So, You *Think You Know* Subchapter V
** GAME SHOW **

Your hosts, direct from their famous Hollywood studio

Eve H. Karasik, Levene, Neale, Bender, Yoo & Golubchik LLP
Robbin Itkin, Sklar Kirsh
J. Scott Bovitz, Bovitz & Spitzer

ACB
Ninth Circuit Retreat
Half Moon Bay, CA | April 26 – 28

The SYTYKSV trophy

v 13

Robbin L. Itkin

https://www.sklarkirsh.com/Professionals/robbin-l-itkin

Fellow, American College of Bankruptcy. Partner and leader of Sklar Kirsh's Bankruptcy and Financial Restructuring Department. Her experience restructuring billions of dollars of debt includes insolvency resolutions in chapter 11 cases and numerous restructurings outside the courtroom. … *Super Lawyers* has featured her since 2005 and has named her among Southern California's Top 50 Women lawyers and Top 100 lawyers. She also is recognized by *Best Lawyers in Southern California* and *Martindale Hubbell*. Robbin was the recipient in 2013 of the Century City Bar Association's "Bankruptcy Lawyer of the Year" award and was featured on the inaugural list of LawDragon's 2020 Leading U.S. Bankruptcy & Restructuring Lawyers. In 2021, the *Los Angeles Business Journal* honored Robbin among its Women of Influence – Attorneys. In 2021 and 2022, the *Los Angeles Times'* "Business of Law" issue named Robbin a "Legal Visionary."

Robbin uses her spare time to fly fish with her husband, a banking and finance lawyer, and to enjoy their two Labrador retrievers. Has co-hosted "So You Think You Know Subchapter V" since the pilot episode.

Eve H. Karasik

https://lnbyg.com/team/eve-h-karasik/

Eve H. Karasik is a partner at Levene, Neale, Bender, Yoo & Golubchik LLP in Los Angeles. She focuses her national practice on corporate restructuring and bankruptcy, including representation of chapter 11 debtors, unsecured creditor and equity committees, trustees, secured and unsecured creditors, asset purchasers, and parties involved in bankruptcy litigation and appeals.

Ms. Karasik is a Fellow of the American College of Bankruptcy and is ranked in Chambers USA, Band 3, Bankruptcy and Restructuring. Ms. Karasik received the Century City Bankruptcy Attorney of the Year (2015) and the Turnaround Management Association “2007 Large Company Transaction of the Year” award. Ms. Karasik serves as Vice President for Diversity and Inclusion on the Executive Committee for the Board of Directors of the American Bankruptcy Institute and is a member of several other professional organizations.

Replaced Alex Trebek in the second season of “So You Think You Know Subchapter V."

J. Scott Bovitz

https://bovitz-spitzer.com/firm_info/bovitz.htm

Fellow, American College of Bankruptcy. Board Certified -- Business Bankruptcy Law -- The American Board of Certification (former chair). Certified Specialist -- Bankruptcy Law -- State Bar of California Board of Legal Specialization (former chair). Rated "AV Preeminent" by Martindale-Hubbell. Selected as Southern California "Super Lawyer" in Bankruptcy-Business (selected 20+ years).

Former adjunct professor: Loyola Law School; University of Nevada, Las Vegas, William S. Boyd School of Law; California Western School of Law.

Produced, composed, recorded, mixed, and/or mastered more than 669 songs (bovitz.com).

Has never (ever) played the Sharon Weiss/Sam Newman drinking game, “Never have I ever.”

Video editor and musical consultant, “So You Think You Know Subchapter V.”

You all know how the show works.

The host asks a question.

The first person to shout out the correct answer ~~wins $20.00~~ is showered with glory by the studio audience

For example…

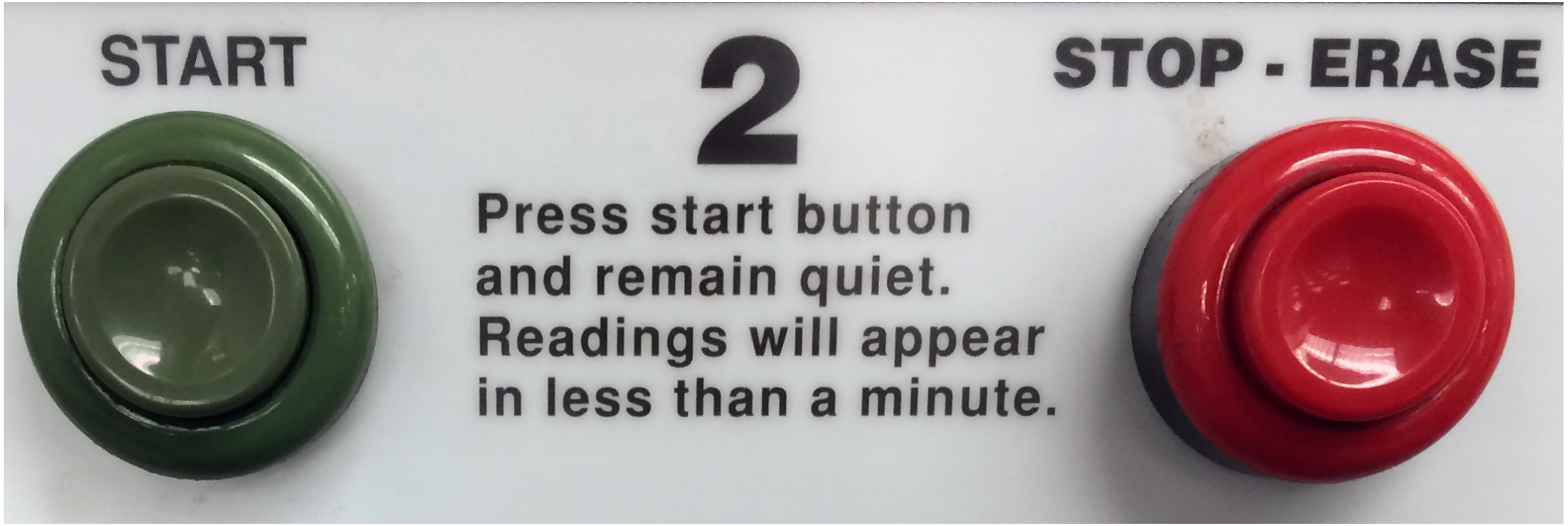
Iktin, Karasik, and Bovitz all served as president of this bankruptcy organization.

