AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Subchapter V Updates and Experiences

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CONCURRENT WORKSHOP

2025

American Bankruptcy Institute

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

- The eligibility requirements for a Chapter 11, Subchapter V bankruptcy, are found in section 101(51D).

- To qualify, the debtor or its affiliate must engage in commercial or business activities, excluding primarily owning single asset real estate, and must not have more than $3,424,000 in noncontingent, liquidated, secured, and unsecured debts, with at least 50% of these debts arising from commercial or business activities, excluding debts owed to affiliates or insiders.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

What does it mean to be "engaged in commercial or business activities?"

- This phrase is interpreted broadly. *See In re Ikalowych*, 629 B.R. 261, 276 (Bankr. D. Colo. 2021).
- A debtor in the process of winding down qualifies. *See In re Vertical Mac Construction, LLC,* 2021 WL 3668037 (Bankr. M.D. Fla. 2021).
- The Eleventh Circuit recently confirmed that a debtor need not have a profit motive. *See In re Ellingsworth Residential Community Ass'n., Inc.,* 2025 WL 78887 (11th Cir. 2025).
- A holding company that has never actively operated a business may be eligible. *See GCPS Holdings,* 2024 WL 4847831 (Bankr. S.D. Tex. 2024).
- As to individuals, they must be more than a wage earner. *See In re Rickerson,* 636 B.R. 416 (Bankr. W.D. Pa. 2021).

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

Calculation of debt limit:

- What is excluded?
  - Contingent debt.
  - Unliquidated debt.
  - Debt owed to affiliates.
  - Debt owed to insiders.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

What is unliquidated debt?

- A debt is liquidated if the amount is readily and precisely determinable by reference to an agreement.
- A debt is considered unliquidated if the value depends on a future exercise of discretion, not restricted by specific criteria.
- Contractual claims are typically liquidated.
- Tort claims are typical unliquidated.
- MCA obligations.
- Future lease obligations.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

What is contingent debt?

- A debt is considered contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability have already vested prior to a debtor filing for bankruptcy protection. *In re McKenzie Contracting, LLC*, 2024 WL 3508375 at *1 (Bankr. M.D. Fla. 2024).
  - Guaranty obligations: If a default is declared prepetition, probably not contingent.
  - Does not require a judgment.
  - MCA obligations.
  - Future lease obligations.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

- 50% or more of the debt must have arisen from the commercial or business activities of the debtor.
  - Whether the debt arises from commercial or business activities of debtor.
    - Tort claims are not business debt.
    - IRS claims are not business debt.
    - Student loan debt may qualify
- Courts are split on whether there must be a nexus between the debt and the commercial or business activities as of the petition date.
- If debt is excluded from the debt limit because it is contingent or unliquidated, it is also excluded for purposes of determining whether fifty percent or more of the debtor's debt arose from the commercial or business activities of debtor.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

Example – Individual Debtor

Type of Debt	Amount	Business?
Mortgage on residence	$400,000	No
IRS	$100,000	No
Medical	$18,000	No
Breach of contract claim by employer	$447,000	Yes
Legal bills related to reach of contract claim	$29,000	Yes
Student loan	$5,000	No

Does he qualify? No.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

- What does it mean to be a person whose primary activity is the business of owning single asset real estate?
  - Single property or project other than residential real property with fewer than four residential lots which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.
  - Analysis is guided by traditional Chapter 11 SARE cases.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

- What constitutes a single project?
- Considerations:
  - Use of the properties.
  - Circumstances surrounding the acquisition of the properties.
  - Location of the properties.
  - Analysis is guided by traditional Chapter 11 SARE cases.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

- What constitutes substantial business other than operating the real property and activities incidental thereto?
  - Operating hotel – rarely a SARE.
  - VRBO and AirBNB.

CHAPTER 11, SUBCHAPTER V: ELIGIBILITY ISSUES

- Is there anything debtors can do to improve their eligibility?
  - Disputed debts count.
  - Pay down debt.
  - Negotiate prepetition waiver of debt.
  - Have insider/affiliate acquire debt at discount.
- Does this impact good faith for confirmation?

Subchapter V Updates and Experiences

2025 ABI Southeast Bankruptcy Workshop

Developments in Expanding the Role of Sub V Trustee

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The duties of a subchapter V trustee ("Sub V Trustee") are statutorily derived and set forth in the Bankruptcy Code in Section 1183(b).

That said, those statutory duties refer to other chapters of the Bankruptcy Code and duties otherwise applicable to chapter 7 and chapter 11 trustees. See 11 U.S.C. §§ 704(a), 1106(a), and 1183. What's more, rather than include all such duties listed among those required of chapter 7 trustees and chapter 11 trustee, only certain of those duties from each statute are required of the Sub V Trustee.

One needs a nautical chart to navigate smoothly the waterways of the Sub V Trustee role in the small business chapter 11 case.

To fully understand where the statutory duties of the Sub V Trustee start, and where they end, I commend the following, which provide just such a chart for safe navigation:

- Written Materials in this presentation prepared by the Hon. Benjamin A. Kahn, United States Bankruptcy Judge, Middle District of North Carolina
- *Is it in the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, 44-May Am. Bankr. Inst. J. 16 (Thomas T. McClendon) (May, 2025)
- *Removal of the Subchapter V DIP: A Road to Nowhere?*, 43-Oct. Am. Bankr. Inst. J. 12 (Michael C. Markham) (October, 2024)

PRACTICE POINTER:

Keep a list of Sub V Trustee duties cross-referenced to the statutory authority on your desk or desktop and refer to that consistently as Sub V Trustee to make sure you are fulfilling each of those duties.

Expansion of Trustee's Duties upon Motion of a Party in Interest

Courts may expand the statutorily prescribed duties of a Sub V Trustee upon a request of a party in interest, or *sua sponte*, for cause, to include the duties of a chapter 11 trustee under Section 1106(a)(3) and (4), to investigate the debtor and its business affairs and to file a written report with the court of the results of such investigation. The scope of such investigation and reporting duties is within the discretion of the court and may be as broad as that of a chapter 7 or chapter 11 trustee, or limited to a certain act, issue or area of concern regarding a debtor's business.

One of the first cases to address expanding the role of the Sub V Trustee was *In re AJEM Hospitality, LLC d/b/a Al's Burger Shack*, 2020 WL 3125276 (Bankr. M.D.N.C., March 23, 2020), decided merely one month after Subchapter V became effective. In that case, Judge James utilized the provisions of Section 1183(b) to expand the duties of the Sub V Trustee upon the motion of the Bankruptcy Administrator for the Middle District of North Carolina. The expanded duties were narrow and limited to suit the needs in the case and included investigating potential intercompany claims and filing a statement summarizing the review. In this case several related debtor entities filed Chapter 11 and their cases were jointly administered. After Subchapter V became effective, the debtor amended its Petition to elect the small business designation of Subchapter V. Recognizing the relationship between debtor entities with common ownership, there existed a need for an independent third-party investigation into intercompany claims.

In another case from North Carolina, the court expanded the duties of the Sub V Trustee to investigate pursuant to Sections 1183(b) and 1106(a)(3) and (a)(4), *In re Classic Acquisitions, LLC*, Case No. 21-10164 (Bankr. W.D.N.C., November 22, 2021) [ECF# 50].

