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2022 Caribbean Insolvency Symposium

Subchapter V Update

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Subchapter V Update

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Subchapter V Debtor Pursuant to 11 USC § 1182 (1) (2)

A debtor according to Subchapter V of the Bankruptcy Code is:

- A person *engaged in commercial or business activities* including any affiliate of such person that is also a debtor under this title:

Excluding:

- A person whose primary activity is the business of owning single asset real estate



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Subchapter V Debtor Pursuant to 11 USC § 1182 (1) (2) (cont'd)

- That has aggregate noncontingent liquidated secured and unsecured debts, not less than 50 percent of which arose from the commercial or business activities of the debtor, as of the date of the filing of the petition or the date of the order for relief in an amount *not more* than \$7,500,000¹;

Excluding:

- debts owed to 1 or more affiliates or insiders; and

¹ The COVID-19 Bankruptcy Extension Act of 2021, signed into law in March 2021, extended the debt ceiling to \$7,500,000 through March 27, 2022.



Subchapter V Debtor Pursuant to 11 USC § 1182 (1) (2) (cont'd)

AND Does Not Include:

- **(i)** any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$7,500,000 (excluding debt owed to 1 or more affiliates or insiders);
- **(ii)** any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 ([15 U.S.C. 78m](#), [78o\(d\)](#)); or
- **(iii)** any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 ([15 U.S.C. 78c](#)).



Actively Engaged in Commercial or Business Activities - Considerations

- That the Debtor is engaged in commercial or business activities at the time of filing of the Bankruptcy Petition. The Bankruptcy Code's meaning of "engaged in" such activities is to be interpreted in the present tense; therefore, it is at the time of the filing of the petition under Subchapter V that such determination of eligibility proceeds.
- That at the time of filing of petition under Subchapter V the scheduled debts may be a remanent of previous commercial or business activities. In re Wright, No. 20-01035-HB Chapter 11, 2020 Bankr. LEXIS 1240 (Bankr. D.S.C. Apr. 27, 2020).



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Actively Engaged in Commercial or Business Activities – Considerations (cont'd)

- The Debtor's intention to continue commercial or business activities. In re Thurmon, 625 B.R. 417 (Bankr. W.D. Mo. 2020)41400, Dkt. 97)
- If the Debtor is a corporation that finds itself in a wind down phase at the time of filing even if such corporation does not operate as it did initially may fall within the definition of engaged in commercial or business activities.
- A Debtor who has a defunct company but renders similar services part-time or full-time as an independent contractor at the time of filing may fall within the definition of engaged in commercial or business activities.



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Redesignation

Courts are divided as to whether redesignation to a Subchapter V is permitted in a pending non-Subchapter V Chapter 11 case. The only common trend these diverting opinions have is that "re-designation will not necessarily be proper in all Chapter 11 petitions commenced prior to the effective date of SBRA". In re Bonert, 2020 Bankr. LEXIS 1783, at **7-8, 2020 WL 3635869, at *3 (Bankr. C.D. Cal. June 3, 2020).



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Redesignation (cont'd)

- The majority of courts that have addressed the issue have found that a debtor who filed a Chapter 11 petition prior to the effective date of SBRA may amend the petition to elect treatment under Subchapter V.
- For instance, in In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. April 10, 2020), the court allowed the debtor to proceed under Subchapter V, even though the debtor's petition had been filed 15 months prior to the effective date of SBRA and both the debtor and a creditor had filed competing plans of reorganization. The Ventura court held that "any practicality and scheduling issues arising from a SBRA designation in a case commenced prior to the effective date of the SBRA" could be resolved by an extension of any SBRA-specific deadlines. Id. at 15.



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Redesignation (cont'd)

- Other courts, however, have declined to grant redesignation to subchapter V. For instance, in In re Double H Trans. LLC, 2020 Bankr. LEXIS 1341 (Bankr. W.D. Tex. Mar. 5, 2020), the Court concluded that "to permit the Debtor to now elect 'Subchapter V' status at this stage of the bankruptcy case [that is, 116 days after the Debtor filed its Original Petition,] would create a procedural quagmire and likely create 'cause' to dismiss or convert the Debtor's case". Id. at 554.
- In addition, the Double H Trans. LLC court also considered that a debtor is required to file documents required by Section 1116(1) (most recent balance sheet and other financial information) when electing Subchapter V treatment as a small business debtor, 11 U.S.C. § 1187(a), and that in that case, the amended petition filed by the debtor electing Subchapter V treatment did not include the required financial information.



