



AMERICAN
BANKRUPTCY
INSTITUTE

2022 Consumer Practice Extravaganza

The Roles and Powers of Trustees

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Statutory Overview and Discussion

- i. Intended purpose of streamlining reorganization process
- ii. What is the SVT's role
- iii. What does it mean to "be accountable for all property received"?
- iv. What happens if the debtor is removed from possession?
- v. Who should be the disbursing agent (debtor or SVT)?
- vi. How are services charged?
- vii. What is the scope of post-confirmation duties (i.e., claim objections, avoidance actions)?
- viii. What happens if the case is converted?

2022 CONSUMER PRACTICE EXTRAVAGANZA

Duties of Chapter 11 Sub V Trustee vs Chapter 11 Trustee

11 U.S.C. § 1106 Duties of Trustee (Chapter 11)

11 U.S.C. § 1116 – Duties of Trustee or Debtor in Possession in Small Business Case

11 U.S.C. § 1183 – Duties of Trustee (Chapter 11 Sub V Case)

Duties		Ch 11 Trustee (In Possession)	Sub V Trustee (Not in Possession)	Sub V Trustee (In Possession)	Ch 11 Small Bus. Case (In Possession)
1.	Collect and reduce to money property of the estate and close estate expeditiously. §704(a)(1) (Not applicable in Chapter 11)				
2.	Be accountable for all property received. §1106(a)(1) & §1183(b)(1). §704(a)(2)	X	X	X	X
3.	Insure debtor performs statement of intention under §521(a)(2)(B). §704(a)(3) (Not applicable in Chapter 11)				
4.	Investigate financial affairs of the debtor. §704(a)(4) (Not applicable in Chapter 11)				
5.	Examine POCs and object when improper §1106(a)(1) & §1183(b)(1). §704(a)(5)	X	X	X	X
6.	Oppose discharge of debtor, if advisable §1106 & §1183(b)(1) §704(a)(6)		X	X	
7.	Furnish info concerning the estate and estate's administration to parties-in-interest, unless court orders otherwise. (§1106(a)(1) & §1183(b)(1)) §704(a)(7)	X	X	X	X
8.	File with periodic reports and summaries of operation of business (§1106(a)(1) & §1183(a)(5)) §704(a)(8) (applies to operating Ch. 7 debtors.)	X		X	X

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Duties		Ch 11 Trustee (In Possession)	Sub V Trustee (Not in Possession)	Sub V Trustee (In Possession)	Ch 11 Small Bus. Case (In Possession)
9.	Provide domestic support notices. §1106(a)(1) & §1183(b)(6). §704(a)(10).	X			X
10.	Continue to perform obligations of employee benefit plan administrator §1106(a)(1) & §1183(b)(5) §704(a)(11)	X		X	X
11.	Use best efforts to transfer patients from health care business being closed (§1106(a)(1) & §1183) §704(a)(12)	X		X	X
12.	Provide notices to holders of domestic support obligations. §1106(a)(8) & §1183(b)(6)) §704(c) (See statute for notice details.)	X	X	X	X
13.	File Schedules and SOFA if Debtor has not. §1106(a)(2) and §1183(b)(5)	X		X	X
14.	Investigate acts, conduct, assets, liabilities and financial condition of debtor and debtor's business. §1106(a)(3) and §1183(b)(2).	X	X (If Court so orders on request of trustee, OUST or party in interest)	X (If Court so orders on request of trustee, OUST or party in interest)	X
15.	File a statement of an investigation, including facts pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in management; and transmit a copy or summary to any creditors' committee or equity security holders' committee, indenture trustee or court designated entity. §1106(a)(4) and §1183(b)(2) .	X	X (If Court so orders on request of trustee, OUST or party in interest)	X (If Court so orders on request of trustee, OUST or party in interest)	X
16.	File a Plan; File report why not filing Plan; or recommend conversion. §1106(a)(5) (In Sub V only debtor can file a plan. (§1189(a))	X			x
17.	For any year Debtor failed to file a tax return, furnish such info that may be required with gov't unit. §1106(a)(6) and §1183(b)(5).	X		X	X