The filed report of the Sub V Trustee resulted in the conversion of the case for cause inasmuch as his investigation revealed "facts suggesting fraud, dishonesty, incompetence, misconduct, mismanagement and irregularity in the management of the affairs of the debtor, and several causes of action that may be available to the estate." The Trustee did a nice job in his report setting forth the transactions at issue in a well organized manner [ECF# 100].

In 2022 two cases addressed expanding the duties of the Sub V Trustee as the "next appropriate step" prior to removal of the debtor as a debtor in possession or conversion of the case. The first of these was *In re No Rust Rebar, Inc.*, 641 B.R 412 (Bankr. S.D. Fla. 2022), followed closely by *In re Corinthian Communications Inc.*, 642 B. R. 224 (Bankr. S.D.N.Y. 2022). In both cases, the courts were faced with debtors who had principal owners with other related companies who failed to cooperate and make fulsome disclosures. The lack of corporate formalities between related entities and the lack of transparency in financial disclosures caused the U.S. Trustees in those cases to file motions to remove the debtor as a debtor in possession and expand the powers of the Sub V trustees. In both cases, the courts declined the invitation to remove the debtor in possession and instead took the approach that expanding the duties of the Sub V Trustee to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor was appropriate.

Judge Glenn in the *Corinthian Communications* case embraced this middle ground approach as necessary to formulate sufficient facts to determine whether the debtor could survive and be successfully reorganized if the debtor in possession were removed and the Sub V Trustee saddled with operating the business. The court expressed its concern about whether the case would survive without the principal remaining in control of the operation of debtor.

Expanding the duties of the Sub V Trustee is only permitted for "cause" and only if the court authorizes the expansion. One court recently addressed this and found that "cause" did not exist to expand the trustee's role in the case. *In re Velsicol Chemical LLC*, 2024 WL 4879960 (Bankr. N.D. Ill., November 22, 2024). In this case, the movant, a creditor and party in interest in the case who had requested information from debtor in a Rule 2004 examination, failed to demonstrate "cause" for the court to enter an order consistent with Section 1183(b)(2). Specifically, the court held that despite the filings by related debtor entities, there were no allegations of intercompany claims, no challenge to the true financial condition of debtors, and no allegations of a lack of transparency on the part of the common principal owner of debtors.

Notably in this case, the court identified a central role of the Sub V Trustee as a party who appears at status conferences and provides the court with valuable information on the progress of the case. "The courts rely on the Subchapter V Trustee to provide candid advice concerning a debtor's efforts to comply with its duties under the Code." Id. at *4 *citing In re New York Hand & Physical Therapy PLLC*, 2023 WL 2962204, at *1 (Bankr. S.D.N.Y., April 14, 2023). The court stated that nothing in the Sub V Trustee's "valuable information" and "candid advice" suggested a basis for a finding of "cause."

PRACTICE POINTER:

A party in interest contemplating filing a motion with the court seeking an order expanding the duties of the Sub V Trustee to investigate and report should base its motion on existing factual allegations meriting such a request. It cannot be based on mere supposition or speculation of what the Sub V Trustee may uncover if permitted to investigate.

Factors which may be appropriate for consideration by the court would include: (a) schedules that reflect intracompany claims between affiliated debtor entities and/or non-debtor affiliates, (b) conflicts of interest between the debtor and its principal regarding recovery of potential preferential transfers or fraudulent transfers, (c) undisclosed assets, liabilities, or transfers which come to light in a case, (d) lack of cooperation by the debtor in making disclosures and providing financial information required by the court and the Bankruptcy Code, and (e) lack of cooperation and failure of communication with the Sub V Trustee in the plan negotiation process.

Expansion of the Sub V Trustee's Duties Upon Removal of the Debtor in Possession

In re Duling Sons, Inc.., 650 B.R. 578 (Bankr. D.S.D. 2023) addressed the choice between converting a Subchapter V case to a chapter 7 case or removing the debtor in possession and expanding the duties of the Sub V Trustee. That case involved a contentious dispute between sibling owners of the debtor. One brother was deceased and his estate held a majority non-voting interest in the debtor, while the other brother held operational control, albeit through a minority interest in the debtor. There were allegations of gross mismanagement by the minority operating owner. The court found that cause existed to convert the case, or to remove the debtor in possession.

Because the court identified several reasons why remaining a subchapter V debtor was to the advantage of the bankruptcy estate and its creditors, the court elected to remove the debtor from possession and expand the duties of the Sub V Trustee. The court observed, however, those expanded duties did not include the duty to file a plan, which was reserved solely for the debtor under Subchapter V. The court cautioned that the debtor must work with the Sub V Trustee to jointly propose a plan if it wanted to reap the benefits of Subchapter V, and that conversion was the only remaining option if debtor refused to do so.

Another case also resulted in the removal of the debtor in possession, under much different circumstances. *In re B GSE Group, LLC*, Case No. 23-30013 (Bankr. W.D.N.C., May 22, 2023) [ECF# 242]. In this case, debtor filed a plan which contemplated the sale of assets to an insider. Several parties objected and the court rejected the motion stating that it could not rely on debtor's "business judgment" due to the insider status of the buyer. Debtor then consented to being removed as a debtor in possession with the Sub V Trustee given expanded duties under Section 1183(b)(5). The Sub V Trustee independently considered the merits of the sale motion, supported it and the Debtor's plan. The plan called for an independent CRO for the reorganized debtor to pursue litigation claims for the estate post-confirmation. The Sub V Trustee became the post-confirmation CRO for that purpose. The removal of the debtor in possession under these circumstances and the introduction of a neutral third party in the person of the Sub V Trustee ameliorated the objections of creditors and the court confirmed the plan.

The court in *In re Pinnacle Foods of California, LLC* , 2025 WL 951650 (Bankr. E. D. Cal., March 27, 2025), took the other approach and declined the invitation to remove the debtor in possession and expand the duties of the Sub V Trustee and instead converted the case to chapter 7. In this case, the court determined that an inability to assume a franchise agreement necessary for the sale of the businesses as going concerns impeded any prospective efforts of a Sub V Trustee with expanded duties to reorganize. In the end, the court determined there was little to no advantage to the creditors of the estate in remaining in Subchapter V over conversion to chapter 7.

Trustee's Role Upon Removal of the Debtor in Possession and the Conundrum of Filing a Plan

As acknowledged in *Duling Sons*, only a debtor may file a plan in Subchapter V cases. So what role does a Sub V Trustee play when the trustee's duties and powers have been expanded by the court upon removal of DIP and the Sub V Trustee is operating the debtor's business, or liquidating debtor's assets?

This problem was addressed by *In re ComedyMX, LLC*, 647 B.R. 457 (Bankr. D. Del. 2022). Here an uncooperative and combative principal owned the debtor. The court found clear cause to remove the debtor in possession under Section 1185 finding that management could not perform its fiduciary functions. Judge Goldblatt acknowledged the Bankruptcy Code did not permit any party other than the debtor to file a plan.

The court found that while the Sub V trustee will manage debtor's business affairs and continue to facilitate the development of a consensual plan in his expanded role, the debtor retained the right to file a plan, and must attempt to do so. Judge Goldblatt held that efforts to propose a plan by the debtor while the Sub V Trustee operated the business must be exhausted before the court considered more drastic measures.

