Central States
Bankruptcy Workshop

Business Track

Subchapter V: Lessons Learned and Minding the Gaps

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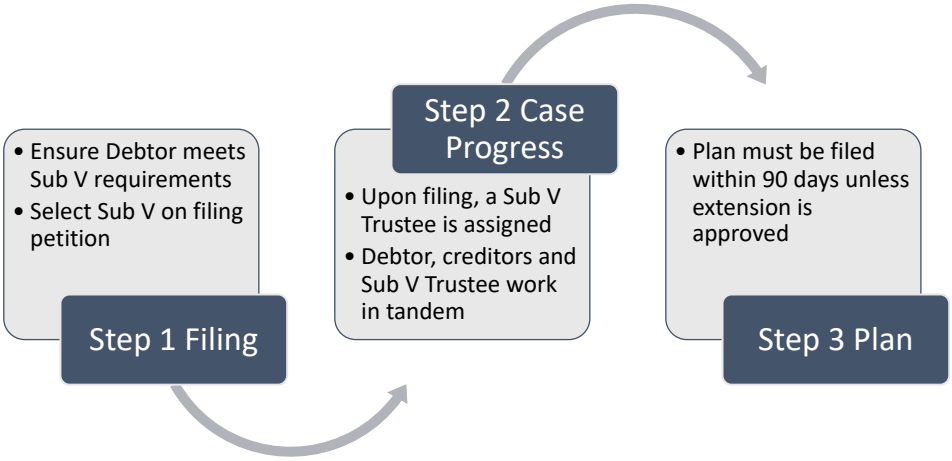
CONCURRENT SESSION

2022

Getting Acquainted with the Sub V Process



Benefits Observed

Pros

- Intent to be a cost-effective approach to bankruptcy
- Debtor remains as debtor-in-possession
- Eliminates automatic appointment of a creditors' committee
- No UST quarterly fees
- Consensual and non-consensual plans are being confirmed
- Confirmed consensual plan = debtor makes plan distribution payments
- Elimination of absolute priority rule

CONS

- 90 days to file plan (are you prepared or are you not?)
- Subchapter V debtors are more likely to have fewer resources for adequate bankruptcy reporting and drafting plan budgets.
- If debtor's financial books and records are incomplete or disorganized, it could have an immediate impact on the success of the case and potentially lead to dismissal or conversion.
- Debtor must file Sub V Status Report no less than 14 days prior to mandatory status hearing before the Court (usually within 60 days after filing)
- Confirmed non-consensual plan = Sub V Trustee or third party may be elected to make plan distribution payments (additional costs to the estate)

Issues Observed

Issues

- CHAPTER 11 RULES!
- § § 362 etc. Litigation
  - Lift Stay/Adequate Protection
  - Cash Collateral
- Assumption/Rejection of Leases
- Discovery Disputes
- Professional Fees

CONSEQUENCES

- Confirmation Delays
- Unlimited Administrative Costs
- Disproportionate Professional Fees

Debtor and Creditor Tips

Debtor

- Sub V Trustee can be as involved or less involved as needed – debtor's relationship in creditor negotiations is key
- Ensure familiarity with Subchapter V process, reporting guidelines and timeframes, especially cash collateral and MOR reporting
  - Debtor bank account statements must align with bankruptcy requirements

Creditor

- 90-day process reduces administrative expenses and process that is dedicated and focused on reaching a consensual plan
- Utilizing Subchapter V Trustee to review and opine on pre-bankruptcy areas of concern and how it translates post-petition and ultimately into a confirmable plan

How are Trustees Appointed?

- Two types:
  - Standing Trustee:
    - SBRA 4(b) amends 28 U.S.C. 586 to make its provisions for the appointment of a standing chapter 12 and 13 trustees applicable to the appointment of standing Sub V trustees.
  - Case-by-Case Trustees:
    - The UST has selected a pool of candidates who may be appointed on a case-by-case basis in Sub V cases rather than appointing standing trustees.
    - Wide range of skills: attorneys, retired judges, CPAs, financial professionals.

Discussion questions: Was the SBRA intended to have standing trustees v. case-by-case trustees? Testimony in support of the legislation suggests that Congress intended to have a standing trustee in each case.

How are Trustees compensated?

- Different compensation for different types of trustees:
  - If trustee is standing, compensation is percentage of payments the trustee makes to creditors under the same provisions that govern compensation for standing chapter 12 and chapter 13 trustees.
  - If a case-by-case trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of 330(a), without regards to the limitation in 326(a).
    - Courts have interpreted these sections to impose no limitations on trustees' compensations (CITE cases)

Discussion question and input from other panelists:

1. Does the lack of quarterly UST fees and unsecured creditors' committee fees make up for the need to pay the sub V trustee?
2. What is reasonable compensation?
3. Do we have statistics on fees in the first 365 days?

When is the trustee paid?

- A non-standing trustee's compensation is allowable as an administrative expense, which has priority under 507(a)(2) subject only to claims for domestic support obligations:
  - In a consensual plan, trustee must be paid at the effective date of the plan, unless the trustee agrees otherwise.
  - In a non-consensual plan, the trustee is paid through the plan.