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Duties		Ch 11 Trustee (In Possession)	Sub V Trustee (Not in Possession)	Sub V Trustee (In Possession)	Ch 11 Small Bus. Case (In Possession)
18.	After confirmation of Plan, file necessary reports or as ordered by court. §1106(a)(7)	X	X	X	X
19.	Append to petition most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or statement that no such documents exist. §1116(1)				X
20.	Attend meetings scheduled by court and OUST. §1116(2). See also §1183(b)(3) (appear and be heard at status conferences and certain hearings.)		X (Appear and be heard at status conferences and certain hearings.)	X (Appear and be heard at status conferences and certain hearings.)	X
21.	Timely file all schedules and SOFA. §1116(3).				X
22.	File post-petition financial reports required by FRBP §1116(4).				X
23.	Maintain insurance customary to industry. §1116(5)				X
24.	Timely file tax returns and other gov't filings; timely pay all taxes entitled to administrative expense priority. §1116(6)				X
25.	Allow OUST to inspect debtor's business premises, books and records. §1116(7)				X
26.	Appear and be heard at the status conference and any hearing re: the value of property subject to a lien; confirmation of plan; modification of plan after confirmation; or sale of property of estate. §1183(b)(3)		X	X	
27.	Ensure debtor commences making timely plan payments. §1183(b)(4)		X	X	
28.	Facilitate the development of a consensual plan. §1183(b)(7)		X	X	

Small Business Reorganization Act / Subchapter V

By:

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*The opinions expressed by Ms. Lally are solely her own and do not necessarily represent those of the United States Department of Justice or the United States Trustee Program.

Subchapter V: The Purpose

- ▶ The Small Business Reorganization Act a.k.a. the SBRA or Subchapter V became effective on February 19, 2020.
- ▶ Subchapter V is part of Chapter 11.
- ▶ The primary objective of Subchapter V is to make reorganization under Chapter 11 of the Bankruptcy Code more feasible and affordable for small businesses.

Subchapter V: The Purpose

To enable small business debtors to reorganize more quickly, inexpensively, and efficiently, Subchapter V:

- ▶ Has no creditors' committees;
- ▶ Utilizes short / quick deadlines;
- ▶ Limits "Small Business Debtor" by definition;
- ▶ Requires a Trustee to be appointed;
- ▶ Allows for Plan confirmation over objection of class of creditors and even where less than 100% of secured claims to be paid.

Subchapter V: Debt Limitations

- ▶ Traditional Chapter 11 cases impose no debt limitations on individual or business debtors.
- ▶ Subchapter V eligibility was originally limited to those businesses with non-contingent, liquidated debts in an amount not greater than \$2,725,625.

Subchapter V: Debt Limitations

- ▶ The CARES Act extended those debt limits to debtors with **less than \$7,500,000** in non-contingent, liquidated debt through March 27, 2021. The higher debt limit was **extended through March 27, 2022**.
- ▶ While this increase is **temporary**, many of those within the bankruptcy community have acknowledged that this **should be a permanent change**.

Three Paths in Chapter 11

Traditional Chapter 11	Small Business Case (without Subchapter V Election)	Subchapter V Case
No debt limit	"Small Business Debtor" with up to \$2,725,625 total debt	"Small Business Debtor" with up to \$7,500,000 total debt

Subchapter V: Deadlines

In effort to expedite Subchapter V cases, there are short deadlines. Subchapter V:

- ▶ Requires the Debtor to file a *status report 14 days before the status conference* (generally filed 46 days after the date of filing);
- ▶ Requires the Court to conduct a *status conference within 60 days of the order for relief*, 11 U.S.C § 1188(a);

Subchapter V: Deadlines

In effort to expedite Subchapter V cases, there are short deadlines. Subchapter V:

- ▶ Requires the *Debtor to file a Plan within 90 days of the order for relief*, 11 U.S.C. § 1189(b);
- ▶ Only a Debtor can propose a Plan in a Subchapter V case, 11 U.S.C. § 1189(a).

