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2022 Delaware Views from the Bench

Current Issues in Subchapter V Cases

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Hon. Michelle M. Harner

U.S. Bankruptcy Court (D. Md.) | Baltimore

Hon. Brendan L. Shannon

U.S. Bankruptcy Court (D. Del.) | Wilmington

Hon. J. Kate Stickles

U.S. Bankruptcy Court (D. Del.) | Wilmington

Andrew R. Vara

U.S. Trustee (Region 9) | Cleveland

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November 17, 2022

Hotel du Pont

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Chapter 11 Subchapter V Statistical Summary Through September 30, 2022¹

Subchapter V Filing Summary

Time Period	Subchapter V Cases
Fiscal Year 2020	1,116
Fiscal Year 2021	1,717
Fiscal Year 2022	1,591

Chapter 11 Small Business Case Outcomes Summary

Disposition	Chapter 11 Small Business (Non-Subchapter V)		Subchapter V
	FY 2017 – FY 2019	FY 2020 – FY 2021	FY 2020 – FY 2021 ¹
Pending Without Confirmed Plan	1%	5%	6%
Plan Confirmed	31%	24%	58%
Converted	15%	21%	10%
Dismissed	53%	49%	26%
Total	100%	100%	100%
Median Months to Confirmation	10.8	10.8	6.5
Median Months to Dismissal	6.0	4.9	4.8

- Compared to other (non-subchapter V) chapter 11 small business cases historically, subchapter V cases have had approximately double the percentage of confirmed plans and half the percentage of dismissals, as well as a shorter time to confirmation or dismissal.
- Of subchapter V cases with confirmed plans, approximately 70 percent of the confirmed plans have been consensual plans.

Eligibility to Proceed under Subchapter V

- ✓ 11 U.S.C. §§ 1181–1195
- ✓ Generally, a debtor is eligible to proceed under Sub V if the debtor is a “person” engaged in “commercial or business activities” that does not have aggregate debts in excess of the debt limit, and at least 50% of the debts arise from the debtor’s commercial or business activities
- ✓ Ineligible if (1) primary activity is owning single asset real estate; (2) a member of a group of affiliated debtors that has aggregate debts in excess of the debt limit; (3) is a corporation subject to reporting requirements under Securities Exchange Act of 1934; or (4) is an affiliate of a reporting corporation
- ✓ A trust is not a “person” unless it is a business trust
- ✓ Debt Limit: \$7.5mm until June 21, 2024 sunset of § 1182(1), then \$3,024,725 under § 101(51D)); does not include debts owed to one or more non-debtor affiliates or insiders

Distinct Characteristics of Subchapter V Cases

- ✓ No committee of unsecured creditors (§ 1102(a)(3))
- ✓ Appointment of Sub V trustee (§ 1183(a))
- ✓ Status conference within 60 days of petition and debtor’s report of efforts required at least 14 days before status conference (§§ 1188(a), (c))
- ✓ No disclosure statement required, but the plan must include a brief history of business operations, a liquidation analysis, and projections as to debtor’s ability to may payments under the plan (§1181(b))
- ✓ Only debtor may file plan and must file within 90 days (§§ 1189(a)–(b))
- ✓ No requirement to pay U.S. Trustee fees (28 U.S.C. § 1930(a)(6)(A)) or monthly operating reports
- ✓ No co-debtor stay
- ✓ Cramdown does not include absolute priority rule, but it does require that all of the debtor’s projected disposable income be paid to creditors for a 3- to 5-year period

Role of Subchapter V Trustee

- ✓ Oversee and monitor case, appear and be heard on specified matters, facilitate a consensual plan, make distributions under a nonconsensual plan confirmed under cramdown
- ✓ Interplay with United States Trustee
- ✓ Bankruptcy Code is silent as to payment of Sub V Trustee
 - ✓ Bankr. Md. has required a budget including payment of Sub V Trustee; no compensation under § 330
- ✓ Potential expansion of powers and attendant confidentiality issues
 - ✓ Appropriateness; statute does not contemplate Sub V Trustees becoming operating trustees
 - ✓ Use of confidentiality agreements to address waiver of privilege concerns
- ✓ Appointment of additional professionals
 - ✓ Sub V Trustee expected to perform mostly without assistance of counsel
 - ✓ No disqualification under § 327(a) if professional's claim is less than \$10,000