Non-Debtor Stay

Subchapter V does not provide for a non-debtor stay unlike chapter 12 which does.



Stay Distinction in Small Business v. Subchapter V Case

Under chapter 11 small business cases are not Subchapter V cases. A Subchapter V case is “a case under subchapter V of chapter 11.” A small business debtor who has elected Subchapter V is **NOT** a small business case.

11 USC 101 (51C) “Small business case” – Means a case filed under chapter 11...in which the debtor is a small business debtor and ...not elected Subchapter V...



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Stay Distinction in Small Business v. Subchapter V Case (cont'd)

11 USC (51D) “Small business debtor”—Means person engaged in business or commercial activities (including affiliates) with aggregate noncontingent liquidated secured and unsecured debts of not more than \$2,725,625¹.... not less than 50 % which arose from commercial or business activities (excluding single asset real estate entities).

¹ The COVID-19 Bankruptcy Extension Act of 2021, signed into law in March 2021, extended the debt ceiling to \$7,500,000 through March 27, 2022.



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Stay Distinction in Small Business v. Subchapter V Case (cont'd)

362(n) provides that the automatic stay does not apply when the debtor in the current case was a debtor in a previous “small business case.” Since a Subchapter V is not a “small business case” 362(n) does not apply to a Subchapter V. Therefore, if a Subchapter V case is dismissed and a subsequent case is filed in 2 years, the stay still applies. [But remember 262 c (3) 30 days only is granted without further order of court]



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Injunction Rules Apply in a Subchapter V Case as in any Other Case

- If seeking something other than standard discharge injunction the debtor must comply with Rule 3017 and provide 28 days' notice and time for filing objection
- Must serve notice and details and copy of the plan on a non-creditor
- Rule 2002 c (3) Plan seeking injunction shall give notice with conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction; describe briefly the nature of the injunction; and identify the entities subject to the injunction



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11 USC §1111(b)(1)

A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title [11 USCS § 502] the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse,

Unless:

- i. The class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or
- ii. Such holder does not have such recourse and such property is sold under section 363 of this title [11 USCS § 363] or is to be sold under the plan.



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11 USC §1111(b)(1) (cont'd)

- (B) A class of claims may not elect application of paragraph (2) of this subsection if —
 - i. The interest on account of such claims of the holders of such claims in such property is of *inconsequential* value; or
 - ii. The holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title [11 USCS § 363] or is to be sold under the plan.
- (2) If such an election is made, then notwithstanding section 506(a) of this title [11 USCS § 506(a)], such claim is a secured claim to the extent that such claim is allowed.



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Timing to Make an 1111(b) Election

- The election available to secured creditors in §1111(b) is governed by Bankruptcy Rule 3017.1. Such rule indicates that the election allowed by the Bankruptcy Code may be made at any time *prior* to the completion of the hearing held on the disclosure statement.
- Under Subchapter V cases there may not be a hearing on the approval of the disclosure statement. Therefore, Interim Rule 3017.1 states that the creditor has until such a time as the Bankruptcy Court establishes the deadline. If no deadline is established some courts have allowed creditors to make the election as an objection to the filing of the Subchapter V Plan.



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§1111(b)(2) – Case Study

In re Caribbean Motel Corp, 2022 Bankr. Lexis 25; 2022 WL 50401

- I. Facts
 - The Debtor is a motel operator in which it owns real property that consists of 40-rooms of which 22 are operational.
 - The Debtor filed its bankruptcy petition under Subchapter V.
 - OSP Consortium LLC, herein after "OSP", creditor who holds a lien over the Debtor's real estate property. OSP filed a proof of claim for \$2,415,700.00; however, the value of the real property that secured the claim was \$550,000 and OSP did not contest the value established in the bankruptcy schedules for such real estate property.
 - OSP moved the court to prohibit the Debtor from using cash collateral pursuant §363(c) and requested that the debtor be reassigned to a Single Asset Real Estate Debtor to inhibit qualification under Subchapter V. OSP also informed the court its election under §1111(b)(2) of its partially secured claim.
 - Debtor objected to OSP's election under §1111(b)(2) by arguing that it was not entitled to such treatment because OSP's secured claim is of *inconsequential* value to its claim because the collateral only accounts for 15% of OSP's secured claim.



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§1111(b)(2) – Case Study

In re Caribbean Motel Corp, 2022 Bankr. Lexis 25; 2022 WL 50401

- II. Applicable Issue
 - Is a creditor's partially secured claim where the value of collateral is only 15% of the claim considered to be of inconsequential value for purposes of §1111(b) treatment?