The Role of the Sub V Trustee

- Generally, similar to the role of chapter 12 and 13 trustees, but with the unique duty to "facilitate the development of a consensual plan of reorganization."
  - What does "facilitate the development of a consensual plan of reorganization" mean?

Other Duties

- be accountable for all property received (704(a)(2));
- if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper (704(a)(5));
- if advisable, oppose the discharge of the debtor(704(a)(6));
- unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest (704(a)(7));
- make a final report and file a final account of the administration of the estate with the court and with the United States trustee (704(a)(9));
- appear and be heard at the status conference under section 1188 and any hearing that concerns: (A)the value of property subject to a lien; (B)confirmation of a plan filed under this subchapter; (C)modification of the plan after confirmation; or (D)the sale of property of the estate;
- ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;
- if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;
- if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title
- Only if the court orders:
    - investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan
    - file a statement of any investigation conducted
    - after confirmation of a plan, file such reports as are necessary or as the court orders

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Subchapter V: Lessons Learned and Minding the Gap

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Subchapter V: Lessons Learned and Minding the Gap

I. PRE-FILING CONSIDERATIONS

1. Eligibility Issues
    a. Debt Limit Pre- and Post-CARES Act
    b. Debt Limit under the CARES Act and Bankruptcy Threshold Adjustment and Technical Corrections Act
    c. On-Going Business Requirement
    d. Public Company Exclusion
    e. Changing the Sub V election after filing
    f. Single asset real estate issues
    g. Pre-bankruptcy business planning – consolidation and merger
    h. Litigation and cost implications of eligibility disputes
2. Reorganization in Sub V vs. Standard Chapter 11
    a. Cost - Is it cheaper?
    b. Timing - How much faster is it?
    c. Options - How much more effectively can the Debtor reorganize?

II. POST-FILING, PRE-CONFIRMATION CONSIDERATIONS & TRUSTEE ISSUES

3. Appointment of Subchapter V Trustee
    a. Standing Trustee
    b. Case-by-Case Trustees
4. Trustee Compensation
5. Trustee's role in the case
6. Important case deadlines
    a. § 1188 status conference
    b. Lease assumption / rejection:
    c. Claims bar date:
    d. Plan filing deadline

III. PLAN CONFIRMATION & POST-CONFIRMATION CONSIDERATIONS

7. Confirmation in a Sub V case is governed by 11 USC § 1191
    a. Consensual Confirmation
    b. Cram Down Plans
8. Ensuring compliance with 1191(c)(3)(B) in plan drafting
9. Discharge under § 1192 & Applicability of § 523
10. Post-confirmation obligations in non-consensual confirmation
    a. Quarterly operating reports
    b. Trustee's ongoing role, post-confirmation

I. PRE-FILING CONSIDERATIONS

1. Eligibility Issues

a. Debt Limit Pre- and Post-CARES Act

i. Prior to and after the applicability of the CARES Act, 11 U.S.C. § 1182 defines a "Debtor" as "a small business debtor."

ii. A "Small Business Debtor" is defined at *11 U.S.C. § 101. Definitions*: In this title the following definitions shall apply:

(51D) The term "small business debtor"--

(A) subject to subparagraph (B), means a person ***engaged in commercial or business activities*** (including any affiliate of such person that is also a debtor under this title and ***excluding a person whose primary activity is the business of owning single asset real estate***) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount ***not more than $3,024,725*** (excluding debts owed to 1 or more affiliates or insiders) ***not less than 50 percent of which arose from the commercial or business activities*** of the debtor; and

(B) does not include--

(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $3,024,725 (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is a corporation ***subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934*** (15 U.S.C. 78m, 78o(d)); or

(iii) any debtor that is ***an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934*** (15 U.S.C. 78c)).

b. Debt Limit under the CARES Act and Bankruptcy Threshold Adjustment and Technical Corrections Act

i. The CARES Act (Public Law 116-136, enacted March 27, 2020) and the extension of its bankruptcy provisions (Public Law 117-5, enacted March 27, 2021), contained an expanded definition of "Debtor," which effectively mirrored the Small Business Debtor definition above, but substituted $7,500,000 as the debt limit, instead of the lower Small Business Debtor amount (which was $2,725,625, and was adjusted up to $3,024,725 effective April 1, 2022)

ii. The CARES act contained a sunset provision that caused this expanded definition of "Debtor" to revert upon the expiration of the CARES Act. The

CARES Act expired without further legislative action on March 27, 2022. So, post-March 27, 2022, the definition of a "Debtor" for Sub V is simply "Small Business Debtor" (see above).

iii. Although the CARES Act has expired, efforts are underway to prolong the increased debt limit in Sub V. The ***Bankruptcy Threshold Adjustment and Technical Corrections Act*** ("BTATCA") passed the Senate on April 7, 2022, and passed the House of Representatives on June 7, 2022; it is currently awaiting signature by the President.

iv. Once approved, the effects of BTATCA on Sub V would be:

1. The CARES Act definition of "Debtor" with the $7,500,000 debt limit would retroactively be effective for any case commenced on or after March 27, 2020;

2. The BTATCA also contains a sunset that would cause it to expire 2 years after its enactment, and the definition of "Debtor" would once more revert to "Small Business Debtor," which will necessitate further legislation if this increased debt limit is to become permanent

v. NOTE: 11 U.S.C. § 104(a), which governs the 3-year adjustment of various dollar amounts specified in the Bankruptcy Code, does *not* refer to § 1182, but it does refer to 101(51D) (Small Business Debtor definition), which would have implications if the $7,500,000 limit were made permanent without adding a reference to § 1182 to § 104(a).

c. On-Going Business Requirement

i. A Sub V Debtor must be "a person engaged in commercial or business activities." Note that under 11 U.S.C. § 101(41), "Person" includes individual, partnership, and corporation (and corporation, under § 101(9)(A)(iv) includes "unincorporated company" which would cover an LLC)

ii. But what constitutes "engaged in commercial or business activities"? Courts are split on whether the Debtor must be *currently* engaged in commercial or business activities.