Trustee's Role in Pursuing Avoidance Actions or other Litigation Belonging to Estate

Two courts have determined that a Sub V Trustee's duties do not extend to the powers granted trustees to commence causes of action on behalf of the estate. *Singh v. Price (In re Turkey Leg Hut & Co LLC)*, 659 B,R, 539 (Bankr. S.D. Tex. 2024) involved a Sub V Trustee who brought an adversary proceeding against the spouse of the debtor's principal seeking a TRO and injunction on behalf of the debtor to enjoin the spouse from interfering with the debtor.

The court held that the debtor in possession has exclusive standing to bring avoidance actions and other causes of action on behalf of the estate under Section 1184, and that none of the statutory duties of the Sub V Trustee under Section 1183 authorize the Sub V Trustee to bring such actions on behalf of the estate.

In this case, the debtor remained in possession. Had the debtor been removed from possession and the Sub V Trustee's duties expanded, there could have been a different result, as additional powers may accompany those expanded duties.

Similarly, on an appeal from a bankruptcy court decision declining to expand the duties of a Sub V Trustee to include the authority to pursue avoidance actions on behalf of the estate, the district court on appeal affirmed the bankruptcy court and declined to find an abuse of discretion. *Ghatanfard v, Zivkovic (In re Ghatanfard)*, 666 B.R. 14 (S.D.N.Y. 2024). In this case, the bankruptcy court recognized the conflict of interest for debtor with respect to fraudulent conveyances he made to his life partner in excess if $6,000,000. The court examined the statutory authority it had to expand the Sub V Trustee's duties to include the filing of avoidance actions on behalf of the estate prior to entering an order converting the case to chapter 7. It found that it did not have the statutory authority to expand the duties of the Sub V Trustee to include such functions under section 1183.

It does not appear the court was asked to consider removing the debtor in possession or expanding the duties of the Sub V Trustee under Section 1185 and 1183(b)(5).

How Can a Sub V Trustee Gain Authority to Pursue Avoidance Actions?

Unlike the situation in *Turkey Leg*, when a debtor in possession is removed under Section 1185 and the duties of a Sub V Trustee expanded under Section 1183(b)(5), the trustee has all the duties of a traditional chapter 11 trustee, including the duties to exercise the powers granted a trustee under Sections 544, 547, 548, 549 and 550. In such circumstances the Sub V Trustee would have full standing to pursue causes of action on behalf of the estate.

Debtor may propose a plan that retains the Sub V Trustee as a disbursing agent, liquidating trustee, authorized agent of estate to bring avoidance actions and other claims of the estate against third parties.

When a plan proposes to expand the duties of a Sub V Trustee post-confirmation to pursue causes of action on behalf of the estate, then the provisions of the confirmed plan, whether consensual or nonconsensual, would control.

Plan should clearly set out the duties and powers of a Sub V Trustee post-confirmation.

Trustee's Role Where DIP Counsel is Inexperienced or Ineffective

Occasionally as a Sub V Trustee, it becomes necessary to provide enhanced guidance and assistance to debtor's counsel to "facilitate a consensual plan of reorganization." This does not imply that the Sub V Trustee has a duty to take over the strategic planning and direction of the case, but it might include reasonable assistant to make sure the debtor has a fair opportunity to reorganize its business and emerge from bankruptcy.

Sub V Trustee generally have significant experience in chapter 11 cases and can draw on those experiences to advise debtor's counsel on options which may result in a consensual plan and successful case. Taking a larger role in assisting debtor to put forward a plan that fairly treat its creditors and stands a better chance of acceptance and confirmation with the consent of the creditors is a vital role the experienced Sub V Trustee can provide.

Similarly, those experiences provide a Sub V Trustee with powerful negotiating skills in dealing with creditors to facilitate an acceptable plan treatment. Debtor's counsel may not yet have the skills, experience or leverage with those creditors to produce a fair and balanced result for the parties.

Because taking a larger role in assisting the inexperienced or ineffective counsel generally results in higher fees of the Sub V Trustee, a Sub V Trustee should clearly and explicitly document his or her time records so the court, the U.S. Trustee or Bankruptcy Administrator and the creditors understand the time investment and value provided by such assistance.

Trustee's Role Where DIP is Uncooperative

Can or should the Sub V Trustee move to convert or dismiss a case? In typical cases a creditor or U.S. Trustee or the Bankruptcy Administrator in the case will take these steps and the Sub V Trustee will just need to file a response or statement in support or opposition to such motion in furtherance of his or her duty to "appear and be heard in the case." That duty is probably elastic enough to include taking the affirmative step of filing a motion to dismiss or convert, and often the Sub V Trustee may be the party in interest with the most relevant information necessary to assess a need for dismissal or conversion.

Can or should the Sub V Trustee move to expand his or her duties or powers? Again, in typical cases a party in interest is going to "carry this water" for the trustee. While such a motion may not always be outside the defined duties of the Sub V Trustee, it would be better received coming from another party in interest.

That said, if a debtor refuses to cooperate in the plan development process, or fails to produce required financial information, this should be a red flag to the Sub V Trustee that expanded duties of investigation may be required.

Trustee's Role to Facilitate Confirmation of Plan Implicitly Requires Trustee to Protect the Rights of Unsecured Creditor

Trustee should not support a plan that does not meet the minimum confirmation standards required by the Code. This occasionally places the Sub V Trustee in an adverse position with the debtor who has proposed a plan which contains terms which are contrary to required confirmation standards. The Sub V Trustee has the mandatory duty to appear and be heard on confirmation.

Where creditors are inactive in small cases, the Sub V Trustee has a duty to safeguard unsecured creditors where the actions of debtor are contrary to the best interest of creditors.

Fair and Equitable in Subchapter V

Bankruptcy Policy Foundations

- Equality of distribution among creditors
- Reorganizations must be 'fair and equitable'
- Absolute priority rule applies to large Chapter 11s
- Subchapter V differs significantly—no APR

Fair and Equitable in Subchapter V

- § 1191(b): Cramdown allowed if plan is fair and equitable
- § 1191(c)(2): Requires projected disposable income (PDI)
- § 1191(c)(3): Requires feasibility of plan payments

Statutory Interpretation of § 1191(c)

- 'Includes' in § 1191(c) is non-exclusive (§ 102(3))
- Courts may consider additional fairness factors
- Judicial discretion is consistent with Chapter 11

Trinity Case

- Debtor proposed 3-year plan; court fixed 5-year period
- Court found 3-year term not fair and equitable
- Introduced 5-factor test for determining plan duration
- Debtor failed to meet burden under §§ 1191(b) and (c)

Premier Glass Case

- Plan included speculative legal expenses
- Risk of expense shifted unfairly to unsecured creditors
- Court found plan not fair and equitable despite meeting PDI
- True-up provision for fees deemed appropriate

Broader Fair and Equitable Considerations

- Fair and equitable requires more than just PDI
- Plans that meet technical requirements may still fail
- Courts may deny confirmation for unfair risk-shifting

Good Faith vs. Fair and Equitable

- § 1129(a)(3) good faith is a separate requirement
- Trinity: Plan proposed in good faith but still not confirmable
- Fair and equitable focuses on class treatment, not good faith

Discretion and Policy in Chapter 11

- Judicial discretion is built into Chapter 11
- Subjective evaluations include PDI, feasibility, fairness
- Fair and equitable not limited to checklist in § 1191(c)