Name it.

Answer:

Los Angeles Bankruptcy Forum.

Ready to play?



Should we write “Subchapter V”

or

“subchapter V”?

Answer:

subchapter V

In re RS Air, LLC, 638 B.R. 403, 405 (B.A.P. 9th Cir. 2022)

"We further hold that the burden is on the debtor to prove ***subchapter V*** eligibility."

From now on, the questions will be harder.

Is a single asset real estate enterprise eligible to be a subchapter V debtor?

Answer:

No.

11 U.S.C. § 101(51B)

The term “single asset real estate” means real property constituting ***a single property or project***, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and ***on which no substantial business is being conducted by a debtor other than the business of operating the real property*** and activities incidental thereto.

11 U.S.C. § 1182(1)(A)

The term “debtor”—

(A) … means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and ***excluding a person whose primary activity is the business of owning single asset real estate***) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor …

Federal Rule of Bankruptcy Procedure 1020(b)

(a) Small Business Debtor Designation. In a voluntary chapter 11 case, ***the debtor shall state in the petition whether the debtor is a small business debtor*** and, if so, whether the debtor elects to have subchapter V of chapter 11 apply. … ***The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect***.

(b) Objecting to Designation. The United States trustee or a party in interest may file an ***objection to the debtor's statement*** under subdivision (a) ***no later than 30 days after the conclusion of the meeting of creditors*** held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

(c) Procedure for Objection or Determination. Any objection or request for a determination under this rule shall be governed by Rule 9014…

In re Bridle Path Partners, LLC, No. BR 23-23960, 2024 WL 86601, at *1 (Bankr. D. Utah Jan. 8, 2024)

Debtor Bridle Path Partners, LLC owns almost 900 acres of raw, mountain property in Cache County, Utah, and is in the process of obtaining final plat approval for an equestrian community consisting of 130 lots along with open space, trails, and riding facilities. The Debtor filed under Subchapter V of Chapter 11, but ***the U.S. Trustee has challenged the Debtor's qualification to proceed under this subchapter on the grounds that this is a single asset real estate case***. After conducting an evidentiary hearing, the Court now issues the following Memorandum Decision finding that the Debtor is ***precluded from proceeding under Subchapter V*** pursuant to 11 U.S.C. § 1182(1)(A). ...

On October 12, 2023, the Debtor filed its response, asserting that this is not a SARE case because (1) the Property is not a single project within the meaning of § 101(51B), and (2) the ***Debtor intends to conduct various other businesses on the Property after its development as a recreational community***.


https://www.hjnews.com/news/government/wellsville-city-council-approves-preliminary-plans-for-bridle-path-estates/article_e7bd4f24-35d0-56f5-b165-82c05984a5ba.html
Bridle Path Estates

In re Bridle Path Partners, LLC, No. BR 23-23960, 2024 WL 86601, at *2 (Bankr. D. Utah Jan. 8, 2024)

Subchapter V offers qualifying debtors certain benefits, such as ***no quarterly fee to the U.S. Trustee, no creditors' committee, no disclosure statement, no competing plans, and no absolute priority rule***. However, § 1182(1)(A) expressly excludes from Subchapter V a debtor that owns "single asset real estate," as that term is defined by § 101(51B). Further, § 362(d)(3) requires that a SARE debtor must satisfy one of two requirements, or secured creditors can readily obtain relief from stay. These requirements are: (1) the debtor files a plan within 90 days of the petition date that has a reasonable possibility of being confirmed within a reasonable time; or (2) the debtor commences making monthly interest payments to secured claim holders. It ***is thus not surprising that a debtor with significant real estate holdings would prefer to avoid the designation as a SARE debtor both to avoid the requirements of § 362(d)(3) and to be able to proceed under the more expeditious and economical provisions of Subchapter V***.

In re Bridle Path Partners, LLC, No. BR 23-23960, 2024 WL 86601, at *5 (Bankr. D. Utah Jan. 8, 2024)

The development of Bridle Path Estates involves the entirety of the Property**.** ***The Debtor's proposed developments for the Property, consisting of the building lots and the Equine Amenities, are in furtherance of the Debtor's unitary concept of creating an equestrian, recreational community comprised of cohesive and interdependent subdivisions and amenities.*** The almost exclusive source of revenue to repay secured creditors will come from the Debtor's sale of the Bridle Path Estates lots.