Designation and Revocation

- ✓ Small business case vs. Sub V case—debtor must make election (§§ 1182(1)–(2), 101(51D)(A), 103(i))
- ✓ Statute does not state when debtor must make election, but see B.R. 1020(a)
- ✓ Calculations of debt
 - ✓ “directly and substantially connected to the ‘commercial or business activities’ of the debtor” (*In re Ikalowych*, 629 B.R. 261, 288 (Bankr. D. Colo. 2021))
- ✓ Relationships to reporting entities

Confirmation-related Issues

- ✓ New value
 - ✓ Sub V plan may modify claim secured only by a security interest in debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor
- ✓ Cramdown permitted even if all impaired classes do not accept (§ 1191(b))
- ✓ Elimination of absolute priority rule (§ 1181(a))
- ✓ Debtor must commit disposable income to payments under the plan (§ 1191(c))
- ✓ Feasibility requirement for cramdown: debtor "will" be able to make all payments under the plan, or debtor must show a "reasonable likelihood" of its ability to make plan payments (§ 1191(c)(3)(B)(i))

Effects of Confirmation

Consensual Confirmation (§ 1191(a))

- ✓ Debtor receives immediate discharge under § 1141(d)(1)(A), including a discharge of debts excepted under § 523(a)
- ✓ Post-confirmation modifications permitted only by consent (§ 1193(b))
- ✓ Debtor makes payments under the plan, as Sub V Trustee's services terminate upon substantial confirmation
- ✓ Payment of administrative expenses cannot be deferred without agreement of such claimant
- ✓ Individual debtor retains post-petition property and earnings in event of conversion

Effects of Confirmation

Nonconsensual Confirmation (§ 1191(b))

- ✓ No discharge until debtor completes plan payments for period of at least three years (or up to five years, as the court fixes) (§ 1192)
- ✓ Debtor discharged from all 1141(d)(1)(A) debts, plus debts allowed under § 503, except for debts on which last payment is due after first three years of plan (or up to five years, as the court fixes) and debts excepted under § 523(a)
- ✓ Post-confirmation modifications permitted within 3 or 5 years, depending on plan (§ 1193(c))
- ✓ Sub V Trustee makes payments under the plan
- ✓ Property of the estate includes post-petition assets and earnings

Fourth Circuit's Cleary Decision on § 523 Exceptions to Discharge

- ✓ *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022)
- ✓ Cleary Packaging, LLC filed petition under Subchapter V of Chapter 11, in part, to discharge a \$4.7 million judgment against it for intentional interference with contracts and tortious interference with business relations
- ✓ Judgment holder Cantwell-Cleary Co., Inc. argued that the judgment debt fell within the realm of non-dischargeable debts for “willful and malicious injury” under § 523(a)(6)
- ✓ Cleary Packaging countered that § 523(a)’s list of exceptions to dischargeability apply only to individual debtors
- ✓ Fourth Circuit held that § 1192(2) (i) more specifically governs discharges in *Subchapter V proceedings*; (ii) refers to a *kind of debt* listed in § 523 rather than any *kind of debtor* addressed by § 523(a); and (iii) excepts debts of individual and corporate debtors for “willful and malicious injury” from discharge

Potential Post-confirmation Remedies

- ✓ Removal of Debtor in Possession (§ 1185(a))
- ✓ Dismissal or conversion to chapter 7 for cause (§ 1112(b)(1))
- ✓ Liquidation of nonexempt assets (§ 1191(c)(3)(B)(ii))

Additional Resources

- ✓ **Bankruptcy Judge Paul W. Bonapfel's *A Guide to Small Business Reorganization Act of 2019*, including its revisions and 2022 supplement**
 - ✓ https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf
- ✓ **Casamatta, Daniel J. and Bujold, Michael J., *The USTP's Positions on Select SBRA Legal Issues*, ABI On Our Watch (Nov. 2022)**
- ✓ **USTP Subchapter V Trustee Handbook**
 - ✓ https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download
- ✓ **Kahn, Benjamin A. and Ruben, Samantha M., *Key Events in the Timeline of Subchapter V Cases***
 - ✓ www.gamb.uscourts.gov/USCourts/sites/default/files/pd/SubchapterV_Key.pdf
- ✓ **Subchapter V Case Decision Tracker**
 - ✓ <https://advance.lexis.com/open/document/openwebdocview/Subchapter-V-Decision-Tracker/7pdmfid=1000522&pdcdocfullpath=%2Fshared=%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A637R-XD31-FCYK-20VM-00000-00&pdcomponentid=500749>

