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Subchapter V: Cutting-Edge Issues

CONCURRENT SESSION

Hon. Bruce A. Harwood
U.S. Bankruptcy Court (D. N.H.); Concord

Megan W. Murray
Underwood Murray PA; Tampa, Fla.

Rebecca F. Redwine
Hendren Redwine & Malone, PLLC; Raleigh, N.C.

Lisa A. Tracy
Executive Office for U.S. Trustees; Washington, D.C.

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Honorable Bruce A. Harwood, US Bankruptcy Court District of New Hampshire
Megan W. Murray, Underwood Murray PA, Tampa, Florida
Rebecca F. Redwine, Hendren Redwine & Malone, PLLC, Raleigh, North Carolina
Lisa A. Tracy, Executive Office for U.S. Trustees, Washington D.C.

I. Opening

From the effective date of the Small Business Reorganization Act of 2019 (SBRA) through September 30, 2023, more than 6,400 chapter 11 cases in the 88 districts overseen by the United States Trustee Program (excluding three districts each in Alabama and North Carolina) have proceeded under subchapter V for some period of time. Results to date indicate that SBRA is working as intended, with 55 percent of subchapter V cases resulting in confirmed plans and more than two-thirds of these plans confirmed consensually. Subchapter V cases are being confirmed at about twice the rate and being dismissed at just over half the rate of other (non-subchapter V) chapter 11 small business cases. Further, the median time to confirmation of just over 6½ months in subchapter V cases is about four months faster than for other small business cases, suggesting that SBRA has promoted a more efficient path to reorganization for small business owners.

II. Trustee Issues

Expanded Trustee Duties

Upon Removal of the Debtor:

Courts have considered the expansion of subchapter V trustees' powers, most typically upon a request for removal of a debtor in possession under section 1185 of the Bankruptcy Code. In *In*

re Duling Sons, Inc., 650 B.R. 578 (Bankr. D.S.D. Apr. 10, 2023), the bankruptcy court considered the role and powers of the Sub V Trustee in the context of a request for dismissal or conversion of the case to chapter 7. In *Duling Sons*, the parties argued that the debtor's principal had engaged in gross mismanagement of the business and raised allegations of fraud and/or self-dealing against the debtor. *Id*. at 580. A creditor filed a motion to either: convert the case from chapter 11 to chapter 7, or remove the debtor in possession, and the U.S. Trustee similarly filed its own motion to dismiss or convert, while joining the creditors' motion to remove the debtor in possession. *Id*. The court found cause to convert or dismiss and to remove the debtor in possession, as the debtor had made no progress after 16 months with respect to a plan of reorganization, while the case was accruing large administrative expenses. *Id*. at 581-82. Further, the court found there was a direct conflict of interest with respect to the estate and the estate's investigation of the principal's actions, which gave further cause to convert or remove the debtor in possession. *Id*. After finding cause, the court found that removal of the debtor in possession was in the best interest of the estate, citing the advantages of Subchapter V and the Subchapter V trustee. *Id*. The court then expanded the Sub V trustee's powers to those "specified in section 704(a)(8) and paragraphs (1), (2), (3), (4), and (6) of section 1106(a)[.]" *Id*. at 582-83 (citing 11 U.S.C. § 1183(b)(5)). Notwithstanding, the court noted that it could not unilaterally grant the Sub V trustee the power to file a plan and ordered that the case be converted to chapter 7 unless the debtor and the Sub V trustee timely filed a joint plan. *Id*. at 583-84.

In *In re Comedymx*, 2022 Bankr. LEXIS 3551 (Bankr. D. Del. Dec. 16, 2022), the court elected to remove subchapter V debtors and expand the subchapter V trustee's powers rather than redesignate the cases as chapter 11 cases. In *Comedymx*, the creditor moved the court to either (i) amend the petition to redesignate the case as a chapter 11 case under Federal Rule of Bankruptcy