For these reasons, the Court finds that ***the Bridle Path Estates is a single asset real estate project*** under § 101(51B) that disqualifies the Debtor under § 1182(1)(A) from proceeding under Subchapter V.

Is a subchapter V debtor required to have a “profit motive”?

Answer:

No.

11 U.S.C. § 1182(1)(A)

The term “debtor”—

(A) … means a person ***engaged in commercial or business activities*** (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor …

In re RS Air, LLC, 638 B.R. 403, 405-406, 409 (B.A.P. 9th Cir. 2022)

We hold that a profit motive is not required to satisfy § 1182(1)(A). ... RS Air had no flight operations since at least 2017, no revenue or income since as early as 2012, and no employees. ***In fact, argued NetJets, RS Air had never been a revenue-generating business, and its sole purpose was to serve as the intermediary through which Perlman acquired interests in and paid for the availability and use of private jets***. ... The court rejected NetJets' argument that employees are required for eligibility, observing that many small businesses have no employees. ...

... we conclude that no profit motive is required for a debtor to qualify for subchapter V relief. ***To hold otherwise would wrongfully exclude nonprofits and other persons that lack such a motive***. That RS Air had no profit motive did not render it ineligible for subchapter V.

https://www.bjtonline.com/business-jet-news/netjets-breaks-ground-in-arizona (December 2022)

Is a debtor required to be actively operating on the bankruptcy petition date in order to be eligible for subchapter V relief?

Answer:

No.

In re RS Air, LLC, 638 B.R. 403, 409 (B.A.P. 9th Cir. 2022)

A majority of courts have held that a ***debtor need not be "actively operating" on the petition date, but must be "presently" engaged*** in commercial or business activities on the petition date to satisfy § 1182(1)(A). … We agree with the majority, that the term ***"engaged in" is inherently contemporary in focus and not retrospective***. Thus, ***a debtor need not be maintaining its core or historical operations on the petition date, but it must be "presently" engaged in some type of commercial or business activities*** to satisfy § 1182(1)(A).

Do unpaid student loans from medical school arise from a doctor's commercial or business activity?

Answer:

No.

11 U.S.C. § 1182(1)(A)

The term “debtor”—

(A) … means a person ***engaged in commercial or business activities*** (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate ***noncontingent liquidated secured and unsecured debts*** as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) ***not less than 50 percent of which arose from the commercial or business activities of the debtor*** …

In re Reis, No. 22-00517-JMM, 2023 WL 3215833, *1-2, 4 (Bankr. D. Idaho May 2, 2023)

Debtor Dr. Laura T. Reis ("Debtor") filed a bankruptcy petition on November 22, 2022. ... In doing so, she indicated her intention to file under chapter 11, subchapter V ("Sub V"). *Id*. ... On February 6, 2023, the United States Trustee's ("UST") office filed an objection to Debtor's eligibility to proceed under Sub V. ... She did not own a business prior to entering medical school, nor did she have any existing student loan debt. ... In this bankruptcy case, Debtor indicated her debts were not primarily consumer debts, and she listed ***$645,869,89 in student loan debt***. ... the issue before the Court is ***whether less than 50 percent of Debtor's debts arose from commercial or business activities***. *Id*. This determination turns on the characterization of Debtor's student loan debt, because, as described above, ***more than half of her debt is derived from student loans***.

In re Reis, No. 22-00517-JMM, 2023 WL 3215833, at *4 (Bankr. D. Idaho May 2, 2023)

Section 1182(1)(A) requires the Court to determine ***whether Debtor was engaged in a commercial or business activity*** on the petition date, and ***separately, whether the debts arose from the Debtor's commercial or business activities***.

The former question looks at the present—the petition date. … The latter determination is necessarily backward looking, as it would be rare for all of a debtor's commercial or business debts to have been incurred on or around the petition date. …

Here, the UST has conceded that ***Debtor was engaged in commercial or business activity on the petition date***—she had opened her own medical practice to treat patients. Thus, this Court's focus is on ***the nexus required, if any, between Debtor's medical school student loan debt and the commercial or business activity*** she engaged in while she operated her own practice.

In re Reis, No. 22-00517-JMM, 2023 WL 3215833, at *6 (Bankr. D. Idaho May 2, 2023)

The Court finds it germane that Debtor did not operate a private business before going to medical school and did not operate a business after obtaining her medical degree until more than a decade had passed. Rather, she was a student who hoped to gain employment following the conclusion of her studies and had aspirations of opening her own practice at some future time. ***When she began borrowing, Debtor did not have any specific opportunity in mind, nor did she have any employment lined up***. After graduating in 2009 and completing her residency in 2012, she worked for four employers in three states before creating an LLC in 2020 and ***opening her practice in 2021***. The majority of courts have rejected the argument that working as an employee would constitute "commercial or business activities" for purposes of eligibility under Sub V. .... Here, ***the gap between incurring the debt and actually engaging in any sort of commercial or business activity as an owner is simply too great to find that the student loans at issue arose from Debtor's commercial or business activities***.

Laura T. Reis, MD

What is the dollar limit for eligibility in subchapter V?