Subchapter V: “Small Business Debtor”

Defined

- ▶ Engaged in commercial or business activities, *excluding the primary business of owning single asset real estate.*
- ▶ Aggregate, non-contingent, liquidated secured and unsecured debts as of the date of the filing not more than \$7,500,000.00 (currently).
- ▶ More than 50% of debts arising from commercial or business activities. *Incurred for purpose of making profit.* 11 U.S.C. § 101(51D).

Subchapter V: Small Business Debtors

Owning Real Estate

- ▶ Prior to the SBRA, the definition of a Small Business Debtor *explicitly excluded*, “a person whose primary activity is the business of owning or operating real property or activities incidental thereto.”
- ▶ The SBRA broadened the definition to include those who own more than one property.
- ▶ The SBRA still excludes single asset real estate (“SARE”) owners who own only one property. 11 U.S.C. § 101(51B).

Subchapter V: Small Business Trustees

- ▶ Traditional Chapter 11 involves the Debtor as a DIP (Debtor-in-Possession) acting as its own "Trustee" that runs its business, more or less, in the ordinary course that existed pre-petition.
- ▶ Typically, in Chapter 11, a Trustee would only be appointed if the case were an involuntary and/or the court found reason to believe the Debtor could not or should not operate its own business.

Subchapter V: Small Business Trustees

- ▶ Every Subchapter V case involves the appointment of a Small Business Trustee.
- ▶ **Subchapter V Trustees are selected based on the unique characteristics of each case.**
- ▶ Therefore, the selection of a Subchapter V Trustee is akin to the selection of a Trustee in a non-SBRA Chapter 11 case.

Subchapter V: Small Business Trustees

- ▶ One of the more significant roles of a Subchapter V Trustee is to facilitate “the development of consensual Plan of reorganization.” See 11 U.S.C. § 1183(b)(7).
- ▶ This aspect of the Subchapter V Trustee’s duties is completely unique-- **no other party has had a similar charge under the Bankruptcy Code.**

Subchapter V: Small Business Trustees

The Trustee’s Overall Duties & Obligations

- ▶ Oversee and monitor the case / evaluate viability of prospect for reorganization:
 - Review Financials
 - Attend the Initial Debtor Interview - IDI
 - Attend the Initial Meeting of Creditors - 341
- ▶ Facilitate a Consensual Plan.
- ▶ Appear and be heard on specified matters, including the status conference and confirmation hearing.
- ▶ Communicate with U.S. Trustee and the Court.
- ▶ Make distributions under a nonconsensual Plan confirmed under the cramdown provisions.

** See generally, 11 U.S.C. § 1183(b).*

Subchapter V: Small Business Trustees

- ▶ The *Subchapter V Trustee Handbook*, supra note 79, at 3-9, states:
- ▶ “As soon as possible, the Trustee should begin discussions with the Debtor and principal creditors about the Plan the Debtor will propose, and the Trustee should encourage communication between all parties in interest as the Plan is developed. **The Trustee should be *proactive* in communicating with the Debtor and Debtor’s counsel and with creditors, and in promoting and facilitating Plan negotiations.**”

Subchapter V: Small Business Trustees

- ▶ July 2021 - Advice for Subchapter V cases from Judges Saladino and Kruse (Nebraska) sent an email, in part, to:
- ▶ “Encourage creditors and counsel to attend the informal facilitation meetings the Subchapter V Trustees are holding after the 341 meeting of creditors. The meeting is designed to get key parties together to discuss the Plan as early as possible. The meeting is listed on the 341 notice to creditors.”

Subchapter V: Small Business Trustees

Power to operate the business

- ▶ If the Subchapter V Trustee is appointed as a Trustee in possession, the Trustee becomes responsible for filing DIP monthly reports with the Court.
- ▶ Power to operate the business, but no power to propose a Plan. Power to sell assets.

