# BANKRUPTCY RESEARCH BINDER

# BANKRUPTCY JUDGE CHARLES NOVACK

# UPDATED THROUGH May 6, 2026

**TABLE OF CONTENTS**


ABANDONMENT . . . . . 1

ABSTENTION - §§ 305 AND 1334(c) . . . . . 3
§ 305 abstention . . . . . 4

ADEQUATE PROTECTION - §361 - B.R. 4001 . . . . . 5

ADEQUATE ASSURANCE - § 366 . . . . . 6

ADMINISTRATIVE EXPENSE - §503. . . . . 7

AGENCY . . . . . 11

ALTER EGO. . . . . 12

APPEALS . . . . . 14

APPOINTMENT OF PROFESSIONALS . . . . . 18

ARBITRATION . . . . . 21

ASSIGNMENT OF RENTS . . . . . 22

ATTORNEY – Discipline; conflicts of interest; attorney/client relationship; fees. . . . . 23

AUTOMATIC STAY . . . . . 26
1. § 362(a) - In general . . . . . 26
2. § 362(a) and Abandonment . . . . . 30
3. § 362(a) - Annulment. . . . . 30
4. § 362(a) - Interplay with Cal. law . . . . . 31
5. § 362(a) - Lawsuits, Unlawful Detainer actions, and Collection Efforts. . . . . 32
6. § 362(a) - Reopening . . . . . 34
7. § 362 - State Court Authority. . . . . 34
8. § 362(b) - Exceptions. . . . . 35
9. §362(c) . . . . . 36
10. § 362(d) . . . . . 36
11. § 362(h) (BAPCPA version) . . . . . 37
12. § 362(k) . . . . . 37

AVOIDING POWERS - §§ 544, 546, 550 . . . . . 41

CASH COLLATERAL & POST-PETITION FINANCING - § 364 . . . . . 47

CERCLA. . . . . 49

CHAPTER 7 . . . . . 50

CHAPTER 9 . . . . . 51

CHAPTER 11 . . . . . 52
1. Anti-Modification . . . . . 52
2. Appeal . . . . . 52
3. Appointment of Ch 11 Trustee . . . . . 53
4. Bad Faith Filing . . . . . 53
5. Classification of Claims. . . . . 53
6. Confirmation of Plan . . . . . 54
7 . Conversion of Ch 11 to Ch 7 or Chapter 13 . . . . . 56
8. New Value Exception and Absolute Priority Rule . . . . . 57
9. Notice of Plan . . . . . 59
10. § 1125. . . . . 59
11. Valuation for § 1111(b) Purposes . . . . . 60
12. Vote on Plan. . . . . 60
13. Post Confirmation . . . . . 61
14. Misc.. . . . . 62

SBRA . . . . . 67

CHAPTER 12 . . . . . 68
1. Eligibility . . . . . 68

CHAPTER 13 . . . . . 69
1. Chapter 13 Plan and Modification . . . . . 69
2. Chapter 13 Trustee. . . . . 71
3. Child Support. . . . . 71
4. Claim and issue preclusion - binding effect of plan. . . . . 72
5. Direct Payment of Claims “Outside” the Plan. . . . . 73
6. Dismissal or Conversion . . . . . 73
7. Disposable Income . . . . . 74
8. Good Faith/Bad Faith. . . . . 77
9. Tax Debt. . . . . 77
10. § 109. . . . . 78
11. § 1322. . . . . 79
12. § 1325. . . . . 81

13. § 1325 (hanging paragraph) . . . 81
14. Student Loans. . . . 82
15. Fees . . . 82
16. Discharge - § 1328 . . . 83
17. § 1305. . . . 83
18. Misc . . . 83
19. Motions to Value, "Lien Strips," Bad Faith and Effect on Eligibility . . . 85

CHAPTER 15 . . . 87

CLAIMS . . . 88
1. Definition . . . 88
2. 502(b)(2) . . . 88
3. 502(b)(6) . . . 89
4. 502(b)(7) . . . 89
5. 502(b)(9) . . . 90
6. 502(c) - Estimation . . . 90
7. 502(d) . . . 90
8. 502(e)(1)(B) . . . 90
9. 502(h) . . . 91
10. 502(j) - Reconsideration . . . 91
11. Claims Assignment and Trading . . . 91
12. Contingent claims - definition . . . 92
13. Effect of proof of claim; burden of proof; requirements for valid proof of claim; procedure. . . . 92
14. Environmental Claims . . . 94
15. Informal and amended proofs of claim; reconsideration of claims. . . . 94
16. Tardily-filed claims; excusable neglect . . . 95
17. Miscellaneous . . . 96

COLLATERAL ESTOPPEL & RES JUDICATA (ISSUE AND CLAIM PRECLUSION) . . . 98

COLLECTIVE BARGAINING AGREEMENTS - § 1113 . . . 103

COMMERCIAL PAPER . . . 104

COMMUNITY PROPERTY - § 541(a)(2)(A),(B) . . . 105
Effect of Tax Returns . . . 105
1) pre-'85 transaction . . . 105
2) post-'85 transaction . . . 106

COMPENSATION OF PROFESSIONALS . . . 108
1. Bonuses . . . 108

2. Chapter 7 . . . . . 109
3. Chapter 13 . . . . . 109
4. § 329, Rule 2014, Rule 2016 and Disclosure. . . . . 109
5. § 326. . . . . 110
6. § 328. . . . . 110
7. § 330. . . . . 111
8. § 503(b) . . . . . 113
9. Postpetition attorney fees – §§ 502(b), 506(b), etc. . . . . 113
10. § 506(c) . . . . . 114
11. §726(b)(5) . . . . . 115
12. Time Sheets . . . . . 115
13. Attorney fees under state law or federal bankruptcy law . . . . . 115
14. Retainers . . . . . 116
15. Carve-outs . . . . . 116
16. Misc.. . . . . 117

COMPROMISE & SETTLEMENT . . . . . 120

CONFLICT OF LAWS. . . . . 123

CONTEMPT . . . . . 124

CONTINUANCE . . . . . 125

CONTRACTS - California Law . . . . . 126

CONVERSION BETWEEN BANKRUPTCY CHAPTERS . . . . . 128

CONVERSION - STATE LAW . . . . . 130

COSTS - 28 U.S.C. §§ 1920 and 1927 . . . . . 131

CREDIT CARDS . . . . . 132

CREDIT COUNSELING - § 109(h). . . . . 133

CREDITORS COMMITTEE . . . . . 134

DAMAGES. . . . . 135

DEBT RELIEF AGENCIES– 11 U.S.C. §§ 526 - 528 . . . . . 136

DECLARATORY JUDGMENT . . . . . 137

DEEPENING INSOLVENCY DOCTRINE. . . . . 138

DEFINITIONS . . . . . 139

DISCHARGE AND DISCHARGEABILITY - General Principles- Collateral Estoppel, Res Judicata, Damages, Burden of Proof, Weighing Evidence, etc. . . . . 140

1. Attorney's Fees and § 523(d) . . . . . 140
2. Cal. Civ. Code § 3287(a) . . . . . 142
3. Cal. Civ. Code § 92848 . . . . . 142
4. Issue Preclusion/Collateral Estoppel . . . . . 143
5. Default Judgment . . . . . 145
6. Extension of time to file Complaint/Equitable Tolling . . . . . 146
7. Fraud . . . . . 146
8. Fed. R. Bankr. P. 9006 under 4007(1) . . . . . 146
9. FRCP 17(a) . . . . . 147
10. Novation. . . . . 147
11. Punitive Damages . . . . . 147
12. Claim Preclusion/Res Judicata. . . . . 147
13. Rule 9(b) Fed.R. Civ.P. 15. . . . . 148
14. § 362. . . . . 148
15. § 509. . . . . 148
16. § 523. . . . . 148
17. § 523(a)(2) . . . . . 148
18. § 523(a)(4) . . . . . 148
19. § 523(b) . . . . . 149
20. § 1141(d)(3) . . . . . 149
21. Waiver . . . . . 149
22. Prejudgment/Post Judgment Interest . . . . . 149
23. Misc . . . . . 149

DISCHARGEABILITY - Liability of Corporate Officer or Relatives for Acts of Corporation. 152

DISCHARGEABILITY - Time for filing Nondischargeability Actions . . . . . 153

DISCHARGEABILITY - Effect on innocent spouse's property . . . . . 156

DISCHARGEABILITY - 523(a)(1). . . . . 157

DISCHARGEABILITY - 523(a)(2) . . . . . 160

DISCHARGEABILITY - 523(a)(3) . . . . . 166

DISCHARGEABILITY– 523(a)(4) . . . . . 167

DISCHARGEABILITY - § 523(a)(5). . . . . 171

DISCHARGEABLITY - § 523(a)(6) . . . . . 173

DISCHARGEABILITY - 523(a)(7) . . . . . 177

DISCHARGEABILITY - § 523(a)(8)– Student loans . . . . . 178

DISCHARGEABILITY - 523(a)(9) - Drunk Driving. . . . . 182

DISCHARGEABILITY - 523(a)(14) . . . . . 183

DISCHARGEABILITY -523(a)(15). . . . . 184

DISCHARGEABILITY - 523(a)(18) . . . . . 186

DISCHARGEABILITY - 523(a)(19) . . . . . 187

DISCHARGE- Objection to Discharge and Revocation . . . . . 188

DISCHARGE, EFFECT OF DISCHARGE, AND DISCHARGE INJUNCTION - § 524 . . . . 192

DISCOVERY– GENERALLY . . . . . 196

DISCRIMINATION . . . . . 198

DISMISSAL OF THE CASE - §§ 521(i), 707(a), 1112(b) and 1307(a) . . . . . 199

DISMISSAL OF ADVERSARY PROCEEDING/CONTESTED MATTER . . . . . 202

DISMISSAL - 707(b) . . . . . 203

DUTIES OF THE DEBTOR - § 521 . . . . . 205

ELECTION OF REMEDIES . . . . . 206

ELIGIBILITY . . . . . 207

ENVIRONMENTAL PROBLEMS IN BANKRUPTCY CASES . . . . . 208

EQUAL ACCESS TO JUSTICE ACT - 26 U.S.C. 7430 . . . . . 209

EQUITABLE SUBORDINATION. . . . . 210

EQUITABLE SUBROGATION. . . . . 211

ESTOPPEL - EQUITABLE AND JUDICIAL . . . . . 212

EVIDENCE. . . . . 214

EXECUTORY CONTRACTS § 365 . . . . . 216
1. General. . . . . 216
2. Executory Contracts - Leases. . . . . 217
3. Executory Contracts - Non-lease contracts . . . . . 220

EXEMPTIONS . . . . . 222
1. General. . . . . 222
2. Homestead . . . . . 229
3. Lien Avoidance--see under this topic heading, infra. . . . . 233
4. Retirement Accounts, Life Insurance and Annuities . . . . . 233
5. Standing and Burden of Proof . . . . . 235
6. Exemption planning. . . . . 235

EXTENSION OF TIME (§ 108). . . . . 237

FOREIGN JUDGMENTS. . . . . 238

FORECLOSURE . . . . . 239

FRAUD - CALIFORNIA LAW . . . . . 241

FRAUDULENT TRANSFER. . . . . 242

FULL FAITH AND CREDIT . . . . . 248

GUARANTORS . . . . . 249

HESCA–CAL. CIVIL CODE § 1695 et seq. . . . . 250

IMMUNITY . . . . . 251

INJUNCTION (see also Preliminary Injunction) . . . . . 252

INSURANCE . . . . . 254
INTELLECTUAL PROPERTY RIGHTS . . . . . 255
INTEREST . . . . . 256
INVOLUNTARY PETITION. . . . . 259
JURISDICTION - PERSONAL. . . . . 263
JURISDICTION – SUBJECT MATTER AND "STERN" CASES. . . . . 264
JURY . . . . . 274
LACHES. . . . . 276
LANDLORD TENANT - CALIFORNIA LAW . . . . . 277
LAW OF THE CASE DOCTRINE . . . . . 278
LIEN AVOIDANCE - §§ 522(f) and (h) and 506(d). . . . . 279
LIENS - CALIFORNIA LAW . . . . . 287
LIS PENDENS . . . . . 289
MANDAMUS. . . . . 290
MARSHALLING OF ASSETS . . . . . 291
MEETING OF CREDITORS - § 341 AND RULE 2003 . . . . . 292
MISCELLANEOUS . . . . . 293
MITIGATION OF DAMAGES . . . . . 296
NOTICE AND HEARING . . . . . 297
PACA . . . . . 298
PARTNERSHIPS - CA LAW. . . . . 299
PENDENT/SUPPLEMENTAL JURISDICTION . . . . . 300

PETITION PREPARERS . . . . . 301

POST-CONFIRMATION MATTERS . . . . . 303

POST-PETITION TRANSFERS - § 549 . . . . . 304

PREEMPTION . . . . . 307

PREFERENCES - § 547 . . . . . 309
1. Contemporaneous Exchange . . . . . 309
2. Dishonored Check . . . . . 310
3. Earmarking Doctrine . . . . . 311
4. Insolvent Debtor . . . . . 312
5. New Value . . . . . 312
6. 90 - Day . . . . . 313
7. § 547 (b)(5) . . . . . 313
8. § 547(c) . . . . . 314
9. § 547(c)(1) . . . . . 314
10. § 547(c)(2) and Ordinary Course of Business . . . . . 314
11. § 547(c)(3) . . . . . 317
12. § 547(c)(4) . . . . . 317
13. § 547(e)(1)(A) . . . . . 317
14. § 550. . . . . 317
15. Cal. CCP § 488.500 . . . . . 317
16. Miscellaneous . . . . . 318

PRELIMINARY INJUNCTION . . . . . 323

PRETRIALS . . . . . 325

PRIORITY CLAIMS . . . . . 326

PRIVILEGE–California law . . . . . 329

PROPERTY OF THE ESTATE . . . . . 330
1. Constructive Trust . . . . . 330
2. 11 U.S.C. §541(c)(2) . . . . . 331
3. § 541(a) . . . . . 332
4. § 541(a)(6) . . . . . 333
5. § 541(a)(7) . . . . . 333
6. § 362. . . . . 333
7. § 363. . . . . 333

8. Taxes . . . . . 334
9. Other Trusts - Also see separate Trust section. . . . . 334
10. Letters of Credit . . . . . 337
11. Misc . . . . . 337

PROPERTY, REAL and PERSONAL - California Law . . . . . 342

REAFFIRMATION . . . . . 344

REBUTTAL v. IMPEACHMENT . . . . . 346

RECLAMATION . . . . . 347

RECUSAL . . . . . 348

REMEDIES. . . . . 350

REMOVAL & REMAND . . . . . 351

RE-OPENING CASE - Sec. 350(b) . . . . . 353

ROOKER-FELDMAN AND BARTON DOCTRINES . . . . . 355

RULE 4 & 7004 - SERVICE OF PROCESS . . . . . 358

IRS . . . . . 362

RULE 8 . . . . . 363

RULE 9(b). . . . . 363

RULE 11 and other SANCTIONS . . . . . 363

RULE 12 . . . . . 370

RULE 13–COUNTERCLAIM AND CROSS-CLAIM . . . . . 372

RULE 15 . . . . . 372

RULE 17 . . . . . 374

RULE 19 - INDISPENSABLE PARTY . . . . . 375

RULE 20 . . . . . 375
RULE 24 – INTERVENTION . . . . . 375
RULE 36 . . . . . 376
RULE 37 . . . . . 376
RULE 41 . . . . . 377
RULE 50 . . . . . 378
RULE 52 . . . . . 379
RULE 54 . . . . . 379
RULE 55 . . . . . 381
RULE 56 - SUMMARY JUDGMENT. . . . . 383
RULE 58- B.R. 9021. . . . . 386
RULE 59 . . . . . 386
RULE 60(b). . . . . 389
RULE 62 - B.R. 9024 -Motion for Stay Pending Appeal . . . . . 394
RULE 68 . . . . . 395
BANKRUPTCY RULE 1009(a). . . . . 396
BANKR. RULE 3008 . . . . . 396
BANKR. RULE 7001 . . . . . 396
BANKR. RULE 7054(b). . . . . 396
BANKR. RULE 9006 . . . . . 397
BANKR. RULE 9010 . . . . . 397
BANKR. RULE 9014 . . . . . 397

SANCTIONS . . . . . 399

SEALING DOCUMENTS . . . . . 401

SECTION 105(a)--Equitable powers of the Bankruptcy Court . . . . . 402

SECURED TRANSACTIONS . . . . . 403
1. Article 9 . . . . . 403
1a. Assignment . . . . . 404
2. 9-105 . . . . . 404
2a. 9-109 . . . . . 405
3. 9-201 . . . . . 405
4. 9-203 . . . . . 405
5. 9-504(3) . . . . . 405
6. CCP § 726 . . . . . 406
7. CCP § 780 . . . . . 407
8. CCP § 1717 . . . . . 407
9. Michigan Law . . . . . 407
10. Perfection of Security Interest . . . . . 407
11. § 506. . . . . 409
12. § 506(a) . . . . . 410
13. § 506(b) (see also attorney fees, supra) . . . . . 410
14. § 506(c) . . . . . 410
15. § 552(b) . . . . . 411
16. 35 U.S.C. § 261 . . . . . 412
17. Washington Law . . . . . 412
18. Tracing of proceeds . . . . . 413
19. § 325 (hanging paragraph) . . . . . 413
20. Ipso facto clauses–enforceability . . . . . 413
21. Misc . . . . . 414