Answer:

$7,500,00.00 (until June 21, 2024).

Sunset date

Carrie V. Hardman and David Neier, ***Creditors' Rights in Bankruptcy*** **§ 17:27**

On June 21, 2022, the President signed into law the extension of the $7.5 million debt limit for Subchapter V eligibility with a sunset date of June 21, 2024. ***Bankruptcy Threshold Adjustment and Technical Corrections Act***, Pub. L. No. 117-151, 136 Stat. 1298 (2022).

When calculating the dollar limit for eligibility of the FIRST filer in subchapter V, do we count debts of an affiliate that files LATER?

Answer:

No.

11 U.S.C. § 103(i)

Applicability of chapters. … Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply.

11 U.S.C. § 1182(1)(A)

The term “debtor”—

(A) … means a person engaged in commercial or business activities

including any affiliate of such person that is also a debtor under this title and …

that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition ***… in an amount not more than $7,500,000***

(excluding debts owed [by that petitioner] to 1 or more affiliates or insiders)

not less than 50 percent of which arose from the commercial or business activities of the debtor …

In re Free Speech Sys., LLC, 649 B.R. 729, 733 (Bankr. S.D. Tex. 2023)

.... the debtor makes the statement of election to proceed under Subchapter V in a bankruptcy petition. ***That case proceeds in accordance with the statement of election unless the court finds that the statement is incorrect***.

In this case, the Debtor's statement of election in its voluntary petition—and the basis for making it as of that day—remain true. So the Debtor remains eligible under Subchapter V. ... ***If postpetition affiliate filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time. That contradicts the text and purpose of Subchapter V***.

Alex Jones (Free Speech Sys.)

When calculating the dollar limit for eligibility of the LATER filer in subchapter V, do we count debts of affiliates who file EARLIER?

Answer:

Yes.

Consider staggering the bankruptcy petitions.

In re Phenomenon Mktg. & Ent., LLC, No. 2:22-BK-10132-ER, 2022 WL 1262001, at *3 (Bankr. C.D. Cal. Apr. 28,2022), modified, No. 2:22-BK-10132-ER, 2022 WL 3042141 (Bankr. C.D. Cal. Aug. 1, 2022)

Section 101(2)(A) defines an "**affiliate**" as an entity "that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor ...." Phe.no owns 100% of the Debtor, and Holdings owns 100% of Phe.no. Therefore, under the plain language of the Bankruptcy Code, both Phe.no and Holdings are "**affiliates**" of the Debtor.

When calculating the dollar limit for eligibility of the debtor in subchapter V, do we count disputed debts?

Answer:

Probably.

Prof. Karasik says so.

11 U.S.C. § 101(51D) and *Scovis*

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

(A) … means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate ***noncontingent liquidated secured and unsecured*** debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $3,024,725…

In re Scovis, 249 F.3d 975, 983–984 (9th Cir. 2001) ("If the amount of the creditor's claim at the time of the filing the petition is ascertainable with certainty, **a dispute regarding liability will not necessarily render a debt unliquidated**" [internal quotes omitted]). Decided in a chapter 13 case.

Do you count the full amount of lease rejection damages when calculating the dollar limit for eligibility in subchapter V?

Answer:

Two views.

Judge Brand says “no.”

11 U.S.C. § 101(51D)

(51D) The term “small business debtor”—

(A) … means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate ***noncontingent liquidated*** secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $3,024,725 [originally “$2,000,000”, adjusted effective April 1, 2022] (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor …

In re Parking Mgmt., Inc., 620 B.R. 544, 55, 560 (Bankr. D. Md. 2020)

As set forth in the Findings of Fact, on May 21, 2020, the court authorized the rejection of five parking leases as of May 12, 2020, and without objection by the landlords, seven leases as of May 7, 2020, the petition date. … The debtor did not include the lease rejection claims on its schedules. The parties dispute ***whether the lease rejection claims were contingent*** as of the petition date. …

For the foregoing reasons, the court concludes ***the lease rejection claims and PPP obligation were contingent as of the date of filing, and the debtor's obligation to repay the PPP was unliquidated as of that date***. Therefore, these claims are ***not included in the debt limitation determination*** of § 1182 and the debtor is eligible to proceed under Subchapter V.

Contra, In re Macedon Consulting, Inc., 652 B.R. 480, 486 (Bankr. E.D. Va. 2023)

While it may be argued that the timing of payments is the future extrinsic event that may never occur, the Court disagrees. The timing of lease payments is simply that - timing. Absent the end of the world, we know the future date will occur. As a result, ***liability under the Leases must be considered noncontingent and liquidated, and the Debtor in this case is therefore above the debt limits for subchapter V***, which are capped at $7.5 million of aggregate noncontingent liquidated debts.