Procedure 1009(a) so that a chapter 11 trustee could be appointed or (ii) remove the debtors pursuant to section 1185 and allow the subchapter V trustee to operate the business, while the United States Trustee moved the court to either remove the debtors or dismiss for cause. *Id.* at 459. The debtors' principal had sent emails that made it "abundantly clear that he cannot serve in a fiduciary capacity to this bankruptcy estate." *Id.* First, the court considered whether it had authority to de-designate the cases, noting that there was no dispute that the debtors were eligible for subchapter V, and that neither the Code nor the Rules provided a standard for assessing a motion to amend a bankruptcy petition. *Id.* at 462-63. On the one hand, the court viewed the text of Rule 1009 as being suggestive of a potential right of parties other than the debtor to amend a petition while also considering there to be "sound reasons of policy" to do so. *Id.* at 463. On the other hand, the court emphasized that section 103(i) of the Code leaves the decision to proceed under subchapter V with the debtor, that a creditor may not move a debtor into subchapter V, and that Rule 1020 implies that a debtor's decision to proceed under subchapter V is controlling unless the court determines the debtor is ineligible. *Id.* at 463-44. Ultimately, the court decided that it need not resolve the question because even if it had authority to override the debtor's judgment it should be exercised only as a last resort. *Id.* at 464. Instead, the court removed the debtors from possession, finding cause from a "manifest demonstration that management is unable to conduct itself as an appropriate fiduciary for the bankruptcy estate." *Id.* at 465. Such removal thus expanded the subchapter V trustee's powers under section 1183(b)(5), granting the subchapter V trustee to operate the business of the debtor (although it could not file a plan). *Id.*

Without Removal of the Debtor: Some courts have elected to expand the subchapter V trustee's powers pursuant to section 1183(b)(2) without removing the debtor from possession. For example, in *In re Corinthian Commc'ns., Inc., 642 B.R. 224* (Bankr. S.D.N.Y. Aug. 3, 2022), the bankruptcy

court expanded the Subchapter V trustee's duties under 11 U.S.C. § 1183(b)(2) to include an investigation of the financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuation of such business, for purposes of 11 U.S.C. § 1106(a)(3). The lack of any intercompany agreement between the debtor and its affiliates raised a substantial issue whether the debtor had intercompany claims against the affiliates or vice versa, and the court found that the debtor's continued lack of disclosure to the trustee also constituted cause to expand the trustee's duties. *Id*. at 233-25.

It is notable that the court in *Corinthian* said it could expand the powers *sua sponte,* even though section 1185(a) begins 'on request of a party in interest,'. *Id*. at 233.

Role of the Trustee Upon Plan Confirmation

In subchapter V cases that are confirmed consensually under section 1191(a), section 1183(c)(1) provides that the services of the subchapter V trustee are terminated when the plan is substantially consummated, although the U.S. Trustee may reappoint the subchapter V trustee as needed for performance of duties under section 1183(b)(2)(C) and section 1185(a). In subchapter V cases that are confirmed non-consensually under section 1191(b), the services of the subchapter V trustee do not terminate until the completion of plan payments and the subchapter V trustee files a final report.

In *In re Gui-Mer-Fe, Inc.*, 2022 Bankr. LEXIS 1144 (Bankr. D.P.R. Apr. 25, 2022), the court refused to administratively close the case without a final decree because the plan was confirmed under section 1191(b) and plan payments had not been completed and thus the subchapter V trustee had not been discharged. Initially, the debtor requested entry of a final decree on the grounds that the plan was effective, and the estate fully administered, but upon the court's order suggesting that would contradict the confirmation order, the debtor withdrew its request, and

instead asked for administrative closing of the case to save the debtor from incurring costs for post-confirmation professional services to allow more funds for payments to creditors. *Id.* at 1-2, 6. The plan provided that the debtor would make direct payments to creditors pursuant to section 1194(b). *Id.* at 6. The U.S. Trustee opposed the request, arguing that such an order was premature because the subchapter V trustee had not been discharged from her duties, had various continuing duties, and would not be discharged until the debtor completed all plan payments. *Id.* at 7-8. The court ultimately denied the debtor's request, finding that its reasoning was unfounded, as subchapter V debtors are exempted from paying quarterly fees and do not have to file monthly operating reports after the effective date of the plan. *Id.* at 20-21. The court emphasized that plan confirmation under section 1191(b) does not terminate the subchapter V trustee's services pursuant to section 1183(b) and (c)(2), because for example, if the confirmed plan needs to be modified in the future under section1193(c), the services of the debtor's attorney and the subchapter V trustee will be required. *Id.* at 21. Instead, in chapter 11 subchapter V cases that are confirmed under section 1191(b), the services of the subchapter V trustee do not terminate until the completion of plan payments and the subchapter V trustee files a final report, and thus, administratively closing the case would contravene the express language of section 350(a). *Id.* at 21-22.