Faculty

Joshua B. Brooks is an associate with Young Conaway Stargatt & Taylor, LLP in Wilmington, Del., where his practice largely includes advising future claimants representatives in mass tort matters, counseling debtors in chapter 11 restructuring and chapter 15 recognition proceedings, and assisting with district court commercial litigation. Prior to becoming an associate, he was a conflicts analyst at the firm while attending law school. In addition to his bankruptcy practice, Mr. Brooks is active in the firm's Diversity, Equity, and Inclusion Committee, Hiring Committee and *Pro Bono* Committee, and he is a co-leader of the firm's First Generation Affinity Group. He is admitted to practice in Delaware and Maryland, and he volunteers with the Office of Child Advocate and mentors high school and law school students. Mr. Brooks is a member of ABI and the American Bar Association, Delaware Barristers Association and the Delaware State Bar Association's Young Lawyers Section, and he is vice-chair of the Delaware State Bar Association's Multicultural Judges and Lawyers Section's Law School Outreach. He received his B.S. *cum laude* from Wilmington University and his J.D. from Widener University Delaware Law School, where he was a Moe Levine Trial Team member.

Hon. Michelle M. Harner is a U.S. Bankruptcy Judge for the District of Maryland in Baltimore, appointed in 2017. Prior to her appointment to the bench, she was the Francis King Carey Professor of Law and the Director of the Business Law Program at the University of Maryland Francis King Carey School of Law, where she taught courses in bankruptcy and creditors' rights, business associations, business planning, corporate finance and the legal profession. Judge Harner lectured frequently during her academic career on various topics involving corporate governance, financially distressed entities, risk management and related legal issues. Her academic scholarship is widely published, with her publications appearing in, among others, the *Vanderbilt Law Review*, *Notre Dame Law Review*, *Washington University Law Review*, *Minnesota Law Review*, *Indiana Law Journal*, *Fordham Law Review* (reprinted in *Corporate Practice Commentator*), *Washington & Lee Law Review*, *William & Mary Law Review*, *University of Illinois Law Review*, *Arizona Law Review* (reprinted in *Corporate Practice Commentator*) and *Florida Law Review*. Judge Harner has served as the Associate Reporter to the Advisory Committee on the Federal Rules of Bankruptcy Procedure, the Reporter to the ABI Commission to Study the Reform of Chapter 11, and most recently chaired the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts. She also served as the Robert M. Zinman ABI Resident Scholar for the fall of 2015. Judge Harner is an elected conferee of the National Bankruptcy Conference, an elected Fellow of the American College of Bankruptcy, and an elected member of the American Law Institute. She previously was in private practice in the business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day. Judge Harner received her B.A. *cum laude* from Boston College in 1992 and her J.D. *summa cum laude* from The Ohio State University College of Law in 1995.

David M. Klauder is a founding member of Bielli & Klauder, LLC in Wilmington, Del., where he focuses his practice on representing clients in all aspects of bankruptcy, including debtors and creditors in chapter 7 and chapter 11 cases, as well as representing chapter 7 trustees in consumer and corporate cases. He has represented clients in various bankruptcy courts throughout the country, with his primary focus on cases in the District of Delaware and the Eastern District of Pennsylvania.

He has also been appointed as both a chapter 7 trustee and fee examiner in cases in the District of Delaware. In addition, Mr. Klauder represents clients on both the plaintiff and defendant sides in civil litigation disputes in the state and federal courts in Delaware and Pennsylvania. Prior to forming Bielli & Klauder, he spent approximately three years practicing bankruptcy and civil litigation at a small Wilmington firm, and worked as a trial attorney at the Office of the U.S. Trustee in both the Wilmington and Philadelphia offices. While at the U.S. Trustee's Office, he had supervisory attorney responsibilities for some of the largest chapter 11 cases in the nation. Mr. Klauder is an active member of ABI, the Delaware Bankruptcy Inn of Court and the Eastern District of Pennsylvania Bankruptcy Conference. He received his B.B.A. from Loyola University Maryland and his J.D. from the George Washington University Law School.