1. Must be currently engaged in business activities: "the 'engaged in' inquiry is inherently contemporary in focus instead of retrospective, requiring the assessment of the debtor's current state of affairs as of the filing of the bankruptcy petition" *In re Johnson*, No. 19-42063-ELM, 2021 WL 825156, at *6 (Bankr. N.D. Tex. Mar. 1, 2021).

2. The *Johnson* court refers to the similar analysis in eligibility disputes under Chapter 12 farm cases ("engaged in a farming operation") and Chapter 11 railroad reorganizations ("engaged in the transporation by railroad"), as well as the plain reading of the statute, and the underlying

purpose or rehabilitation / reorganization of the business – such purposes being irrelevant to a business that is no longer operating.

3. Need not be currently engaged in business activities: "He is 'engaged in commercial or business activities' by addressing residual business debt and otherwise meets the remaining requirements under § 101(51D)." *In re Wright*, No. CV 20-01035-HB, 2020 WL 2193240, at *3 (Bankr. D.S.C. Apr. 27, 2020)

4. The *Wright* court relies on *2 Collier on Bankruptcy* ¶ 101.51D (16th ed. 2020), which says "The definition of a 'small business debtor' is not restricted to a person who at the time of the filing of the petition is presently engaged in commercial or business activities and who expects to continue in those same activities under a plan of reorganization. That person may have incurred $2,725,625 in noncontingent, liquidated, secured and unsecured debts that arose from business activities before the date of the filing of the case, but as of the petition date may have discontinued those business activities. There is nothing in the legislative history to suggest that in this latter instance, the small business amendments should not apply to that person."

d. Public Company Exclusion

i. The definition of a debtor, either under 11 U.S.C. § 101(51D) or § 1182(1), excludes "any debtor that is a corporation ***subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934*** (15 U.S.C. 78m, 78o(d))." In general, the provisions of the Securities Exchange Act require reporting by any public company, and as such, public companies are not eligible for Subchapter V relief.

ii. It similarly excludes "any debtor that is ***an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934*** (15 U.S.C. 78c))." An "issuer" under the Securities Exchange Act means "any person who issues or proposes to issue any security." 15 U.S.C. § 78(c)(8). So, any affiliate of a company that issues stock (i.e., a "security") is similarly ineligible for Subchapter V. To be considered an "Affiliate" under 11 U.S.C. § 101(2)(A), the affiliate company must own, hold, or control, with the power to vote, more than 20% of the issuing company's securities (stock).

e. Changing the Sub V election after filing

i. It is possible to file an amended petition and elect Subchapter V treatment, if eligible. An area where this might be appropriate would be cases filed after March 27, 2022, that didn't qualify for Subchapter V after the debt limit of the CARES Act expired, but which will qualify upon enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act (which back-dates the debt limit to March 27, 2020).

ii. *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020), authorized a debtor who had filed Chapter 11 on January 2, 2022, prior to the Small Business Reorganization Act effective date of February 19, 2020, to subsequently change the election and proceed under Sub V after the SBRA became effective. See also *In re Progressive Solutions, Inc.*, 2020 WL 975464 (Bankr. C.D. Cal. Feb. 21, 2020) and *In re: Moore Properties of Pers. Cty., LLC*, 2020 WL 995544 (Bankr. M.D.N.C. Feb. 28, 2020), relied upon by *In re Body Transit, Inc.*, both of which reached similar results.

iii. The Court in *In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020), disallowed the changed election where the Debtor sought to change the election after the increase of the debt limit under the CARES Act; this outcome was dictated by the language of the CARES Act, which indicated the higher debt limit applied to cases filed "on or after the date of enactment of this Act," which plainly excluded such an election for a case filed prior to the enactment of the CARES Act.

f. Single asset real estate issues

i. The definition of a small business Debtor excludes "a person whose primary activity is the business of owning single asset real estate." This can often cause problems for closely held companies, where there are two separate but related entities, often with common ownership – the Real Estate Holding Company that owns the real estate premises, and that leases the premises to the Operating Entity which carries on the business operations unrelated to the leasing of the real estate.

ii. In a foreclosure situation, it may be difficult to confirm a standard chapter 11 plan when there is only a single creditor who wants to proceed with the foreclosure and isn't interested in restructuring the debt. In that case, it may be impossible to confirm a plan over the secured creditor's objection, as there may not be any other creditors to constitute an impaired class voting in favor of a plan, or if there are other impaired creditors that would otherwise vote in favor, the secured claimant might buy out their claims and vote against the plan, precluding a cramdown under 11 U.S.C. § 1129(b).