Postconfirmation in Subchapter V: Plan Modification, Dismissal and Conversion

Statutory Basis for Postconfirmation Modification

- §1193(b): Modification after consensual confirmation
- §1193(c): Modification after cramdown confirmation
- Modifications must satisfy confirmation standards under §§ 1191(a) or (b)

Procedural Requirements

- Only debtor may propose modification (unlike Chapters 12 & 13)
- Modification must be warranted by circumstances
- Good faith and business judgment required

Timing of Modifications

- Consensual: Only before substantial consummation
- Single payment may trigger substantial consummation
- Nonconsensual: Within 3–5 years as fixed by the Court

Conversion or Dismissal

- §1112(b)(1): Court shall convert or dismiss case for cause
- Party in interest must request relief
- 16 examples of 'cause' listed in §1112(b)(4)

Examples of 'Cause' – § 1112(b)(4)

- Loss or diminution of estate and no likelihood of rehabilitation
- Gross mismanagement of estate
- Failure to maintain insurance, pay taxes, or comply with court orders
- Material default with respect to confirmed plan

Exceptions §1112(b)(2)

- Court may not convert or dismiss if:
  - Unusual circumstances exist
  - Plan confirmation likely within a reasonable time
  - Debtor's act or omission justifiable and will be cured

Effect of Conversion on Confirmed Plan

- Depends on confirmation type and plan language
  - Cramdown: Estate includes all debtor property at conversion
  - Consensual: Less clear. Revested property may not return to estate

Akamai Physics – Commentary on Conversion or Dismisal

- Conversion after confirmation may not benefit creditors
- Estate may lack assets due to revesting in debtor
- Dismissal does not undo plan if discharge was entered

Practice Tip: Plan Vesting Language

- Creditors may seek language to delay vesting
- Ensures estate retains property if conversion occurs
- Avoids disputes over estate composition at conversion

Effect of Dismissal

- Key question: Has discharge been entered?
- Dismissal post-discharge does not affect plan's binding effect
- §349(b): Reinstates prior proceedings, revests property

Subchapter V Plans and the "Fair and Equitable" Requirement for Cramdown Confirmation
ABI Southeast Bankruptcy Workshop

Benjamin A. Kahn[1]
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When considering how to interpret any provision of chapter 11, it is helpful to begin with a consideration of general bankruptcy policies and principles. Collier on Bankruptcy concisely summarizes these chapter 11 precepts in relevant part:

> The primary policies and principles underlying the Bankruptcy Code include equality of distribution among creditors of equal priority in order to prevent a race to the courthouse to dismember the debtor, ensuring that any plan of reorganization is fair and equitable as between classes of creditors that hold claims of differing priority or secured status, and preserving value for various stakeholders in business ventures. With the exception of those cases in which an eligible debtor elects to proceed under subchapter V of chapter 11, the principle that business reorganizations should be fair and equitable between classes of differing security or priority is embodied in chapter 11 through the absolute priority rule, which has been aptly described as "the organizing principle of the modern law of corporate reorganizations." * * *
>
> Assessing whether a proposed reorganization is fair and equitable in a case under subchapter V of chapter 11 requires a different rubric. Cases under subchapter V differ significantly from larger chapter 11 cases in ways that make the absolute priority rule embodied in Code sections 1129(b)(2)(B) and (C) less reflective of what might be fair and equitable between and among classes of creditors and interests. Large cases involve sophisticated investors with frequently complex debt structures, the security of which may impact capital markets. These larger cases also frequently result in creditors receiving meaningful distributions. In contrast, small business bankruptcies often have simple capital structures with few creditors. Furthermore, unlike large cases, small businesses typically have little going concern value because the value lies in the owner's human capital that is easily portable. General unsecured creditors in small business cases do not typically receive significant distributions because "administrative costs and priority tax claims frequently consume the bulk of unencumbered property in confirmed Chapter 11s."
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> The absolute priority rule stems from the United States Supreme Court's decision in *Northern Pacific Railway Co. v. Boyd*, in which the Court held that "[i]f the value of the [rail]road justified the issuance of stock in exchange for old shares, the

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> creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control." The paradigm of small business bankruptcies stands in stark contrast to the reorganization of big businesses, such as the railroads, with which the Court was concerned in *Boyd*, and counsels against utilizing the absolute priority rule to determine whether a proposed plan is fair and equitable. First, as stated above, for most small business bankruptcies, there is little intrinsic value in the business, and any such value and control is vested in the entrepreneur whose talent and human capital is portable and necessary to the business. Second, "[i]n the absence of an actual sale, absolute priority requires some nonmarket valuation procedure … [which] is costly and prone to error." For these reasons, Congress eschewed the absolute priority rule with respect to assessing whether a proposed plan is fair and equitable as to each class of claims or interests that is impaired under, and has not accepted the plan in cases under subchapter V of chapter 11 in favor of the disposable income and feasibility requirements of Code section 1191(c).

7 Collier on Bankruptcy ¶ 1100.01 (Sommers & Levin 2025) (footnotes and citations omitted).

Having set out these general principles, we turn to the applicable statutes in subchapter V. Section 1191(b) requires the court to confirm a plan notwithstanding non-acceptance by any impaired class "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."

With the exception of classes of secured claims,[3] the term "fair and equitable" is defined differently in a case under subchapter V than in a non-subchapter V case under 11 U.S.C. § 1129(b). In lieu of the absolute priority rule expressed in §§ 1129(b)(2)(B) and (C), § 1191(c)(2) includes a projected disposable income ("PDI") requirement. Also called the "best efforts" test, the PDI requirement requires the debtor to commit its entire projected disposable income to pay its creditors for the full duration of the commitment period. In addition to the PDI requirement, § 1191(c)(3) requires the court to determine either that the debtor will be able to make payments under the plan or that a reasonable likelihood exists that the debtor will be able to make plan payments. This article will address whether courts, in considering confirmation of a nonconsensual subchapter V plan under § 1191(b), can consider more than the PDI and feasibility requirements[4] when determining whether a plan is "fair and equitable" to a non-accepting, impaired class of creditors or interests.

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[3] Unlike § 1129(b), § 1191(c) does not separately state the requirements of the fair and equitable requirement for classes of unsecured claims. Nevertheless, the standard for classes of secured claims is contemplated by § 1129(b)(2)(A). *See* Bonapfel, A Guide to The Small Business Reorganization Act of 2019, VIII. B.2. p. 39-40 (rev. 2022).

[4] The PDI requirement of the fair and equitable condition, as stated in § 1191(c)(2), provides that as of the effective date of the plan:

The preamble of § 1191(c) provides "the condition that a plan be fair and equitable . . . *includes* the following requirements . . . ." (emphasis added). The rule of construction in § 102(3) is that "includes" is not limiting. Some courts have concluded that this language suggests that the specific requirements in § 1191(c) do not exclusively determine whether a plan is fair and equitable but are instead "baseline requirements."[5] For the reasons explained below, this approach is consistent with both the statutory language of § 1191(c) and the discretionary authority vested in the bankruptcy courts in chapter 11.