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§1111(b)(2) – Case Study

In re Caribbean Motel Corp, 2022 Bankr. Lexis 25; 2022 WL 50401

- I. Conclusion of Law
 - The Bankruptcy Court for the District of Puerto Rico reached a decision on §1111(b)(2) by adopting prior case law established by the Bankruptcy Court in the Southern District of New York where in a similar case it held that a collateral with a 15.6% value of a secured claim was not inconsequential.
- II. Holding
 - The Debtor's opposition to OSP's election pursuant §1111(b) treatment was denied because the Court understood that the collateral with 15% value was not inconsequential.



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To what extent can the election of §1111(b) be plausible for a Subchapter V debtor where such election makes it far more difficult for a Debtor's reorganization?

- The Court's recent determination calls to question, on whether the Court should limit the application of §1111(b) treatment in Subchapter V cases because in certain situations such application may make the Debtor's reorganization too difficult and may force the debtor to liquidate the estate.



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Consensual Plan Means Debtor Receives a Discharge Upon Confirmation

- The effect of the granting of a discharge is that the automatic stay terminates.
- Under a cramdown plan, the stay remains in effect until the case is close or dismissed, or the debtor receives a discharge.
- The vesting of property of the estate in the debtor means that the automatic stay with regard to acts against property terminates but in a cram down case, the vesting does not occur until case concluded.



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Consensual vs. Non-Consensual Plan

- **Consensual** means plans where the debtor obtained the requisite votes in favor of a plan from all impaired creditors (all impaired creditors consented) versus
- **Non-consensual plan** is a cram down plan where the debtor did not obtain a consensual vote (all impaired creditors did not consent) and the court confirms anyway.



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Benefits of a Consensual Plan

- Debtor receives discharge upon confirmation (good for individuals)
- Automatic stay terminates
- Trustee is discharged. No more fees.
- No requirement that projected disposable income test be met



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Non-Consensual or Cramdown Plan

- No discharge at confirmation—receive at completion of plan payments
- Automatic stay stays in effect
- Property of estate includes post-petition assets and earnings
- Trustee is not discharged and has duties. More fees.



Importance of Properly Prepared Financial Projections

- Success of achieving consensual conformation is enhanced
- Frequently one creditor is active and a good projection is persuasive
- Necessary for a contested confirmation
- Most creditors will fold at the last minute



Actively Engaged in Commercial or Business Activities Case Studies

BY. CARMEN CONDE TORRES, ESQ.

Sub-Chapter V requirement: Person “engaged in commercial or business activities”

In re Wright, No. 20-01035-HB
Chapter 11, 2020 Bankr. LEXIS
1240 (Bankr. D.S.C. Apr. 27, 2020)

I. Facts

- In the case at bar the Debtor filed its bankruptcy petition on February 28, 2020, where the Debtor elected to proceed as a subchapter V small business debtor.
- The Debtor was the sole member of a limited liability company that had filed for bankruptcy on September 17, 2018.
- The bankruptcy case for the limited liability company was dismissed on June 19, 2019.
- The Debtor was also a 49% owner of another corporation, where his wife held the other 51% owner of such corporation. Such corporation filed for bankruptcy on September 17, 2018, however, such case was dismissed on June 20, 2019.
- The Debtor testified in the Creditors Meeting of both the limited liability company and the corporation that the afore mentioned businesses had ceased operations in 2018.
- The United States Trustee filed a Motion to Strike ton the Debtor’s Small Business Debtor election because it did not meet the requisite definition of “small business debtor” pursuant 11 U.S.C. §101(51D).

II. Applicable Issue

- When is a Debtor considered to be “engaged in commercial or business”; does this mean that the Debtor be actively engaged in such activities at the time of filing of the bankruptcy petition?

Sub-Chapter V
requirement : Person
“engaged in
commercial or
business activities”

In re Wright, No. 20-01035-HB
Chapter 11, 2020 Bankr. LEXIS
1240 (Bankr. D.S.C. Apr. 27, 2020)

I. Conclusions of Law

- The Bankruptcy Court of the District of South Carolina in its discussion made an interpretation according to the legislative intent of Congress’s recently enacted Small Business Reorganization Act of 2019 (“SBRA”). In its brief discussion the Court indicated that the SBRA and Subchapter V were designed to broaden relief available to address small business debt. Furthermore, it goes on to say that SBRA “was intended to improve the ability of small businesses to reorganize and ultimately remain in business”. In its analysis indicates that nothing in the aforementioned piece of legislation or in the language of the definition of a small business debtor limits the application to debtors *currently* engaged in business or commercial activities.