g. Pre-bankruptcy business planning – consolidation and merger

i. **Consolidating Operations through Purchase & Sale Agreement**

1. *Palace Theater, LLC*, WD Wis. Case # 21-11714: The Debtor, Palace Theater, LLC, owned real estate (theater premises) that it leased to 94 North Productions LLC ("94 North"). 94 North operated a dinner theater business, running the show production operations and the hospitality operations for the dinner theater. A foreclosure judgment was entered, and the sheriff's sale was imminent. The day before the sheriff's sale, the Debtor and 94 North entered into a Purchase and Sale Agreement transferring substantially all of 94 North's physical assets to the Debtor, subject to liens and encumbrances, and by which the

Debtor agreed to pay all payroll expenses related to the hospitality operations. Nothing in the record indicated lighting or sound equipment, or performer contracts were transferred, or that the Debtor assumed any other of 94 North's liabilities.

2. The Court here framed the question and its answer as "With respect to the question of the Debtor's eligibility to proceed under subchapter V of chapter 11, this case involves a novel question: whether a debtor whose primary activity was once the business of owning single asset real estate can change the nature of its single asset real estate property by purchasing assets of its lessee and assuming the lessee's business operations mere hours before filing its bankruptcy petition. The Court holds that the Debtor has not carried its burden to prove that its primary activity on the Petition Date was not the business of owning single asset real estate. Accordingly, the Debtor is not eligible to be a debtor under subchapter V."

ii. **Corporate Merger:**

1. Prebankruptcy merger of operating entity and real estate holding company pursuant to all state law corporate merger requirements should satisfy eligibility requirements and avoid SARE issues.

2. Be aware of tax implications in a merger – there may be tax attributes such as tax losses that can be carried forward, but if the company that holds the tax attributes ceases to exist when it is merged into another entity, these tax attributes may be lost. Always consult with competent tax counsel to assess the implications of such a change.

3. Consider operational issues as well, such as contracts, employment issues, tax withholding issues, insurance, and licensing.

4. In the Palace Theater case, the Debtor had not wanted to do a full corporate merger pre-petition, for various reasons in its business judgment. During the pendency of the case, those reasons became less compelling, and the Debtor filed a motion to approve a formal merger of the non-bankrupt entity, 94 North Productions LLC, into the Debtor. The Court denied the motion, indicating that there is no specific code provision that would permit such a merger pre-confirmation, although 11 U.S.C. § 1123(a)(5) would permit merger pursuant to a confirmation order, and that § 105 (the Court's equitable powers) would not extend to approving such a merger without a specific Bankruptcy Code provision that would be furthered by the merger.

h. Litigation and cost implications of eligibility disputes

i. "When a debtor's eligibility to file under a particular chapter of the Bankruptcy Code is challenged, the burden is upon the debtor to establish such eligibility." *In re Voelker*, 123 B.R. 749, 750 (Bankr. E.D. Mich. 1990) (citing numerous

cases). As such, it is important to enter a case with a game plan if there are any questions surrounding eligibility.

ii. Litigating eligibility issues may become very expensive and may not be worthwhile if the case could just as well proceed as a standard Chapter 11 case. Potential cost savings that might otherwise exist in Sub V will be lost if eligibility litigation consumes a significant amount of resources.

2. Reorganization in Sub V vs. Standard Chapter 11

a. Cost - Is it cheaper?

i. "It depends" – it can be cheaper in many cases, but becoming embroiled in costly litigation over eligibility or other issues can quickly eliminate any cost savings that might otherwise be had.

ii. Trustee Fees: The Subchapter V fees can be significantly cheaper than the US Trustee fees, particularly in cases that are confirmed non-consensually and must remain open for the 3-year duration of the case.

1. For example, consider a debtor that has disbursements of $100,000 per month ($300,000 per quarter), and confirms a 36-month non-consensual repayment plan in a relatively prompt 6-month timeframe from the petition date. Fees would be:

a. US Trustee Fees: these are based on a statutory percentage, calculated on case disbursements (see https://www.justice.gov/ust/chapter-11-quarterly-fees). In a standard chapter 11, the above example would equal 14 quarterly UST fee payments (2 pre-confirmation and 12 post confirmation) of $1,200 each, for a total of $16,800 in UST Fees

b. Subchapter V Trustee Fees: A subchapter V trustee's fees are based on hourly rates, which can vary, and total fees will thus depend depending on the extent of work performed by the Trustee.

i. In cases where the trustee is not relied on heavily for negotiation / mediation amongst the parties, fees can be expected to be minimal – e.g., $700 where there is no contested confirmaton hearing (see *In re Vossekuil Properties*, ED WI Case # 20-24480, Dkt # 103) or $2,075.00 where there is a contested confirmation hearing but no significant mediation by the trustee (see *In re Urgent Care Physicians, Inc.*, ED WI Case # 21-24400, Dkt # 122).