Hon. Brendan L. Shannon is a U.S. Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Delaware in Wilmington, appointed in 2006. He manages a full chapter 11 docket and also handles all chapter 13 consumer bankruptcy cases filed in Delaware. He served as Chief Judge from 2014-18. Prior to his appointment to the bench, Judge Shannon was a partner with Young Conaway Stargatt & Taylor, LLP in Wilmington, Del., where he primarily represented corporate debtors and official committees in chapter 11 cases. He is an adjunct professor in the Bankruptcy LL.M. Program at St. John's University School of Law in New York, and at Widener School of Law in Delaware. He also serves on the board of editors of *Collier on Bankruptcy* (16th ed.) and is a contributing author for *Collier Forms* and for several chapters covering the Federal Rules of Bankruptcy Procedure. In addition, he serves on the editorial board of the *American Bankruptcy Institute Law Review*. In 2011, Judge Shannon was appointed to serve as a member of the National Bankruptcy Conference. In 2020, he was inducted as a member of the American College of Bankruptcy. Judge Shannon is a member of the Delaware State Bar Association, the American Bar Association, ABI and the Rodney Inns of Court in Wilmington, Del. He is also a member of the board of directors of the Delaware Council on Economic Education. Judge Shannon received his undergraduate degree from Princeton University and his J.D. from the Marshall-Wythe School of Law at the College of William and Mary.

Hon. J. Kate Stickles is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed on April 6, 2021. Previously, she was member of Cole Schotz P.C.'s Bankruptcy and Corporate Restructuring Department in its Wilmington, Del., office and practiced in the areas of corporate bankruptcy, insolvency and creditors' rights, having represented debtors, official committees, creditors, examiners and trustees in chapter 11 cases. Judge Stickles has been named in *Chambers USA: America's Leading Lawyers for Business* since 2010 and has been listed in *The Best Lawyers in America* and in *Delaware Super Lawyers* in the area of Bankruptcy and Creditor-Debtor Rights Law. She served as counsel to chapter 11 debtors in a variety of industries, including manufacturing and distribution, telecommunications, health care and media, in some of Delaware's most significant bankruptcy cases. Judge Stickles has published in, and served as a contributing editor for, the *ABI Journal* and has also published in *The Americas Restructuring and Insolvency Guide*, the ABI Bankruptcy Litigation Committee eNewsletter and the ABI Commercial Fraud Committee eNewsletter. Judge Stickles is active in the Bankruptcy Section of the Delaware State Bar Association, having served as the Section's chair (2010-11), vice chair Commercial Bankruptcy (2009-10) and secretary (2008-09). She is also a member of the Delaware Views from the Bench Advisory Board and the International Women's Insolvency & Restructuring Confederation (IWIRC), for which she served as director-at-large from 2010-11. Judge Stickles received her B.A. in political science and communications from Western Maryland College and her J.D. from Temple University School of Law.

Andrew R. Vara is the U.S. Trustee for Regions 3 and 9 in Cleveland, which encompass 10 field offices in Delaware, New Jersey, Pennsylvania, Ohio and Michigan. He has worked for the U.S. Department of Justice for 29 years, serving as a trial attorney, Assistant U.S. Trustee in Cleveland and Wilmington, Del., and the acting assistant U.S. Trustee in both the Southern District of New York and Western District of Michigan. Following law school, Mr. Vara clerked for Hon. Laurence Howard, Chief Judge for the U.S. Bankruptcy Court in Grand Rapids, Mich. He also is a regular faculty member and lecturer at training seminars held at the National Advocacy Center in Columbia, S.C. Mr. Vara has been a panelist at numerous ABI conferences, including its Annual Spring Meeting, Winter Leadership Conference, Mid-Atlantic Bankruptcy Workshop and Central States Bankruptcy Workshop. He was a member of the ABI's Ethics Task Force and chaired ABI's Ethics and Professional Compensation Committee. Mr. Vara served as a presenter on U.S. and international insolvency law at forums sponsored by the Commercial Law Development Program in Bahrain and the Kingdom of Saudi Arabia. He received his B.A. *magna cum laude* in political science from Duke University and his J.D. with honors from The Ohio State University in May 1991, where he was awarded membership in the Order of the Coif.