Sub-Chapter V
requirement: Person
“engaged in
commercial or
business activities”

In re Wright, No. 20-01035-HB
Chapter 11, 2020 Bankr. LEXIS
1240 (Bankr. D.S.C. Apr. 27, 2020)

I. Application

- After applying the definition to the facts at hand, there being no restrict as to whether such business or commercial activities being current at the time of filing the fact that the limited liability company and corporation ceased operations; didn’t affect the Debtor’s eligibility to proceed under Subchapter V. In addition, stated that the Debtor met with the requirement because it was stipulated that 56% of his debts are business debts and his total debt amount is less than the cap established in the statute.

II. Holding

- The Court denied the U.S. Trustee’s Motion to Strike against the Debtor’s election to proceed under Subchapter V of the Bankruptcy Code.

Sub-Chapter V
requirement: Person
“engaged in
commercial or
business activities”

In re Thurmon, 625 B.R. 417
(Bankr. W.D. Mo. 2020)

I. Facts

- In the case at bar the Debtors filed their bankruptcy petition in early August, 2020. Where the Debtors elected to proceed as a Subchapter V small business debtor.
- Three months prior to the petition the Debtors’ business had closed down and they had no intent to resume business activities. Furthermore, the business was sold prior to the bankruptcy petition.
- Former business entity however was still active and in good standing with the Department of State.

II. Applicable Issue

- When is a Debtor considered to be “engaged in commercial or business”; does this mean that the Debtor be actively engaged in such activities at the time of filing of the bankruptcy petition?

Sub-Chapter V
requirement: Person
“engaged in
commercial or
business activities”

In re Thurmon, 625 B.R. 417
(Bankr. W.D. Mo. 2020)

I. Conclusions of Law

- The Bankruptcy Court of the Western District of Missouri in its discussion interpreted the meaning of “**engaged in** commercial or business activities” in disagreement to prior case law.
- In its discussion it goes on to say, after citing some prior caselaw, indicates that none of the prior caselaw precisely defined the meaning of the “engaged in” phrase included in the Subchapter V statute. Furthermore, the Court stated that “when Congress does not define a term, we rely on the word or phrase’s plain meaning or common understanding.” With that in mind adding the word “currently” to the phrase “engaged in” would be redundant, because the present tense is inherent to the phrase itself.

Sub-Chapter V
requirement: Person
“engaged in
commercial or
business activities”

In re Thurmon, 625 B.R. 417
(Bankr. W.D. Mo. 2020)

- I. Application
 - In the case at bar the Debtors had sold the business prior to the filing of the petition and had no intent to return to such business. To say that the Debtors were engaged in business or commercial activities would be erroneous just because the business entity was active and in good standing with the State Department.
- II. Holding
 - The Court sustained the U.S. Trustees' objection to the Debtor's election to proceed under Subchapter V of the Bankruptcy Code.

Sub-Chapter V
requirement: Person
“engaged in
commercial or
business activities”

In re Offer Space, LLC, 629 B.R.
299 (Bankr. D. Utah 2021)

- I. Facts
 - In the case at bar the Debtor filed its bankruptcy petition on December 30, 2020 pursuant 11 USC §§ 1181-195.
 - The Debtor was a limited liability company formed in the state of Utah in 2015 that provided vendor marketing solutions to direct marketers including, customer relations management, merchant account management, and marketing campaign management using certain proprietary software.
 - In late 2019 and early 2020, the Debtor began suffering difficulties due to legal claims and chargebacks. However, the Debtor marshaled its assets and took reasonable measures to conduct its business, generate revenue and pay its creditor's.
 - The Debtor was in a wind down phase.
 - The U.S. trustee objected to the Debtor's eligibility for Subchapter V based on the requirement that a debtor must be “engaged in commercial or business activities”. Because the business was inoperable as of the petition date.
- II. Applicable Issue
 - Does a Debtor's actions in winding down its business constitute “commercial or business activities” for purposes of Subchapter V eligibility?