SETOFF & RECOUPMENT . . . . . 418

SEVERANCE PAY . . . . . 422

SOVEREIGN IMMUNITY--STATE AND FEDERAL . . . . . 423

STANDING, MOOTNESS AND RIPENESS . . . . . 427

STARE DECISIS . . . . . 432

STATUTE OF FRAUDS . . . . . 434

STATUTE OF LIMITATIONS . . . . . 435
State Law. . . . . 435
§§ 546, 108, 549(d), etc. . . . . 435

STATUTORY LIENS - §545 . . . . . 438

STATUTORY CONSTRUCTION . . . . . 439

SUBORDINATION OF CLAIMS-- § 510(b). . . . . 440

SUBROGATION . . . . . 442

SUBSTANTIAL CONTRIBUTION. . . . . 443

SUBSTANTIVE CONSOLIDATION . . . . . 444

SURETY . . . . . 445

TAX . . . . . 446
1. Cal. Rev. & Tax Code § 6051 . . . . . 447
2. Cal. Rev. & Tax Code § 6829 . . . . . 447
3. Cal. Rev. & Tax Code § 18590 . . . . . 447
4. Ch 11 . . . . . 447
5. Ch 7 . . . . . 448
6. Ch 12 . . . . . 448
7. Ch 13 . . . . . 448
8. ERISA Pension . . . . . 449
9. Excise Tax . . . . . 450
10. § 362(b)(4) . . . . . 451
11. § 362(h) . . . . . 451
12. § 503(10)(1)(B)(I) . . . . . 451
13. § 505. . . . . 451
14. § 506. . . . . 451
15. § 507(a)(7) . . . . . 452
16. § 523(a)(1) . . . . . 452
17. § 523(a)(7) . . . . . 453
18. § 724(b) . . . . . 453
19. § 4971(a) of the IRC . . . . . 454
20. Trustee . . . . . 454
21. Trust Fund . . . . . 455
22. 26 U.S.C. § 6321 . . . . . 455
23. 26 U.S.C. § 7421(a) . . . . . 456

24. 26 U.S.C. § 6323(f) . . . . . 456
25. 26 U.S.C. § 6502 . . . . . 456
26. 26 U.S.C.§ 6672(a) . . . . . 456
27. Misc . . . . . 457

TELEPHONE APPEARANCE . . . . . 460

TORTS- CALIFORNIA LAW . . . . . 461

TRUSTEES. . . . . 462

TRUSTS . . . . . 464

TURNOVER. . . . . 468

USE SALE OR LEASE OF PROPERTY - § 363 . . . . . 469

USURY. . . . . 474

VALUATION/LIENSTRIPS/LIEN MODIFICATION . . . . . 475

VENUE. . . . . 477

VEXATIOUS LITIGANT . . . . . 478

WAIVER. . . . . 480

**ABANDONMENT**

In re Pena, 974 F.3d. 934 (9th Cir. 2020)

Chapter 7 trustee's abandonment of real property does not include abandonment of rents collected by the Chapter 7 trustee.

In re Stevens, 617 B.R.328 (9th Cir. B.A.P. 2020)

Under § 554(b), technical abandonment of a state court lawsuit requires inclusion of the lawsuit as property of the estate in the debtor's schedules, and simply listing the lawsuit on the statement of financial affairs is insufficient.

Catalano v. CIR, 279 F.3d 682 (9th Cir. 2002)

An order lifting or modifying the automatic stay by itself does not constitute a *de facto* abandonment of the property of the estate. Procedures under § 554 must be followed before property is legally abandoned.

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)

Listing of prepetition "songrights" in a value of "unknown" "was not so defective that it would forestall a proper investigation of the asset." Accordingly, the right to post-petition royalties from these assets vested in the debtor upon confirmation of his chapter 11 plan. Unpaid prepetition royalties did not vest in the debtor, because they were subject to a separate listing requirement as causes of action.

In re Adair, 253 B.R. 85 (9th Cir. B.A.P. 2000)

Debtor had no ongoing duty to provide trustee with updated information regarding properly disclosed estate assets. (Case had been closed for 3 years).

In re DeVore, 223 B.R. 193 (9th Cir. B.A.P. 1998)

Order reopening case and withdrawing no-asset report does not negate a technical abandonment.

In re Johnston, 49 F.3d 538 (9th Cir. 1995)

Tax consequences to debtor are irrelevant in determination to abandon.

In re Pace, 159 B.R. 890 (9th Cir. B.A.P. 1993), *aff'd in part, vacated in part*, 56 F.3d 1170 (9th Cir. 1995), *op amended and superseded on denial of rehearing* 67 F.3d 187 (9th Cir. 1995), *aff'd in part, vacated in part,* 67 F.3d 187 (9th Cir. 1995)

Unscheduled assets are neither abandoned nor administered under 554(d).

In re Pace, 146 B.R. 562 (9th Cir. B.A.P. 1992)

Abandonment of a promissory note does not equal abandonment of a malpractice action.

In re Pauline, 119 B.R. 727 (9th Cir. B.A.P. 1990)

(abandonment prevents trustee's property-churning conduct)

In re Berg, 45 B.R. 899, 903 (9th Cir. B.A.P. 1984)
(when abandonment occurs)

**ABSTENTION - §§ 305 AND 1334(c)**

In re Lacher, __B.R.__ (9th Cir. B.A.P. 2025)

A State is not immune under the 11th Amendment from proceedings addressing discrimination by the State under § 525(a), and the Younger Doctrine does not apply to protect the state when a debtor seeks to enforce the discharge against the State. The Doctrine does not apply to actions that Congress has expressly authorized or when the injunction is necessary for the federal court to enforce its own jurisdiction or enforce its own judgments.

In re Macke Intern. Trade, Inc., 370 B.R. 236 (9th Cir. BAP 2007)

Bankruptcy court may award attorney fees to a debtor where case is dismissed pursuant to § 305(a), even if debtor meets all of the requirements for an involuntary under § 303. Case was properly dismissed under § 305, where debtor had done an assignment for the benefit of creditors six months before the involuntary was filed, and the petitioning creditor was the only creditor not to consent to the assignment.

In re Franceschi, 268 B.R. 219 (9th Cir. B.A.P. 2001), *aff'd*, 43 Fed.Appx. 87 (9th Cir. 2002)- NO LONGER GOOD LAW - SEE In re Lacher, __.B.R.__ (9th Cir. 2025).

Action for declaratory and injunctive relief properly dismissed on sovereign immunity grounds as to state bar, and on Younger abstention grounds as to the state bar's chief trial counsel. In order to abstain under Younger, the court must find that state proceedings :

1. are ongoing;
2. implicate important state interests; and
3. provide the plaintiff an adequate opportunity to litigate federal claims.

Security Farms v. International Brotherhood of Teamsters, 124 F.3d 999, 1009-10 (9th Cir. 1997)

District court's denial of abstention treated as a decision not to remand, since after the removal of the proceeding to federal court, the state court action was extinguished. "Section 1334(c) abstention should be read in pari materia with section 1452(b) remand, so that the former applies only in cases in which there is a related proceeding that either permits abstention in the interests of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2)."

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

Remand order based on abstention not appealable

In re Conejo Enterprises, Inc., 71 F.3d 1460 (9th Cir. 1995) (see also "automatic stay")
Opinion Withdrawn by In re Conejo Enterprises, Inc., 78 F.3d 1456 (9th Cir. 1996), AND
Opinion Superseded by In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

1) Court has jurisdiction to review mandatory abstention issue, notwithstanding pre-1994 statute to contrary.

2) Mandatory abstention not approved because after requesting mandatory abstention, creditor filed a claim making action core.

1334(c)(2)In order for mandatory abstention to apply, a proceeding must:

(1) be based on a state law claim or cause of action;
(2) lack a federal jurisdictional basis absent bankruptcy;
(3) be commenced in a state forum of appropriate jurisdiction;
(4) be capable of timely adjudication; and
(5) be a non-core proceeding.

In re Conejo Enterprises, Inc., 71 F.3d 1460, 1464 (9th Cir. 1995); see also In re Kold Kist Brands, Inc., 158 B.R. 175, 178 (C.D. Cal. 1993); In re World Solar Corporation., 81 B.R. 603, 606 (S.D. Cal. 1988); In re Baldwin Park Inn Assoc., 144 B.R. 475 (C.D. Cal. 1992).

In re Eastman, 188 B.R. 621 (9th Cir. B.A.P. 1995)

Dismissing a chapter 7 case under the more restrictive provisions of 305 (and not 707) requires a factual finding that *both* the debtor and creditors would be 'better served' by a dismissal.

**§ 305 abstention**

In re Davis, 177 B.R. 907 (9th Cir. B.A.P. 1995)

Court improperly abstained where it failed to consider economy, convenience, fairness and comity.

In re Eastport Associates, 935 F.2d 1071 (9th Cir. 1991)

Rehearing denied and opinion amended, July 31, 1991.

In re Tucson Estates, Inc., 912 F.2d 1162 (9th Cir. 1990)

Bankruptcy court abstention warranted for resolution of related state court case.

(note: holding limited by *In re Conejo*) Also discusses discretionary abstention under 1334(c)(1).

**ADEQUATE PROTECTION - §361 - B.R. 4001**

In re Sunnymead Shopping Center, 178 B.R. 809 (9th Cir. B.A.P. 1995)

Acceptance of a/p payments does not violate 'one action' rule**.**

In re Deico Electronics, 139 B.R. 945 (9th Cir. B.A.P. 1992)

No strict rules apply to amount, frequency or commencement of adequate protection payments.

**ADEQUATE ASSURANCE - § 366**

In re Crystal Cathedral Ministries, 454 B.R. 124 (C.D. Cal. 2011)

Utilities cannot unilaterally define "adequate assurance" under § 366.

**ADMINISTRATIVE EXPENSE - §503**

In re Cook Inlet Energy LLC, 583 B.R. 494 (9th Cir. B.A.P. 2018)

The terms of a rejected prepetition employment contract are not presumptive on the value of the postpetition services rendered before rejection, and do not create a burden shift. Case also provides a good explanation of burden shifting in objections to proof of claims.

In re Imperial Credit Industries, Inc., 527 F.3d 959 (9th Cir. 2008)

A chapter 7 debtor's obligation on a claim arising from a capital maintenance agreement with the FDIC under § 365(o) is not entitled to administrative expense priority, where it is specifically provided for under § 507(a)(9).

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Hashim, 379 B.R. 912, 914 (9th Cir. B.A.P. 2007)

"If a court does not authorize a creditor under 11 U.S.C. § 503(b)(3) to recover, for the benefit of the estate, property that was transferred or concealed by the debtor, the Federal Rules of Civil Procedure 17(a) and 19(a) require that the court realign as plaintiff a bankruptcy trustee who is a defendant."

In re Brown & Cole Stores, LLC, 375 B.R. 873 (9th Cir. B.A.P. 2007)

Secured creditors are entitled to the administrative expense priority allowed by § 503(b)(9). Because such claims arise prepetition, they may be subject to setoff under § 553(a) if all of the requirement of the statute are met.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Metro Fulfillment, Inc., 294 B.R. 306 (9th Cir. B.A.P. 2003)

Penalty wages under Cal. Labor Code §§ 203 and 203.1 that arose out of postpetition work were entitled to an administrative expense priority.

In re BCE West, L.P., 319 F.3d 1166 (9th Cir. 2003)

An alleged breach of contract for failure to seek a non-disturbance agreement which ultimately resulted in alleged post-petition damages, is a breach of contract that arose pre-petition,

and thus is not entitled to an administrative priority.

In re Microage, Inc., 291 B.R.503 (9th Cir. B.A.P. 2002)

§ 502(d) may be used to bar payment of administrative claims (such as the reclamation claim in this case), but not after the administrative claim has been allowed.

In re LPM Corp., 300 F.3d 1134 (9th Cir. 2002)

Post-petition rent claims do not have super-priority over other chapter 11 administrative claims or chapter 7 administrative claims.

In re Kadjevich, 220 F.3d 1016 (9th Cir. 2000)

Creditor's claim for attorney fees arising from a prepetition fraud action and postpetition loan costs were not entitled to administrative expense priority.

In re San Rafael Baking Co., 219 B.R. 860 (9th Cir. B.A.P. 1998)

Bankruptcy court may not award administrative priority payments to employee trust fund for period after expiration of debtor's collective bargaining agreement

In re Abercrombie, 139 F.3d 755 (9th Cir. 1998)

Under chapter 11, claim for attorneys' fees based on post-petition judgment arising from pre-petition contract does not qualify for priority as "administrative expense."

In re Santa Monica Beach Hotel, Ltd., 209 B.R. 722 (9th Cir. B.A.P. 1997)

Postpetition contract must be construed to include all reasonable compensation to claimant provided under pre-petition contract.

In re Endy, 104 F.3d 1154 (9th Cir. 1997)

Postconversion UST fees and Chapter 7 adm expenses prorated and have priority over Chapter 11 expenses when assets insufficient to pay all three.

In re Allen Care Centers, 96 F.3d 1328 (9th Cir. 1996)

State's costs in closing down nursing home not entitled to adm priority in absence of actual benefit to estate. *Reading* and *Midlantic* distinguished.

Irmas Family Trust v. Madden (In re Joseph E.Madden), 185 B.R. 815 ( 9th Cir. 1995)

Despite lack of benefit to estate, where debtor-in-possession continued pre-filing Breach of contract litigation against a defendant, the successful defendant was entitled to an administrative priority for the portion of the attorney's fees incurred post-petition pursuant to attorneys' fee clause in contract.

In re Dak Industries, 66 F.3d 1091 (9th Cir. 1995)

Executory contract as in nature of a lump sum sale of software rather than a grant of permission to use intellectual property as such was a prepetition debt not entitled to administrative

priority.

In re Sierra Pacific Broadcasters, 185 B.R. 575 (9th Cir. B.A.P. 1995)

Post-petition injury and post-petition worker's compensation claim is administrative priority - no showing of benefit to estate necessary.

In re World Sales, Inc. 183 B.R. 872 (9th Cir. B.A.P. 1995)

Where contributions to hsw fund required on a monthly basis, contract governs in determining administrative expense priority, even though employees only worked 18 of 31 days of the month, after which time business shut down

Carpenters Health & Welfare Trust Funds (In re Rufener Constr. Inc.), 53 F.3d 1064 (9th Cir. 1995)

Section 1113 limiting the power of a debtor to unilaterally terminate or modify terms of a collective bargaining agreement applies only in chapter 11 cases and not to chapter 7 cases. Therefore the unpaid contributions were not entitled to administrative expense status.

In re Pacific-Atlantic Trading Co., 27 F.3d 401 (9th Cir. 1994)

Rent accrued on nonresidential lease postpetition and pre-rejection gives rise to an administrative claim for the full amount of the rent accrued, regardless of the actual value conferred by the lease.

In re Palau Corporation., 139 B.R. 942 (9th Cir. B.A.P. 1992), *aff'd*, 18 F.3d 746 (9th Cir. 1994)

Award for postpetition wages not entitled to administrative expenses - estate received no benefit

In re Carolina Triangle Ltd. Partnership, 166 B.R. 411, 415 (9th Cir. B.A.P. 1994)

Post-petition real property taxes are not administrative expense under 503(b)(1)(B) if Trustee abandons the property. The property taxes created in rem liability against the property but not in personam liability against the estate, and as such, the property taxes were incurred by the property, not by the estate

In re Hooker Investment, Inc., 145 B.R. 138 (Bankr. S.D.N.Y. 1992)

Golden parachute not entitled to administrative expense priority

*see also* In re Selectors, Inc. 85 B.R. 843 (9th Cir. B.A.P. 1988)

In re Texscan, 107 B.R. 227 (9th Cir. B.A.P. 1989), *aff'd*, 976 F.2d 1269 (9th Cir. 1992)

fn. 4 - ins. carrier claims based on employees' post-petition injuries are adm

In re Glasply Marine Industries, Inc., 971 F.2d 391 (9th Cir. 1992)

In re Riverside-Linden Investment Co., 945 F.2d 320 (9th Cir. 1991)

Chapter 7 case - interest on attorney fee claim accrued from date fees awarded by bankruptcy court not from date fees invoiced

In re D. Papagni Fruit Company, 132 B.R. 42 (Bankr. E.D. Cal. 1991)
Under Cal. Law, property taxes are in rem.

In re Johnson, 901 F.2d 513 (6th Cir. 1990)
60 day bar date for filing of claims in a Chapter. 7 conversion from Chapter 11 to Chapter 7 applies to administrative expenses from Chapter 11.

In re MacNeil, 907 F.2d 903 (9th Cir. 1990)
Absent factual determination whether certain secured creditors entitled to 11 U.S.C. § 507(b) superpriority, unempowered advisory opinion rendered

In re Mark Anthony Const. Inc., 886 F.2d 1101 (9th Cir. 1989)
Interest on post-petition taxes = 503(b) priority.

In re Blumer, 95 Bankr 143 (9th Cir. B.A.P. 1988) *aff'd*, 826 F.2d 1069 (9th Cir. 1987)
Goods supplied in ordinary course of business.