Trustee Compensation

Subchapter V case-by-case trustees are compensated through section 330(a)(1)(A) of the Code for "reasonable compensation for actual, necessary services rendered" and section 330(a)(1)(B) for "actual, necessary expenses," regardless of whether the trustee makes disbursements of estate funds. 11 U.S.C. § 330(a). Compensation awarded by the court is payable as an administrative expense claim upon confirmation after section 1191(a) consensual confirmation but may be paid during the life of the plan after section 1191(b) non-consensual

confirmation. 11 U.S.C. § 1191(e). Subchapter V trustees are specifically excluded from section 326(a), which sets limits on other chapter 11 trustees' compensation based on the moneys they disburse or turn over, and not subject to the section 326(b) limitation of compensation to 5 percent of plan payments that is applicable to standing chapter 12 and 13 case trustees. *See* 11 U.S.C. § 326.

Courts and professionals have been grappling with the issue of compensation for subchapter V trustees, particularly in cases where there are not sufficient funds to pay the trustee or where the case is dismissed without payment to the trustee. In a recent decision, in *In re New York Hand & Physical Therapy PLLC*., No. 21-35911, 2023 WL 2962204 (Bankr. S.D.N.Y. Apr. 14, 2023), the bankruptcy court considered whether the court may condition dismissal of the case upon payment of fees requested by the subchapter V trustee. The court ultimately decided to dismiss the case upon payment of the fees, or, failing that, convert it to a case under chapter 7 within forty-five days after issuance of its decision. *Id.* at 4. The issue arose because the U.S. Trustee filed a motion for dismissal, which the debtor did not oppose, for cause including failure to file monthly operating reports and confirm a plan, and also filed a memorandum in support of the subchapter V trustee's fee application in which it urged the court to award the full amount of compensation sought and defer the order dismissing the debtor's case until it paid the compensation awarded, which the debtor did oppose. *Id.* at 2. The court agreed with the U.S. Trustee that cause existed for dismissal, and reasoned that section 349(b) authorized it to condition dismissal on payment of the fees, explaining that other courts presiding over subchapter V cases had done so. *Id.* at 4 *citing In re Hunts Point Enters. LLC*, No. 20-42393 (AST), 2021 WL 1536389, at *4 (Bankr. E.D.N.Y. Mar. 25, 2021). The court further reasoned that the debtor could make the payments and had "enriched itself" at the expense of the subchapter V trustee. *Id.*

Trustees may seek interim compensation pursuant to section 331 of the Code. Although the issue has not yet been the subject of a recent reported decision, some courts have also allowed trustees to receive interim "retainer" deposits in advance of an approved application for compensation. The Middle District of Florida's subchapter V case procedures order requires the debtor to pay $1,000 to the subchapter V trustee within 30 days of the petition date and monthly thereafter, subject to adjustment upon request of any interested party and to the court's ultimate approval of the trustee's compensation under section 330. The U.S. Trustee has also expressed four principles applicable to subchapter V trustee requests for interim compensation deposits: (1) trustee retainers or advanced payments should be approved by court or Local Rule; (2) retainers should not be in such an amount that it adversely affects the debtor's cash flow and its ability to reorganize; (3) retainers should not be drawn by the trustee without court approval of a section 330 fee application and they remain property of the estate and must be held in a trust account until a fee application is approved; and (4) retainers should not prevent the debtor from paying administrative expenses over time in the case of a non-consensual plan under section 1191(e). *See* Daniel J. Casamatta and Michael J. Bujold, *The USTP's Positions on Select SBRA Legal Issues*, ABI Journal, Vol. XLI, No. 11, November 2022.

In *In re Tri-State Roofing*, 2020 Bankr. LEXIS 3405 (Bankr. D. Idaho, Dec. 7, 2020) the bankruptcy court for the District of Idaho considered a subchapter V trustee's application for compensation. The court examined §326(a) and (b), analyzed Section 326(b) and found it was open to three interpretations: (1) No compensation should be allowed under Subsection 330 to Subchapter V trustees, and only Chapter 12 and Chapter 13 trustees may qualify, (2) Congress only intended to place a percentage limitation on compensation to trustees who are not standing trustees in Chapter 12 and Chapter 13 and not to impose that cap on trustees in Subchapter V, or

(3) Congress intended not only to limit compensation under Section 330 for all standing trustees in Chapters 12, 13, and Subchapter V, but also intended to cap the fees of trustees that are not standing trustees in Chapters 12, 13, and Subchapter V. Id. at *5-9. The court noted that "[i]t seems likely that the intent of Congress was to make trustee compensation in subchapter V mirror that in chapters 12 and 13. However, there is a difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. *Id*. at *8-9. The court concluded that Section 326(b) does not prevent an award of compensation to the trustee under Section 330(a)(1), nor does it place a cap on such compensation. *Id*. at *9.