ii. Contrast with cases that have more extensive trustee involvement – e.g., $24,237.50 where there were

multiple on-site visits by the Trustee and extensive dealing with various parties in the case (see *In re Justin L. Delain*, ED WI Case # 21-20818, Dkt 203)

iii. No Committees: No creditors' committees are appointed (unless ordered for cause), which helps to reduce administrative costs as well

iv. Disclosure Statement: the Subchapter V Plan does not require a separate disclosure statement and attendant hearing on approval thereof. This can cut down on some of the required time and effort involved in proposing the Plan of Reorganization

b. Timing - How much faster is it?

i. Subchapter V is designed to proceed quickly, similar to the timeline in Chapter 12 cases.

ii. § 1189(b) states "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable"

1. This is a stricter deadline than is found in § 1121, which provides for a 120 day exclusive period for the Debtor to file a plan (180 days for small business cases), and provides that such exclusive period can be enlarged if "the debtor, after providing notice…demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time"

c. Options - How much more effectively can the Debtor reorganize?

i. One of the primary benefits of Subchapter V is that the Absolute Priority Rule does not apply. So, in a contentious case where it will be difficult or impossible to confirm a traditional chapter 11 plan, a cram down confirmation under Subchapter V may be possible. This can help keep the Debtor in business, even if it means minimal payments to unsecured creditors.

ii. § 1189(a) states "Only the debtor may file a plan under this subchapter" which provides a slightly greater level of control to the Debtor, compared to standard chapter 11 in which parties with competing interest can, in some circumstances, file a Plan as well. Creditors may still seek conversion or dismissal pursuant to § 1112(b) if circumstances warrant.

II. POST-FILING, PRE-CONFIRMATION CONSIDERATIONS & TRUSTEE ISSUES

3. Appointment of Subchapter V Trustee

a. Standing Trustee:

i. SBRA 4(b) amends 28 U.S.C. 586 to make its provisions for the appointment of a standing chapter 12 and 13 trustees applicable to the appointment of standing Sub V trustees.

b. Case-by-Case Trustees:

i. The UST has selected a pool of candidates who may be appointed on a case-by-case basis in Sub V cases rather than appointing standing trustees.

ii. Wide range of skills: attorneys, retired judges, CPAs, financial professionals.

4. Trustee Compensation: compensation is different for the different types of trustees.

a. If trustee is standing, compensation is a percentage of payments the trustee makes to creditors under the same provisions that govern compensation for standing chapter 12 and chapter 13 trustees.

b. If a case-by-case trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of 330(a), without regards to the limitation in 326(a).

i. Courts have interpreted these sections to impose no limitations on trustees' compensation

c. When is the Trustee Paid?

i. A non-standing trustee's compensation is allowable as an administrative expense, which has priority under 507(a)(2) subject only to claims for domestic support obligations:

1. In a consensual plan, trustee must be paid at the effective date of the plan, unless the trustee agrees otherwise.

2. In a non-consensual plan, the trustee is paid through the plan.

5. Trustee's role in the case

a. Generally, similar to the role of chapter 12 and 13 trustees, but with the unique duty to "facilitate the development of a consensual plan of reorganization."

b. Other Trustee Duties:

i. be accountable for all property received (704(a)(2));
ii. if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper (704(a)(5));
iii. if advisable, oppose the discharge of the debtor(704(a)(6));
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v. make a final report and file a final account of the administration of the estate with the court and with the United States trustee (704(a)(9));
vi. appear and be heard at the status conference under section 1188 and any hearing that concerns: (A)the value of property subject to a lien; (B)confirmation of a plan filed under this subchapter; (C)modification of the plan after confirmation; or (D)the sale of property of the estate;

vii. ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;

viii. if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;

ix. if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title

x. Only if the court orders:

1. investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan

2. file a statement of any investigation conducted

3. after confirmation of a plan, file such reports as are necessary or as the court orders

6. Important case deadlines

a. § 1188 status conference

i. The Court must hold a conference, pursuant to 11 USC § 1188, not later than 60 days after the order of relief, "to further the expeditious and economical resolution of a case under this subchapter." Not later than 14 days prior to the conference, the Debtor must file a report "that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."

ii. Each judge may have a different specific procedure or requirement for what goes into this report; as an example, the Order scheduling this conference in the *In re Urgent Care Physicians Case*, ED WI Case # 21-24000 (Dkt 23), required the report to cover the following issues:

1. The efforts the debtor has undertaken or will undertake to attain a consensual plan of reorganization. See 11 U.S.C. § 1188(c).

2. Any complications the debtor perceives in promptly proposing and confirming a plan, including any need for discovery, valuation

adjudication, motion practice, claim adjudication, or adversary proceeding litigation.

3. The nature of the debtor's business or occupation and the goals of the reorganization plan.

4. Any motions the debtor contemplates filing or expect to file before confirmation.

5. Any objections to claims or interests the debtor expects to file before plan confirmation and any potential need to estimate claims for voting purposes.