Subchapter V: Small Business Trustees

▶ Other Duties

- ▶ A Subchapter V Trustee under § 1183(b)(1) has the duties to:
 - ▶ Be accountable for all property received;
 - ▶ Examine proofs of claim and object to allowance of any claim that is improper, *if a purpose would be served*.
 - ▶ Oppose the discharge of the Debtor, if advisable;
 - ▶ Furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise;
 - ▶ To make a final report and to file it; and
 - ▶ To ensure that the Debtor commences timely payments under a confirmed Plan.

Subchapter V: Plan Preparation

- ▶ A traditional Chapter 11 Disclosure Statement is not required under Subchapter V.
- ▶ Rather, the proposed Plan is required to include:
 - ▶ A brief history of the business operations of the Debtor;
 - ▶ A liquidation analysis; and
 - ▶ Projections on the ability of the Debtor to make payments under the proposed Plan.

Subchapter V: Plan Preparation

- ▶ While only the Debtor can propose the Plan, **the Subchapter Trustee can (and often does) assist in preparation of the proposed Plan.**
- ▶ The Subchapter V Trustee Handbook advises the Trustee to “review the Plan and communicate any concerns to the Debtor about the Plan prior to the confirmation hearing.”

Subchapter V: Plan Confirmation

- ▶ Unlike traditional Chapter 11 cases, there is no absolute-priority rule in Subchapter V, which denies Plan confirmation unless unsecured creditors agree to receive less than 100%.
- ▶ Subchapter V eliminates the absolute- priority rule and the court can confirm a Plan:
 - ▶ Over the objection of creditors;
 - ▶ Even if a class of creditors has not voted to “accept” the Plan; and
 - ▶ Where a secured creditor is paid less than 100% of its allowed claim.

Subchapter V: Plan Confirmation

- ▶ In other ways, the standards for confirmation of a Plan under Subchapter V follows Chapter 11:
 - ▶ The Plan must not “discriminate unfairly;”
 - ▶ The Plan must be “fair and equitable” for “each class of claims or interests that is impaired under and has not accepted the Plan.”

Subchapter V: Plan Confirmation

- ▶ The “fair and equitable” standard under the SBRA includes the following details:
 - ▶ Secured claims must be satisfied (just not at 100%);
 - ▶ The Plan must contribute all of the debtor’s “projected disposable income” to making Plan payments for three to five years; (like a Chapter 13 Plan);
 - ▶ The Plan must be feasible (i.e., there must be a “reasonable likelihood” that the “Debtor will be able to make all payments under the Plan”); and
 - ▶ The Plan must provide “appropriate remedies” to “protect” creditors from a failure to make payments, including “the liquidation of nonexempt assets.”

Subchapter V: Preference Claims

- ▶ Under Subchapter V, before a preference claim can be pursued, a Debtor-in-Possession or the Case Trustee must:
 - ▶ Use “reasonable due diligence;”
 - ▶ In light of “the circumstances of the case;”
 - ▶ To consider “a party’s known or reasonably knowable affirmative defenses.”
- ▶ A Preference suit for less than \$25,000, against a non-insider, involving a non-consumer debt, can only be brought in the district where the defendant resides.

Subchapter V: Eligibility - Personal Guarantors

- ▶ Debtor, Charles Wright designated that he was a small business debtor and elected to proceed as a Subchapter V debtor.
- ▶ Sole member of Boiling Pot Investments, LLC & 49% owner of Carolinas Custom Clad, Inc. Both were small family businesses. Both entities filed for bankruptcy - both cases were dismissed.
- ▶ The entities sold their assets, which did not pay off all debts.
- ▶ Creditors had liens against the Wright's residence, \$220,882.42 of \$395,816.29 was business debt owed as a personal guarantor of the entities.