In re Dant & Russell, Inc. 853 F.2d 700 (9th Cir. 1988) - complete review of subject

In re Thompson, 788 F.2d 560, 563 (9th Cir. 1986)
Starting point is terms of the lease, but "reasonable value of the use to the debtor" is the standard.

In re Spruill, 78 B.R. 766 (Bankr. E.D.N.C. 1987)
Where Trustee opposed a relief from stay motion before abandoning the property, lender was injured as consequence;(thus, in equity, property taxes could be treated as administrative expense).

In re Verco Industries, 20 B.R.664 (9th Cir. B.A.P. 1982)
Timing of payment of administrative claims is within the discretion of the court

In re Western Farmers Ass'n, 13 B.R. 132 (Bankr. W.D. Wash. 1981)
When remaining administrative claims will not be paid in full, attorney fees should not be paid ahead of reclamation creditors.
.....Allowed Under
(1) 506(b)
(2) 362(h)
however, *Westside Printworks* held that attorney fees are allowed under 365(b)(1)(B), although JN is not sure this holding is right

**AGENCY**

In re Wingo, 89 B.R. 54 (9th Cir. B.A.P. 1988)

Buyer of property from a title co. is not necessarily charged with knowledge possessed by title co re filing of bankruptcy.

**ALTER EGO**

Kasolas v. Aurora Capital Advisors (In re Robert S. Brower, Sr.), unpublished 9th Cir. Decision filed on June 4, 2024

Under the alter ego doctrine, a court may attribute liability to individual shareholders for the actions of the corporation. But California courts do not allow third-party creditors to pierce the corporate wall and reach corporate assets to satisfy a shareholder's personal liabilities. But see Curci Invs., LLC v. Baldwin, 14 Cal.App. 5th 214 (2017): recognizing the availability of "outside reverse veil piercing" but only in the context of LLCs and not corporations.

In re R.S. Air, LLC, 651 B.R. 538 (9th Cir. B.A.P. 2023)

Discharge injunction does not protect a debtor's alter ego.

In re Audre, Inc., 216 B.R. 19 (9th Cir. B.A.P. 1997)

It is generally held that the separate corporate existence of a subsidiary will be recognized absent illegitimate purposes unless (a) the business transactions, property, employees, bank and other accounts and records of the corporation are intermingled, (b) the formalities of separate corporate procedures for each corporation are not observed, (c) the corporation is inadequately financed as a separate unit from the point of view of meeting its normal obligations; (d) the respective enterprises are not held out to the public as separate enterprises; and (e) the policies of the corporation are not directed to its own interest primarily, but rather to those of the other corporation. H. Henn and J. Alexander, Laws of Corporations § 148 at 355-56 (3rd ed. 1983).

In re Folks, 211 B.R. 378, (9th Cir. B.A.P. 1997)

Purported creditor did not have standing to assert alter ego claim.

International Brotherhood of Elec. Workers, Local Union No. 332, AFL-CIO v. Hyland Wilson Elec. Contractors, Inc., 881 F.2d 820, (9th Cir.1989)

Factors for disregarding corporation entity in 9301(a) cases.

Firstmark Capital Corporation. v Hempel Financial Corporation, 859 F.2d 92 (9th Cir. 1988)

Wife cannot be liable for husband's and corporation's wrongdoing. Readers of this case should also review the "Dischargeablity" cases which discuss the dischargeability aspect of this.

Ahcon Ltd. v. Smeding, 623 F.3d 1248 (9th Cir. 2010)

9th Circuit held that there is no such thing as a "general alter-ego claim," and, accordingly, a trustee did not have standing to pursue general alter-ego claim.

In re Schaefers, 623 B.R. 777 (9th Cir. B.A.P. 2020)

Alter ego principles did not apply to allow debtor to exempt assets held by LLC.

In re Schwarzkopf, 626 f.3d 1032 (9th Cir. 2010).

Under California law, equitable ownership in a trust may be sufficient to meet ownership

requirement for purposes of alter-ego liability. Alter-ego liability requires (1) there is such a unity of interest and ownership that the separation between individual and corporation ends, and (2) adherence to the fiction of the corp's separate existence sanctions a fraud or promotes injustice.

**APPEALS**

Fantasia v. Diodato, __F.4th__ (9th Cir. 2025)

An order granting or denying stay relief is a final appealable order under 28 U.S.C. section 158(a)(1). This includes order reimposing the automatic stay arising from a rule 60(b) motion.

In re East Coast Foods, Inc., 66 F.4th 1214 (9th Cir. 2023)

Explains that appellate court requires Article III standing (not just prudential standing) to hear a bankruptcy appeal.

In re Mayer, 28 F.4th 67 (9th Cir. 2022)

Order denying stay relief motion is immediately appealable when it conclusively resolves the movant's entitlement to the requested relief, even when order is denied without prejudice.

Ocwen Loan Servicing v. Marino (In re Marino), 949 F.3d 483 (9th Cir. 2020)

Four part test to determine if 9th Circuit has jurisdiction over an appeal from a BAP decision that remands to the Bankruptcy Court. Also discusses possibility of appellant to obtain fees for appellate work. Section 105 does not provide a basis for such fees.

In re Liu, 611 B.R. 864 (B.A.P. 9th Cir. 2020)

Denial of a motion to dismiss under Bankruptcy Code section 109(g) is a final order for purposes of appeal. Case thoroughly analyzes finality caselaw. See also In re Linton 631 B.R 882 (9th Cir. B.A.P. 2021) for good explanation of when an order is appealable.

Reid and Hellyer v. Laski, 896 F.3d 1109 (9th Cir. 2018)

Appealing counsel were deemed to have waived opposition to the settlement by not filing an objection on their firms' behalf and by limiting their appearance on behalf of their respective clients.

Cobb v. City of Stockton, 909 F.3d 1256 (9th Cir. 2018)

Equitable mootness of appeal analysis. See also Blixseth v. Credit Suisse, 961 F.3d 1074.

In re Wilkins, 587 B.R. 97 (B.A.P. 9th Cir. 2018)

14 day deadline in Rule 8002(a) is a mandatory and jurisdictional deadline.

In re Bugliuzza, 852 F.3d 884 (9th Cir. 2017)

Ninth Circuit is authorized to review a district court decision when the district court's decision is final, which requires that the decision "end a case or a discrete dispute." See also In re Watt, 867 F.3d 1155 (9th Cir. 2017).

In re Point Center Financial, Inc., 890 F.3d. 1188 (9th Cir. 2018)

Appellant has standing to appeal bankruptcy court order even though appellant did not object to the underlying motion heard by the bankruptcy court. Appellant need only be a "person

aggrieved," that is, someone who is directly and adversely affected pecuniarily by the bankruptcy court order.

Bullard v. Blue Hills Bank, 575U.S. 496, 135 S.Ct. 1686 (2015)

Order denying confirmation of a Chapter 13 plan is not a final order that a debtor can immediately appeal, if order allows debtor to file another plan.

In re Transwest Resort Properties, Inc., 791 F.3d. 1140 (9th Cir. 2015)

Lender's objections and appeal are not equitably moot, even if Chapter 11 plan has been substantially consummated, if it is possible to devise an equitable remedy that will not burden innocent third parties.

In re Giesbrecht, 429 B.R. 682, 688 (9th Cir. B.A.P. 2010)

Debtors were not required to seek leave to appeal upon denial of confirmation of their first chapter 13 plan. "Here, the interlocutory Order Denying Confirmation merged into the court's final confirmation order, and is sufficient to support appellate jurisdiction of the earlier interlocutory order."

In re Bender, 586 F.3d 1159 (9th Cir. 2009)

Court of Appeals lacked jurisdiction over an appeal under 28 U.S.C. § 158(d)(1), where the B.A.P. had affirmed a finding that a statute of limitations was equitably tolled, but remanded a summary judgment in favor of the trustee on the merits of the avoiding action.

In re City of Vallejo, 408 B.R. 280 (9th Cir. B.A.P. 2009)

Banks did not meet "person aggrieved" test for appellate standing, since the order appealed from did not adversely affect their pecuniary interests, diminish their property, increase their burdens, or impair their rights.

In re Gould, 401 B.R. 415, 421 (9th Cir. B.A.P. 2009)

Appeal was not moot, where even if the debtor had spent a tax refund that the IRS should have been allowed to set off against, the court could still order the money returned.

In re Rosson, 545 F.3d 764, 769 (9th Cir. 2008)

An order converting a chapter 13 case to chapter 7 is final and appealable.

In re Cellular 101, Inc., 539 F.3d 1150 (9th Cir. 2008)

A party's failure to timely inform the court of appeals of a settlement that it believes disposes of a pending appeal precludes the party from asserting the affirmative defense of settlement and release in a later proceeding.

In re Frye, 389 B.R. 87, 88 (9th Cir. B.A.P. 2008)

B.A.P. did not have jurisdiction over a petition to certify a direct appeal under 28 U.S.C. § 158(d)(2). Pursuant to Federal Rules of Bankruptcy Procedure 8007(b), "[t]he receipt by the

appellate court of a copy of the notice of appeal and the assignment of a docket number does *not*, in bankruptcy appeals, constitute "docketing the appeal." That only occurs after notification that the record on appeal is complete.

In re Stasz, 387 B.R. 271 (9th Cir. B.A.P. 2008)

Contempt order was a final order, since it completely resolved a contested matter.

In re Hupp, 383 B.R. 476 (9th Cir. B.A.P. 2008)

Under Federal Rules of Bankruptcy Procedure 8001(e), an election to take an appeal to the district court may not include anything other than the election.

In re Ransom, 380 B.R. 809 (9th Cir. B.A.P. 2007)

B.A.P. allows a direct appeal to the court of appeals, even though B.A.P. issued a decision on debtor's appeal, where that decision was interlocutory and all of the requirements of 28 U.S.C. § 158(d)(2)(A) were met.

Suter v. Goedert, 504 F.3d 982 (9th Cir. 2007)

Motion for stay pending appeal was not mooted by state supreme court's dismissal of an appeal in the underlying suit.

In re Brown, 484 F.3d 1116 (9th Cir. 2007)

Minute order that reserved issue of Rule 11 sanctions for later disposition was not a final, appealable order.

In re Berman, 344 B.R. 612 (9th Cir. B.A.P. 2006)

Direct appeals provisions of B.A.P.CPA do not apply to appeals arising from bankruptcy cases filed before B.A.P.CPA's effective date.

In re Thomas, 428 F.3d 1266 (9th Cir. 2005)

"Rule 8002(b) requires an amended notice of appeal when the bankruptcy court's ruling on a postjudgment motion alters the judgment and the appellant wishes to challenge that alteration."

In re Rains, 428 F.3d 893 (9th Cir. 2005)

Bankruptcy court had jurisdiction to enforce a settlement agreement, even though the validity of the settlement was on appeal.

In re Beachport Entertainment, 396 F.3d 1083 (9th Cir. 2005)

B.A.P. abused its discretion when it dismissed an appeal for failure to include a copy of the bankruptcy court's decision and the answer to the complaint in the appellate record.

In re Silberkraus, 336 F.3d 864 (9th Cir. 2003)

Bankruptcy court retained jurisdiction to publish its written findings of fact and conclusions of law if consistent with its oral findings.

In re Warrick, 278 B.R. 182 (9th Cir. B.A.P. 2002)

Delay of six days past the appeal deadline in moving for extension of time to file notice of appeal was not excuseable neglect, despite debtor's alleged lack of notice of order's entry.

In re Betacom of Phoenix, Inc., 250 B.R. 376 (9th Cir. B.A.P. 2000)

"In ruling on a motion for extension of time to file a notice of appeal under Rule 8002(c) that is filed within the initial ten-day period, a bankruptcy court must consider the following four factors:

1. whether the appellant is seeking the extension for a proper purpose;
2. the likelihood that the need for an extension will be met if the motion is granted;
3. the extent to which granting the extension would inconvenience the court and the appellee or unduly delay the administration of the bankruptcy case;
4. the extent to which the appellant would be harmed if the motion were denied."

In re Lam, 192 F.3d 1309 (9th Cir. 1999)

Bankruptcy creditor forfeits right to appeal from entry of default by not seeking relief in court where default was entered.

In re Arrowhead Estates Development Co, 42 F.3d 1306, (9th Cir. 1994), as amended March 23, 1995

Appellants' claims remanded for consideration on merits where notice of appeal filed after bankruptcy court's oral decision but before entry of formal order in docket

In re Delaney, 29 F.3d 516, 518 (9th Cir. 1994)

Parties have an affirmative duty to 'monitor the dockets to inform themselves of the entry of orders they may wish to appeal.'...In re Sweet Transfer & Storage, Inc. , 896 F.2d 1189, 1193 (9th Cir. 1990) (superseded by Rule as stated in In re Arrowhead Estates Development) lack of notice of an entry of an order is not a ground by itself to warrant finding an otherwise untimely appeal to be timely. See B.R. 9022, Zurich Ins. Co. v. Wheeler, 838 F.2d 338, 340 (9th Cir. 1988)**.**

In re Mouradick, 13 F.3d 326, 329 (9th Cir. 1994)

Order of bankruptcy court extending time to file notices of appeal before the 10 day limit in B.R. 8002(c) did not excuse appellant's failure to file notices of appeal within the time stated in the rule.

**APPOINTMENT OF PROFESSIONALS**

In re AFI Holding, Inc., 355 B.R. 139 (9th Cir. B.A.P. 2006), *aff'd and remanded,* 530 F.3d 832 (9th Cir. 2008)(for determination of removed trustee's right to fees).

Chapter 7 trustee had a material conflict of interest and thus was not disinterested as required by § 701(a)(1) where she previously represented insiders of the debtor. Totality of circumstances test applied. Failure to disclose all connections and appearance of impropriety also supported her removal from the case.

In re Tevis, 347 B.R. 679 (9th Cir. B.A.P. 2006)

Attorney for chapter 7 trustee who had a preliminary consultation with the debtors in the case had burden to show that there was no confidential information disclosed by the debtors that would create a conflict of interest under California law, and thus a material adverse interest precluding appointment under § 327.

In re Triple Star Welding, 324 B.R. 778 (9th Cir. B.A.P. 2005)

Chapter 11 debtor's attorney who failed to file a Rule 2014 statement of disinterestedness was not entitled to any fees absent full disclosure. The court had no discretion to waive this requirement. Furthermore, the court should have consider potential conflicts and receipt of a possible preference, which did not need to be addressed through an adversary proceeding.

In re Maximus Computers, Inc., 278 B.R. 189 (9th Cir. B.A.P. 2002)

Court erred in allowing creditor's counsel to represent the trustee, where firm failed to fully disclose its compensation arrangement with the creditor and whether the firm would continue to represent creditor. Firm might have been able to represent creditor in pursuing actions on behalf of the trustee under 503(b)(3)(B).

In re S.S. Retail Stores Corp., 216 F.3d 882 (9th Cir. 2000)

United States trustee originally objected to counsel for the debtor's appointment on the grounds that they were not disinterested, because one of their partners had been an assistant secretary of the debtor. The bankruptcy court found the firm to be qualified. That decision was affirmed by the bankruptcy appellate panel, but the appeal to the Ninth Circuit was dismissed as not from a final order. The firm thereafter received fees of over $200,000. Once the case was closed, the United States trustee appealed the final fee award on the grounds that the firm should not have been appointed. Held: Disgorgement would not be equitable, where the firm made full disclosure, engaged in no impropriety, and the United States trustee did not seek a stay of the order allowing its appointment.

In re Capitol Metals Co., Inc., 228 B.R. 724 (9th Cir. B.A.P. 1998)

Financial company may not serve as debtor's post-petition financial adviser after company's principal functioned as debtor's prepetition chief financial officer.

In re S.S. Retail Stores Corporation, 211 B.R. 699, 702 (9th Cir. B.A.P. 1997)

Attorney's disqualification from case because he was not disinterested was not attributable to his law firm.

In re Mehdipour, 202 B.R. 474 (9th Cir. Cir. B.A.P. 1996), *aff'd*, 139 F.3d 1303 (9th Cir. 1998)

Payment of broker's commission as administrative expense was defacto approval of broker's employment

In re Bibo, Inc., 76 F.3d 256 (9th Cir. Cir. 1996), *cert. denied sub nom.* Fukutomi v. U.S. Trustee, 117 S. Court. 69 (1996).

Bankruptcy court has authority to appoint Chapter 11 trustee sua sponte

In re Martech USA, Inc., 188 B.R. 847 (9th Cir. B.A.P. 1995), *aff'd*, 90 F.3d 408 (9th Cir. 1996)

The creditors in a bankruptcy case pending in Alaska elected Pardo, a New York resident, to serve as Chapter 7 trustee. Just prior to the election, Pardo entered into an oral, month-to-month lease of an office in Alaska. The lessor was Pardo's Alaska counsel. Pardo visited his Alaska office for the first time on the morning that he was elected.

The B.A.P. held that Pardo was ineligible to serve as trustee because he did not have an office in Alaska within the meaning of the bankruptcy code § 321(a)(1). In so holding the B.A.P. stated that a site which an individual rents for the sole purpose of allowing him an active role in one specific bankruptcy case is not to be considered that person's office under Bankruptcy Code § 321(a)(1).