6. Estimated time by which the debtor expects to file and serve their plan of reorganization.

7. All dates on which the debtor will be unable to attend a hearing on confirmation.

8. Other matters that the debtor expects the Court will need to address before confirmation.

9. Other issues that the debtor contends could have an effect on the efficient administration of the case.

b. Lease assumption / rejection:

i. **Deadlines to assume leases**: 11 USC § 365(d)(4) provides for automatic rejection of non-residential real estate leases if they are not assumed within certain deadlines:

> (A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--
>
> > (i) the date that is **210 days*** after the date of the order for relief; or
> >
> > (ii) the date of the entry of an order confirming a plan.
>
> (B)
>
> > (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the **210-day*** period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

*NOTE: the 210 day period is a temporarily increased period that will revert to 120 days on December 27, 2022, pursuant to the Consolidated Appropriations Act of 2021, PL 116-260, December 27, 2020.

ii. Typically, under § 365(d)(3), a debtor in possession must timely perform lease obligations arising under a non-residential real estate lease, until the lease is assumed or rejected, and the Court, for cause, may extend the time for performance of those obligations for up to 60 days.

1. The Consolidated Appropriations Act of 2021 added § 365(d)(B) to the Code, which allows a Sub V Debtor who is experiencing or has experienced a material financial hardship due to the COVID-19 Pandemic, to extend the date for lease performance to the earlier of:

a. 60 days post-petition, plus an additional 60 days if the Court determines that the debtor is continuing to experience a material financial hardship arising out of the pandemic; or

b. The date the lease is assumed or rejected under § 365

2. This Act will sunset, and these special Sub V provisions will terminate, on December 27, 2022.

c. Claims bar date:

i. a motion to establish claims bar date is not required.

ii. The claims bar date for non-governmental claimants is 70 days after the petition date, and this is included in the Notice of Chapter 11 Case (Official Form 309E2) that is mailed out to all parties on the mailing matrix.

iii. Similar to a standard chapter 11 case, claims will be allowed in the amount scheduled, without the need for a claim to be filed, unless the claim is designated as disputed, contingent, or unliquidated.

d. Plan filing deadline: 90 days from the petition date, pursuant to 11 USC § 1189

III. PLAN CONFIRMATION & POST-CONFIRMATION CONSIDERATIONS

7. Confirmation in a Sub V case is governed by 11 USC § 1191

a. Consensual Confirmation. Section 1191(a) provides that "[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 are met." Paragraph 15 relates to objections by unsecured creditors in an individual debtor case. These are cases where the debtor either with or without the Sub V Trustee's assistance has negotiated (or orchestrated) acceptance by all impaired class to the plan.

i. The apathetic creditor problem. While there is not a lot to say about consensual plans, in researching this issue, one case stood out. In those districts that permit deemed acceptance of the plan when the creditor fails to vote, this is a powerful tool to get to consensual confirmation. In re Robinson, 632 B.R. 208 (Bankr. D. Kan. 2021), allowed "deemed acceptance" of non-voting, non-objecting creditors to satisfy section 1191(a)'s consensual confirmation requirement under applicable 10th circuit law. *Compare* In re Cheerview Enterprises, Inc., 586 B.R. 881, 894 (Bankr. E.D. Mich. 2018) (in an ordinary chapter 11 case, the court stated, "The statute [1129(a)(8)] and the rule [3018(c)] make clear that a claimant's acceptance of a plan of reorganization requires an affirmative act – a written acceptance on the prescribed form. The statute and the rule do not authorize the Court to infer a claimant's acceptance just because the claimant did not vote to reject a plan.").

b. Cram Down Plans. However, if the debtor cannot get to consensual confirmation because subsection (8), (10) or (15) is not satisfied, then "the court, on request of the debtor, shall confirm the plan …. if the plan [a] does not discriminate unfairly and [b] is fair and equitable, with respect to each class of interests that is impaired under, and has not accepted, the plan." 1191(b).

i. "Discriminate unfairly" under 1191(b)

While there is no case law discussing what "discriminate unfairly" means under 1191(b), section 1129(b) includes similar language. Under section 1129(b), "[t]he requirement that a plan not discriminate unfairly means that the class must 'receive treatment which allocates value to the class in a manner consistent with the treatment afforded to other classes with similar legal claims against the debtor'. In re Monarch Beach Venture, 116 B.R. 428, 437 (C.D. Cal. 1993). A plan does not discriminate unfairly within the meaning of the Bankruptcy Code if a dissenting class is treated equally with respect to other classes of equal rank." In re Art & Architecture Books of the 21st Century, 2016 Bankr. LEXIS 859, *66-*67 (Bankr. C.D. Cal. Mar. 18, 2016).

ii. Fair and equitable is defined in section 1191(c)
    1. As to secured claims, use 1129(b)(2)(A) (see 1191(c)(1)):
        a. *In re Young*, 2021 Bankr. LEXIS 765 (Bankr. D. NM Nov. 26, 2021) (holding that allowing state-law foreclosure of secured asset was not the "indubitable equivalent" of surrender under section 1129(b)(2)(A)).
        b. *In re Topp's Mech*, 2021 Bankr. LEXIS 3235 (Bankr. D. Neb. Nov. 23, 2021) (finding that plan was not "fair and equitable to

unsecured creditors where secured creditor was overpaid as a result of the section 1111(b) election).