In *Trinity*, the court required a five-year plan payment period under § 1191(c)(2)(A). The debtor, a small family health urgent care clinic business, requested that the court cramdown its subchapter V plan under § 1191(b), and proposed to pay into the plan its projected disposable income for three years. American Momentum Bank, whose claim the plan proposed to treat as a bifurcated secured and unsecured claim, voted against the plan and objected to confirmation of the plan in part because it contended that the three-year period of payments proposed under the plan was not "fair and equitable" as required under § 1191(b). The bank argued that a longer plan payment period would result in a larger distribution to unsecured creditors. The court explained that to confirm a plan under § 1191(b), it must determine "whether a subchapter V plan that provides for payment of all of the debtor's projected disposable income to creditors for a period of three years is fair and equitable under § 1191(b) and (c)(2), or if the Court should fix a longer payment period." *Id.* at 803. Although the court recognized that the debtor's three-year plan payment period met the baseline requirements set forth in § 1191(c)(2)(A), the court considered whether the debtor had carried its burden to show that the plan was fair and equitable to the dissenting impaired class, including whether the court should fix a longer period. Holding that the legislative history of the SBRA and the unique language of § 1191(c) calls for a case-by-case determination of whether a plan is fair and equitable, Judge Robinson enumerated a five-factor test for courts to consider when fixing the three to five-year period. He denied confirmation because the debtor had not satisfied its burden to show that the proposed plan was fair and equitable under §§ 1191(b) and (c)(2)(A).

(A) the plan provides that all of the projected disposable income of the debtor to be received in the 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; or

(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

[5] *In re Trinity Fam. Prac. & Urgent Care PLLC*, 661 B.R. 793, 815 (Bankr. W.D. Tex. 2024) (quoting *In re Orange Cnty. Bail Bonds, Inc.*, 638 B.R. 137, 146 (9th Cir. B.A.P. 2022)) (quotations omitted). *See also In re Premier Glass Servs., LLC*, 664 B.R. 465, 472 (Bankr. N.D. Ill. 2024) ("These requirements are statutory minimums, but because confirmation is within a judge's discretion and this list is non-exhaustive, a court may consider other relevant factors as well when determining whether a plan is fair and equitable under 1191(c).") (quoting *Hamilton v. Curiel (In re Curiel)*, 651 B.R. 548, 561 n.7 (9th Cir. B.A.P. 2023)) (quotations omitted).

Holding that the debtor in *Premier Glass* failed to establish that the plan was fair and equitable, Judge Thorne similarly considered more than just a calculation of projected disposable income. In the context of determining whether the debtor's proposed subchapter V plan was fair and equitable under § 1191(c)(2), Judge Thorne considered the inherent shifting of the risk from the debtor to the creditors by the debtor's projections of legal fees. The plan contemplated significant legal fees as part of the debtor's projected necessary expenses.[6] Noting that the courts were split on whether a court could *require* a true-up provision as part of its projected disposable income calculation and thereby effectively modify the debtor's plan,[7] Judge Thorne nevertheless noted that "[a] true-up seems especially appropriate" for legal fees where the debtor "may run out of road for litigation before the commitment period ends," or could settle the dispute.[8] In this way, the court was not quibbling whether the litigation expenses were necessary. The issue was really one of risk. By including all the legal fees that might be incurred, the debtor impermissibly shifted a speculative risk of expense entirely to the unsecured creditors.

Both the *Trinity* and *Premier Glass* courts correctly base their rulings on the requirement that the plan be fair and equitable, rather than only the PDI test. As these courts recognize, satisfaction of the PDI test alone does not necessarily produce a fair and equitable result. As in *Trinity*, a plan could fix a commitment period that meets the statutory minimum length but results in an inequitably small distribution to unsecured creditors or impermissibly shifts risk from the debtor to the unsecured creditors. In *Premier Glass*, even fixing a longer five-year period would not have solved the impermissible shifting of the risk. Neither of these proposed plan provisions would technically violate § 1191(c), but the courts in both cases determined that the debtors had failed to establish that the proposed plans were fair and equitable.

As demonstrated by these cases, along with the history of chapter 11, whether a plan is fair and equitable includes more than just a commitment of funds to be applied however the debtor sees fit, especially when a debtor in a subchapter V plan is not otherwise bound by the absolute priority rule. The terms "fair and equitable" "originated in judicial decisions beginning at the turn of the 20th century, and have appeared, in one act or another, in statutory reorganization for over 90 years. They thus reflect and stand proxy for over a century of judicial decision-making, and over a half a century of legislative guidance."[9] In non-subchapter V cases, fair and equitable is a

[6] *Premier Glass*, 664 B.R. at 476 (noting that the debtor increased its projections from $25,000 per year in legal fees to over $100,000 per year during the plan term after a creditor instituted a dischargeability proceeding).

[7] *Id.* at 478, citing, *inter alia*, *In re Packet Constr., LLC*, No. 23-10860, 2024 WL 1926345 (Bankr. W.D. Tex. Apr. 30, 2024) (holding that court could not ordinarily require a true up as part of confirmation, but leaving open—with some skepticism—the possibility that circumstances may exist under which the court could impose a true-up in order to make the plan fair and equitable).

[8] *Id.* at 478.

[9] 7 Collier on Bankruptcy ¶ 1129.03.

concept that includes considerations beyond the absolute priority rule,[10] and allows a court to deny confirmation when the plan is not fair and equitable in other ways.[11]

Indeed, courts in non-subchapter V chapter 11 cases have noted that satisfaction of the absolute priority rule alone may be insufficient, emphasizing that "simple technical compliance with the requirements of section 1129(b)(2) does not assure that the plan is fair and equitable."[12] In some cases, courts have denied confirmation of a nonconsensual chapter 11 plan that technically complies with the absolute priority rule but imposed an undue risk of financial or operational default on a senior class of creditors.[13] As one court put it:

> The concept of fair and equitable involves more than an application of a mechanical calculation of absolute priority based on distribution of property valued abstractly. When the proposed distribution would substantially shift the risk of failure of the plan from a junior class to a senior dissenting class for no legitimate purpose, the plan is not fair and equitable to the dissenting class.[14]

Therefore, satisfaction of the PDI requirement of the fair and equitable condition by itself does not render a plan fair and equitable per se, and both the *Trinity* and *Premier Glass* courts correctly recognize that courts may consider the totality of the plan when considering whether it is fair and equitable.

Despite the discretion that courts are given in determining whether a plan is fair and equitable to a dissenting class, this discretion should not be muddled with concepts of good faith. In *Trinity*, for instance, the bank objected to confirmation of the plan in part because the plan was not proposed in good faith as required by § 1129(a)(3), arguing that the creditors would receive

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[10] The ABI's task force on Subchapter V concluded that the best efforts test is an "effective substitute for the protections of the absolute priority rule . . . and as a practical matter is more beneficial to unsecured creditors." *Premier Glass*, 664 B.R. at 472 n.6 (citing ABI Subchapter V Task Force, *Final Report of the ABI Institute Subchapter V Task Force*, p. 13 (2024) https://abiorg.s3.amazonaws.com/SubV/SBRA_Final_Report.pdf, *archived at* https://perma.cc/C4T7-VA5C).

[11] *See* 7 Collier on Bankruptcy ¶ 1129.03[4][b][ii] (collecting cases, and noting that "some courts have incorrectly read the interplay of section 1129(b)(1) and 1129(b)(2) to be an exhaustive delineation of the fair and equitable rule").