Putting Users First
The Path to
Project Success
Presented by
Liviu Catuneanu Cica
appian World
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In re R&LS Investments, Inc., *2:23-bk-14467-WB* (March 29, 2024, Hon. Julia W. Brand)

Eligibility is determined as of the petition date, and Debtor has the burden to prove eligibility under subchapter V. … Section 1182 requires consideration of debts as they exist as of the date of the filing of the petition. … The ***issue of whether the remaining lease obligations are non-contingent and liquidated as of the petition date, requiring their inclusion in the debt limit calculation for purposes of eligibility***, is not determined by a review of the schedules. That determination rests on the nature of the Debtor's obligations under the leases at the petition date. … the debtor's ***obligation under the lease is unliquidated and contingent*** as of the petition date. This conclusion is supported by In re Parking Mgmt. … The court declines to follow In re Macedon Consulting, Inc. … Based on the above, the court holds that ***as of the petition date, the unexpired leases were contingent and/or unliquidated claims. As a result, they are not to be included in the debt limit determination. Therefore, Debtor is eligible to proceed under subchapter V.***

When must the subchapter V debtor file its plan?

Answer:

90 days -- seriously.

11 U.S.C. § 1189(b)

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

In re Signia, Ltd., U.S. Bankruptcy Court, District of Colorado, 23-14384 TBM (January 29, 2024)

A few years ago, Congress enacted a major addition to Chapter 11 of the Bankruptcy Code1: the Small Business Reorganization Act of 2019 (the "SBRA"). The SBRA (commonly referred to as "Subchapter V"), was designed to streamline the reorganization and rehabilitation process for small business debtors. … However, ***Subchapter V cases are supposed to proceed quickly***. … Notwithstanding Congress' plain timing requirement, the Court has observed over the last several years that Subchapter V debtors and their attorneys in this jurisdiction almost never meet the 90-day mandate. Usually, debtors ask for an extension on generic grounds … Worse still, ***some debtors and their counsel manipulate the deadline by filing bogus placeholder plans of reorganization on the ninetieth day***. Such plans are obviously deficient (many containing blanks, inadequate information, and missing financials) and have no chance of confirmation.

In re Signia, Ltd., U.S. Bankruptcy Court, District of Colorado, 23-14384 TBM (January 29, 2024)

The Court reaffirms that the ***Beyond-the-Debtor's-Control Standard (derived from Section 1221) is the right standard for evaluating requests for extension under Section 1189(b)***. … Thus, the Court must assess whether "external factors — beyond [the debtor's] control — contributed to [the debtor's] inability to comply with the deadlines." Id. … requests for extension of time for Subchapter V debtors to file plans of reorganization should not be routinely granted. Instead, ***debtors bear the stringent or high burden of proving that the requested extension is based on circumstances "for which the debtor should not justly be held accountable."*** That means circumstances beyond the debtor's control.
The circumstances offered by this Debtor in the Motion to Extend are obviously insufficient to justify an extension of the Section 1189(b) 90-day deadline. …

[text rearranged for clarity]

Is the subchapter V debtor required to satisfy 11 U.S.C. § 1129(a)(12) -- pay the fees -- in order to confirm a chapter 11 plan?

Answer:

No.

11 U.S.C. § 1129(a)(12)

(a) The court shall confirm a plan only if all of the following requirements are met …

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

28 U.S.C. § 1930(a)(6)(B)(i)

During the 5-year period beginning on January 1, 2021, in addition to the filing fee paid to the clerk, ***a quarterly fee shall be paid to the United States trustee***, for deposit in the Treasury, in each open and reopened case under chapter 11 of title 11, ***other than under subchapter V***, for each quarter (including any fraction thereof) until the case is closed, converted, or dismissed, whichever occurs first.

(ii) The fee shall be the greater of--

(I) 0.4 percent of disbursements or $250 for each quarter in which disbursements total less than $1,000,000; and

(II) 0.8 percent of disbursements but not more than $250,000 for each quarter in which disbursements total at least $1,000,000.

In re Pancakes Of Hawaii, Inc., No. 23-00386, 2024 WL 1261783, at *5 (Bankr. D. Haw. Mar. 22, 2024)

The Debtor's Chapter 11 Case is proceeding under Subchapter V, and as such, the ***Debtor is not required to pay fees payable under section 1930 of title 2***8, United States Code, as determined by the Bankruptcy Code. Thus, the ***Debtor need not satisfy the requirements of Bankruptcy Code section 1129(a)(12).***

- Specialties
- Pancakes
- Fruit & Juices
- Cereals
- Side Dishes
- Beverages
- Waffles
- Crepes
- Meats
- Egg Specialties
- Omelettes

Hawaii

Honolulu

1414 Dillingham Blvd.
Honolulu, Hawaii 96817

Contact

Phone: 808-847-1496

Map

Show Dillingham Blvd location on Google map.

https://originalpancakehouse.com/phloc_hi.html
(Pancakes of Hawaii dba The Original Pancake House)

If the subchapter V debtor fails to file a plan, may the subchapter V trustee file her own plan?

Answer:

No.

11 U.S.C. § 1189

(a) Who may file a plan. -- ***Only the debtor may file a plan under this subchapter.***

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

May a court remove the subchapter V debtor in possession sua sponte -- and then replace the debtor with the subchapter V trustee as a “trustee in possession”?

Answer:

Yes.

Weird.

11 U.S.C. § 1185

(a) In general.--On request of a party in interest, and after notice and a hearing, the ***court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case***, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.

(b) Reinstatement.--On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

In re Coeptis Equity Fund LLC, No. 23-60001, 2024 WL 1133580, at *1 (9th Cir. Mar. 15, 2024)

Chapter 11 debtor Coeptis Equity Fund LLC (“Coeptis”) appeals the Bankruptcy Appellate Panel's decision to affirm the bankruptcy court's denial of Coeptis's Federal Rule of Bankruptcy Procedure 9024 motion for relief from the court's order removing Coeptis as debtor in possession (“DIP”) and appointing the ***Subchapter V trustee as trustee in possession*** (the “Removal Order”).