2. As to unsecured claims, use 1191(c)(2): All of the projected disposable income of the debtor to be received in a 3- year period, or such longer period not to exceed 5-years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.
    a. "projected disposable income" is defined in section 1191(d). Section 1191(d)(2) defines projected disposable income as "the income that is received by the debtor and that is not reasonably necessary to be expensed … for the payments of expenditures necessary for the continuation, preservation, or operation of the business of the debtor." For individual chapter 11 debtors, a least one court has clarified that calculating "projected disposable income" under 1191(b) is not calculated under section 707(b)(2)'s means test. In re Young, 2021 Bankr. LEXIS 765 (Bankr. D. NM Nov. 26, 2021).
    b. 3 to 5 year period. While it is clear that a three year plan is satisfactory under section 1191(c)(2), a couple cases have sought to extend the term to five years:
        i. *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021) (overruled creditor's section 1129(a)(3) (Good Faith) objection to the plan's three-year term, arguing for a five-year term, because under the totality of the circumstances (i) the unsecured creditors accepted the plan and (ii) debtor contributed more than required under section 1191(c)(2)(B)).
        ii. *In re Urgent Care Physcians, Ltd.*, 2021 Bankr. LEXIS 3466 (Bankr. E.D. WI 2021) (considering legislative history of SBRA, which recognized that small businesses generally have shorter life-spans than large businesses and, absent unusual circumstances, a three year term properly balances "the shorter life-span of small businesses and the timely cost-effective benefits to debtors, against the benefits to creditors." In making this balancing, the court considered (i) the deduction from projected disposable income for anticipated capital needs, (ii) the insiders' financial contributions to the success of the plan, against (iii) the higher payment to creditors under a five year plan.)

8. Ensuring compliance with 1191(c)(3)(B) in plan drafting

a. As to 1191(c)(3)(B), which requires that "the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made." The *In re Urgent Care Physcians, Ltd.*, noted that "there is no indication that Congress intended section 1191(c)(3)(B) to require anything beyond the preservation of a creditor's right to seek the enforcement of the plan terms in the bankruptcy court and, if necessary, its rights

under applicable state law." As a result, this is likely to be analyzed on a case by case basis.

b. Schafer and Weiner uses the following language in its plans to address this issue:

i. **1191(c)(3)(B) Provision**. For the purposes of 11 U.S.C. § 1191(c)(3)(B) and in the event that payments to any creditor are not made as provided in Article IV of the Plan to such creditor, then the creditor may make a written demand (the "Demand Notice") to the Reorganized Debtor which, at a minimum, must clearly and expressly identify the payments that the Creditor claims were not made; and a copy of the Demand Notice shall be provided to Reorganized Debtor's counsel by email at [insert email address]. The Reorganized Debtor shall have sixty (60) days from the date the Demand Notice is received by the Reorganized Debtor to (a) cure the payment default or (b) make other mutually agreeable arrangements with the Creditor to resolve the identified payment default. If the payment default identified in the Demand Notice is not cured or not otherwise resolved as provided under the previous sentence, then the affected Creditor may reopen the Subchapter V Cases and seek appropriate remedies provided under the Bankruptcy Code; provided, however, that if the Reorganized Debtor cures such the payment default identified in the Demand Notice prior to the Bankruptcy Court entering an order authorizing any relief, the identified payment default shall be deemed cured and the Subchapter V Cases shall be immediately closed.

At least one court has approved similar language. See *In re Ellingsworth Residential County Ass'n*, 2020 Bankr. LEXIS 2897 (Bankr. M.D. Fla. Oct. 16, 2020).

9. Discharge under § 1192 & Applicability of § 523

a. While it had long been the case in traditional corporate chapter 11 cases that section 523 did not apply to corporate debtor, several courts have had to address the issue in light of § 1192, which states:

> "if the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first three years … the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—
>
> > (2) On which the last payment is due after the first three years of the plan, or such other time not be exceed 5 years as fixed by the court; or
> >
> > (3) of the kind specified in section 523(a) of this title."

b. While section 1192 appears to prohibit a discharge of indebtedness excepted from discharge under section 523(a), the challenges have not been successful. Generally, the Courts addressing this look to (a) the plain language of section 523(a), which specifically applies only to "individual debtors" and (b) to the application of section 1141 in pre sub

V cases. See *In re Satellite Restaurants, Inc.*, 626 B.R. 871 (Bankr. D. Md. 2021) (former employee wages); *In re Cleary Packaging, LLC*, 630 B.R. 466 (Bankr. D. Md. 2021) (state court judgment involving competition between packaging company and debtor owned by former owner of plaintiff); *In re RTech Fabricators, LLC*, 365 B.R. 559 (Bankr. D. Id. 2021) (custom vehicle manufacturer); and *In re Lapeer Aviation, Inc.*, 2022 Bankr. LEXIS 1032 (Bankr. E.D. Mich. April 13, 2022) (airplane repair).