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020). Accord see, *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020), and *In re Blanchard*, Case No. 19-12440, E.D. La. July 16, 2020, Doc. 137).

Subchapter V: Eligibility - Personal Guarantors

- ▶ Court acknowledged the SBRA was designed to broaden relief available to address small business debt.
- ▶ Issue was to determine whether Wright was, “a person engaged in commercial or business activities.”
- ▶ Court held Debtor was “engaged in commercial or business activities” by addressing residual business debt and otherwise met the remaining requirements under § 101(51D).
- ▶ **Personal guarantors of business debts are eligible as Small Business Debtors under Subchapter V if their business debt is 51% or more.**

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020). Accord see, *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020), and *In re Blanchard*, Case No. 19-12440, E.D. La. July 16, 2020, Doc. 137).

Subchapter V: Eligibility - Debt from Non-Operating Business

- ▶ The Debtor had owned a corporation in the business of providing information transport consulting services.
- ▶ The company has gone out of business about two years prior to the filing of the petition under Subchapter V and had no assets at the time of filing nor did the Debtor plan on trying to reopen the business.
- ▶ At the time of filing, the debtor was a regular, salaried employee of a company also in the information transport consulting services industry and did some work as an independent contractor/consultant proving information technology related services for two other companies.

In re Blue, 21-80059 (Bankr. M.D.N.C. May 7, 2021).

Subchapter V: Eligibility - Debt from Non-Operating Business

- ▶ Tor business activities,” as required by Section 101(51D) of the Bankruptcy Code.
- ▶ Finding no definition in the statute and “scant” legislative history, Judge Kahn joined with other decisions requiring only that the Debtor be currently engaged in **some** business noting Debtor was working and such work is “clearly the delivery of services in exchange for a profit.”
- ▶ Additionally, the Court found nothing in the statute or legislative history of Subchapter V requiring the debtor’s self-employment be full-time.
- ▶ The issues was whether the Debtor was “engaged in commercial activity.”

In re Blue, 21-80059 (Bankr. M.D.N.C. May 7, 2021).

Subchapter V: Eligibility - Debt from Non-Operating Business

- ▶ The Court was not persuaded that there must be a nexus between the business debt arising from the defunct business and the debtor's current business activities.
- ▶ The Court believed requiring the debt to have arisen from current business activities "would be far too limiting for the remedial purposes of Subchapter V" and would otherwise "disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations."

In re Blue, 21-80059 (Bankr. M.D.N.C. May 7, 2021).

Subchapter V: Eligibility - Debt from Non-Operating Business

- ▶ Judge Norton has concluded that debtors who ceased operation of their business and sold the business's assets pre-petition were not "engaged in commercial or business activities," and, therefore, could not proceed under Subchapter.
- ▶ The Court's main holding—that a debtor must be currently engaged in business or commercial activities to be eligible to proceed under subchapter V—rested on a plain reading analysis.
- ▶ The Court noted the phrase "engaged in" is used in other parts of the Code and has been construed, at least implicitly, to mean "currently engaged in."
- ▶ Additionally, "engaged in" would typically be understood to mean "currently engaged in" rather than "currently or formerly engaged in."

In re Thurmon, 2020 WL 7249555 (Bankr. W.D. Mo. Dec. 8, 2020). *See also, In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021).

Subchapter V: Eligibility - Can Engaged in Business Can Mean Liquidation?

- ▶ The Debtor owned and operated a facility converting waste heat into electricity and steam, which it then sold to other nearby plants.
- ▶ After disputes with certain creditors arose, the Debtor ceased operations and was involved in litigation and arbitration when it filed a Chapter 11 petition and elected to be treated as a small business under the SBRA.
- ▶ The Debtor then filed Subchapter V Plan of Liquidation aimed at liquidating its assets, collecting on accounts receivable, and prosecuting claims with proceeds to be later distributed to its creditors.
- ▶ Both the U.S. Trustee and the Debtor's primary creditor objected to the Debtor's SBRA election arguing the debtor was no longer operating its business.