In re Coeptis Equity Fund LLC, No. 23-60001, 2024 WL 1133580, at *1 (9th Cir. Mar. 15, 2024)

Coeptis contends that the bankruptcy court abused its discretion when it issued the Removal Order because 11 U.S.C. § 1185(a) provides that a debtor may be removed as DIP upon the motion of a party in interest, and the bankruptcy court removed Coeptis as DIP on its own motion.

Coeptis contends that 11 U.S.C. § 105(a), which authorizes the bankruptcy court to issue "any order" that is "necessary or appropriate," does not authorize the Removal Order because ***a Subchapter V trustee is a receiver*** and thus, the Removal Order ***violated the prohibition in 11 U.S.C. § 105(b)*** against court-appointed receivers.

In re Coeptis Equity Fund LLC, No. 23-60001, 2024 WL 1133580, at *1 (9th Cir. Mar. 15, 2024)

Even if the bankruptcy court had appointed the trustee, we have explicitly held that ***bankruptcy courts "ha[ve] authority to act sua sponte to appoint a Chapter 11 trustee."*** *In re Bibo, Inc.*, 76 F.3d 256, 258–59 (9th Cir. 1996). This authority follows from the fact that ***a bankruptcy trustee is not a receiver***. "Bankruptcy trustees and receivers have very different roles, duties and loyalties. ***A bankruptcy trustee is the representative of the estate. A receiver, on the other hand, is appointed by the court as a representative of the court to manage, control and deal with the property that is the subject matter of a controversy***." *In re Halvorson*, 607 B.R. 680, 685 (Bankr. C.D. Cal. 2019) (citations omitted).

https://en.wikipedia.org/wiki/Annuit_cœptis

Annuit ***cœptis*** ... is one of two mottos on the reverse side of the Great Seal of the United States. ... Because of its context as a caption above the Eye of Providence, the standard translations are "Providence favors our undertakings" and "Providence has favored our undertakings".

Over the objection of a debtor-in-possession, may a subchapter V trustee obtain an order establishing a retainer deposit to secure partial payment of the trustee's fees and expenses?

Answer:

Yes (but a deposit should be set aside for the benefit of all administrative claimants).

In re Roe, No. 23-32077-THP11, 2024 WL 206678, at *1 (Bankr. D. Or. Jan. 18, 2024)

This matter came before the court on the Subchapter V Trustee's motion for an order requiring Debtor to post a retainer for the trustee's fees and expenses. Debtor opposes the Subchapter V Trustee's request. ...

In re Roe, No. 23-32077-THP11, 2024 WL 206678, at *1, 3 (Bankr. D. Or. Jan. 18, 2024)

A subchapter V trustee has a duty to "ensure that the debtor commences making timely payments required by a plan confirmed under [subchapter V] ...." This includes ensuring that the debtor will be able to commence making timely payments of administrative expenses due immediately upon the effective date of a confirmed plan of reorganization. ... chapter 3 of the Bankruptcy Code applies to cases under chapter 11. ***Under section 363(b), a "trustee, after notice and a hearing, may use ... other than in the ordinary course of business ... property of the estate."*** By its plain and express language, section 363(b) of the Bankruptcy Code is available to trustees.

The Subchapter V Trustee is a trustee under the Bankruptcy Code and may move for relief under section 363(b). ... To use property outside the ordinary course of business, the Subchapter V Trustee must show a both a valid business justification and good faith.

In re Roe, No. 23-32077-THP11, 2024 WL 206678, at *3 (Bankr. D. Or. Jan. 18, 2024)

Debtor correctly argues that the court "should treat the professionals and their administrative claims equally, as the Bankruptcy Code does." Under the Bankruptcy Code, claims of equal priority must be treated the same. *In re MacMillan*, 652 B.R. 812, 815 (Bankr. D. Or. 2023). ***The Subchapter V Trustee's fees are entitled to administrative expense status along with all other administrative expenses in the case***.

The Subchapter V Trustee's rights to payment are pro rata with the other administrative expense claimants.

Thus, ***if any funds of the Debtor are to be set aside, they should be set aside for the pro rata benefit of all administrative claimants***, and not just for the Subchapter V Trustee. Those funds should be placed in a trust account to be used to pay administrative expenses, and not in the form of a retainer in which only the Subchapter V trustee would have a property interest.

May a court award fees to a subchapter V trustee for the trustee's services after the debtor-in-possession is removed and for the trustee's actions to convert the chapter 11 to chapter 7?

Answer:

Yes.

In re Coeptis Equity Fund LLC, No. 23-60003, 2024 WL 1133578, at *1 (9th Cir. Mar. 15, 2024)

Coeptis contends that the Subchapter V trustee should not be compensated for actions taken after Coeptis was removed as debtor-in-possession or for actions the trustee took in order to convert this case to Chapter 7 because, according to Coeptis, removal and conversion were improper. As we held in separately filed memoranda dispositions, ***the bankruptcy court did not abuse its discretion in removing Coeptis as debtor-in-possession and converting the case to Chapter 7***.