10. Post-confirmation obligations in non-consensual confirmation

a. Quarterly operating reports

i. The Debtor must continue to file quarterly operating reports for the duration of the Plan.

b. Trustee's ongoing role, post-confirmation

i. **Consensual Plan**:

1. Discharge is entered and Trustee's services terminate

2. Debtor makes payments directly to creditors

3. Debtor operates the business

4. Trustee files Report of No Distribution if the trustee did not handle funds

ii. **Non-Consensual Plan**:

1. Depending on Plan terms, Plan payments may be made to the trustee, who would then disburse to creditors, but this is not mandatory. See 11 USC § 1194(b) "If a plan is confirmed under section 1191(b) of this title, except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan"

2. Trustee remains involved throughout the Plan, until case completion

3. Debtor continues to operate the business

4. Trustee files a Final Report and Accounting of any funds received and disbursed

Faculty

John W. Menn is a partner in the bankruptcy and insolvency group of Steinhilber Swanson LLP in Oshkosh, Wis., and has built a practice centered primarily around consumer bankruptcy, farm reorganizations and business reorganizations. He represents individual and business debtors in chapter 7, 11, 12 and 13 cases, and he represents debtors in adversary proceedings in bankruptcy, as well as negotiating settlements outside of bankruptcy, as well as negotiating settlements outside of bankruptcy and dealing with debt repayment through Wisconsin's Chapter 128 debt-amortization statute. He also assists clients who are facing foreclosure, helping them defend their foreclosure case and resolve their default through chapter 13, and he has helped many clients obtain home mortgage modifications through the Mortgage Modification Mediation Program, as well as through direct modifications with lenders outside of bankruptcy. In addition to his debtor work, Mr. Menn represents creditors in all chapters of bankruptcy, advising them of their rights, filing claims, negotiating and litigating disputed matters, and pursuing nondischargeability complaints. He has been a speaker at various seminars on topics including exemption issues in bankruptcy, creditors' rights when customers file bankruptcy, chapter 12 farm-reorganization issues, and chapter 13 bankruptcy issues including attorneys' fees, student loans, unfiled claims and dealing with underwater mortgages in chapter 13 cases. Mr. Menn is a member of the State of Wisconsin Bar Association's Bankruptcy, Insolvency & Creditors' Rights Section, Young Lawyers Division, Fox Valley Young Lawyers Association (for which he serves as its treasurer), ABI, Winnebago County Bar Association and the Eastern District of Wisconsin Bar Association. He received his B.A. from Calvin College in 2005 and his J.D. in 2009 from the University of Wisconsin.

John J. Stockdale, Jr. is a member of Schafer & Weiner, PLLC in Bloomfield Hills, Mich., where he focuses on business bankruptcies and transactional matters. Prior to joining the firm in 2008, he ran a publishing company specializing in business valuation and damage computation law. Mr. Stockdale received his undergraduate degree from The Citadel and his J.D. *summa cum laude* from Thomas M. Cooley Law School.

Hon. Kesha L. Tanabe is a U.S. Bankruptcy Judge for the District of Minnesota in St. Paul, appointed on Jan. 7, 2022, and the first Asian-American woman on the federal bench in Minnesota. She previously was a bankruptcy attorney with Tanabe Law in Minneapolis and is licensed in North Dakota, Minnesota and New York. Judge Tanabe started her career as an assistant attorney general in New York. Prior to starting her own firm, she was a partner at ASK LLP, Maslon LLP and Faegre Baker Daniels. Additionally, she was a subchapter V trustee in Region 12 and taught bankruptcy law at the University of St. Thomas School of Law. Judge Tanabe is a board-certified business bankruptcy specialist, a former member of the Bankruptcy Practice Committee for the District of Minnesota and a former co-editor in chief of the *MSBA Bankruptcy Bulletin*. She is a frequent lecturer on bankruptcy topics nationwide, and she is a member of several legal and community organizations, including the International Women's Insolvency & Restructuring Confederation, Minnesota Asian Pacific American Bar Association and Minnesota Lavender Bar Association. She also served as a Special Projects Leader for ABI's Bankruptcy Litigation Committee. Judge Tanabe is a graduate of the London School of Economics and received her J.D. from Cardozo School of Law.

Neema T. Varghese, CIRA is managing director of NV Consulting Services in Chicago and a seasoned financial advisor and independent director in complex situations. She advises clients through liquidity management, transaction advisory services, turnarounds, and protecting creditor interests. Ms. Varghese has served a number of industries, including health care, retail, financial services, oil/gas, pharma, manufacturing and transportation, and she typically has direct reporting responsibilities to C-suite executive teams, boards of directors and debt/equity investor groups. She has more than 15 years of experience in corporate finance advisory and has advised clients (both debtors and creditors) in bankruptcy situations, turnarounds, forensic accounting, asset divestiture, joint ventures, debt restructuring, and transaction advisory services through buy-side and sell-side merger-and-acquisition analysis and post-merger integration. Ms. Varghese has aided companies through cash-management issues, worked through receiverships, prepared entities for liquidations and going-concern sales of parts or entire businesses, and guided secured lenders and private-equity firms through healthy and troubled portfolio companies. In 2019, she was appointed by the Department of Justice to serve as a subchapter V trustee. Ms. Varghese represented the Federal Deposit Insurance Corp. (FDIC) in assessing damages resulting from a $2.5 billion bank failure engaged primarily in mortgage-backed securities. Previously, she was a portfolio manager with Merrill Lynch's Specials Assets group, working with a $100MM+ portfolio, consistently maximizing recovery and minimizing chargeoff exposure. Ms. Varghese is a board member of the Turnaround Management Association, a volunteer tax-preparer with LadderUp and a 2016 winner of The M&A Advisor's Emerging Leader Award. She received her B.S. in accountancy from the University of Illinois at Urbana – Champaign.