In re Port Arthur Steam Energy LP, 21-60034 (Bankr. S.D. Tex. July 1, 2021)

Subchapter V: Eligibility - Can Engaged in Business Can Mean Liquidation?

- ▶ Judge Lopez overruled the objections and allowed the Debtor to continue its case under the SBRA.
- ▶ Again, under Section 1182(1)(A), a small business debtor is defined, in part, as being “engaged in commercial or business activities.”
- ▶ Applying the “plain meaning” to this section and looking to other case law on the issue, Judge Lopez held the Debtor was “engaged in” commercial or business activities as of the chapter 11 petition date because the debtor:
 - ▶ Was pursuing litigation,
 - ▶ Collecting accounts receivable, and
 - ▶ Selling assets and maintaining assets.

In re Port Arthur Steam Energy LP, 21-60034 (Bankr. S.D. Tex. July 1, 2021)

Subchapter V: Eligibility - Can Engaged in Business Can Mean Liquidation?

- ▶ Additionally, Judge Lopez noted the SBRA “does not require a debtor to maintain its core or historical business operations on the petition date.”
- ▶ Judge Lopez also looked to the fact that the Debtor was a corporation and distinguished and declined to follow case law where individuals who had owned defunct businesses and were held ineligible for Subchapter V, even though their debts arose from the defunct business.

In re Port Arthur Steam Energy LP, 21-60034 (Bankr. S.D. Tex. July 1, 2021)

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ 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 the real property and activities incidental thereto.”

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ The United States Bankruptcy Court for the Middle District of Florida, Orlando Division ruled that “hotels generally, and this hotel in particular, do not constitute single asset real estate projects.
- ▶ According to the court, Section 101(51B) requires a debtor who owns a SARE business to demonstrate that it does more than real property management.

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021).

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ Specifically, the court asked, “Does the debtor provide additional value or activities (other than property management) that would remove it from categorization as a SARE project?”

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021).

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ Citing *In re Iowa Hotel Invs. LLC*, 464 B.R. 848, 851 (Bankr. N.D. Iowa 2011), the Court then explained that courts have used the following three-item checklist to characterize a SARE case:
 - ▶ the real property constitutes a single property or project;
 - ▶ the real property substantially generates all of the gross income of the debtor; and
 - ▶ the debtor is not involved in any substantial business besides the business of operating the real property.

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021).

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ Regarding the Debtor in this case, the court found the last prong was not established.
- ▶ Specifically, the court clarified that the facts demonstrated that Debtor's hotel operations constitute more than simply operating the real property and any activities incidental to that operation.

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021).

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ The court proceeded to describe the Debtor as:
 - ▶ A Texas LLC that owns and operates a hotel with 79 rooms;
 - ▶ Noted the Debtor employs 15 individuals;
 - ▶ Provides various services, including but not limited to: room cleaning, laundry, parking, and serving breakfast.
 - ▶ Additionally, the court stated that the Debtor performs administrative functions (such as budgeting and quality control) and indicated that some of the services typically provided are simply unavailable during the pandemic.

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021).

Subchapter V: Eligibility - Hotels / Single Asset Real Estate

- ▶ Notably, the Court was clear that relevant Bankruptcy Code sections do not require a debtor to earn additional income from the other services—rather, the debtor is simply required to do something other than rent hotel rooms.
- ▶ According to the Court, hotels may easily meet this test because rooms must be cleaned, upgraded and maintained, a 24-hour receptionist must be staffed, and a myriad of other services must be provided.
- ▶ **The Court considered it entirely irrelevant that these additional services do not result in a separate income.**

In re ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021).

Subchapter V: Debtor's Post-Petition / Pre-Confirmation Earnings Not Property of the Estate

- ▶ Debtor's Subchapter V was precipitated by a prior Chapter 11 of a business he owned and operated, which left Debtor with an approximate \$1.9 million obligation resulting from his personal guarantee of the business' debts as well as other tax obligations.
- ▶ During the Subchapter V case, Debtor, apparently, frequented a casino in Oklahoma and lost \$4,000 post-petition.