Sub-Chapter V
requirement : Person
“engaged in
commercial or
business activities”

In re Offer Space, LLC, 629 B.R.
299, P. 8 (Bankr. D. Utah 2021)

I. Conclusions of Law

- The Bankruptcy Court of the District of Utah established according to recent caselaw that to determine whether a debtor is “engaged in commercial or business activities” who the Court employed a “totality of the circumstances” analysis. The Court made its determination by analyzing five (5) factors:
 1. Does the Debtor have active bank accounts?
 2. Does the Debtor have accounts receivable?
 3. Is the Debtor analyzing and exploring counterclaims?
 4. Is the Debtor managing its stock?
 5. Is the Debtor winding down its business and taking reasonable steps to pay its creditors and realize value for its assets.
- The Court also noted that terms “activities” and “operations” are not interchangeable; that such terms it found them to be distinct. The Court rejected the U.S. Trustee’s suggestion because the statute does not mandate that the business be operable; that’s why it utilized the term “activities” in lieu of “operations”. The Court stated that the use of the “plain and unambiguous language of Subchapter V indicates a small business debtor may engage in a very inclusive range of commercial or business activities...”

Sub-Chapter V
requirement: Person
“engaged in
commercial or
business activities”

In re Offer Space, LLC, 629 B.R.
299, page 8, 1 (Bankr. D. Utah
2021)

I. Application

- The Bankruptcy Court of the District of District of Utah understood that the Debtor in this case did qualify as a person “engaged in commercial or business activities”, because the Debtor:
 1. had active bank accounts;
 2. had accounts receivable;
 3. Was analyzing and exploring counterclaims in a lawsuit involving Nutra Now;
 4. Was managing the Stock; and
 5. Was winding down its business and taking reasonable steps to pay its creditors and realize value for its assets.

II. Holding

- The Court overruled the U.S. Trustee’s objection to the Debtor’s election to proceed under Subchapter V of the Bankruptcy Code.

Sub-Chapter V requirement: Person “engaged in commercial or business activities”

In re Blue, 630 B.R. 179 (Bankr.
M.D.N.C. 2021)

I. Facts

- In the case at bar the Debtor filed its bankruptcy petition on February 16, 2021, pursuant 11 USC §§ 1181-195.
- The Debtor was the sole owner and president of a corporation in which the Debtor provided information transport (IT) consulting services. Such corporation ceased operations in May 2019 and has no assets.
- Since August 2020, the Debtor worked full-time at Lanier Law Group, for which she was a salaried, W-2 employee. In addition to her employment with the Lanier Law Group, Debtor works as an IT consultant for two different entities as an independent contractor where she does not hire additional personnel to assist with her work for either entities.
- The services provided by the Debtor to the two entities as an individual contractor were like the ones provided by the corporation she once presided.
- Bankruptcy administrator objected to Debtor’s Subchapter V election by questioning which debts arose from the commercial or business activities of the Debtor.
- Debtor did not show that at least 50% of her debt arose from the commercial or business activities.

II. Applicable Issues

- Does a Debtor’s part time consulting services as an independent contractor fall within the scope of the “engaged in commercial or business” requirement of Subchapter V when the debtor’s defunct corporation isn’t currently operating?
- Does a Debtor’s scheduled business debts require that such debts related to the Debtor’s current business activities in order to proceed under Subchapter V?

Sub-Chapter V requirement: Person “engaged in commercial or business activities”

In re Blue, 630 B.R. 179, P. 12, 13
(Bankr. M.D.N.C. 2021)

I. Conclusions of Law

- A. The Bankruptcy Court of the Middle District of North Carolina recently established according to recent caselaw that a person is “engaged in commercial or business activities” when she participates in the purchasing or selling of economic goods or services for a profit. In its discussion the court established that the “term “engaged” as used in §1182(1)(A) requires debtors to be *presently* participating in business or commercial activities as of the petition date.”
- B. Concerning the issue on whether scheduled debt’s must be related to the Debtor’s current business activities; the court determined according to prior caselaw. In its discussion the Court indicated that Congress used very broad language allowing debtors to proceed under Subchapter V, even though their debt’s stem from operation of both currently operating businesses and non-operating businesses.

II. Holding

- Bankruptcy administrator’s objection to Debtor’s Subchapter V election was overruled.

Sub-Chapter V requirement: Person “engaged in commercial or business activities”

Nat'l Loan Inv'rs, L.P. v. Rickerson
(In re Rickerson), Nos. 21-10315-
TPA, 28, 37, 2021 Bankr. LEXIS
3403 (Bankr. W.D. of Pa. Dec. 14,
2021)

I. Facts

- In the case at bar the Debtor filed its bankruptcy petition on June 3, 2021, pursuant 11 USC §§ 1181-195.
- The debtor was a person who had previously engaged in business as a physician but at the time of filing of the bankruptcy petition, the entities by which her medical practice had operated were no longer functioning.
- The debtor had a total of 4 entities one of which was defunct by 2013 another of which was sold in 2014 and the other two (2) where inactive without any remaining assets by 2017.
- At the time of filing of the bankruptcy petition the debtor was engaged in a garden variety employee-employer relationship with an insurance company where she had no sort of ownership or special interest in such employer.
- Debtor did not show that at least 50% of her debt arose from the commercial or business activities.