The basic rules of compensation in a chapter 11 case prevail in a Subchapter V as well. A court may award professionals, including attorneys and trustees, "reasonable compensation for actual, necessary services rendered" and reimbursement of actual and necessary expenses. 11 U.S.C. § 330(a)(1)(A)- (B). As is usual with other professionals, a fee application for a Subchapter V trustee must be "filed with the court which details the work done and expenses advanced for which compensation is sought," and the Subchapter V trustee bears the ultimate burden of proving entitlement to the fees asserted in the application. *In re Louis,* 2022 WL 2055290, at *12 (Bankr. C.D. Ill. June 7, 2022) (internal citations omitted).

The court will independently examine the reasonableness of fee requests and will consider "the nature, the extent, and the value of such services, taking into account all relevant factors, including but not limited to the time spent, the rates charges, and whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of," the case. 11 U.S.C. § 330(a)(3). *Id*. (noting services that are not reasonably likely to benefit the estate or are not necessary to the administration of the case are not compensable).

III. Eligibility Issues

Individual Eligibility Issues

A series of recent cases have continued to define the parameters of Subchapter V eligibility. In one of the most recent cases, *In re Fama*, 2023 WL 6131466 at *9 (Bankr. E.D.N.Y. Sep. 15, 2023), the court undertook a two-part analysis of the definition of "engaged in commercial or business activities." As of the petition date, the debtor in *Fama* held a 25% interest in a defunct construction business. *Id*. at *6. At the time, the debtor was suing shareholders to recover improper distributions. *Id*. In response to a challenge to eligibility raised by a creditor, the debtor argued that "engaged in commercial or business activities" does not require the debtor to be actively or currently involved in such activities on the petition date; the debtor contended that because a significant portion of its debt arose from a business and business transaction, it was eligible for Subchapter V notwithstanding the fact that the business was no longer operating. *Id*. at *5-*6

The *Fama* court adopted the majority view and held that the relevant date for determining whether the debtor was engaged in commercial or business activities was the petition date (i.e., presently engaged in such activities when the case is filed). *Id*. at *11. The court analyzed what constitutes commercial or business activities, noting that the statute uses the word "activities" and not "operations." *Id*. After a lengthy discussion of existing case law, the court held that (1) the term engaged in commercial or business activities is to be construed broadly and determined based upon the totality of circumstances (i.e., the unique facts and circumstances of the debtor's particular situation, debt, and bankruptcy case), (2) a business need not be continuing its usual or prior business operations in order for it to be engaged in business activities (i.e., activities and operations are not interchangeable and activities means something less), (3) a debtor can be eligible for Subchapter V if it is seeking to address residual business debt and to marshal residual business

assets, and (4) it does not matter that the business is not operating and the activities are principally in the form of litigation. *Id*. at *19-20. The court held that the debtor was eligible for Subchapter V because the debtor was attempting to address debt that resulted from prior business operations and recover on claims against other parties related to the same business operations. *Id*.

In *In re Robinson*, 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023), the court expanded the definition of "engaged in commercial or business activities." In *Robinson*, the debtor was an individual, and the sole proprietor of a poultry farm that was winding down its business. *Id*. at *1-*2. In *Robinson*, as of the petition date, the debtor had ceased business operations of a poultry farm more than a year prior, and the debtor was working full time at another job during the pendency of the bankruptcy case. *Id*. Notwithstanding, the court found that the debtor was actively engaged in preserving the value of the business' assets and marketing them for sale. *Id*. at *3. Ultimately, the court held that winding down activities can constitute commercial or business activities based upon the totality of circumstances. *Id*. at *3- *4.