In re Atkins, 69 F.3d 970, 975 (9th Cir. 1995)

Court may enter nunc pro tunc order without showing under all 9 *Crest Mirror* factors if there is a showing of exceptional circumstances: 1) satisfactorily explain failure, 2) demonstrate benefit to the estate in a significant manner.

In re Larson, 174 B.R. 797 (9th Cir. B.A.P. 1994)

Given emergency nature of services performed during pre-appointment period, the short time between commencement of services and court appointment, the small sum in question and the benefit of the services to the estate, the bankruptcy court neither abused its discretion nor committed clear error in finding the objection regarding retroactive billing to be without merit**.**

In re CIC Inv. Corporation., 175 B.R. 52 (9th Cir. B.A.P. 1994)

Attorney with prepetition claim against bankruptcy debtor absolutely barred from representing debtor as general counsel (In re Marro (1st Cir.) distinguished).

In re Occidental Financial Group, Inc., 40 F.3d 1059, 1062-63 (9th Cir. 1994)

Undisclosed representation of principals who were creditors in Chapter 11 required disgorgement of fees - no quantum meruit

In re Reimers, 972 F.2d 1127 (9th Cir. 1992)

Bankruptcy court only change terms of contingent fee agreement in the event of unforeseen circumstances that renders the agreement unreasonable.

In re Haley, 950 F.2d 588 (9th Cir. 1991)

Real estate broker not entitled to recover commission because court approval to act as Broker for sale of debtors' property had not been obtained**.**

In re Downtown Inv. Club III, 89 B.R. 59 (9th Cir. B.A.P. 1988)

Representation of general partner and debtor equals a conflict of interest under the facts.

In re Downtown Investment Club III, 89 B.R. 59, 63 (9th Cir. B.A.P. 1988)

" a nunc pro tunc order is improperly sought when the employment, due to an attorney's mere negligence or inadvertence, has not yet been court approved. Allowing a judge to limit nunc pro tunc orders to extraordinary circumstances will deter attorneys from general nonobservance of §327. " But excusable or explained negligence may justify nunc pro tunc.

In re Crest Mirror & Door Co., Inc., 57 B.R. 830 (9th Cir. B.A.P. 1986)

9 part test

**ARBITRATION**

In re Gurga, 176 B.R. 196 (9th Cir. B.A.P. 1994)

Bankruptcy court must enforce agreement to arbitrate a claim that is non-core**.**

In re Eber, 687 F.3d 1127, 2012 WL 2690744 (9th Cir. 2012)

Bankruptcy Court did not abuse discretion denying motion to compel arbitration of a fraud claim that fell within § 523(a)(2).

In re Thorpe Insulation, 671 F.3d 1011 (9th Cir. 2012)

Bankruptcy Court may deny motion to compel arbitration if arbitration conflicts with underlying purposes of the Bankruptcy Code. Here, arbitration would have undermined purposes of § 524(g). Court noted that in non-core proceedings, court generally lacks discretion to deny enforcement of a valid pre-petition arbitration agreement

**ASSIGNMENT OF RENTS**

In re Scottsdale Medical Pavilion. 52 F.3d 244 (9th Cir.1995), *aff'd.* 159 B.R. 295 (9th Cir. B.A.P. 1993)

(Az. law) because creditor properly perfected security interest in rents, prepetition rents constituted cash collateral.

In re Days California Riverside Ltd. Partnership, 27 F.3d 374 (9th Cir.1994)

Postpetition hotel revenues, encumbered by a prepetition trust deed and security interest are 'proceeds, product, offspring, rents or profits' under §552(b). A major premise of hotel financing is the stream of revenues. Hotel room charges are held to be 'rents' for security purposes and thus subject to the lender's prepetition lien. However, the net revenues, after allocation of expenses, derived form food and beverage service are not 'rents.' See also *In re San Francisco Drake Hotel Assocs*., 131 B.R. 156 (Bankr. N.D. Cal. 1991), *aff'd,* 147 B.R. 538 (N.D. Cal. 1992).

**ATTORNEY – Discipline; conflicts of interest; attorney/client relationship; fees.**
**Please note that the issue of attorneys fees may also be found in other sections.**

In re Gilsvik, __B.R.__ (9th Cir. B.A.P. 2025)

Good summary of how a bankruptcy court should evaluate the attorney's fees charged by a Chapter 7 debtor's counsel - the same rules that apply to estate professionals under § 330(a) apply to debtor's counsel. The bankruptcy court should consider the nature, extent, and value of the services rendered, taking account of all relevant factors, including the time spent on the services, the rates charged for the services, and the customary compensation of comparably skilled attorneys in other cases. The juydge may rely on their own knowledge of customary rates and their experience concerning reasonable and proper fees.

In re Antonia Andrade-Garcia, 635 B.R. 509 (9th Cir. B.A.P. 2021)

State laws which provide for attorney's fee awards are applicable in bankruptcy court litigation only to the extent they are connected to the substance of the claim being litigated and not dependent on the misconduct or improper purpose of the parties or attorneys.

In re Gilman, 603 B.R. 437 (9th Cir. B.A.P. 2019)

CCP § 685.080 two year deadline applies to attempt to recover attorney's fees in post state court judgment adversary proceedings and evidentiary hearings. Bankruptcy Code § 108© does not toll application of 685.080 to postpetition fees. See how case addresses Daff v. Good (In re Swintek), 906 F.3d 1100 (9th Cir. 2018).

In re Zito, 604 B.R. 388 (9th Cir. B.A.P. 2019)

Travelers decision supports unsecured creditor's right to assert a post-petition claim against the estate for attorney's fees if governing contract/state law permits such fees. As for fees in a non-dischargeability action, Cohen v. de la Cruz, 523 U.S. 213 applies, and it applies even to adversary proceedings under § 523(a)(3). The test: would the creditor be able to recover the fee outside of bankruptcy under state or federal law. The BAP raises an interesting issue regarding whether a fee award would be premature when the state court had not determined if the debtor is liable to the creditor.

In re Shannon, 553 B.R. 380 (9th Cir. B.A.P. 2016)

Suggests possibility that attorney's fees may be awarded in a § 523(a)2)(A) case because such a case may partially be "on the contract" under Washington law.

Baker Botts LLP v. Asarco, LLC, 135 S.Ct. 2158, 192 L.Ed. 2d 208 (2015)

A court may not award reasonable fees to counsel under § 330 for defending against objections to its fees.

Penrod v. AmeriCredit Financial Services, Inc. (In re Penrod), 802 F.3d 1084 (9th Cir. 2015)

Chapter 13 debtor who prevails in a contract dispute on the basis of federal bankruptcy law (in this case, seeking to bifurcate a secured car claim over an objection involving the hanging

paragraph in § 1325(a)(9)) may recover fees under California Civil Code § 1717. The Ninth Circuit provides a definition of when a claim is an "action on a contract." The Ninth Circuit held that this phrase should be liberally construed, and that an action is on a contract when a party seeks to enforce, or avoid enforcement of, the provisions of a contract. See also In re Bos, 818 F.3d 486 (9th Cir. 2016).

Hale v. United States Trustee, 509 F.3d 1139 (9th Cir. 2007)

Bankruptcy court did not abuse discretion in sanctioning counsel for repeatedly assisting pro se debtors without appearing as counsel and without performing critical and necessary services.

In re Lehtinen, 332 B.R. 404 (9th Cir. 2005)

Court's three month suspension of attorney for numerous acts of misconduct may have been warranted, but the court wrongly failed to consider mitigating and aggravating factors under the ABA standards as adopted in *In re Crayton*, infra.

In re Rindlisbacher, 225 B.R. 180 (9th Cir B.A.P. 1998)

Ethical and attorney-client obligations barred attorney from raising former client's undisclosed income as grounds for denial of client's discharge in bankruptcy.

In re Crayton, 192 B.R. 970 (9th Cir B.A.P. 1996) - disbarment

Permanent bar against bankruptcy practice in district reversed. Chapter. 11 bar left in place.

U.S. v. Blackman, 72 F.3d 1418 (9th Cir. 1995), *cert. denied*, 117 S. Court. 275 (1996)

1. Federal common law of attorney client privilege applies under FRE
2. General Rule: Client I.D. and nature of fee arrangement not protected

In re America West Airlines, 40 F.3d 1058 (9th Cir. 1994)

Under 28 U.S.C. 1654, corporations and partnerships must be represented by attorneys.

Admiral Ins. Co. v. U.S. District. Court for District. of Arizona, 881 F.2d 1486 (9th Cir. 1989) - attorney-client privilege

Elements of privilege - no unavailability exception

In re Glad, 98 B.R. 976 (9th Cir. B.A.P. 1989)

('what' constitutes the practice of law)

In re Edsall, 89 B.R. 772 (Bankr. N.D. Ind. 1988)

Attorney not permitted to withdraw from representing debtor in dischargeability action - failure to receive payment not grounds.

U.S. v. Summet, 862 F.2d 784 (9th Cir. 1988)

Censure of attorney for in-court misconduct.

Merle Norman Cosmetics, Inc. v. U.S. District. Court, Cent. District of California, 856 F.2d 98 8(9th Cir. 1988)

Disqualification - conflict of interest standard.

**AUTOMATIC STAY**

**1. § 362(a)–In General**
**2. § 362(a) and Abandonment**
**3. § 362(a)–Annulment**
**4. § 362(a)–Interplay with California Law**
**5. § 362(a)–Lawsuits, Unlawful Detainer actions, and Collection Efforts**
**6. § 362(a)– Reopening**
**7. § 362(a)–State Court Authority**
**8. § 362(b)–Exceptions**
**9. § 362(c)**
**10. § 362(d)**
**11. § 362(h)(the BAPCPA version)**
**12. § 362(k)**
**** For Standing, see "Standing" in the General Index.**

**1. § 362(a) - In general**

City of Chicago v. Fulton, 141 S.Ct. 585 (2021)

A creditor does not violate the stay under § 362(a)(3) by retaining vehicle seized pre-petition after owner files a Chapter 13. Holding vehicle is not an act exercising control. See interplay with § 542.

In re Stuart, __B.R.__ (9th Cir. B.A.P. 2021)

As a follow-up to Fulton, § 362(a)(3) does not require that a creditor dismiss a pre-petition garnishment action. Creditor allowed to maintain the status quo.

In re Perryman, 631 B.R. 899 (9th Cir. B..P. 2021)

Actions that don't disturb the status quo, like continuing status conferences in state court litigation, don't violate the automatic stay. Such conduct is not a "continuation of a judicial action" under § 362(a)(1).

In re Sorensen, 586 B.R. 327 (9th Cir. B.A.P. 2018)

Right to redeem pawned property is part of the bankruptcy estate, and pawnbroker must obtain stay relief to give the statutory notice to the debtor to terminate the loan and debtor's right to redeem the pawned property.

In re Zotow, 432 B.R. 252 (9th Cir. B.A.P. 2010)

Lender's postpetition notice to debtor and his attorney regarding an increase in their monthly escrow payments did not violate the automatic stay, where the document sent was solely informational, it was not accompanied my a payment coupon or envelope, and only one such notice was sent. Nor did the lender violate § 362(a)(6) by receiving postpetition payments from the trustee that were in part based on prepetition amounts owed, where it engaged in no act to

collect the payments.

In re Keller, May 26, 2017 (9th Cir. B.A.P. 2017)

Creditor's post-petition reporting of overdue or delinquent payments to a credit reporting agency is not a *per se* violation of § 362(a)(6).

In re Mwangi, 764 F.3d 1168 (9th Cir. 2014)

Wells Fargo exercised control over property of the estate in when it put an administrative hold on the debtors' accounts without asserting a right to setoff. The funds were exempted by the debtor. A Chapter 7 debtor, however, does not have standing to pursue a claim that the bank § 362(a)(3) because 1) before they revested in the debtor, the debtor did not have the right to posess or control them (only the Chapter 7 trustee did); and 2) after the funds revested in the debtor, they were no longer property of the estate, which is the focus of § 362(b)(3). See also In re Perry, 540 B.R. 710 (Bankr. C.D.Cal. 2015).

In re Palmdale Hills Property, LLC, 423 B.R. 655, 668 (9th Cir. B.A.P. 2009)

1. Raising equitable subordination as a defense to a stay relief motion by a lender which is also in bankruptcy did not violate the automatic stay in the lenders' case, since equitable subordination involves the debtor's equity in the property. However, the adjudication of an equitable subordination action which seeks affirmative relief would violate the lenders' stay. The lenders' protection under § 362 did not evaporate by filing a proof of claim in the borrower's case.

2. ". . .[W]hile the California bankruptcy court may have concurrent jurisdiction to determine the scope or applicability of the automatic stay, the New York bankruptcy court must have the final say as to whether the automatic stay applies to the bankruptcy case before it."

In re MILA, Inc., 423 B.R. 537 (9th Cir. B.A.P. 2010)

Regardless of whether D & O policy proceeds were property of the estate, the bankruptcy court did not abuse its discretion in lifting the automatic stay to allow the insurer to advance defense costs to the debtor's sole officer.

In re Blixseth, 452 B.R. 92 (B.A.P. 9th Cir. 2011)

Failure to file timely Statement of Intent terminates automatic stay as to all personal property securing a debt under §§ 521(a)(2)(C); 362(h)(1) and (2).

Boucher v. Shaw, 572 F.3d 1087 (9th Cir. 2009)

The automatic stay has no applicability to Fair Labor Standards Act claims against individual managers of the debtor. Such claims do not seek to reach property that has been pledged to the secure the debtor's debts, or that would otherwise impact property of the estate.

In re Kronemyer, 405 B.R. 915 (9th Cir. B.A.P. 2009)

Surety had standing to bring motion for relief from the automatic stay, even though it only had a contingent claim for contribution or reimbursement under § 502(e)(1).

In re Wardrobe, 559 F.3d 932, 937 (9th Cir. 2009)

". . .[A]n order granting limited relief from an automatic stay to allow a creditor to proceed to judgment in a pending state court action is effective only as to those claims actually pending in the state court at the time the order modifying the stay issues, or that were expressly brought to the attention of the bankruptcy court during the relief from stay proceedings."

In re Gould, 401 B.R. 415 (9th Cir. B.A.P. 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

Reusser v. Wachovia Bank, N.A. 525 F.3d 855, 861 (9th Cir. 2008)

". . .[A] final order lifting an automatic stay is binding as to the property or interest in question–the *res*– and its scope is not limited to the particular parties before the court. Thus, while Wachovia was the deed of trust holder, but Washington Mutual was the movant under § 362, the order lifting the stay applied to Wachovia, even though it wasn't mentioned in the order.

In re Johnson, 346 B.R. 190, 194 (9th Cir. B.A.P. 2006)

Bankruptcy court has jurisdiction to annul the stay and impose sanctions for its violation even after the case is dismissed.

In re Sewell, 345 B.R. 174, 182 (9th Cir. B.A.P. 2006)

"Debtors' case was reinstated and the automatic stay was reimposed as of the time the Reinstatement Order was docketed, not when it was signed. . . The bankruptcy court had discretion to determine when Debtors' case was reinstated and the automatic stay was reimposed." Foreclosure sale was allowed to stand, as it occurred between the time the case was dismissed and the reinstatement order was docketed.

In re Tippett, 338 B.R. 82 (9th Cir. B.A.P. 2006), *aff'd,* 542 F.3d 684 (9th Cir. 2008)

Debtor-initiated transfers are outside the scope of the automatic stay.

Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005)

District Court had jurisdiction to decide whether automatic stay applied to a proceeding pending before it.

40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 469 U.S. 2003)

Section 549(c) is not an exception to § 362. It is designed to protect purchasers from the debtor, whereas 362 is designed to protect the debtor.

In re Allen, 300 F.3d 1055 (9th Cir. 2002)

Chapter 11 plan which did not incorporate pre-confirmation § 362 stipulation and order

was properly confirmed, where stipulation did not recite that it would be binding on the debtor in a chapter 11 plan.

In re Canter, 299 F.3d 1150 n. 4 (9th Cir. 2002)

"Because the stay under § 362 is "automatic" and "self-executing" only upon filing of a bankruptcy petition, no authority exists for "reinstating" an automatic stay that has been lifted."

In re Mitchell, 279 B.R. 839 (9th Cir. B.A.P. 2002)

The bona fide purchaser defense of § 549 (c) to a trustee's action to avoid a postpetition transfer does not provide an exception to the automatic stay. Purchaser out of a foreclosure that occurred a day after bankruptcy filed violated § 362.

In re Bibo, Inc., 200 B.R. 348 (9th Cir. B.A.P. 1996), *opinion vacated*, 139 F.3d 659 (9th Cir. 1998)

Debtor's subordinate lien interest in property precluded senior lien holder from foreclosing on property - § 362.

In re Del Mission Limited, 98 F.3d 1147 (9th Cir. 1996)

State violated automatic stay by knowingly retaining disputed taxes after bankruptcy court ordered them repaid.

Citizens Bank of Maryland v. Strumpf, 116 S.Ct. 286 (1995)

Administrative hold is not a setoff, i.e., no violation of stay.