II. Issues

- When is a Debtor considered to be “engaged in commercial or business”; does this mean that the Debtor be actively engaged in such activities at the time of filing of the bankruptcy petition?
- Does the meaning of a person “engaged in commercial or business activities” for purposes of Subchapter V encompass a Debtor's employment relationship with an employer in cases where the employee has no ownership or special interest with the employer?
- Does the burden of proof in establishing eligibility for Subchapter V lie on the Debtor or on the party questioning such eligibility?

Sub-Chapter V requirement: Person “engaged in commercial or business activities”

Nat'l Loan Inv'rs, L.P. v. Rickerson
(In re Rickerson), Nos. 21-10315-
TPA, 28, 37, 2021 Bankr. LEXIS
3403 (Bankr. W.D. of Pa. Dec. 14,
2021)

I. Conclusions of Law

- A. The Bankruptcy Court of the Western District of Pennsylvania recently established that for a Debtor to qualify for Subchapter V such Debtor must be a person “engaged in commercial or business activities.” The court discussed whether the meaning of such phrase is to be interpreted in the present tense or if there is room for Debtor's previously engaged in such activities. The court concluded that in order to be eligible to proceed under Subchapter V a Debtor must be **presently** engaged in commercial or business activities on the day of the filing of the bankruptcy petition. In such discussion the court notes that there is contrary caselaw holding that past commercial or business activity is sufficient to meet the eligibility requirement. However, the Court rejected such case law and found those cases to be non-persuasive.
- B. In terms of the second issue on whether an employment relationship where the Debtor has no sort of ownership or special interest with the employer falls within the meaning of “engaged in commercial or business activities”? In its discussion the Court questioned prior caselaw that suggested that virtually all private sector wage earners may be considered as engaged in commercial or business activities because such interpretation is implausible due to the other requirement that “not less than 50% of a debtor's aggregate noncontingent liquidated secured and unsecured debts” must have arisen from the “commercial or business activities of the debtor”. It also indicated that Subchapter V is entitled “Small Business Debtor Reorganization” and that the definition of who is eligible must be construed in that context. The court concluded that employment with a small business does not equate to the common use of language meaning of such entitlement.
- C. Concerning the issue regarding burden of proof; the Court concluded according to prior case law. In its very brief discussion on the matter indicated that “it has generally been held that the burden of proof in establishing eligibility for bankruptcy relief lies with the party filing the bankruptcy petition.”

Sub-Chapter V
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Nat'l Loan Inv'rs, L.P. v. Rickerson
(In re Rickerson), Nos. 21-10315-
TPA, 28, 37, 2021 Bankr. LEXIS
3403 (Bankr. W.D. of Pa. Dec. 14,
2021)

- I. Application
 - A. The Bankruptcy Court of the Western District of Pennsylvania understood that the Debtor in this case did not qualify as a person “engaged in commercial or business activities”, because the entities had been inactive for several years nor there was any intent to ever reactivate any of the entities or to resume a medical practice.
 - B. Regarding the issue of whether employment relationships where a Debtor has no sort of ownership or special interest with the employer falls within the meaning of “engaged in commercial or business activities”? The court concluded that the Debtor’s employment by the insurance company does not fall within the meaning of “commercial or business activities.”
 - C. Concerning the issue regarding burden of proof; the Court concluded that the Debtor failed to meet her burden of proof to show that she was presently engaged in commercial or business activities.
- II. Holding
 - The court determined that the Debtor did not qualify to proceed under Subchapter V of the Bankruptcy Code due to the fact the Debtor failed to meet her burden of proof to show that she was engaged in commercial or business activities. In addition, the Debtor did not show that at least 50% of her debt arose from her commercial or business activities.

AMERICAN BANKRUPTCY INSTITUTE

CARIBBEAN INSOLVENCY SYMPOSIUM 2022

(Ocean Reef Club in Key Largo, Florida)

FURR COHEN, P.A.

ROBERT C. FURR, ESQ.