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Subchapter V: Debtor's Post-Petition / Pre-Confirmation Earnings Not Property of the Estate

- ▶ The U.S. Trustee became aware of the Debtor's use of post-petition funds to gamble upon review of Debtor's monthly operating report and supporting bank statements that showed post-petition withdrawals totaling \$8,000 related to gambling.
- ▶ Upon inquiry, the Debtor stated he played slot machines with the \$8,000, lost \$4,000, and deposited the remaining \$4,000 back into his checking account.

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Subchapter V: Debtor's Post-Petition / Pre-Confirmation Earnings Not Property of the Estate

- ▶ Debtor's 2018 and 2019 tax returns showed gambling income and equal losses of \$250,234 and \$185,674.27, respectively.
- ▶ The Debtor further provided that his 2020 tax return would show \$95,930.50 gambling income and offset expenses.
- ▶ Debtor's Statement of Financial Affairs was later amended to include this information

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Subchapter V: Debtor's Post-Petition / Pre-Confirmation Earnings Not Property of the Estate

- ▶ The U.S. Trustee moved to dismiss the Debtor's Subchapter V case citing Debtor's "gross mismanagement" related to his loss of \$4,000 as a result of gambling post-petition.
- ▶ The Bankruptcy Court denied the U.S. Trustee's Motion to Dismiss finding Debtor's gambling did not constitute gross mismanagement given the facts of the case.

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Subchapter V: Debtor's Post-Petition / Pre-Confirmation Earnings Not Property of the Estate

- ▶ “Gross mismanagement” qualifies as “cause” for dismissal if the alleged mismanagement occurred post-petition and the Court finds the action(s) in question is material.
- ▶ Therefore, the Court looked solely to the Debtor’s alleged, post-petition mismanagement resulting from one trip to the casino in question in December 2020—i.e. the Court did not look specifically at other, pre-petition gambling.
- ▶ In denying the Motion to Dismiss, the Court found, in part, the Debtor’s post-petition but pre-plan confirmation earnings were not property of the Subchapter V bankruptcy estate.

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Subchapter V: Debtor's Post-Petition / Pre-Confirmation Earnings Not Property of the Estate

- ▶ Under traditional Chapter 11 “property of the estate” is defined by § 1115 of the Code and includes earnings from a debtor’s services performed post-petition.
- ▶ However, §1181(a) makes §1115 inapplicable in Subchapter V.
- ▶ Accordingly, a Subchapter V debtor’s post-petition earnings are not property of the bankruptcy estate, and, therefore, the Debtor’s use of non-estate assets to gamble could not constitute gross mismanagement of the “Estate.”

In re Robinson, 20-11471 (Bankr., KS August 20, 2021).

Discharge - When?

Consensual Confirmation

“If a plan is consensual and confirmed under Section 1191(a), the debtor receives a discharge under Section 1141(d)”

- ▶ “§1141(d)(1) says: “the confirmation of a plan - (A) discharges the debtor from any debt that arose before the date of such confirmation...” (an immediate event).

Non-Consensual Confirmation

If a plan is confirmed under Section 1191(b), “the debtor receives a discharge under Section 1192.”

- ▶ § 1192 says: “If the plan of the debtor is confirmed under section 1191(b)...as soon as practicable after completion [of all payments during the plan term]...the courts shall grant the debtor a discharge...”

In Summary: Why Subchapter V?

- ▶ **Efficient and affordable**, reducing the time, fees, and professional expenses typically incurred in traditional Chapter 11 cases
- ▶ Alternative to Chapters 7 and 13 for individual debtors
- ▶ Retain **equity** and **control** of business
- ▶ **Expedited** confirmation process, with increased likelihood of **success**
- ▶ Amended plan requirements and **additional plan features**
- ▶ United States Trustee **quarterly fees not required**
- ▶ **Discharge** granted as early as confirmation in case of consensual plan

In Summary: Why Subchapter V?