In re Ramirez, 183 B.R. 583 (9th Cir. B.A.P. 1995)

Property seized under pre-petition-bankruptcy judgment levy remains part of bankruptcy estate for purposes of automatic stay

1. Client files are property of attorney's estate
2. Stay applied even after completion of levy
3. Test for willful violation of stay
4. Damages measured from time files removed from office

Bigelow v. C.I.R., 65 F.3d 127 (9th Cir. 1995)

Tax court proceedings to resolve a disputed notice of deficiency and assertion of overpayment following a bankruptcy court order of discharge did not constitute an 'act against property of the bankruptcy estate' and did not violate the stay

Delpit v. Comm'r Internal Revenue Service, 18 F.3d 768 (9th Cir. 1994)

Stay applies to appeal from Tax court judgment regarding debtor' alleged tax deficiency.

Hillis Motors, Inc. v. Hawaii Auto. Dealer's Ass'n, 997 F.2d 581 (9th Cir. 1993)

Revocation of certificate of incorporation violated automatic stay even though it occurred post-confirmation.

In re Glasply Marine Industries, Inc., 971 F.2d 391 (9th Cir. 1992)

Postpetition real estate taxes are subject to the automatic stayIn re Schwartz, 954 F.2d 569 (9th Cir. 1992)

(IRS tax assessment and lien made in violation of 362 is void, not voidable.

In re Advanced Ribbons & Office Products v. U.S. Interstate Distrib., 125 B.R. 259 (9th Cir. B.A.P. 1991)

Foreclosure on stock of guarantor in debtor not a violation of 523(a)(6).

In re Abrams, 127 B.R. 239 (9th Cir. B.A.P. 1991)

Failure to return property after knowledge of bankruptcy is willful violation.

Globe Investment & Loan Co., Inc., 867 F. 2d 556 (9th Cir. 1989)

(1) Non-creditor mortgagee had no standing to assert stay violation

(2) stay does not provide protection to creditors

Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989)

(Rejecting *Piccinin*, i.e., unusual circumstances exception to general rule that 362 does not cover non-debtors.)

In re Teerlink Ranch Ltd., 886 F.2d 1233 (9th Cir. 1989)

(Stay n/a to court having jurisdiction over debtor)

In re Shamblin, 890 F.2d 123 (9th Cir. 1989)

(1) IRS tax sale in violation of stay is void, not voidable

(2) questionable whether stay could ever be annulled retroactively

In re Krueger , 88 Bankr 238 (9th Cir. B.A.P. 1988)

(Ch 13 case dismissed without due process, thus stay never lifted, thus foreclosure sale void.)

**2. § 362(a) and Abandonment**

Catalano v. CIR, 279 F.3d 682 (9th Cir. 2002)

An order lifting or modifying the automatic stay by itself does not constitute a *de facto* abandonment of the property of the estate. Procedures under § 554 must be followed before property is legally abandoned.

**3. § 362(a) - Annulment**

In re Merriman, 616 B.R. 381 (9th Cir. B.A.P. 2020)

Supreme Court *Acevedo* case does not apply to the automatic stay, since Congress expressly grants bankruptcy courts under § 392(d) the authority to annul the stay. Case also gives

a good analysis of legal standard for "cause" to lift the stay.

In re Fjeldsted, 293 B.R.12 (9th Cir. B.A.P. 2003)

Finding of bona fide purchaser status under § 549(c) is not sufficient cause to annul the stay under a "balancing of the equities" test. Court suggests 12 factors to examine in determining whether to annul.

In re Cady, 266 B.R. 172 (9th Cir. B.A.P. 2001), *aff'd,* 315F.3d 1121 (9th Cir. 2003)

1) Balance of the equities supported denial of retroactive annulment of the stay;

2) Creditor did not violate the automatic stay by filing a nondischargeability abstract of judgment, since under state law it created no lien on estate property, and since there was no stay in effect when the property was abandoned to the debtor upon closing of the case.

In re National Environmental Waste Corp., 129 F.3d 1052 (9th Cir. 1997), *cert denied, 524 U.S. 952, 118 S.Ct. 2368,(1998)*

Standards for annulling the stay - Factors

1) How much notice the creditor had of filing

2) Did debtor assert it as a defense

3) Would Court have lifted stay anyway

4) Egregiousness of creditor's conduct

Here, retroactive annulment of automatic stay is supported by debtor's long delay in objecting to substantial notice of contract's termination relied on by debtor in obtaining confirmation of reorganization plan.

In re Kissinger, 72 F.3d 107 (9th Cir. 1995)

Court does not abuse its discretion in granting retroactive annulment of automatic stay where bankruptcy petition filed during recess in action against debtor.

Retroactive relief should only be granted in extreme circumstances, *In re Shamblin*, 890 F.2d 123, 128 (9th Cir. 1989)

**4. § 362(a) - Interplay with Cal. law**

In re Nghiem, 264 B.R. 557 (9th Cir. B.A.P. 2001), *cert. denied*, 539 U.S. 905 (2003)

Lender not required to give additional actual notice of foreclosure sale after bankruptcy case was dismissed, where lender had orally postponed sale during pendency of case as required by state law. In re Tome, 113 B.R. 626 (Bankr. C.D. Cal. 1990) rejected.

In re Bebensee-Wong, 248 B.R. 820 (9th Cir. B.A.P. 2000)

Recording of trustee's deed 14 days after foreclosure sale and 2 days after bankruptcy petition was filed related back to the time and date of the sale under Cal. Civ. Code § 2924h(c), and did not violate the automatic stay . (Court distinguishes case where foreclosure sale occurred after bankruptcy petition filed, implying that in that situation, the sale would be void.)

In re Hilde, 120 F.3d 950 (9th Cir. 1997)

Under California law, judgment creditor need not "perfect" lien created by service on debtor of order to appear for examination to defeat avoidance of lien by bankruptcy trustee.

In re Fadel, 492 B.R. 1 (9th Cir. B.A.P. 2013)

Under "form of title" presumption, the description in a deed as to how title is held presumptively reflects the actual ownership of real property. Property in question was purchased during marriage in non-debtor's spouse's name only, and debtor consented in writing to this title by signing a Interspousal Transfer Deed. Thus, secured creditor's foreclosure did not violate automatic stay in debtor's bankruptcy case.

**5. § 362(a) - Lawsuits, Unlawful Detainer actions, and Collection Efforts**

In re Censo, 638 B.R. 416 (9th Cir. B.A.P. 2022)

A creditor's defense of claims brought by a debtor does not violate the automatic stay. Analysis is more complicated in multiple party/multiple claim litigation when trying to determine if a case involves an action or proceeding against the debtor. Here, claims and parties "must be disaggregated so that particular claims, counterclaims, cross claims and third party claims are treated independently when determining which of their respective proceedings are subject to the stay.

In re Koeberer, 632 B.R. 680 (9th Cir. 2021)

Bank's continued litigation of a fraudulent conveyance action against a non-debtor violates the second clause in § 362(a)(1), and also violated (a)(3), because the bank was pursuing a claim that was property of the bankruptcy estate. The debtors had standing to raise (a)(1), but did not have standing to raise (a)(3), because the latter only related to property of the estate.

Daff v. Good, 2018 U.S.App. LEXIS 29646

Period in which a creditor may execute on a California "ORAP" lien constitutes the continuation of the original action that resulted in the judgment and is thus tolled during the automatic stay under § 108(c).

Keller v. New Penn Financial (In re Keller), 568 B.R. 118 (BAP 9th Cir. 2017)

Creditor's post-petition reporting of overdue or delinquent payments to a credit reporting agency, regardless of the information's accuracy, is not a per se violation of § 362(a)(6).

In re Sholem Perl, 811 F.3d 1120 (9th Cir. 2016)

After a purchaser of real property at trustee's sale obtains a U.D. judgment and writ of possession, debtor occupant of the premises no longer has any interest in the real property, and a post-petition eviction does not violate the automatic stay.

Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010)

Attorney who had obtained a contempt order against the debtor for failing to pay spousal support had a duty " to alert the appellate court to the obvious conflicts between the order and the

stay." Liability for actual damages and emotional distress affirmed. However, attorneys fees allowed only for the work done to enforce the automatic stay, not for work on the adversary proceeding to obtain damages.

Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210 (9th Cir. 2002)

Under § 362(a), the prohibition against continuation of judicial actions requires that the action be automatically dismissed or stayed, and not merely that it not be pursued. Note: the action here was commenced post-petition. No need, under Fulton, to dismiss a pre-petition action; allowed to maintain the status quo.

In re Arneson, 282 B.R. 883 (9th Cir. B.A.P. 2002)

The automatic stay applies to collection efforts on a dischargeability judgment rendered in a previous bankruptcy case.

In re LPM Corp., 300 F.3d 1134 (9th Cir. 2002)

Bankruptcy court order requiring immediate payment of post-petition rent as an administrative priority did not relieve the landlord of the necessity of obtaining relief from the automatic stay before proceeding with a writ of execution.

In re Baldwin Builders, 232 B.R. 406 (9th Cir. B.A.P. 1999)

Bankruptcy creditor's post-petition suits to enforce pre-petition mechanic's lien violated automatic stay.

In re Way, 229 B.R. 11 (9th Cir. B.A.P. 1998)

Post-petition dismissal of debtor's pre-petition state court lawsuit did not violate automatic stay.

In re Luz International, Ltd., 219 B.R. 837 (9th Cir. B.A.P. 1998)

Bankruptcy court erred in electing to decide merits of complex multi-party setoff claim in hearing on underwriter's motion for relief from automatic stay

In re Turner, 204 B.R. 988 (9th Cir. B.A.P. 1997)

Municipal court judgment may be void for having been entered in violation of bankruptcy stay.

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

Bankruptcy court did not abuse discretion in failing to lift stay to allow remanded state court action to go forward where claimant filed a proof of claim.

Parker v. Bain, 68 F.3d 1131 (9th Cir. 1995)

1.) Stay prevents an appeal by a debtor when the action or proceeding below was against the debtor

2.) Appeal on a claim by the debtor against another is not stayed.

3.) Appeal on counterclaim against debtor is stayed.

Dean v. Trans World Airlines, 72 F.3d 754 (9th Cir. 1995), *cert. denied*, 519 U.S. 863 (1996)

Post-filing dismissal of action against bankruptcy debtor violates automatic stay where decision to dismiss requires court to first consider other issues presented by or related to underlying case.

In re White, 186 B.R. 700 (9th Cir. B.A.P. 1995)

Although debtor is stayed from appealing an adverse judgment where the action was brought against him, the cross-defendant is not stayed from seeking a dismissal of debtor's cross-complaint.

In re Robbins, 964 F.2d 342 (4th Cir. 1992)

Lifting stay to liquidate claim in a divorce case.

Noli v. C.I.R., 860 F.2d 1521 (9th Cir. 1988)

(Validity of order from bench lifting stay on Tax Ct proceeding).

In re Cimarron Investors,848 F.2d 974 (9th Cir. 1988)

(Interest - under secured creditor not entitled to interest to compensate for delay caused by stay of foreclosure).

In re Kemble, 776 F.2d 802 (9th Cir. 1985)

Judicial economy alone justifies lifting stay to permit state ct lawsuit to proceed.

**6. § 362(a) - Reopening**

In re Aheong, 276 B.R. 233 (9th Cir. B.A.P. 2002)

Bankruptcy court properly reopened case and annulled stay based on debtor's delay in raising the issue and failure to follow the local rule.

**7. § 362 - State Court Authority**

In re Dunbar, 245 F.3d 1058 (9th Cir. 2001)

State administrative law judge's decision regarding scope of the automatic stay in bankruptcy did not preclude independent review by bankruptcy court.

In re Gruntz, 202 F.3d 1074 (9th Cir. 2000) (en banc)

1) Only bankruptcy court has authority to finally determine whether the stay applies.

2) § 362(b)(1) excepts all criminal proceedings from the stay, regardless of their purpose.

Hinduja v. Arco Products Co., 102 F.3d 987 (9th Cir. 1996)

Stipulated order for lifting automatic stay that incorporates terms of settlement does not

bar separate action for breach of stipulation or underlying agreement in district court. Trustee was not required to seek enforcement of stipulation in bankruptcy court .

**8. § 362(b) - Exceptions**

In re Dingley, 852 F.3d 1143 (9th Cir. 2017)

Civil contempt proceedings are exempted from the automatic stay under government regulatory exception (§ 362(b)(4)) where contempt proceedings intended to effectuate the court's public policy interest in deterring litigation misconduct.

In re Partida, 862 F.3d 909 (9th Cir. 2017)

Automatic stay does not enjoin the federal government from collecting a civil judgment under the Mandatory Victims Restitution Act, which allows the government to collect a civil judgment "notwithstanding any other federal law."

In re RW Meridian, LLC, 564 B.R. 21 (9th Cir. B.A.P. 2017)

Automatic stay enjoins a county tax sale of real property even after debtor's right to redeem has lapsed, so long as the bankruptcy petition was filed before the tax sale was completed under California law.

Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005)

California attorney general's suit under the Clayton Act did not seek to protect the pecuniary interest of the state, and thus fell under § 362(b)(4).

Allen v. Allen, 275 F.3d 1160 (9th Cir. 2002), *aff'd in part*, 23 Fed.Appx. 859 (9th Cir. 2002)

Action seeking modification of existing support award was exempt from the automatic stay under § 362(b)(2)(A)(ii)

In re Chapman, 264 B.R. 565 (9th Cir. B.A.P. 2001)

Section 362(b)(4) does not stay a civil forfeiture action by the government brought under 21 U.S.C. § 881(a)(7).

In re First Alliance Mortgage Co., 263 B.R. 99 (9th Cir. B.A.P. 2001)

State's prosecution to judgment of claims for civil penalties, attorney fees and restitution under consumer laws is exempted under § 362(b)(4).

In re Berg, 230 F.3d 1165 (9th Cir. 2000)

Award of attorney fees imposed as a sanction under FRAP 38 for pursuing a frivolous appeal excepted from the stay under § 362(b)(4).

In re Boggan, 251 B.R. 95 (9th Cir. B.A.P. 2000)

Creditor who retained possession of debtor's car in order to continue perfection of its statutory repairman's lien did not violate automatic stay pursuant to § 362(b)(3).

In re Weisberg, 136 F.3d 655 (9th Cir. 1998), *cert denied,* 525 U.S. 826 , 119 S.Ct. 72(1998)
Stockbroker need not seek relief from automatic stay to liquidate bankruptcy debtor's shares of stock pledged as collateral for "margin loan" § 362(b)(6).

In re Universal Life Church, 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)
The Court of appeals affirmed a judgment of the district court and dismissed on appeal. The court held that the IRS' revocation of a religious-organization debtor's tax-exempt status is permissible under the police and regulatory power exception to the bankruptcy automatic stay § 362(b)(4).

NLRB v. Continental Hagen Corp., 932 F.2d 828 (9th Cir. 1991)
(NLRB action not affected by stay under § 362(b)(4)).

National Labor Relations Board v. Continental Hagen Corporation., 932 F.2d 828 (9th Cir. 1991)
NLRB action not affected by automatic bankruptcy stay.

In re Wade, 115 B.R. 222 (9th Cir. B.A.P. 1990) *aff'd.* 948 F.2d 1122 (1991)
Attorney's state bar excepted from bankruptcy proceedings as governmental unit. Assertion of counter claim in relief from stay motion procedurally improper.

In re Poule, 91 B.R. 83, (9th Cir. B.A.P. 1988)
(state licensing bureau not stayed from imposing fine under 362(b)(4)).

**9. §362(c)**

In re Dao, 616 B.R. 103 (Bankr. E.D.Cal. 2020)
Termination of the stay under § 362(c)(3) does not terminate stay regarding property of the bankruptcy estate. This is the majority position.

In re Nelson, 391 B.R. 437 (9th Cir. B.A.P. 2008)
Section 362(c)(4) is not ambiguous. Where two or more bankruptcy cases have been pending in the same year, no automatic stay of any kind goes into effect upon filing the third case.

**10. § 362(d)**

In re Jimenez, 613 B.R. 537 (9th Cir. B.A.P. 2020)
Provides good definition of what is a "scheme" under 362(d)(4), and reminds parties of the need for a judge to make a finding of fact that a scheme exists. Also addresses whether a 362(d)(4) order is moot on appeal if the case is dismissed before the appeal is heard.

In re Dorsey, 476 B.R. 261 (Bankr. C.D.Cal. 2012)
In rem relief under "hinder, delay and defraud" language of § 362(d)(4) is available in a "hijacked" bankruptcy case even if the debtor is unaware of the scheme to defraud. See also In re

Vasquez, 2017 Westlaw 6759067 (Bankr.C.D.Cal. 2017).

In re Delaney-Morin, 304 B.R. 365 (9th Cir. B.A.P. 2003)

Bankruptcy court erred in granting relief from the stay because of postpetition defaults, where the hearing was noticed as a nonevidentiary one, the nature of the defaults upon which the order was based were not alleged in the motion, the debtor was not present at the hearing, and there was no competent evidence to support a finding of such defaults.

In re Duvar Apt., Inc., 205 B.R. 196 (9th Cir. B.A.P. 1996)

Debtor's bad faith filing warranted lifting stay.

In re Sun Valley Newspapers, Inc., 171 B.R. 71 (9th Cir. B.A.P. 1994)

(d)(2) standard - re effective reorg, is it patently unconfirmable? Does it have a realistic chance of being confirmed? Plausible..probable...assured

Equity under (d)(2) = value less all encumbrances

In re CBJ Development, 202 B.R. 467 (9th Cir. B.A.P. 1996)

Combination hotel and bar was not "single asset real estate" and was therefore subject to automatic stay.