Another court recently addressed individual Subchapter V eligibility in *In re Reis*, 2023 WL 3215833 (Bankr. D. Idaho May 2, 2023). As of the petition date, the debtor in *Reis* was winding down a medical practice. Id. at *1-2. The debtor's total debt was less than the statutory limit for Subchapter V, but over half of the debt was for student loans incurred in connection with attending medical school. Id. at *3. The US Trustee objected to the debtor's Subchapter V election, arguing that the debtor was ineligible because more than half of the total debt was not related to commercial or business activities. *Id*. at *4-5. Additionally, the US Trustee argued that § 1182(1)(A) requires a "nexus or contemporaneousness between Debtor's engagement in commercial activity and the debts that "arose from" commercial activity" contending that fifty

percent or more of a debtor's debt must arise from the same commercial or business activities that a debtor was engaged in on the petition date. *Id*. at *4-5.

The *Reis* court rejected this argument, holding that the two tests set forth in §1182(1)(A) are separate and no nexus has to exist between a debtor's qualifying debts and the debtor's current business and commercial activities; the commercial or business activities which gave rise to the debt can be different from the commercial or business activities that the debtor is engaged in on the petition date. *Id*. Notwithstanding, the court sustained the US Trustee's objection, holding that merely working as an employee does not constitute commercial or business activities. *Id*. at *6. In *Reis*, the medical school related student loan debt was incurred more than 10 years prior to the debtor opening the medical practice and the debtor worked multiple jobs at various hospitals and medical groups after medical school but before opening the medical practice. *Id*. The court left open the possibility that student loan debt *may* qualify as a debt arising from commercial or business activities for the purposes of Sub V eligibility but held that the 10-year gap between incurring the debt and opening the medical practice was too great for the debt to be considered as arising from commercial or business activities. *Id*. at *7.

Note that the case law goes both ways. For example, the court in *In re Ikalowych* held the debt must be "directly and substantially connected" to the commercial or business activities engaged in by the debtor, 629 B.R. 261, at 288 (Bankr. D. Colo. 2021), whereas the court in *In re Blue*, required no such connection. 630 B.R. 179 at 191 (Bankr. M.D.N.C. 2021).

Refining "Engaged in Commercial or Business Activities" for Corporate Eligibility

Section 11 U.S.C. § 1182 defies a subchapter debtor as a person is engaged in commercial or business activities … *excluding* a person whose primary activity is the business of owning single

asset real estate). 11 U.S.C. § 1182(1). This provision has breathed new life into courts' analysis of the definition of a single asset real estate debtor.

For example, in *In re Evergreen Site Holdings, Inc.,* 652 B.R. 307 (Bankr. S.D. Ohio June 21, 2023) the court considered whether a corporate debtor whose primary business activity was owning single asset real estate was eligible for Sub V. In *Evergreen*, the debtor owned two adjoining parcels of land: one parcel had a rented residential home and operated as a mobile home park, and the second parcel was vacant and unused due to pending litigation. *Id*. at 311-12. First, the court adopted the majority view that the debtor has the burden of proof on establishing Sub V eligibility. *Id*. at 316. The court then analyzed Section 101(51B) and the definition of single asset real estate, determining that that although the real property generated substantially all of the gross income of the debtor, the two properties were being used different purposes and thus could not be viewed as part of a common project or scheme. *Id*. at 317-19. The court held that the debtor was not a single asset real estate debtor and ruled that the debtor was eligible for Sub V. *Id*. at 319.

IV. Consensual vs. non-consensual plan confirmation

Failure to Vote

Section 1191(a) provides "[t]he court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title [1] are met.

Section 1191(b) of the Bankruptcy Code provides the exception to the rule, which provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, ***other than paragraphs (8),*** (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair

> and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Voting for Subchapter V plans, in some cases and in some jurisdictions has been lethargic or apathetic, perhaps in part due to lower claims amounts at issue. Understandably, bankruptcy courts have now been focused on analysis of voting of classes of creditors under Subchapter V plans, because cases confirmed as consensual provide certain benefits, including a discharge at confirmation. 11 U.S.C. § 1192.