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Description	Chapter 11	Sub V Chapter 11	Chapter 13
Individual or business debtor	Either	Either	Individual only
Debt Limits	None.	\$7,500,000.00 total, secured and unsecured debt. ¹ 50% or more of the debt must be business related debt. 11 U.S.C. § 101(51D)(A).	\$1,257,850 secured. \$419,275 unsecured. 11 U.S.C. § 109(e).
Single Asset Real Estate	Yes, however, certain instances may constitute a bad faith filing and result in the case being dismissed.	No.	Yes.
Filing Fee	\$1,717.00	\$310.00	\$1,717.00
Trustee	No. Unless Court otherwise appoints.	Yes. Not operating unless court orders otherwise.	Yes. Not operating.
Trustee Fees	Yes. Quarterly US Trustee fee 28 U.S.C. § 1930.	No, Quarterly UST Fee. However, sub V standing trustee appointed in each case is compensated on an hourly basis.	Standing Chapter 13 trustee receives a 10% fee on disbursements made under the Plan.
Who may file a plan	Debtor only during exclusivity, otherwise any interested party.	Debtor only.	Debtor only.
Deadline to file a plan	No, except in small business cases.	Yes, 90-days after entry of order for relief, but can be extended for cause. 11 U.S.C. § 1188(a)	Yes. 14-days. Fed. R. Bankr. 3015(b).

¹ The Sub V total debt limit of \$2,725,625 has been temporarily increased to \$7,500,000 with the passage of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and applies to cases filed between March 27, 2022.

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Description	Chapter 11	Sub V Chapter 11	Chapter 13
Disclosure Statement Required	Yes.	No. 11 U.S.C. § 1187(c) unless court orders otherwise.	No.
Form Plan	No.	No.	Local Form under Fed. R. Bankr. 3015.1.
Creditors Committee	Yes, can be appointed.	No unless court orders otherwise.	No.
Absolute Priority Rule Applies	Yes. 11 U.S.C. § 1129(b)(2)(B)(iii) applies, except in individual cases where 11 U.S.C. § 1115 is met.	No. 11 U.S.C. § 1181 excludes § 1129(b).	No.
Modification of Mortgage on principal residence	No.	Yes, if the proceeds of the loan secured by the mortgage on principal residence were used toward the business	No.
Payment of Administrative Expenses	Yes, required to be paid on effective date.	Yes, but can be paid over time through plan.	Yes, but can be paid over time through plan.
Must have one assenting impaired class	Yes, and cramdown must satisfy 11 U.S.C. § 1129.	No, as long as plan does not discriminate unfairly. 11 U.S.C. § 1191(b).	No.
Disposable Monthly Income	No definite period.	3-5 years and must be paid into the plan, generally.	3-5 years and must be paid to the general unsecured creditors under the plan.

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Description	Chapter 11	Sub V Chapter 11	Chapter 13
Discharge	Yes, upon completion of all required payments under the confirmed plan and all exceptions to discharge under 11 U.S.C. § 523 apply.	Yes. At confirmation if plan is consensual, or, if nonconsensual plan, then after completion of all plan payments. All exceptions to discharge under 11 U.S.C. § 523 apply.	Yes, upon completion of plan payments. 11 U.S.C. § 1328 limits the exceptions found in § 523, making the debts in § 523(a)(1)(A), (6), (7), (10), (11), (12), (13), (14), (15), (16), (17), (18), and (19) dischargeable.
Modification of Plan	Yes, only the debtor. 11 U.S.C. § 1127.	Yes, only the debtor. 11 U.S.C. § 1193.	Yes, 11 U.S.C. § 1329, debtor, chapter 13 trustee, or creditors can seek a modification of the plan prior to completion of plan payments.
Disinterestedness of Attorneys that are owed money pre-petition	Case law holds that the attorney are conflicted and not disinterested	No, if amount owed is less than \$10,000.00. 11 U.S.C. § 1195.	Not an issue, attorneys can be paid through the plan.
Co-Debtor Stay	Not in Bankruptcy Code. Can be obtained through Plan confirmation.	Not in Bankruptcy Code. May be obtained through Plan confirmation, but no case law developed on this issue yet.	Yes. 11 U.S.C. § 1301.
Financial Documents Required to be filed	Documents requested by United States Trustee at beginning of case and Monthly Operating Reports.	Documents requested by United States Trustee at beginning of case and Monthly Operating Reports.	Generally, only tax returns annually.
Status Conference Deadline	Usually set by Court, but not specifically in the Bankruptcy Code.	Yes, must be held within 60-day of the entry of the order for relief.	No.