**11. § 362(h) (BAPCPA version)**

In re Dumont, 383 B.R. 481, 489 (9th Cir. 2009)

"Ride through" option under pre-B.A.P.CPA law (*In re Parker,* 139 F.3d 668 (9th Cir. 1998)) was eliminated in 2005. *"At least where the debtor has not attempted to reaffirm,* our decision in *Parker* has been superceded by B.A.P.CPA." (Emphasis added)

In re Blixseth, 684 F.3d 865 (9th Cir. 2012)

Under § 362(h), all personal property of a chapter 7 debtor, whether listed or not, is removed from the bankruptcy estate if the debtor does not timely file a statement of intention regarding such property.

**12. § 362(k)**

In re Koeberer, 632 B.R. 680 (Bankr. 9th Cir. 2021)

There is no "it was only a technical violation of the stay" defense to a § 362(k) request for fees and damages. While the moving party must show "injury," and the court may consider the severity of the violation when deciding the amount of sanctions, there is no category of violations so minor that it automatically negates the mandatory language of § 362(k). Court notes in a footnote that a court may withhold all contempt remedies if the violation is technical, and further notes in the same footnote that it may be possible that a technical stay violation may not make a particular violation "void." Court retains discretion, however, to not award any damages if violation is so minor that debtors did not suffer any damages.

In re Rodriquez, 2020 Bankr. LEXIS 920 (9th Cir. B.A.P. 2020)

Court may apply doctrine of mitigation of damages to attorneys fee awards under § 362(k). Court has discretion to determine reasonableness of fee awards.

Easley v. Collection Service of Nevada, 910 F.3d 1286 99th Cir. 2019)

Debtor may recover attorneys' fees incurred on appeal in defending bankruptcy court award of attorneys' fees to debtor for a willful violation of the automatic stay under § 362(k).

Sternberg v. Johnson, 595 F.3d 937 (9th Cir. 2010)

Attorney who had obtained a contempt order against the debtor for failing to pay spousal support had a duty " to alert the appellate court to the obvious conflicts between the order and the stay." Attorneys fees limitation overruled by In re Schwartz-Tallard, below.

In re Schwartz-Tallard, 803 F.3d 1095 (9th Cir. 2015)

After an en banc review, the Ninth Circuit held that a debtor was authorized to recover attorney's fees incurred both to end the stay violation and to prosecute the stay violation action under Bankruptcy Code § 362(k). *Sternberg v. Johnson*, 595 F.3d 937 (9th Cir. 2010) was therefore partially overruled.

In re Achterberg, 573 B.R. 819 (Bankr. E.D.Cal. 2017)

Ignorance of the law or advice or counsel is not a bona fide defense to a § 362(k) claim.

Barcelos v.United States, 576 B.R. 854 (Bankr. E.D.Cal. 2017)

Debtor failed to exhaust his administrative remedies (and therefore failed to address the IRS' sovereign immunity) before filing an adversary proceeding against the IRS asserting that it violated the automatic stay. Compare with In re Pinkstaff below.

In re Ozenne, 337 B.R. 214 (9th Cir. B.A.P. 2006)

Storage company that sold debtor's personal property after being notified of his bankruptcy filing committed willful violation of the automatic stay, since under Cal. Civil Code § §1980-1991, the debtor had the right to redeem it up to the time of sale. Standard for a willful violation restated. In re Williams, 323 B.R. 691 (9th Cir. B.A.P. 2005), *aff'd,* 204 Fed. Appx. 582 (9th Cir. 2006).

Debtor may be entitled to damages for willful violation of the automatic stay, even though the stay was subsequently annulled.

In re Peralta, 317 B.R. 381 (9th Cir. B.A.P. 2004)

"It is settled that the "willfulness test" for automatic stay violations merely requires that: (1) the creditor know of the automatic stay; and (2) the actions that violate the stay be intentional. . . .No specific intent is required; a good faith belief that the stay is not being violated "is not relevant to whether the act was 'willful' or whether compensation must be awarded." In re Goodman, 991 F.2d 613, 618 (9th Cir.1993).

In re Hayden, 308 B.R. 428 (9th Cir. B.A.P. 2004)

Towing company did not willfully violate automatic stay by failing to return debtor's impounded car, where state of Washington gave the company a lien for towing and storage.

In re Dawson, 390 F.3d 1139 (9th Cir. 2004)

Damages for emotional distress caused by willful violations of the automatic stay are available under § 362(h).

In re Stinson, 295 B.R. 109 (9th Cir. B.A.P. 2003), *aff'd in part, reversed in part,* 128 Fed.Appx. 30 (9th Cir.2005)

1. Court properly prorated fees based on proportion of claims upon which debtor prevailed, where debtor's counsel was given two opportunities to correct her inadequate fee application, but failed to do so;

2. In the absence of significant economic loss, emotional distress damages are improper.

3. Court properly balanced the equities in denying punitive damages.

In re Campion, 294 B.R. 313 (9th Cir. B.A.P. 2003)

Collection company that knows of automatic stay but whose computer mistakenly sends a collection notice willfully violates the automatic stay, entitling the debtor to attorney fees.

In re Dyer, 322 F.3d 1178 (9th Cir. 2003)

"Serious" punitive damages may not be awarded under § 105 for civil contempt of the automatic stay by entities who are not individuals. Only compensatory sanctions, attorney fees and compliance with the stay may be awarded.

In re Roman, 283 B.R. 1 (9th Cir. B.A.P. 2002)

Attorneys fees are a part of the actual damages allowed by the statute. The debtor has a duty to mitigate the amount of fees incurred. Sanctions may not be awarded under both § 362(h) and § 105.

In re Colortran, Inc., 210 B.R. 823 (9th Cir. B.A.P. 1997), *aff'd in part, vacated in part*, 165 F.3d 35 (9th Cir. 1998)

Freight forwarder willfully violated automatic stay by withholding bankruptcy debtor's shipment.

In re McHenry, 179 B.R. 165 (9th Cir. B.A.P. 1995)

Technical violation of the stay did not warrant actual or punitive damages.

In re Davis, 177 B.R. 907 (9th Cir. B.A.P. 1995)

Debtor's damages action for violation of automatic stay does not become moot because underlying case dismissed.

Havelock v. Taxel (In re Pace), 56 F.3d 1170 (9th Cir. B.A.P. 1995), *aff'd. in part, vacated in*

*part*., 67 F.3d 187 (9th Cir. 1995)

Under § 105 stay applies to unscheduled assets even though case closed. Trustee could recover attorney fees and costs under 362(h) as an "individual".

"A trustee in bankruptcy is not an "individual" and thus may not recover damages under 362(h) but may seek sanctions under bankruptcy code §105(a).

In re Cascade Roads, Inc., 34 F.3d 756 (9th Cir. 1994)

U.S. is not covered by 362(h); while civil contempt power may not exist in bankruptcy court, sanctions power does.

In re Goodman, 991 F.2d 613 (9th Cir. 1993)

Standard for willful violation; 362(h) applies only to individuals, but civil contempt available.

In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992)

IRS liable for damages under 362(h); no sovereign immunity under 106(a), at least where IRS has filed a claim.

In re Bulson, 117 B.R. 537 (9th Cir. 1990), *aff'd.* 974 F.2d 1341 (9th Cir. 1992)

Award of atty fees to debtor for wilful violation by IRS of stay.

In re Bloom, 875 F.2d 224 (9th Cir. 1989)

Standard. for finding willful violation of stay - damages and interest.

In re Taylor, 884 F.2d 478 (9th Cir. 1989)

(1) damages for violation - 362(h)

(2) res judicata - stay lift order may be res judicata in subsequent case, see In re Taylor, 77 B.R. 237 (9th Cir. B.A.P. 1987) criticized.

**AVOIDING POWERS - §§ 544, 546, 550**

Merit Management Group, LP v. FTI Consulting, Inc., 138 S.Ct. 883 (2018)

When determining whether the § 546(e) safe-harbor exception applies, court should focus on the actual transfer that the trustee is seeking to avoid, and not any of the interim transfers.

In re DBSI, 697 Fed.Appx. 493 (9th Cir. 2017)

Where the trustee proceeds against the IRS under § 544(b)(1), sovereign immunity is waived under § 106.

In re Milby, 875 F.3d 1129 (9th Cir. 2017)

Equitable tolling case. If facts support the equitable tolling of the two year statute of limitations under § 546, the event that "tolls" the statute stops the clock until the occurrence of a later event that permits the statute to resume running. Here, equitable tolling applied to a trustee who learned of a fraudulent transfer a week before the statute of limitations ran, but waited a year to file the adversary proceeding.

In re Matter of Walldesign, Inc., 872 F.3d 954 (9th Cir. 2017)

Trustee could recover avoidable fraudulent transfers against initial transferees, regardless of whether the initial transferees where aware that the payment was fraudulent.

In re JTS Corp., 617 F.3d 1102 (9th Cir. 2010)

Bankruptcy court properly found under 11 U.S.C. § 544(b) and Cal. Civ. Code § 3439.04 that transfer of property to the debtor's chairman, who paid only $10 million, was constructively fraudulent, based upon a reasonably equivalent value calculated at over $11.8 million (starting from a full fair market value of $15,760,000). The defendant, however, was entitled to a reduction in the amount of liability as a good faith transferee under § 3439.09(d), and should be credited both with the $10 million purchase price as well as the value of an option to repurchase he granted the debtor. He was also entitled to a credit for the settlement amounts paid by joint tortfeasors pursuant to Cal. Civil Code § 877. Ultimately, the defendant was found to owe nothing to the trustee for the conveyance.

In re Deuel, 594 F.3d 1073 (9th Cir. 2010)

Under § 544(a)(3), the trustee is not deemed to have constructive notice "as of commencement of the case" from bankruptcy documents filed after the case is commenced. *Professional Investment Properties of America,* 955 F.2d 623 (9th Cir. 1992) distinguished as having involved an involuntary petition that disclosed as unrecorded lien.

In re Taylor, 599 F.3d 880, 890 (9th Cir. 2010)

Where a security interest in a car has been avoided as a preferential transfer, under § 550 "the court has discretion whether to award the trustee recovery of the property transferred or the value of the property transferred." The bankruptcy court did not abuse its discretion in awarding the value of the security interest. However, it did abuse its discretion in holding without an

evidentiary basis that the value of the security interest was equal to an unsecured loan at the full amount the creditor initially loaned, since it is doubtful that the car was worth that much 21 days after the debtors took possession of the car.

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. B.A.P. 2008)

"We hold that a trustee, subject to the requirement of establishing avoidance, may prosecute an action to recover from a subsequent transferee under § 550 without having earlier avoided the initial transfer." Bankruptcy court also correctly found that the good faith defense in § 550(b)(1) was not available to the law firm transferee.

In re Straightline Investments, Inc., 525 F.3d 870, 882 (9th Cir. 2008)

Postpetition transfer of accounts receivable was properly avoided under § 549. Under § 550 trustee was entitled to collect the entire amount factor recovered on the accounts, even though the factor had already paid the debtor, where the factor was fully aware of the bankruptcy when he advanced the money.

In re Incomnet, Inc., 463 F.3d 1064 (9th Cir. 2006)

In one-step, non-conduit case, defendant was "initial transferee" even though it was heavily regulated by the FCC, and was thus subject to preference avoidance.

In re Cohen, 300 F.3d 1097 (9th Cir. 2002)

Person listed as the purchaser on a cashier's check was not the initial transferee, where someone else was the actual purchaser. Payee of the check was the initial transferee, and as such, was strictly liable for the transfer under §§ 550 and 548.

In re First T.D. & Investment, Inc. 253 F.3d 520 (9th Cir. 2001)

Assignment of collateral notes and trust deeds to investors may be perfected in California without possession and thus cannot be avoided under the strong arm clause.

In re Mizudo, 223 F.3d 1050 (9th Cir. 2000)

Statute of limitations in pre-1994 § 546 did not begin to run until trustee appointed, where foreign estate administrator was neither a trustee nor debtor in possession.

In re Parmetex, Inc., 199 F.3d 1029 (9th Cir. 1999)

Statute of limitations under pre-1994 version of Bankruptcy Code began running from date of appointment of interim trustee.

In re P.R.T.C., Inc., 177 F.3d 774 (9th Cir. 1999)

Chapter 7 trustee can transfer avoiding actions to third parties, as long as they are acting in the common interests of all creditors.

In re Harvey, 222 B.R. 888 (9th Cir. B.A.P. 1998)

Bankruptcy trustee as bona fide purchaser could avoid creditors' unsecured and

unrecorded interests in property where vague and inconsistent language in schedules failed to provide notice.

In re Sale Guaranty Corp., 220 B.R. 660 (9th Cir. B.A.P. 1998), *aff'd*, 199 F.3d 1375 (9th Cir. 2000)

Property held in resulting trust, and trustee had constructive knowledge of trust. Thus, transfers unavoidable under § 544 (a)(3)

In re Varner, 219 B.R. 867 (9th Cir. B.A.P. 1998)

Creditor's failure to include debtor in possession's social security and driver's license numbers on abstract of judgment did not render judgment lien avoidable

We conclude as a matter of law that a debtor in possession cannot avoid a judgment creditor's lien under § 544(a)(3) when the creditor recorded an abstract of judgment pursuant to California Code of Civil Procedure § 674(a), listed the debtor's social security and driver's license numbers as "unknown" and had no knowledge of the social security and driver's license numbers at the time the abstract was recorded or at any time prior to the bankruptcy filing. Accordingly, we reverse and direct the bankruptcy court to enter judgment I favor of the creditor.

In re Video Depot, 127 F.3d 1195 (9th Cir. 1997)

The court of appeals affirmed a judgment of the district court. The court held that under § 550(a) of the Bankruptcy Code, a bankruptcy trustee can recover a corporate debtor's pre-petition payment by cashier's check to a controlling principal's creditor.

In re Megafoods Stores, Inc., 210 B.R. 351 (9th Cir. B.A.P. 1997), *aff'd in part, vacated in part*, 163 F.3d 1063 (9th Cir. 1998)

1. Debtor's commingling of unremitted retail sales taxes with personal funds no bar to creation of statutory trust in favor of taxing authority
2. § 550 and conduit theory
3. State law controls interest rate because property is not part of bankruptcy estate.

In re Hamilton Taft & Company, 114 F.3d 991 (9th Cir. 1997)

Bankruptcy trustee cannot avoid stockbroker's pre-petition transfer of security to third party in debtor' direction in reverse repurchase transaction.

In re Dominion Corporation, 199 B.R. 410 (9th Cir. B.A.P. 1996)

Brokerage firm acted as conduit and not as transferee in principal's diversion of bankruptcy estate assets.

In re Marino (Dye v. Rivera), 193 B.R. 907 (9th Cir. B.A.P. 1996), *aff'd* 117 F.3d 1425 (9th Cir. 1997)

Constructive notice - § 544

In re Lucas Dallas, Inc.,185 B.R. 801 (9th Cir. B.A.P. 1995)

"[T]he principal of a corporate debtor does not become a 'transferee' by the mere act of causing the debtor to make a fraudulent transfer."

In re Presidential Corporation, 180 B.R. 233 (9th Cir. B.A.P. 1995)

Seller's agent does not become "initial transferee" of purchase money received through escrow from corporate debtor for benefit of buyer - § 550.

Loo v. Martinson (In re Skywalkers, Inc.), 49 F.3d 546 (9th Cir. 1995)

Section 550(c) does not preclude trustee from both 1) avoiding vendor's lien on liquor license and 2) recovering preferential payment made to vendor for the license. Avoidance of the lien was not a satisfaction of preference claim. Fact that the estate retained license and received proceeds of sale was of no consequence to preference action. Vendor still retained an unsecured claim for the amount owed to her.

In re Acequia, Inc. 34 F.3d 800 (9th Cir. 1994)

Once a creditor with an allowable claim has been located, the trustee has an unlimited right to involve state law avoiding powers under 544(b). The amount is governed by 550 and is not limited by what creditors will receive in a plan.

In re Weisman, 5 F.3d 417 (9th Cir. 1993)

Inquiry or constructive notice - § 544(a)(3).

In re Software Centre Int'l Inc., 994 F.2d 682 (9th Cir. 1993)

2 yr state of 546(a) applies to debtor-in-possession.

In re Kim, 161 B.R. 831 (9th Cir. B.A.P. 1993)

Actual knowledge by debtor-in-possession is irrelevant under 544(a)(3); no constructive notice given on abstract.

In re Thomas, 147 B.R. 526 (9th Cir. B.A.P. 1992), *aff'd.* 32 F.3d 572 (9th Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995)

Huber also argues that § 544(a)(3) cannot apply because the property is impressed with a constructive trust and, as such, it is not property of the estate under § 541(d), to which a trustee's avoidance powers may apply. While some case authorities support Huber's contentions, see In re Quality Holstein Leasing, 752 F.2d 1009, 1013 (5th Cir. 1985), the Ninth Circuit has specifically rejected this reasoning. *See* Seaway Express, 912 F.2d at 1128-29, Tleel, 876 F.2d at 772-773. Under the law in this circuit § 541(d) does not stand as a bar to the avoidance of an equitable interest, including a constructive trust interest, in real property under § 544(a)(3), *id.* Rather § 544 (a)(3) allows the trustee to avoid such interest to the same extent that they could be avoided by a bona fide purchaser under state law.