Most recently, in *In re Franco's Paving, LLC,* 2023 WL 6475125 (Bankr. S.D. T.X. October 5, 2023, Jones, J.) the Bankruptcy Court for the Southern District of Texas held that a creditor class in which no votes were cast on a proposed plan would not be considered in determining whether the plan could be confirmed as consensual. In *Franco's Paving*, the court set forth a limited analysis of what constitutes acceptance vs. rejection under § 1126. *Id*. at *2-3. According to the court, when no votes are cast in a class, the mathematical computation under § 1126(c) (acceptance by at least 2/3 in amount and more than ½ in number of allowed claims in the class) becomes an impossibility, an "absurd proposition" that "could not have been intended when Congress enacted the current version of § 1126" such that Congress must have "presumed that at least one vote [in each class] was cast". *Id*. at *2. The court adopted the 10th Circuit's reasoning in *In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263 (10th Cir. 1988), which held that a failure to vote must either be an acceptance or a rejection, and concluded "that by failing to cast a ballot, the non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance." *Id*. at *3. The court noted that Subchapter V is intended to encourage consensual plans and from a practical standpoint, "a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection. The

outcome should be no different, as the overarching policy of Subchapter V is satisfied." *Id*. Consequently, where no votes are cast in a class, the court held that the class should not be counted for purposes of § 1126(a)(8). *Id*.

In *In re Creason,* 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023), the debtor sought confirmation of its plan as a consensual plan under § 1191(a). In *Creason*, the sole creditor in a secured class of claims did not return a ballot and did not object to confirmation of the plan. *Id*. at *1. The bankruptcy court confirmed the plan as a cramdown plan under 1191(b). *Id*. at *3. The court held that for a plan to proceed as a consensual plan, each class of impaired claims must affirmatively accept the plan. *Id*. at *2-3. The court rejected the debtor's argument that a failure to vote constitutes acceptance of the plan (the deemed acceptance argument). *Id*. In doing so, the court declined to follow the Tenth Circuit's ruling in *In re Ruti-Sweetwater, Inc*., 836 F.2d 1263 (10th Cir. 1988). *Id*. Further, the court ordered that the debtor, rather than the trustee, could make the plan payments to alleviate the continued involvement and expense of the Sub V trustee. *Id*. at *3.

Tenth Circuit: Deemed Acceptance

The bankruptcy court for the District of New Mexico recently considered whether the failure of an impaired class to vote on a plan is deemed acceptance of the plan in an individual Sub V case. *In re Jaramillo*, 2022 WL 4389292 (Bankr. D.N.M. Sep. 22, 2022). In *Jaramillo*, the debtor initially filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code; the case was later converted to a Subchpater V case. *Id*. at *1. The debtor's plan was unopposed, but only three creditors voted in favor of the plan and no creditor in an unimpaired class voted. *Id*. at *2. The debtor sought confirmation of a consensual plan under §1191(a). *Id*. Significantly, the court ruled that chapter 11 "deemed acceptance rule" applies in Sub V cases. *Id*. at *5.

The *Jaramillo* court announced that a plan can be confirmed as a consensual plan, even when an impaired creditor class does not vote on the plan. *Id*. Notwithstanding, the court denied confirmation of the plan due to the plan's failure to properly classify claims, adequately describe proposed treatment, and other issues unrelated to the deemed acceptance argument. Id.

V. Confirmation Issues

Feasibility/ Fair and Equitable Requirement

Courts have held that a Sub V cramdown plans, as well as consensual plans, require that the debtor prove feasibility under § 1191(c)(3) with respect to a non-accepting impaired class, as part of the fair and equitable requirement of § 1191(b). See *In re Saturno Design, LLC,* 2023 WL 5962573 (Bankr. D. Or. Sep. 13, 2023). In *Saturno Design,* the debtor's proposed plan was a cramdown plan under § 1191(b); the secured creditor held a large secured claim as well as an unsecured deficiency claim and did not accept the plan. *Id*. at *1. The *Saturno Design* court held that feasibility under § 1191(c)(3)(B) was indistinguishable from feasibility under § 1129(a)(11), and as a result, by showing a reasonable probability of success of the plan the debtor also proved a reasonable likelihood that the debtor would be able to make all payments under the plan. *Id*.

VI. Dischargeability Issues

Dischargeability for the Corporate Debtor

A number of courts have recently addressed the issue of whether the exceptions to discharge contained in § 523(a) apply to non-individual debtors in the context of confirmation of a non-consensual Sub V plan.