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Description	Chapter 11	Sub V Chapter 11	Chapter 13
Voting for Confirmation of Plan	Yes. Confirmation requires ½ in number of voters and 2/3 in amount of creditors voting in an impaired class for impaired class to have accepted the plan.	Voting is required, however, notwithstanding the votes, the Plan can be crammed down so long as it satisfies the requirements of 11 U.S.C. § 1191(b), adopting § 1129(a), except (8), (10), and (15).	No.
Does the Means Test Apply?	In individual case, if demanded by objecting class of creditors.	No.	Yes.
Debtor's bank accounts	Debtor must open DIP Account	Debtor must open DIP Account	Debtor maintains existing accounts.

Faculty

Carmen D. Conde-Torres is the main partner at and founder of C. Conde & Associates in San Juan, P.R., and has experience in high-profile reorganization issues related to the financial stability of corporate and individual debtors. Before founding C. Conde & Assoc., she worked as an assistant to the director of the Puerto Rico Electric Power Authority and actively participated in administrative and operational decisions at the highest levels. She has also been a member of the board of directors of the Government Development Bank (GDB), among other private and governmental entities. Ms. Conde also worked as attorney advisor to the U.S. Trustee for the District of Puerto Rico. During her tenure at the U.S. Trustee's Office, she was designated as attorney in charge of criminal prosecutions in bankruptcy fraud with the U.S. District Attorney's Office for the District of Puerto Rico. Ms. Conde has been a presenter for ABI, the Federal Bar Association's Puerto Rico Chapter, the Puerto Rico Bankruptcy Bar Association, the Puerto Rico Judicial Conference, the Puerto Rico Bar Association and the Puerto Rico Chamber of Commerce. She has also been appointed by the U.S. Court of Appeals for the First Circuit as a member of the board for the evaluation of candidates for bankruptcy judges in Puerto Rico. Ms. Conde received her B.S. in 1970 from the University of Puerto Rico and her J.D. *cum laude* from Inter-American University.

Carol L. Fox, CPA, CIRA, CFA is a senior managing director with B. Riley Financial in Fort Lauderdale, Fla., and has more than 30 years of private and public accounting experience. She previously was with GlassRatner and Kapila & Company, where she focused on forensic accounting, litigation support and bankruptcy. For more than 20 years, Ms. Fox's practice has focused on providing bankruptcy, restructuring and forensic services to a wide range of industries with a specific focus on the health care sector. She has provided restructuring and bankruptcy-related services for distressed situations in the health care, life sciences, mining, transportation, e-commerce, real estate, telecommunications, hospitality, agriculture and marine sectors. In addition, she has led high-profile investigations of investment schemes, fraud investigations, internal corporate investigations, due-diligence assignments and matters involving business disputes and quantification of damages. Ms. Fox currently serves as case-by-case subchapter V trustee in the Southern District of Florida, serves on the Board of Directors for the International Women's Insolvency & Restructuring Confederation's (IWIRC's) Florida Chapter, was named one of the U.S. Top Women Dealmakers by Global M&A Network in 2019, and was recognized in 2021 by the *ABF Journal* as one of the Top Women in Asset-Based Lending. Ms. Fox received her B.S. in accounting from the University of Florida.

Robert C. Furr is a partner with Furr & Cohen, P.A. in Boca Raton, Fla., and serves as a panel trustee for the U.S. Department of Justice in the Southern District of Florida. He is regularly appointed as a chapter 11 trustee and has been designated as the chapter 12 trustee in the Southern District. Mr. Furr has represented numerous businesses in chapter 7 liquidations and in chapter 11 reorganizations, as well as individuals in complex chapter 7 and chapter 11 proceedings. He lectures frequently on issues of bankruptcy, creditors' rights and remedies before national organizations. Mr. Furr served as editor of *NABTalk* from 2000-05 and sat on NABT's board of directors from 2000-11, serving as president during the 2008-09 term. He is currently serving as secretary on the board of the American Board of Certification. Mr. Furr is a contributor to the *ABI Journal* and is admitted to practice law in Georgia and Florida and in all federal courts in Florida and the Eleventh Circuit Court of Appeals.

In 1983, Mr. Furr became a Board Certified Civil Trial Lawyer by the Florida Bar, and in 1994 he received an AV rating by Martindale-Hubbell. He is listed in *The Best Lawyers in America* and in *Florida Super Lawyers* and is a Fellow in the American College of Bankruptcy. Mr. Furr received his J.D. from Emory University in 1975.