The ***bankruptcy court did not abuse its discretion in awarding compensation in these matters***.

If an individual subchapter V debtor seeks to confirm a chapter 11 plan, how can she prove that the value of the property to be distributed under the plan is not less than the individual's projected disposable income of the debtor during the five years after confirmation?

Answer:

Trick question!

No proof required.

11 U.S.C. § 1129(a)(15) – not sub V

The court shall confirm a plan only if all of the following requirements are met …

In a case in which ***the debtor is an individual*** and in which the holder of an allowed unsecured claim objects to the confirmation of the plan —

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) ***the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2))*** to be received during the ***5-year period*** beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

11 U.S.C. §1325(b)(2)

(2) For purposes of this subsection, the term ***"disposable income" means current monthly income received by the debtor*** (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) ***less amounts reasonably necessary*** to be expended--

(A)

(i) for the ***maintenance or support of the debtor*** or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions ... in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of ***expenditures necessary for the continuation, preservation, and operation of such business***.

11 U.S.C. § 1191(a) – different rule

The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), ***other than paragraph (15) of that section***, of this title are met.

In re Hacienda Co., LLC, No. 2:22-BK-15163-NB, 2023 WL 6143216, at *6 (Bankr. C.D. Cal. Sept. 20, 2023)

Section ***1129(a)(15)*** pertains to individuals, and in any event it is ***inapplicable in Subchapter V cases such as this one***. *See* § 1191(a).

If an attorney is owed $9,000.00 by a debtor-to-be on a prepetition claim, may that attorney retain the unsecured claim and still seek employment by the subchapter V debtor-in-possession?

Answer:

Yes.

11 U.S.C. § 1195

Notwithstanding section 327(a) of this title, ***a person is not disqualified*** for employment under section 327 of this title, by a debtor ***solely because*** that person holds ***a claim of less than $10,000*** that arose prior to commencement of the case.

May a creditor file a nondischargeability complaint against a corporate subchapter V debtor?

Answer:

Yes...
in the Fourth and Fifth Circuits.

11 U.S.C. § 523

A discharge under section 727, 1141, ***1192***, 1228(a), 1228(b), or 1328(b) of this title does not discharge ***an individual debtor*** from any debt … [fraud, embezzlement, willful and malicious injury by the debtor to another entity or to the property of another entity, etc.].

11 U.S.C. § 1192

If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable ***after completion by the debtor of all payments*** due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter***, the court shall grant the debtor a discharge of all debts*** provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, ***except any debt*** —

(1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

(2) ***of the kind specified in section 523(a) of this title***.

In re Off-Spec Sols., LLC, 651 B.R. 862, 866–867 (B.A.P. 9th Cir. 2023), appeal dismissed, No. 23-60034, 2023 WL 9291577 (9th Cir. Nov. 2, 2023)

Section 523(a) provides that "[a] discharge under section 727, 1141, ***1192***, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt" defined in the subsequent subparagraphs of § 523(a). ***Facially, these sections appear to conflict because § 523(a) refers to individual debtors, while § 1192 provides for discharge of both individual and corporate debtors and does not distinguish between them when excepting debts "of the kind specified in section 523(a)."*** In *Cleary*, ***the Fourth Circuit held that § 1192 refers to the types of debts, not the types of debtors, and consequently, makes those types of debts nondischargeable to all debtors under § 1192***. 36 F.4th at 515. Based on the language and context of the statutes, we believe that ***the better interpretation is that § 1192 reiterates § 523(a)'s application to debtors under subchapter V, and § 523(a) limits its applicability to individuals***.

In re Off-Spec Sols., LLC, 651 B.R. 862, 870 (B.A.P. 9th Cir. 2023), appeal dismissed, No. 23-60034, 2023 WL 9291577 (9th Cir. Nov. 2, 2023)

We are also ***unpersuaded*** that "Congress's importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings" ***reflects an intent to make nondischargeable debts applicable to corporate debtors***. *In re Cleary Packaging, LLC*, 36 F.4th at 516.

Cleary cites two cases for the proposition that § 523(a) applies to corporate debtors under chapter 12 … Like *Cleary*, both cases rely on the general/specific canon of construction, which we find inapposite for the reasons stated above, and neither case offers an explanation why this interpretation does not render surplusage § 523(a)'s specific application to § 1228(a).

In re R&W Clark Constr., Inc., 656 B.R. 628, 637 (Bankr. N.D. Ill. 2024)

… the court is not swayed by the reasoning of *Cleary Packaging*. … There is, quite frankly, no ambiguity in the language.

Imprecision is not ambiguity. …

The better reading of sections 1192(2) and 523(a) is that Congress did not through inartful language attempt to upset the existing, fundamental nature of either chapter 11 or the Bankruptcy Code as a whole. … As a result, ***section 523(a) simply does not apply to corporate debtors in chapter 11, whether they be in Subchapter V or otherwise.***

Matter of GFS Indus., L.L.C., No. 23-50237, 2024 WL 1644229, at *1,7 (5th Cir. Apr. 17, 2024)

Although the question is complicated by a certain textual awkwardness in the Bankruptcy Code, we ultimately side with the Fourth Circuit and rule that, in Subchapter V proceedings, both corporate and individual debtors are subject to the list of § 523(a) discharge exceptions.