- ▶ Attorneys not disqualified with pre-petition fees of < \$10,000 (Sec. 1195)
- ▶ No Creditors' Committee unless ordered for cause (Sec. 1102)
- ▶ Administrative Claims can be paid over life of Plan (Sec. 1191(e))
- ▶ Retention of Equity / No Absolute Priority Rule (Sec. 1191(b))
- ▶ Approval of impaired class not necessary to confirm plan (Sec. 1191(b))

Questions?

Faculty

G. Matthew Barberich, Jr., CPA, ABV, CFF, CGMA, CIA, CFE, ASA, MBA is a director with B. Riley Advisory Services in Kansas City, Mo. He has led numerous litigation support and forensic accounting engagements involving the quantification of losses from alleged embezzlements and other asset misappropriations; accounting irregularities; calculation of lost profits and other economic damages; critiques and rebuttals of lost profits and other economic damages; shareholder and business disputes; statutory and/or regulatory compliance; and whistleblower investigations. Previously, Mr. Barberich provided litigation support, business valuation and forensic accounting services for MarksNelson, LLC in Kansas City from 2004-18, and he was an associate at Taylor, Perky & Parker, LLC in 2003. Mr. Barberich has also performed hundreds of valuations of closely held companies for estate and gift tax purposes; income tax compliance; estate planning; appraisal review; shareholder agreements; marital dissolutions; shareholder disputes; and dissenting shareholder and minority oppression lawsuits. He is a member of the American Institute of Certified Public Accountants, the Kansas Society of Certified Public Accountants, the Institute of Internal Auditors, the Association of Certified Fraud Examiners and the American Society of Appraisers. In February 2020, Mr. Barberich was appointed to serve as a subchapter V trustee for the Western District of Missouri on a case-by-case basis. He received his B.B.A. in accounting and his M.B.A. with a concentration in accounting from Pittsburg State University in Pittsburg, Kan.

Jody A. Corrales is a shareholder in the Tucson, Ariz., office of DeConcini McDonald Yetwin & Lacy, P.C. where she focuses her practice on bankruptcy and creditors' rights. She has extensive experience in bankruptcy law and has been appointed to serve as a subchapter V panel trustee for the District of Arizona. Ms. Corrales is Board Certified in Consumer Bankruptcy Law by the American Board of Certification and is certified as a Bankruptcy Specialist by the Arizona Board of Legal Specialization. She was named to the 2020 Class of ABI's "40 Under 40" and has been recognized as a "Rising Star" in the Bankruptcy and Creditor-Debtor Rights Law category of *Southwest Super Lawyers* since 2013, when she was nominated to participate in the National Conference of Bankruptcy Judges (NCBJ) Next Generation Program. She currently serves on the Ninth Circuit Conference Executive Committee following a stint as co-chair of the Arizona delegation of Ninth Circuit Lawyer Representatives. Ms. Corrales devotes considerable time to *pro bono* endeavors, frequently assisting self-represented litigants in bankruptcy court and federal district court. In 2014, she was awarded the inaugural Hon. Eileen W. Hollowell *Pro Bono* Attorney of the Year Award from the U.S. Bankruptcy Court for the District of Arizona. Ms. Corrales received her J.D. from the University of Arizona James E. Rogers College of Law.

Elizabeth M. Lally is a partner with Spencer Fane LLP in Omaha, Neb. Her experience includes representing borrowers and lenders in complex financing transactions, debt restructurings and out-of-court workouts, as well as chapter 7, 12 and 11 reorganizations and liquidations. Ms. Lally regularly represents debtors-in-possession and unsecured creditors' committees in complex chapter 11 reorganizations and liquidations, and is a subchapter V trustee for Region 12, covering Iowa and South Dakota. She received her B.A. *cum laude* in English from Bradley University in 1999 and her J.D. in 2005 from DePaul University College of Law.