[12] *See, e.g.*, *Matter of Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1352 (5th Cir. 1989) (noting that § 1129(b) "sets minimal standards that a plan must meet, and does not require that 'every plan not prohibited be approved'" (citations omitted)).

[13] In one case, the plan proposed that the secured creditor retain its liens, "but [with a] promise of deferred payments [that was] uncertain and inadequate, and, significantly, [without] provisions providing remedies or protections to the [secured creditor] in the event of a default." *In re Biz as Usual, LLC*, 627 B.R. 122, 132-33 (Bankr. E.D. Pa. 2021).

[14] *Aetna Realty Inv., Inc. v. Monarch Beach Venture, Ltd. (In re Monarch Beach Venture, Ltd.)*, 166 B.R. 428, 436 (C.D. Cal. 1993).

more if the plan period were longer.[15] Judge Robinson rejected the argument, noting that the good faith standard of § 1129(a)(3) is a separate and distinct test for confirmation from the fair and equitable condition of § 1191(b), and is not a valid basis to find that a plan is not fair and equitable. In fact, Judge Robinson found that the debtor had proposed the plan in good faith under § 1129(a)(3), but still denied confirmation of the plan because the debtor failed to meet its burden to demonstrate that the plan was fair and equitable under § 1191(b).

Some have argued that a broader consideration of "fair and equitable" is analogous to unwise, subjective, and undelimited considerations of good faith in consumer chapter 13 cases under § 1325(a)(3). This argument is misplaced. First, as Judge Robinson recognized in *Trinity*, whether a plan is proposed in good faith[16] is a separate consideration from the fair and equitable standard for class treatment under chapter 11. Second, the PDI test in chapter 13 is structurally different from the PDI test in chapter 11. Under § 1191(b), the court "shall confirm" a plan if, among other requirements, it is fair and equitable, and the statute then gives minimum standards for meeting that condition, which include that the plan apply the debtor's PDI for the period fixed by the court. In contrast, § 1325(b) *prohibits* the court from confirming a plan over the rejection of an unsecured creditor or the trustee unless either the plan provides for payment of all unsecured claims in full or the debtor contributes its PDI for the applicable commitment period. The PDI test in chapter 13 is simply another hurdle to confirmation.

Allowing courts greater discretion in chapter 11 cases to determine whether a plan is fair and equitable is consistent with the policy of business reorganization under chapter 11. Business cases, particularly those in chapter 11 and especially those in subchapter V,[17] rely significantly more on judges' subjective determinations than consumer cases do, and any policy against judges imposing their value judgments on a business are considerably less weighty than the policy against judges making value judgments about individuals' personal financial decisions in consumer cases. In fact, chapter 11 is replete with provisions and practices that require judges to make subjective determinations, including those about fairness and equity. Sales and settlements under § 363 require the court to review a debtor's business judgment. Determining PDI itself often requires a subjective evaluation of the debtor's business plan, financial projections, and the overall economic environment. Section 1112(b) requires the court to determine whether appointment of a trustee, dismissal, or conversion is in the "best interests" of the estate and creditors. Whether a disclosure

[15] 11 U.S.C. § 1129 provides that the court "shall confirm a plan only if all of the following requirements are met" and lists several requirements. The requirement in § 1129(a)(3) is that "[t]he plan has been proposed in good faith and not by any means forbidden by law."

[16] Whether a chapter 11 case is filed in good faith also is a separate consideration. Unlike chapter 13, which requires a court to determine that the *petition* was filed in good faith as part of the confirmation process, *see* 11 U.S.C. § 1325(a)(7) (emphasis added), chapter 11 has no similar requirement under § 1129 for confirmation of a chapter 11 plan. Chapter 11 considers the efficacy of the petition under § 1112(b).

[17] Even an individual debtor under subchapter V must be engaged in commercial or business activities on the petition date and more than half of his or her debt must arise from commercial or business activities, or must be an affiliate of such a debtor. *See* 11 U.S.C. §§ 1182(1) and 101(51D).

statement contains adequate information is highly contextual. Compensation of professionals requires consideration of the reasonableness of the fees. All of these standards require the courts to make subjective determinations of the fairness, equity, and good faith of the process and debtor's business judgments. By listing the minimum requirements for PDI among the requirements for a plan to be "fair and equitable" to a dissenting class, § 1191(c) does not excise from the phrase all the meaning of the underlying words "fair" and "equitable" in favor of only the listed elements in § 1191(c). Bankruptcy policy underlying chapter 11, the history of cases interpreting its meaning under multiple versions of bankruptcy law, and the non-exclusive language of § 1191(c) indicate that Congress did not limit the determination of fair and equitable to the PDI test alone.

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POSTCONFIRMATION PLAN MODIFICATION, DISMISSAL AND CONVERSION ISSUES IN SUBCHAPTER V

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I. Postconfirmation Modification of Subchapter V Plans.

A. Statutory Basis.

1. Section 1193(b) addresses postconfirmation modification after consensual confirmation.

2. Section 1193(c) deals with modification after cramdown confirmation.

> 11 U.S.C. § 1193(b) and (c)
>
> (b) Modification After Confirmation.—
> If a plan has been confirmed under section 1191(a) of this title, the debtor may modify the plan at any time after confirmation of the plan and before substantial consummation of the plan, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. The plan, as modified under this subsection, becomes the plan only if circumstances warrant the modification and the court, after notice and a hearing, confirms the plan as modified under section 1191(a) of this title.
>
> (c) Certain Other Modifications.—
> If a plan has been confirmed under section 1191(b) of this title, the debtor may modify the plan at any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1191(b) of this title. The plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan, as modified, under section 1191(b) of this title.

B. Procedural Requirements.

1. Only the debtor may propose a modified plan. Contrast with other chapters, such as Chapter 11 cases involving individuals or Chapters 12 and 13 in which trustees or unsecured claim holders may request postconfirmation modifications.

2. Section 1193(c) stipulates that any modification must be "warranted" by the "circumstances."

a) The debtor must demonstrate that the "circumstances warrant such modification."

b) Contrast with Chapter 13. The Fourth Circuit imposes a threshold requirement of a substantial and unanticipated change in financial circumstances to justify postconfirmation modifications. This standard, articulated in cases such as *In re Murphy* and *In re Arnold*, seeks to ensure that the doctrine of *res judicata* is not undermined by allowing modifications without sufficient justification. *In re Murphy*, 474 F.3d 143, 148 (4th Cir. 2007); *In re Arnold*, 869 F.2d 240, 244 (4th Cir. 1989). Courts apply this test objectively, considering whether the change was unforeseen at the time of plan confirmation.

c) *Samurai Martial Sports*, 644 B.R. 667 (Bankr. S.D. Tex. 2022).

(1) Reviewed similar standard of § 1127(b):

> Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(2) Modification is warranted when the debtor shows that the circumstances that gave rise to modification were unforeseen and rendered the confirmed plan unworkable.

(3) Debtor's good faith and business judgment are relevant.

(4) Modification denied. In this case, the debtor's intentional failure to make plan payments, rather than the air conditioning problems, was the cause of the need for modification.

(5) The failure to fund the emergency reserve was the result of the debtor's "bad faith or poor business judgment," because its accounting records indicated that the debtor had been capable of making the requisite payments.