Under California law, a bona fide purchaser without actual or constructive notice takes free of a prior equitable interest or constructive interest. Rafferty v.. Kirpatrick, 29 Cal. App. 2d

503, 507-508 (1938), Tleel, 876 F.2d at 771-72. Section 544(a)(3) makes a trustee's actual knowledge irrelevant. See Tleel; Constructive notice, however, will preclude avoidance under § 544(a)(3). In re Probasco, 839 . F.2d 1352, 1354-55 (9th Cir. 1988) Whether the trustee can avoid Huber's constructive trust interest in the property under § 544(a)(3) therefore, turns upon whether the trustee had constructive or inquiry notice of that interest.

Huber's occupancy of the property did not provide constructive notice, since she occupied it with the debtor/titleholder

In re Raitan, 139 B.R. 931 (9th Cir. B.A.P. 1992)

1. C.C.P. § 708.320 does create a lien on partnership property upon the issuance of a charging order.

2. Security interest in stock may have been perfected upon the holder of such stock; notice of plaintiff's interest may have held it as a bailee.

In re Professional Investment Properties of America, 955 F.2d 623 (9th Cir. 1992), *cert. denied*, 506 U.S. 818 (1992)

Creditor's filing of involuntary petition put trustee on inquiry notice of creditor's interest in unrecorded instruments.

In re Lendvest Mortgage, Inc., 119 B.R. 199 (9th Cir. B.A.P. 1990); see also In re Lendvest Mortgage, 42 F.3d 1181 (9th Cir. 1994)

(Where the def/dtr assumed all risk of loss and only the right to proceeds ( but not the DOT) were assigned to plaintiff, transaction was not a sale).

In re Dietz, 914 F.2d 161 (9th Cir. 1990)

§ 550(b).

In re Seaway Express Corp., 105 B.R. 28 (9th Cir. B.A.P. 1989), *aff'd*. 912 F.2d 1125 (9th Cir. 1990)

(Constructive trusts - trustee has power to avoid notwithstanding 541(d))

In re Heides, 915 F.2d 531 (9th Cir. 1990)

(Failure to perfect security interest in real estate contract subordinated interest to that of trustee).

In re Mill Street, Inc.. 96 B.R. 268 (9th Cir. B.A.P. 1989)

Assignee of debt for collection is an "initial transferee" - § 550.

In re Probasco, 839 F.2d 1352, 1354-55 (9th Cir. 1988)

Under cal law, bfp takes free of prior equitable interest or constructive trust interest. Section 544(a)(3) makes a trustee's actual knowledge irrelevant - see Tleel, 876 F.2d 771-772. Constructive notice, however, will preclude avoidance under section (a)(3) see in re Probasco, 839 F.2d 1352 (9th Cir. 1988). Whether the Trustee can avoid Huber's constructive trust interest in

the property under 544(a)(3) turns upon whether the trustee had constructive or inquiry notice of the interest. However, Huber's occupancy of the property did not provide constructive notice because she occupied it with the debtor/title holder...In re Thomas, (9th Cir. B.A.P. (1992)

In re EPD Investment Company, LLC and Jerrold S. Pressman,, Jan. 7, 2015 (9th Cir. 2015).

§ 546(a) preempts California's statute of limitations and statutes of repose under Cal. Civil Code §§ 3439.09(a), (b) and (c), and the Trustee has two years to file avoidance actions under §544(a) so long as the fraudulent claim has not yet expired on the petition date (or the date the order for relief is entered).

**CASH COLLATERAL & POST-PETITION FINANCING - § 364**

In re Harbin, 486 F.3d 510, 514 (9th Cir. 2007)

"...[W]e conclude that under limited circumstances, a bankruptcy court may exercise its equitable powers to grant retroactive approval of a post-petition financing transaction pursuant to 11 U.S.C. §364(c)(2).

In re Cooper Commons, LLC, 430 F.3d 1215 (9th Cir. 2005), *cert denied,* 546 U.S. 1174 , 126 S.Ct. 1340 ( 2006)

A post petition lender could agree to reimburse the chapter 11 trustee's fees and expenses without also agreeing to pay for the debtor's attorneys under §507(a)(1). Further, the debtor's attorneys had no standing to challenge the financing under §364(e), since they did not obtain a stay of the order pending appeal.

In re ProAlert LLC, 314 B.R. 436 (9th Cir. B.A.P. 2004)

Debtor could use cash collateral to pay administrative expenses under § 363 without having to prove entitlement to surcharge the secured creditor's collateral under § 506(c).

In re Stanton, 248 B.R. 823 (9th Cir. B.A.P. 2000), *aff'd,* 285 F.3d 888 (9th Cir. 2002), *as amended*, 303 F.3d 939 (9th Cir. 2002)

Debtors were guarantors on a factoring arrangement for their business. As additional security for payment, they pledged their house as security. The debtors subsequently filed a chapter 7 case. They continued their business's factoring arrangement, and incurred additional indebtedness that was not covered by the business's assets. The chapter 7 trustee sold their house, but the factor asserted its security interest in the proceeds in the amount of over $244,000 for postpetition indebtedness incurred by the nondebtor business.

Held: The factor's lien on the house was not avoidable under § 549, and the debtors were not required to seek court approval as to the postpetition encumbrances on their house under § 364.

In re Hotel Sierra Vista Limited Partnership, 112 F.3d 429 (9th Cir. 1997)

Proof of extent of secured creditor's interest in post-petition room revenues of debtor hotel requires pro rata allocation of hotel's operating expenses

Case remanded to determine amount of claim under *Days California*, 27 F.3d 374 (9th Cir. 1997)**.**

Scottsdale Medical Pavilion v. Mutual Benefit Life Inc. Co. (In re Scottsdale Medical Pavilion), 52 F.3d 244 (9th Cir. 1995), *aff'g*, 159 B.R. 295 (9th Cir. B.A.P. 1993).

Secured creditor had an immediately perfected security interest in rents upon the petition date from prepetition collection of rents, which constituted cash collateral under §365(a) and was thus entitled to adequate protection.

In re Sunnymead Shopping Center Company, 178 B.R. 809 (9th Cir. B.A.P. 1995)

Secured creditor's acceptance of adequate protection payments from cash collateral

securing real estate not violation of CA one-action rule.

In re Defender Drug Stores, Inc., 145 B.R. 312 (9th Cir. B.A.P. 1992)

Bankruptcy court has discretion to allow enhancement fee to lender as a part of postpetition financing

In re Sun Runner Marine, Inc., 116 B.R. 712 (9th Cir. B.A.P. 1990), *vacated in part, aff'd in part*, 945 F.2d 1089 (9th Cir. 1991)

364(e) - debtor not permitted to assume liability arising from unsecured nonexecutory contract

In re Ames Dept Stores, Inc., 115 B.R. 34, 37 (S.D.N.Y. 1990)

In re Tenny Village Co., Inc., 104 B.R. 562, (D.N.H. 1989)

Freightliner Market Dev. Corp. v. Silver Wheel Freightlines, Inc., 823 F.2d 362 (9th Cir. 1987)

**CERCLA**

In re Hanna, 168 B.R. 386, (9th Cir. B.A.P. 1994)

Clean-up costs arising solely from pre-petition releases of petrol products were not entitled to administrative expense.

In re Dant & Russell, 951 F.2d 246 (9th Cir. 1991)

Apportionment of CERCLA clean-up costs.

In re Jensen, 995 F.2d 925 (9th Cir. 1993)

Environmental claims arise upon debtor's conduct.

In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990)

Secured party that does not participate in mgmt of debtor is not an 'owner'.

Louisiana-Pacific v. ASARCO, 909 F.2d 1260 (9th Cir. 1990)

Traditional rules of states re: successor liability apply.

**CHAPTER 7**

In re Marrama, 549 U.S. 365, 127 S.Ct. 1105 (2007)

Debtor forfeited his right to convert his case to chapter 13 where he did not qualify as a debtor because of his bad faith concealment of assets.

In re AFI Holding, Inc., 355 B.R. 139 (9th Cir. B.A.P. 2006), *aff'd and remanded,* 530 F.3d 832 (9th Cir. 2008)(for determination of removed trustee's right to fees).

Chapter 7 trustee had a material conflict of interest and thus was not disinterested as required by § 701(a)(1) where she previously represented insiders of the debtor. Totality of circumstances test applied. Failure to disclose all connections and appearance of inpropriety also supported her removal from the case.

In re Concannon, 338 B.R. 90 (9th Cir. B.A.P. 2006)

Section 506(d) cannot be used by a chapter 7 debtor to strip off a wholly unsecured nonconsensual lien.

In re Padilla, 222 F.3d 1184 (9th Cir. 2000)

1. Bad faith as a general proposition does not provide "cause" to dismiss a Chapter 7 petition under § 707(a).
2. Credit card "bust out" did not constitute cause under § 707(a).

In re Laskin, 222 B.R. 872 (9th Cir. B.A.P. 1998)

Ch. 7 debtors may not "strip off" unsecured second deed of trust on residence.

In re Oxborrow, 913 F.2d 751 (9th Cir. 1990) - § 702

Election of trustee invalid where less than 70% of creditors requested election.

**CHAPTER 9**

In re City of Vallejo, 408 B.R. 280 (9th Cir. B.A.P. 2009)

City proved that it met all of the eligibility requirements to file a chapter 9 case under § 109(c).

**CHAPTER 11 (starting with this edition, this segment will now include some SBRA cases. You should still review the SBRA appendix, which is attached)**

1. **Anti-Modification**
2. **Appeal**
3. **Appointment of Ch 11 Trustee**
4. **Bad Faith Filing**
5. **Classification of Claims**
6. **Confirmation of Plan**
7. **Conversion of Ch 11 to Ch 7**
8. **New Value Exception and Absolute Priority Rule**
9. **Notice of Plan**
10. **§ 1125**
11. **Valuation for §1111(b) Purposes**
12. **Vote on Plan**
13. **Post Confirmation**
14. **Misc. For SubChapter 5 cases, check the Appendix**

**1. Anti-Modification**

In re Abdelgadir, 455 B.R. 896

Petition date determines whether anti-modification provision of home loan applies.

In re Lee, 215 B.R. 22 (9th Cir. B.A.P. 1997)

Deed of trust that named certain appliances as part of security did not deprive mortgage lender of anti-modification protections.

In re Lievsay, 199 B.R. 705 (9th Cir. B.A.P. 1996), *cert. denied*, 522 U.S. 1149 (1998)

Boilerplate language in deed of trust does not take a residence out of anti-modification provision of 1123(b).

In re Wages, 2014 WL 1133924 (9th Cir. B.A.P. 2014)

Anti-modification provision in § 1123(b)(5) prevents confirmation of a Chapter 11 plan that seeks to modify loan secured by the debtor's principal residence, even if debtor uses other portions of the property for other purposes, such as farming. Section only requires three factors: loan must be secured by real property, real property must be the debtor's principle residence, and there must be no other security for the debt.

**2. Appeal**

In re Gotcha International L.P., 311 B.R. 250 (9th Cir. B.A.P. 2004)

Appeal of confirmation order dismissed for equitable mootness, where debtor had obtained a refinance and distributed substantial payments to all but two classes.

In re Transwest Resort Properties, Inc., 791 F.3d. 1140 (9th Cir. 2015), which holds that just because plan is substantially consummated, appeal is not necessarily equitably moot.

### 3. Appointment of Ch 11 Trustee

In re Fred Lowenchuss, 171 F.3d 673 (9th Cir. 1999), *cert. denied*, 528 U.S. 877 (1999)

1. Ch 11 Trustee properly appointed
2. Notice and opportunity for hearing adequate

In re BIBO, Inc., 76 F.3d 256 (9th Cir. 1996), *cert. denied*, 519 U.S. 817 (1996)

Court may appoint Chapter 11 trustee *sua sponte*.

### 4. Bad Faith Filing

In re Orange County Bail Bonds, Inc., 638 B.R. 137 (9th Cir. B.A.P. 2022)

Filing a bankruptcy petition in bad faith constitutes cause to dismiss/convert under section 1112(b). Case explains what constitutes bad faith.

Sino Clean Energy, Inc. V. Seiden, 901 F.3d 1139 (9th Cir. 2018)

A Chapter 11 petition lacking requisite authority by the board must be dismissed.

In re Marsch, 36 F.3d 825 (9th Cir. 1994)

Having found that case was filed in bad faith, court abused discretion in staying dismissal for 60 days.

In re St. Paul Self Storage Limited Partnership, 185 B.R. 580 (9th Cir. B.A.P. 1995)

No business, one asset, no employees, etc. = bad faith. Dismissal under § 1112(b) appropriate.

In re Rainbow Magazine, Inc., 136 B.R. 545 (9th Cir. B.A.P. 1992)

Bad faith filing..sanctions
Also Discovery Sanctions standard

In re Can-Alta Properties, Ltd., 87 B.R. 89 (9th Cir. B.A.P. 1988)

Bad faith filing.

### 5. Classification of Claims

In re Loop 76, LLC, 465 B.R. 525 (B.A.P. 9th Cir. 2012), affirmed, 574 Fed.Appx. 644, 2014 U.S.App. LEXIS 10759 (9th Cir. June 10, 2014).

A third party source for recovery on a creditor's unsecured claim, such as a guarantor, is a factor in determining whether claims are substantially similar under § 1122(a).

In re Barakat, 99 F.3d 1520 (9th Cir. 1996), *cert. denied*, 520 U.S. 1143 (1997)

Separate class of deficiency claimants without a business or economic justification was not allowed. Separate classification of unsecured prepetition claims of trade creditors who were continuing to do business with debtor was also impermissible.

In re Montclair Retail Center, L.P., 177 B.R. 663 (9th Cir. B.A.P. 1995)

Separate classification of secured creditor's claim had no reasonable justification. *Johnson* distinguished.

In re Johnston, 21 F.3d 323 (9th Cir. 1994)

(1) Separate classification of secured creditors' deficiency claim was proper here, where claim was currently being litigated.

(2) Full present payment to senior creditors is required before payments to junior creditors may be permitted.

In re Commercial Western Finance Corp, 761 F.2d 1329 (9th Cir. 1985)

Secured creditors' claims on different properties must be separately classified**.**

**6. Confirmation of Plan**

In re Solimano Framing Group, LLP, __B.R.__ (9th Cir. B.A.P. 2025)

While an order confirming a plan is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to re judicata effect, this general proposition is subject to some major limitations, including the due process rights of parties affected by the plan. Courts do not apply claim preclusion where application of the doctrine would violate a parties' due process rights. Case provides a good explanation of what due process issues may arise in plan confirmation, including a plan's failure to clearly inform an affected party that its rights are being impacted. Case also gives a good explanation of :Law of the Case.

In re Purdue Pharma, 144 S.Ct. 2071 (2024)

Bankruptcy Code does not authorize a release and injunction that, as part of a Chapter 11 plan, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants. Supreme Court did not address what constitutes "consent."

In re Curiel, __B.R.__ (9th Cir. B.A.P. 2023)

Excellent discussion of how to determine "feasibility" and apply the cramdown procedures in a nonconsensual SubChapter V case under section 1191(c).

In re Orange County Bail Bonds, Inc., 638 B.R. 137 (9th Cir. B.A.P. 2022)

Defines "good faith" requirements under section 1129(a)(3). Explains plan feasibility under section 1129(a)(11) - must show a reasonable probability of success. Also explains court's role in setting commitment period in a SubChapter V case.

Garvin v. Cook Investments NW, 992 F.3d. 1031 (9th Cir. 2019)

Confirmation of Chapter 11 plan which was partially funded by debtor's tenant (who legally sold marijuana under WA law) did not violate § 1129(a)(3). Section directs court to examine the proposal of the plan, not the substantive terms of the plan.

In re Transwest Resort Properties, 881 F.3d 724 (9th cir. 2018)

Plain language of §1111(b) does not require a Chapter 11 plan treatment of a §1111(b) creditor to include a due on sale clause. Also, § 1129(a)(10) is applied on a "per plan," not a "per debtor" case when plan is proposed by multiple debtors.

In re New Investments, Inc., 840 F.3d 1137 (9th Cir. 2017)

Cure of default in Chapter 11 plan requires default interest as applicable in underlying document, overruling *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338 (9th Cir. 1988).

In re Sunnyslope Housing Limited Partnership, (9th Cir. 2017)

§ 1129 cram down valuation for secured creditor determined under § 506(a)(1), "in light of the purpose of the valuation and of the proposed disposition or use of such property." Valuation therefore determined by how debtor intends to use property, and not by foreclosure value, even though foreclosure value exceeds value as determined by how plan will use the property. 9th Circuit follows Rash, 520 U.S. 953 (1997). Court also applies *Till* to determine cram down interest rate.

In re Harbin, 486 F.3d 510, 514 (9th Cir. 2007)

In determining the feasibility of a plan, the bankruptcy court "must evaluate the possible effect of a debtor's ongoing civil case with a potential creditor, whether that litigation is pending at the trial level or on appeal."

In re Associated Vintage Group, Inc., 283 B.R. 549 (9th Cir. B.A.P. 2002)

Confirmation of a chapter 11 liquidating plan did not terminate ability to object to a secured claim as being preferential under § 502(d). Doctrine of claim preclusion did not apply.