In *In re Off-Spec Sols. LLC,* 651 B.R. 862 (B.A.P. 9th Cir. July 6, 2023), the Ninth Circuit BAP affirmed the bankruptcy court's ruling that the exceptions to discharge in § 523(a) apply only to individual debtors in the context of confirmation of a nonconsensual plan under Sub V. The

BAP relied on the language of the statues and the statutes' context to conclude that § 1192 reiterates § 523(a)'s application to Sub V debtors, and that § 523(a) limits its applicability to individuals. *Id*. at 867. The BAP specifically noted that if Congress intended for § 523(a) to apply to corporations receiving a discharge under § 1192, then it would not have added a reference to §1192 in its amendment to § 523. *Id.* In reaching its decision, the BAP highlighted that virtually all bankruptcy courts that have considered the issue have reached the same conclusion. *Id*. at 865. The BAP analyzed the Fourth Circuit's reasoning in *Cantwell-Cleary Co. v. Cleary Packaging, LLC* (In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022) at length, but held that its interpretation of the statute, congressional intent, and bankruptcy policy was better. *Id*. at 867-73.

Interestingly, the court noted that

> It is vexing that our interpretation means that a corporate debtor gets a slightly broader discharge under § 1192 than under a consensual plan, but it is more difficult to believe that Congress intended to make § 523(a) applicable to corporate debtors through an opaque reference rather than an express statement. We agree with Judge Bonapfel that: "[I]t is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses, by among other things eliminating the absolute priority rule in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier."

Id. at 873 (internal citations omitted).

In *In re 2 Monkey Trading*, 650 B.R. 521 (Bankr. M.D. Fla. Apr. 28, 2023) the court held that §523(a) exceptions to discharge only apply to individual Sub V debtors, and not to corporate Sub V debtors. The court expressly rejected the Fourth Circuit's reasoning in *Cleary Packaging,* 36 F.4th 509 at 522; *See, e.g., In re Hall*, 2023 Bankr. LEXIS 1008 (Bankr. M.D. Fla. Apr. 13, 2023) (holding that the interplay between the statutes does not result in debts of the kind specified in § 523(a) being nondischargeable for corporate debtors upon a nonconsensual confirmation.);

Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC), 2022 Bankr. LEXIS 3199 (Bankr. W.D. Tex. Nov. 10, 2022) (holding that that the exceptions to discharge contained in Section 523(a) that are applicable to Sub V debtors through Section 1192(2) only apply to individual Sub V debtors and not to corporate Sub V debtors, such as an LLC.)

In *Synergetic Oil Tools, Inc. v. Relevant Holdings LLC* (*In re Relevant Holdings LLC*), 2023 U.S. Dist. LEXIS 53042 (D. Colo. Mar. 28, 2023), the bankruptcy court initially held that the discharge exceptions in § 523(a) only applied to individual Sub V debtors and not to corporate Sub V debtors, relying on *In re Satellite Restaurants Inc. Crabcake Factory USA*, 626 B.R. 871 (Bankr. D. Md. 2021) and *In re Cleary Packaging LLC*, 630 B.R. 466 (Bankr. D. Md. 2021). Two creditors appealed the bankruptcy court's decision, and the district court granted the parties leave to appeal the interlocutory order. The District Court reversed and remanded, noting that the two cases relied upon by the bankruptcy court had been overruled by the Fourth Circuit, and indicating that it found the Fourth Circuit's analysis in *Cleary Packaging,* 36 F.4th 509 to be persuasive. *In re Relevant Holdings*, LLC, 2023 U.S. Dist. LEXIS 53042 at *7-8.

The issue is also currently pending in two circuit courts of appeal. The Fifth Circuit granted direct review of the *Avion Funding* (Bankr. W.D. Tex.) decision cited above. *See Avion Funding, L.L.C. v. GFS Industries, L.L.C.*, No. 23-50237 (5th Cir.) (fully briefed and scheduled for oral argument on December 5). The Eleventh Circuit has likewise granted direct review of the *In re 2 Monkey Trading* (Bankr. M.D. Fla.) decision discussed above. *See BenShot, LLC v. 2 Monkey Trading, LLC*, No. 23-12342 (11th Cir.) (currently at briefing stage).