(6) The Court also considered whether the debtor's proposed modification complied with the requirements of § 1191(b). After examining the provisions of that section and the

sections it incorporates by cross reference, the court concluded that the plan as modified:

(a) would not have been feasible, as required by § 1129(a)(11), in view of the debtor's deficient performance;
(b) had not been proposed in good faith, as required by § 1129(a)(3); and
(c) did not satisfy § 1129(a)(1) because it did not include an updated liquidation analysis or adequate projections.

d) Creditor May Not Seek Modification. A *creditor* cannot seek modification of a confirmed subchapter V plan to demand that more monies be contributed to the plan. *In re Chesney*, 2023 WL 8855242, *10 (Bankr. W.D.N.C. 2023).

(1) *In re Chesney*. The court considered the request of a creditor with a nondischargeable debt for relief from the automatic stay after confirmation of a cramdown plan to collect its judgment from a substantial potential postconfirmation commission. The Debtor asserted this was effectively an attempt to modify the debtor's plan postconfirmation.

(2) Property of the Estate – Cramdown Confirmation. Section 1186(a) provides that, after cramdown confirmation under § 1191(b), property of the estate includes, in addition to property specified in § 541, the postpetition earnings and property that the debtor acquires postpetition.

(3) Property of the Estate Protected by Stay. The Court held that the § 362 automatic stay continues to apply during the plan term in a cramdown case, and it forecloses the collection of debts from estate property and from the debtor. See 11 U.S.C. § 362(a). The stay applies to nondischargeable debts just as it does to the claims of other creditors.

(4) No Obligation to Modify. Court also said it was "doubtful" that the debtor would have an *obligation* to modify her own plan to increase plan payments.

3. Section 1129 Confirmation Standards.

a) The plan as modified must satisfy (after notice and a hearing) the confirmation requirements of § 1191(a) (consensual confirmation) or § 1191(b) (nonconsensual confirmation), as applicable.

b) *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 2021). Modification of the plan postconfirmation was approved to address feasibility concerns. Court stressed that a modified plan must meet the same requirements as the original plan and be proposed in good faith.

4. Timing – The manner of the original confirmation determines the timing limits of the plan modification.

a) Consensual.

(1) Substantial Consummation. A consensual plan may only be modified before the plan is "substantially consummated."

(2) *In re Daly*, 666 B.R. 810 (Bankr. S.D.Fla. Jan 8, 2025). After substantial consummation of a confirmed chapter 11 plan, the plan can no longer be modified under § 1193(b), even if a dischargeability determination is later reversed on appeal.

(3) Section 1101(2) "Substantial Consummation" means:

> (a) transfer of all or substantially all of the property proposed by the plan to be transferred;
> (b) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
> (c) commencement of distribution under the plan.

(4) Single Payment = Substantial Consummation?

(a) *National Tractor Parts, Inc*., 2022 WL 2070923 (Bankr. N.D. Ill. June 6, 2022). Even a single, *de minimis* payment under a confirmed consensual subchapter V plan constitutes the "commencement of distribution" under § 1101(2)(C), triggering substantial consummation and barring post-confirmation modification under § 1193(b).

(b) *But see*, *In re Dean Hardwoods*, 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010). Distribution must begin to all or substantially all creditors — not just one — before substantial consummation is triggered.

(5) Voting. If a plan has been confirmed under §1191(a), any holder of a claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless, within the time fixed by the court, such holder changes the previous acceptance or rejection of the holder.

b) Nonconsensual. A nonconsensual plan may be modified at any time during the three-to-five-year period as fixed by the Court for the payment of projected disposable income.

II. Postconfirmation Conversion or Dismissal.

A. Court's Authority to Dismiss or Convert.

1. Section 1112(b)(1) provides in relevant part:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause[.]

2. Party in Interest. Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause."

3. Cause. Section 1112(b)(4) lists 16 examples of "cause" to include:

> 11 U.S.C. § 1112(b)(4)
>
> (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
> (B) gross mismanagement of the estate;
> (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;
> (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
> (E) failure to comply with an order of the court;

> (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
> (G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
> (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
> (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
> (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
> (K) failure to pay any fees or charges required under chapter 123 of title 28;
> (L) revocation of an order of confirmation under section 1144;
> (M) inability to effectuate substantial consummation of a confirmed plan;
> (N) material default by the debtor with respect to a confirmed plan;
> (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and
> (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

4. Best Interests. The court must determine whether conversion is in the best interests of creditors and the estate.

5. Burden of Proof. The movant bears the burden of proving cause by a preponderance of the evidence.

6. Mandatory. The Court is obligated to dismiss or convert a case if the movant demonstrates cause and the exception in § 1112(b)(2) does not apply. *In re Akamai Physics, Inc*., 2022 Bankr. LEXIS 1089, *8.

7. Statutory Authority.

> 11 U.S.C. § 1112(b)(2)
>
> (2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case

> under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—
>
> > (A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and
> >
> > (B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—
> >
> > > (i) for which there exists a reasonable justification for the act or omission; and
> > >
> > > (ii) that will be cured within a reasonable period of time fixed by the court.

B. Effect of Conversion on the Confirmed Plan.

1. Traditional Chapter 11 Plans.

a) In the chapter 11 context, courts have reached a wide variety of conclusions. Some courts have held that conversion from chapter 11 to chapter 7 does not revest in the estate property that vested in the debtor upon plan confirmation unless the plan or confirmation order so provided. See*, e.g., In re L & T Mach., Inc*., 2013 WL 3368984, at *5–*6 (Bankr. D. Kan. July 3, 2013) (because chapter 11 plan's terms revested property in debtor at confirmation, court dismissed chapter 11 case rather than convert to chapter 7 because estate would have contained no property); *In re Freeman*, 527 B.R. 780, 787–88 (Bankr. N.D. Ga. 2015) (same). Other courts have found that property of the estate in a case converted from chapter 11 consists of property owned by the debtor as of the petition date, the confirmation date, or the date of conversion.

b) In *In re Baroni*, 36 F.4th 958, 972–73 (9th Cir. 2022), the individual debtor confirmed a chapter 11 plan. Six years later, her case was converted to one under chapter 7. Although the debtor argued that her converted estate contained no assets given that the plan provided for revesting in the debtor upon confirmation, the Ninth Circuit instructed lower courts to take a "holistic approach" in determining whether the plan or confirmation order deviated in § 1141(b)'s default rule. Although the property revested in the

> debtor upon confirmation, the plan also provided that the Bankruptcy Court retained jurisdiction over disputed claims, required the debtor to fund a disputed claims reserve, and maintained the automatic stay through discharge. The Ninth Circuit stated that the fact of the ongoing automatic stay favored continuation of the estate. Further, allowing unadministered assets to revert to the debtor upon conversion would "frustrate the intent of the Plan and is contrary to many of its provisions."

2. Subchapter V.

a) Depends on Confirmation Type and What the Confirmation Order Requires.

(1) Cramdown.

> [P]roperty of the estate in a sub V case converted to chapter 7 after cramdown confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.
>
> Hon. Paul W. Bonapfel, *SBRA: A Guide to Subchapter V of the U.S. Bankruptcy Code* (Revised June 2022) at 262.

(2) Consensual.

> If property of the estate vested in the debtor at the time of confirmation of a consensual plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles … and, if so, which view it adopts.
>
> *Id*.

b) Practice Consideration.