[Footnote 1] To be sure, the issue is a close and interesting one—as shown by the fact that it was recently the subject of a national bankruptcy moot court competition. *See* Paul R. Hage & G. Ray Warner, *31st Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition*, 32 NORTON J. BANKR. L. & PRAC. art. 1 (Feb. 2023). ...

In sum, we agree with the Fourth Circuit that 11 U.S.C. § 1192(2) subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a).

Is the classic “fair and equitable” test the very same test used for confirmation of a subchapter V plan?

Answer:

No.

11 U.S.C. § 1191(b)

… if all of the applicable requirements of section 1129(a) of this title,

other than paragraphs (8) [all classes accept], (10) [at least one class accepts], and (15) [projected income of individual over five-years] of that section, are met with respect to a plan,

the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs

if the plan does not ***discriminate unfairly***, and is ***fair and equitable***, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1191(c)(1), (2)

For purposes of this section, ***the condition that a plan be fair and equitable with respect to each class of claims or interests includes*** the following requirements:

(1) With respect to a class of ***secured claims***, the plan meets the requirements of section ***1129(b)(2)(A)*** of this title.

(2) As of the effective date of the plan—

(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 … is not less than the projected disposable income of the debtor.

11 U.S.C. § 1191(c)(3)

(A) The debtor ***will be able to make all payments*** under the plan; ***or***

(B)

(i) **there is a reasonable likelihood** that the debtor will be able to make all payments under the plan; and

(ii) ***the plan provides appropriate remedies***, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

11 U.S.C. § 1191(d)

Disposable Income.—For purposes of this section, the ***term "disposable income" means the income that is received by the debtor and that is not reasonably necessary to be expended***—

(1) for—

(A) ***the maintenance or support of the debtor*** or a dependent of the debtor; or
(B) ***a domestic support obligation*** that first becomes payable after the date of the filing of the petition; or

(2) for the payment of ***expenditures necessary for the continuation, preservation, or operation of the business*** of the debtor.

May a subchapter V plan provide for third party releases?

Answer:

Only the Supreme Court knows.

But not in the Ninth Circuit.

In re Kalos Cap., Inc., No. 22-58326-SMS, 2023 WL 7179265, at *1-2 (Bankr. N.D. Ga. Oct. 31, 2023)

Debtor's principals propose to fund a Chapter 11 plan in exchange for third-party releases of themselves, former employees, and affiliated businesses. The releasee-funded plan and third-party releases are functionally similar to those in newsworthy mass tort bankruptcies. … the record establishes that the ***releases are appropriate under Eleventh Circuit law***, and the Court will confirm the Plan. … Unable to afford the increasing legal expenses associated with the arbitrations, Debtor decided to wind down its business, withdraw from FINRA, and liquidate its assets. Debtor filed this Chapter 11 case to effectuate an orderly liquidation.

In re Kalos Cap., Inc., No. 22-58326-SMS, 2023 WL 7179265, at *3 (Bankr. N.D. Ga. Oct. 31, 2023)

The UST objects to the Confirmation of Debtor's Plan on the bases that: (1) the Court does not have statutory authority to grant nonconsensual third-party releases; (2) granting the Releases would violate due process; and (3) Debtor failed to show the facts of the case warrant the granting of the Releases under the Dow Corning seven-factor test adopted by the Eleventh Circuit... The Fifth, ***Ninth***, and Tenth Circuits, following reasoning consistent with the UST's position, ***prohibit nonconsensual third-party releases solely by their interpretation of § 524(e),*** which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Based on this section, Circuits prohibiting nonconsensual third-party releases reason that "Congress did not intend to extend such benefits to third-party bystanders," especially those that have not fully opened their books and records to their creditors, and insist that one must submit to the entire bankruptcy process to receive a discharge of their debts.


KALOS
CAPITAL

After confirmation of a subchapter V plan, what if the debtor's actual net disposable income is ***higher*** than the proposed net disposable income.

Must the plan be modified?

Answer:

Probably not, if we carefully look at In re Sisk (chapter 13).

11 U.S.C. § 1191(c)(1), (2)

For purposes of this section, ***the condition that a plan be fair and equitable with respect to each class of claims or interests includes*** the following requirements:

…

(2) As of the effective date of the plan—

(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 … is not less than the projected disposable income of the debtor.

In re Sisk, 962 F.3d 1133, 1148-1149 (9th Cir. 2020)

... we disagree with the BAP's reading of *In re Anderson*, 21 F.3d 355 (9th Cir. 1994). There, the trustee sought a plan provision to require the debtors to pay their "actual" rather than "projected" disposable income and to allow him to automatically adjust their periodic plan payments without a court order. ... ***Nevertheless, § 1325(b)(1)(B) expressly requires only the payment of "projected disposable income."*** *Id*. ... the trustee was not permitted "to impose a different, more burdensome requirement" on debtors. *Id.* ... allowing the trustee to automatically adjust debtors' payments conflicted with the procedures established for modifying a debtor's plan under § 1329. *Id*. The BAP construed *Anderson* to prohibit a plan provision that amounts to a plan modification without notice to the trustee or creditors or complying with § 1329's modification procedures. But *Anderson* counsels us to adhere to the requirements of the Code and not to substitute them with "different, more burdensome" terms.

And the winners are...