Faculty

Hon. Bruce A. Harwood is Chief U.S. Bankruptcy Judge for the District of New Hampshire in Concord, appointed to the bench in March 2013. He also serves on the First Circuit's Bankruptcy Appellate Panel. Prior to his appointment to the bench, Judge Harwood chaired the Bankruptcy, Insolvency and Creditors' Rights Group at Sheehan Phinney Bass + Green in Manchester, N.H., representing business debtors, asset-purchasers, secured and unsecured creditors, creditors' committees, trustees in bankruptcy, and insurance and banking regulators in connection with the rehabilitation and liquidation of insolvent insurers and trust companies. He was a chapter 7 panel trustee in the District of New Hampshire and mediated insolvency-related disputes. Judge Harwood is ABI's Vice President-Communication, Information & Technology, and serves on its Executive Committee. He previously served as ABI's Secretary, as co-chair of ABI's Commercial Fraud Committee, as program co-chair and judicial chair of ABI's Northeast Bankruptcy Conference, and as Northeast Regional Chair of the ABI Endowment Fund's Development Committee. He also served on ABI's Civility Task Force. Judge Harwood is a Fellow in the American College of Bankruptcy and was consistently recognized in the bankruptcy law section of *The Best Lawyers in America*, in *New England SuperLawyers* and by *Chambers USA*. He received his B.A. from Northwestern University and his J.D. from Washington University School of Law.

Megan W. Murray is a founding shareholder of Underwood Murray PA in Tampa, Fla., and has nearly 20 years of reorganization and workout experience advising business owners, debtors, trustees, creditors' committees, secured and unsecured creditors, and asset-purchasers and sellers. She has experience both on the legal side and business side in a global financial institution, and she counsels businesses and owners in a wide variety of industries, including but not limited to real estate, health care, hospitality, pharmaceutical, medical services, construction, insurance, transportation, logistics, aviation and financial services. Ms. Murray also has extensive experience representing a variety of fiduciaries, from chapter 7 and 11 trustees to assignees in assignments for the benefit of creditors and receivers in proceedings across the state. In addition to her broad range of representations in core bankruptcy matters, she counsels her clients in making critical business decisions, while prosecuting and defending complex business disputes. She has experience in director and officer liability litigation, bondholder disputes, shareholder and partnership disputes, court-appointed receiverships, health care receiverships, assignment proceedings, recovery of large and small business assets, and lien priority disputes related to a variety of collateral, including real property, equipment, medical equipment, aircraft and logistics-related assets. Ms. Murray has been recognized in *Chambers USA*, *Florida Super Lawyers* and *The Best Lawyers in America*, and she was named a *Florida Trend Magazine* "Legal Elite." She is rated AV-Preeminent by Martindale-Hubbell, and she is a 2018 honoree of ABI's "40 Under 40" program. Ms. Murray received her B.B.A. from the University of Iowa Tippie College of Business in 2002 and her J.D. with honors from the University of Iowa College of Law in 2011, where she was a contributing editor to the *Iowa Law Review* and an ABI Medal of Excellence recipient.

Rebecca F. Redwine is a partner with Hendren, Redwine & Malone, PLLC in Raleigh, N.C., and focuses her practice on debtor representation in chapter 11 and chapter 7 bankruptcies for both businesses and individuals. She also counsels clients experiencing insolvency, assists in workouts, rou-

tinely serves as local counsel and is a certified mediator. Ms. Redwine has served as unsecured creditors' committee counsel and has been appointed as examiner and as a receiver in various proceedings. She is admitted to practice in the Eastern, Middle and Western Districts of North Carolina in the U.S. District Court and the U.S. Court of Appeals for the Fourth Circuit. Ms. Redwine serves on the Local Rules Committee for the U.S. Bankruptcy Court for the Eastern District of North Carolina and as chair of the Bankruptcy Law Specialty Committee for the North Carolina State Bar Board of Legal Specialization. She holds various leadership roles with ABI, the International Women's Insolvency & Restructuring Confederation (IWIRC), the American Board of Certification and the North Carolina Bar Association. She is a frequent presenter at bankruptcy conferences and is a guest lecturer in bankruptcy classes at the University of North Carolina School of Law and Campbell University School of Law. Ms. Redwine earned a Phi Beta Kappa key from North Carolina State University, where she received her B.A. in 2004, and was an honor student at the University of North Carolina School of Law, where she received her J.D. in 2007.

Lisa A. Tracy is the deputy general counsel for the Executive Office for U.S. Trustees in Washington, D.C. She served as counsel to the director of the Executive Office from 2007-08. Previously, Ms. Tracy served for two and a half years as a trial attorney in the U.S. Trustee Program's Brooklyn field office. She joined the Department of Justice in 2002 through the Attorney General's Honors Program. Prior to working for the Department, Ms. Tracy clerked for Hon. Lee M. Jackwig, Chief Bankruptcy Judge for the Southern District of Iowa. She received her J.D. from American University's Washington College of Law in 2001.