> [T]o avoid these potential issues and to ensure that the estate has property at the time of conversion, creditors negotiating a consensual plan may want to insist on a provision in the plan that will keep assets as property of the estate until the debtor completes payments or meets some other milestone."
>
> Bonapfel at 263.

C. Effect of Dismissal.

1. Critical Inquiry – Has there been an entry of a discharge order?

   a) Consensual Confirmation. The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under §1191(a).

   b) Nonconsensual/Cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.

2. Postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.

3. "Delay of Discharge" Chapters – Chapters 11 (nonsub V) individual debtors, 12, and 13.

   a) Dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

   b) Confirmed subchapter V "cramdown" plans. Because of the similarities to delay of discharge plans, (primarily the delayed discharge; retention of the trustee; inability to close the case until all plan payments have been made; and the disposable income cramdown), the Court opined that dismissal or conversion would negate such plans. *Akamai Physics, Inc*., 2022 WL 1195631 (Bankr. D. N.M. 2022).

4. Section 349. Unless the court orders otherwise for cause, § 349:

   a) Provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and

   b) Revests property of the estate in the entity in which such property was before the filing of the case.

11 U.S.C. § 349(b)

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

D. *Akamai Physics, Inc*., 2022 WL 1195631 (Bankr. D. N.M. 2022).

1. Court denied US Trustee Motion to Dismiss or Convert but included a review of the impact of dismissal or conversion in chapter 11 when a discharge has been entered.

2. The Court concluded that in most chapter 11 cases with confirmed plans of reorganization [with the exception of individual or subchapter V "cramdown" cases], neither conversion nor dismissal materially benefits creditors. "Instead, a creditor's remedy is to sue the debtor in state court to enforce the creditor's rights under the chapter 11 plan." *Akamai Physics* at *14.

3. The Court noted that if a "typical" chapter 11 cases (i.e., not individual or subchapter V "cramdown" cases) is converted after plan confirmation, the Court concluded that the resulting chapter 7 estate has no assets because the plan vested all estate property in the reorganized debtor and that in such cases conversion does not help creditors.

4. In cases where a discharge has been entered, the Court concluded that "Dismissal has no materially greater benefit to creditors; it does not

"undo" the plan, which remains binding on the reorganized debtor and its creditors." *Akamai Physics* at *13-14.

Faculty

H. David Cox is the founding member of Cox Law Group PLLC in Lynchburg, Va., and practices bankruptcy law throughout the Western District of Virginia. Prior to entering private practice, he clerked for the late Hon. William E. Anderson. He co-edits the treatise *Bankruptcy Practice in Virginia*, co-authored the fourth edition of ABI's *Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code*, and has lectured at numerous regional and national CLE programs. Mr. Cox is a member of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy, chair of the Bankruptcy Law Section of the Virginia Bar Association and a faculty member of the mandatory Virginia State Bar Harry L. Carrico Professionalism Course, and he serves on ABI's Board of Directors. In November, 2022, he was elected as a member of the National Bankruptcy Conference. Mr. Cox received his B.A. in 1992 from Virginia Tech and his J.D. in 1995 from the University of Richmond - TC Williams School of Law.

Hon. Benjamin A. Kahn is a U.S. Bankruptcy Judge for the Middle District of North Carolina in Greensboro, sworn in on Feb. 3, 2014. He also is a member of the U.S. Judicial Conference Advisory Committee on the Bankruptcy Rules, and chairs its Forms Subcommittee. Judge Kahn serves as faculty for Phase I and Phase II Orientation for Newly Appointed Bankruptcy Judges, having previously served as a member of the Advisory Committee on Bankruptcy Judge Education for the Federal Judicial Center from 2019-25 and as its chair from 2020-25. In addition, he is a conferee of the National Bankruptcy Conference, for which he currently serves on its Nominating Committee and chairs its Committee on the Court System and Bankruptcy Administration, and previously served on the Executive Committee and Nominating Committee. Judge Kahn is a Fellow of the American College of Bankruptcy and a member of the board of editors for *Collier on Bankruptcy*, for which he is a contributing author. He served as the judicial chair of ABI's Southeast Bankruptcy Workshop from 2019-23. Judge Kahn is Board Certified in Business and Consumer Bankruptcy Law by the American Board of Certification, for which he served as a member of its board of directors until his appointment to the bench. Prior to joining the bench, he was a certified mediator in North Carolina. He also was recognized as among the Top 10 *North Carolina Super Lawyers* across all practice areas for the two years immediately preceding his appointment, elected to the Legal Elite Hall of Fame by *Business North Carolina Magazine* in 2014 as the category winner in North Carolina for Bankruptcy, and was included among Band 1 bankruptcy practitioners in North Carolina in *Chambers and Partners USA*. Judge Kahn received his B.A. in political science and history in 1990, and his J.D. with honors in 1993, from the University of North Carolina at Chapel Hill.

Edward J. Peterson, III is a partner on the Business Reorganization Team of Berger Singerman LLP in Tampa, Fla. He focuses his practice on representing debtors and creditors in out-of-court workouts and bankruptcy cases throughout the Southeast, including subchapter V cases. Mr. Peterson also has significant experience representing creditor committees, as well as assignors and assignees in assignments for the benefit of creditors. In addition to his bankruptcy and restructuring work, he handles commercial litigation in state and federal courts, including cases involving directors and officers and disputes related to loans secured by real estate. Mr. Peterson is a past president of the Turnaround Management Association of Florida and the Tampa Bay Bankruptcy Bar Association, and he is a frequent speaker and author on insolvency matters in Florida and Alabama. He received his B.A. in

economics in 1995 from Kenyon College and his J.D. *magna cum laude* in 1999 from the University of Alabama, where he was admitted to the Order of the Coif.

Ashley S. Rusher is a shareholder and managing director at Blanco Tackabery & Matamoros, P.A. in Winston-Salem, N.C. Her work for financial institutions, landlords and creditors over the past 35 years covers a wide range of areas, including loan modifications, workouts and forbearances, bankruptcy and receiverships, collection and asset recovery, regulatory compliance, contract review and negotiation, loan document review and audit, corporate governance, title curative litigation and lender liability defense. Ms. Rusher is a subchapter V trustee for the Middle District of North Carolina and has represented chapter 7 and 11 trustees, as well as served as a chapter 11 trustee. She currently serves on the North Carolina Bar Association Board of Governors and the North Carolina Bar Foundation Board of Directors, and is a past chair of the Bankruptcy Section of the North Carolina Bar Association. Ms. Rusher chairs the Middle District Bankruptcy Seminars, Inc., which provides continuing legal education to North Carolina bankruptcy professionals on an annual basis. She is an ABI member and a past chair of of ABI's Southeast Bankruptcy Workshop advisory board. Ms. Rusher is a Fellow of the American College of Bankruptcy. She also is rated AV-Preeminent by Martindale-Hubbell in Bankruptcy and Litigation and is recognized in *The Best Lawyers in America* for Bankruptcy and Litigation, in *Super Lawyers* for Bankruptcy; and as a "Legal Elite" for Bankruptcy by *Business North Carolina Magazine*. In addition, she received the Women in Business Award from the *Triad Business Journal* and the Women Extraordinaire Award from *Business Leader Magazine*. Ms. Rusher is admitted to practice in North Carolina and Georgia. She received her B.A. in 1984 and her J.D. in 1987 from the University of Kentucky.