In re Allen, 300 F.3d 1055 (9th Cir. 2002)

Chapter 11 plan which did not incorporate pre-confirmation § 362 stipulation and order was properly confirmed, where stipulation did not recite that it would be binding on the debtor in a chapter 11 plan.

Stratosphere Litigation L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137 (9th Cir. 2002)

Third party creditor was barred by res judicata from challenging bankruptcy court's confirmation of debtor's reorganization plan after party's predecessor had previously failed to object.

In re Wolfberg, 255 B.R. 879 (9th Cir. B.A.P. 2000), *aff'd*, 37 Fed.Appx. 891 (9th Cir. 2002)

Debtor's attempt to assert a claim of homestead exemption after confirmation of a chapter 11 plan was barred by res judicata.

In re Consolidated Water Utilities, Inc., 217 B.R. 588 (9th Cir. B.A.P. 1998)

Unsecured creditor who votes for reorganization plan cannot object when plan distribution does not include post-petition interest.

Pursuant to Bankruptcy Code § 1141(a), all parties to a confirmed plan are bound by its terms. A confirmation order is a binding, final order, to be accorded full res judicata effect. *In re Heritage Hotel Partnership I*, 160 B.R. 374, 377 (9th Cir. B.A.P. 1993). *Aff'd without op*., 59 F.3d 175 (9th Cir.1995). As long as due process is complied with, a confirmed plan binds all entities that hold a claim or interest, even if they are not scheduled, have not filed a claim, have not received a distribution under the plan or are not permitted to retain an interest under such plan,

*Id.,* A plan confirmation order precludes the raising of issues which could or should have been raised during the pendency of the case. *Id.*

Trulis v. Barton, 67 F.3d 779 (9th Cir. 1995)

Confirmed Chapter 11 plan is *res judicata* as to all parties and questions.

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993), *aff'd*. 59 F.3d 175 (9th Cir. 1995)

Confirmation order of a plan which made no mention of lender liability suit acted as bar of suit under *res judicata*.

Radlax Gateway Hotel, LLC vs. Amalgamated Bank 566 U.S. 639, 132 S.Ct. 2065 182 L.Ed.2d 967:

§ 1129 (b)(2)(A) requirements for cramdown plans do not permit debtors to sell an encumbered asset free and clear of a lien without permitting the lienholder to credit bid.

**7 . Conversion of Ch 11 to Ch 7 or Chapter 13**

In re Orange County Bail Bonds, Inc., 638 B.R. 137 (9th Cir. B.A.P. 2022)

Analyzes elements of section 1112(b)(4)(A) argument that conversion is necessary because of a substantial and continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

In re Baroni, __ F.4th __ (9th Cir. 2022)

Party seeking relief under section 1112(b)(1) has initial burden of persuasion to establish that cause exists. Even where cause established, bankruptcy court must still consider best interest of creditors and the estate. Failure to make plan payments constitutes a material default and cause to convert even if the debtor has made payments for an extended period before the default or taken other significant steps to perform the plan. Not every missed payment is a material default - factors relevant to determining whether missed payments are a material default include the number of missed payments, number of aggrieved creditors and how long the default occurred. Case also explains meaning of "unusual circumstances" under section 1112(b)(2).

When do assets held post confirmation by a reorganized debtor revest in the Chapter 7 case upon conversation? Central question is whether the Plan's language, purposes, and context changed the effect of the general vesting provisions in section 1141 after conversion to 7.

In re Owens, 552 F.3d 960 (9th Cir. 2009)

Bankruptcy court properly dismissed rather than converting chapter 11 case that was filed in bad faith as a litigation tactic. Although conversion might have benefitted moving party, the best interests of *all* creditors must be considered in converting or dismissing a case. here, creditors might have fared worse in chapter 7 because the chapter 7 discharge would have deprived them of access to the debtor's substantial future income.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict

with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Consolidated Pioneer Mortgage Entities, 264 F.3d 803 (9th Cir. 2001)

Conversion from Chapter 11 to chapter 7 was warranted where corporation charge with responsibility for liquidating bankruptcy estate caused unreasonable delay by failing to account to investors.

In re Smith, 235 F.3d 472 (9th Cir.2000)

1) Under Rule 2003(e), a § 341 meeting must be adjourned to a specific time; 2) conversion of the case from chapter 11 to chapter 7 does not restart the running of the 30-day period for filing objections to exemptions.

In re Greenfield Drive Storage Park, 207 B.R. 913 (9th Cir. B.A.P. 1997)

Lapse of payments was material default under Chapter 11 plan that warranted conversion of case to Chapter 7

**8. New Value Exception and Absolute Priority Rule**

In re Juarez, 603 B.R. 610 (9th Cir. B.A.P. 2019)

Retention of exempt property by individual Chapter 11 debtor does not violate the absolute priority rule. This case also has a good analysis of new value, disposable income and other individual Chapter 11 confirmation issues.

In re Brotby, 303 B.R. 177 (9th Cir. B.A.P. 2003)

1. Class that provided for nondischargeable debt to not receive distributions until litigation was complete, when other unsecured creditors were to receive earlier distributions, violated § 1123(a)(4); 2. Under limited circumstance, § 1141(d)(2) allows a plan to include a collection injunction, if plan provides for payment in full over time and the court has sufficient confidence that the plan is feasible; 3. misleading financial figures did not taint disclosure statement; 4. individual debtors are eligible for the new value exception to the absolute priority rule, but must prove the *Bonner Mall* test; 5**.** findings regarding good faith under § 1129(a)(3) were inadequate.

In re General Teamsters, Warehousemen and Helpers Union, Local 890, 265 F.3d 869 (9th Cir. 2001)

Following local union's liquidation, parent union did not have equity interest in local for purposes of absolute priority rule solely by effect of provision in parent union's constitution requiring local's assets to escheat to parent for two years or until local reorganized.

In re Ambanc La Mesa Ltd. Partnership, 115 F.3d 650, 656-657 (9th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998)

1. New value exception requires equivalence be contributed in cash or other present value,

not notes. $320,000 held de minimus as a matter of law. Interest must be paid on unsatisfied debt where new value inadequate.

2. Discrimination between classes must satisfy four criteria to be considered fair under 11 U.S.C. § 1129(b): (1) the discrimination must be supported by a reasonable basis, (2) the debtor could not confirm or consummate the plan without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of the discrimination is directly related to the basis or rational for the discrimination, *In re Wolff*, 22 B.R. 510, 511-12 (9th Cir. B.A.P. 1982). Moreover, separate classification for the purpose of securing an impaired consenting class under § 1129(a)(10) is improper *See In re Greystone III Joint Venture*, 995 F2d 1274, 1279 (5th Cir. 1991) *cert. denied,*, 506 U.S. 821 (1992) and *cert. denied* 506 U.S. 822 (1992), *In re Holywell Corp.* , 913 F.2d 873, 880, (11th Cir. 1990)

In re Dollar Associates, 172 B.R. 945 (Bankr. N.D. Cal. 1994) (Carlson, J.)

Single asset real estate debtor is not permitted to confirm a "new value" plan where property is over encumbered. Plan is not "fair and equitable" under § 1129(b)(1), even though it satisfies the "new value" exception to the absolute priority rule and may technically comply with § 1129(b)(2). Plan would not serve goals of reorganization and would undermine Bankruptcy Code restriction by reducing the creditor's lien to court-determined value of collateral.

Sun Valley Newspapers, Inc. v. SunWorld Corp (In re Sun Valley Newspapers, Inc.), 171 B.R. 71 (9th Cir. B.A.P. 1994)

Following *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899 (9th Cir. 1993), *motion to vacate denied and case dismissed,* 513 U.S. 18 (1994), the B.A.P. has held that "cause" exists under § 362(d)(1) for relief from stay where debtor's proposed "new value" plan is unconfirmable as a matter of law. After 13 months and the filing of three proposed plans, the debtor's plan still had two fatal defects:

(1) it proposed to release insider guarantees in violation of § 524(e), and

(2) the contribution of old equity in consideration for retaining their ownership interest did not meet the new value tests of *Bonner Mall*. The insiders' canceling their claim against the estate did not constitute new money or money's worth necessary for reorganization, nor has the size of claim released reasonably equivalent in value to the retained equity interest.

Everett v. Perez (In re Perez), 30 F.3d 1209 (9th Cir. 1994)

Payment of unsecured claims in full over 67 months without interest, while debtor retained some value. Was not fair and equitable and did not satisfy the absolute priority rule because unsecured creditors did not receive the full present value of their claims. Debtors in possession and their counsel have the duty to represent to the court that the plan satisfies the requirements of confirmation, so violation of the absolute priority rule may be raised on appeal although not argued in the trial court. Client is the estate, not the debtor individually, and counsel has an independent duty to determine whether an action will benefit the estate or merely cause delay.

In re Tucson Self Storage, Inc., 166 B.R. 892 (9th Cir. B.A.P. 1994)

Unfair classification, unfair discrimination, absolute priority rule

(1) Classification based solely on the right to make § 1111(b) election was improper.

(2) 100% to trade and 10% to secured deficiency claim was unfair discrimination.

(3) Payment of $50,000 to debtor was a loan, not new value. Payment of promoters and administrative claimants was not a sufficient reason for new value.

In re Johnston, 21 F.3d 323 (9th Cir.1994)

Absolute priority rule not violated by permitting a debtor to retain rights in estate property under Chapter 11 plan.

In re Zachary, 811 F.3d 1191 (9th Cir. 2016)

Absolute priority rule applies in individual Chapter 11 cases.

In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), *motion to vacate denied and case dismissed*, 513 U.S. 18 (1994)

New value exception survives bankruptcy code when all pre-code requirements of doctrine satisfied; if equity is retaining interest, must meet Bonner Mall test

In re Green, 98 B.R. 981 (9th Cir. B.A.P. 1989)

Plan calling for less than 100% payment and for debtor to retain 50% interest in lawsuit violates absolute priority rule.

**9. Notice of Plan**

In re Maya Construction, Inc., 78 F.3d 1395 (9th Cir. 1996), *cert. denied*, 519 U.S. 862 (1996)

Where debtor knows of a potential claimant, debtor must list it and give notice. A failure to do so may bar discharge of the debt. Case remanded to determine if creditor had adequate notice of plan conf. but sat on his rights. Case may be important for what it says about unknown claimants.

In re Downtown Investment Club III, 89 B.R. 59 (9th Cir. B.A.P. 1988)

Failure to give general unsecured creditors notice of modified plan makes it void under 9024 and 1127 'material plan modifications require a formal disclosure statement and court approval

**10. § 1125**

In re California Fidelity, Inc., 198 B.R. 567 (9th Cir. B.A.P. 1996)

§ 1125(b) - Solicitation without a disclosure statement - what constitutes a solicitation - sanctions.

Jacobsen v. AEG Capital Corp., 50 F.3d 1493 (9th Cir. 1995)

1. § 1125(e) only provides a safe harbor for disclosure and solicitation. It does not protect bad faith acts.

2. Forced sale doctrine of § 10(b)(5) has no applicability to a Chapter 11 reorganization.

In re Scioto Valley Mortg. Co., 88 B.R. 168 (Bankr. S.D. Ohio 1988)
§1125 - basic requirements of disclosure statements

### 11. Valuation for § 1111(b) Purposes

In re Transwest Resort Properties, Inc., 881 F.3d 724 (9th Cir. 2018)
A Chapter 1 plan can eliminate a "due on sale" clause in its treatment without violating § 1111(b).

In re Salamon, 854 F.3d 632 (9th Cir. 2017)
Section 1111(b) does not apply to a lien extinguished in a foreclosure sale during the Chapter 11.

In re Weinstein, 227 B.R. 284 (9th Cir. B.A.P. 1998)
Bankruptcy court properly applied under secured bank's statutory election to treat claim as secured by ordering debtors to repay present value of collateral in 120 monthly payments equaling secured and unsecured portions of bank's claim. §1111(b)(2) option - Adequate protection payments properly credited to secured, not unsecured claim.

In re Tuma, 916 F.2d 488 (9th Cir. 1990)
Creditor of corporation holding personal guaranty of debt could elect to have its claim treated as secured. Valuation of stock.

In re California Hancock, Inc., 88 B.R. 226 (9th Cir. B.A.P. 1988)
Creditor was entitled to credit bid in sale pursuant to plan. §§ 1111(b) and 363(k).

### 12. Vote on Plan

In re Fagerdala USA -Lompac, Inc., 89 F.3d 848 (9th Cir. 2018)
Under section 1126(e), a court may not designate claims for bad faith simply because (1) a creditor offers to purchase only a subset of available claims in order to block a plan of reorganization, and/or (2) blocking the plan will adversely impact the remaining creditors. Bad faith requires more. At a minimum, there must be some evidence that a creditor is seeking "to secure some untoward advantage over other creditors for some ulterior motive."

In re Transwest Resort Properties, Inc., 881 F.3d 724 (9th Cir. 2018)
The need for an impaired, assenting class in a cramdown plan applies on a per-plan basis, not a per-debtor basis.

In re Figter Limited, 118 F.3d 635 (9th Cir. 1997), *cert. denied*, 522 U.S. 996 (1997)
Sole secured creditor of single-asset bankruptcy debtor does not per se act in bad faith by acquiring and voting majority of unsecured claims to defeat proposed reorganization plan.

In re M. Long Arabians, 103 B.R. 211 (9th Cir. B.A.P. 1989)

Failure to vote on plan does not constitute acceptance of plan

In re Federal Support Company, 859 F.2d 17 (4th Cir. 1988)

Bad faith vote; fact that creditor was named as a defendant in debtor's state antitrust case did not show that creditor acted in bad faith in voting against reorganization plan.

In re Fagerdala USA-Lompoc, Inc., 891 F.3d. 848 (9th Cir. 2018)

Bankruptcy Court may not designate claims for bad faith under § 1126(e) simply because a creditor offers to purchase only a subset of available claims to block a Chapter 11 plan, and/or blocking the plan will adversely impact the remaining creditors. Must be some evidence that the creditor is seeking to secure some untoward advantage over other creditors for some ulterior motive.

**13. Post Confirmation**

In re Younessi, 601B.R. 815 (9th Cir. B.A.P. 2018)

180 day period to file a complaint to revoke plan confirmation under § 1144 runs from entry of order granting motion to modify the confirmation order.

In re J.J. Re-Bar Corp., Inc. 420 B.R. 496 (9th Cir. B.A.P. 2009)

IRS could continue to pursue collection of trust fund taxes against the principals of the debtor, since the debtor was not the "primary obligor" of such taxes as specified in the permanent injunction provisions of the chapter 11 plan.

In re JZ L.L.C., 371 B.R. 412 (9th Cir. B.A.P. 2007)

Pursuant to section 1141(b), all property of the estate vests in the debtor upon confirmation of the plan, regardless of whether it was listed in the bankruptcy schedules. Thus, the debtor retains standing to control estate property after the case is closed.

In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir. 2005)

Tort and breach of contract action brought post confirmation by debtor and newly-formed corporation was within the bankruptcy court's subject matter jurisdiction. The "related to" test was too broad in this context; rather, the inquiry was whether there was a close nexus to the bankruptcy plan or proceeding.

In re Transwest Resort Properties, Inc., 791 F.3d. 1140 (9th Cir. 2015)

Lender's objections and appeal are not equitably moot, even if Chapter 11 plan has been substantially consummated, if it is possible to devise an equitable remedy that will not burden innocent third parties.

**14. Misc.**

Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020)

Good discussion of permissible use of Exculpation Clauses in Chapter 11 plans and interaction with Bankruptcy Code § 524(a) and (e).

Um v. Spokane Rock I, LLC, 904 F.3d 815 (9th Cir. 2018)

Assuming that § 1141(d)3)(B) does not require that the individual debtor engage in his/her pre-petition business, this code section is not satisfied by the debtor's mere employment in someone else's business after consummation of a Chapter 11 plan.

In re Beltway One Development Group, LLC, 547 B.R. 819 (BAP 9th Cir. 2016)

Oversecured creditor entitled to default interest rate during pendency of Chapter 11 case where plan did not "cure" the loan and no showing that rate was unenforceable under nonbankruptcy law, unreasonable or inequitable.

In re Tower Park Properties LLC, 803 F.3d 450 (9th Cir. 2015)

Trust beneficiary is not a "party in interest" under § 1109(b) where his interets are adequately protected by a party-in-interest trustee.

General Electric Cap. v. Future Media Productions, 547 F.3d 956 (9th Cir 2008)

Where creditor's oversecured claim was paid in full out of the proceeds of an asset sale, rather than pursuant to a chapter 11 plan, and thus not subject to the "cure" provisions of § 1124 that a chapter 11 plan would allow, creditor was entitled to a default rate of interest. Court distinguishes the holding in *In re Entz-White Lumber and Supply, Inc.,* 850 F.2d 1338 (9th Cir. 1988), and disapproves of the holding in *In re Casa Blanca Project Lenders*, 196 B.R. 140 (9th Cir. B.A.P. 1996)

In re Cooper Commons LLC, 512 F.3d 533 (9th Cir. 2008)

Counsel for former debtor-in-possession was not entitled to compensation from a carve-out negotiated by chapter 11 trustee for himself and his professionals, where the carve-out did not include debtor-in-possession counsel, and debtor-in-possession counsel had previously waived any entitlement to a carve-out.

Miller v. U.S, 363 F.3d 999 (9th Cir. 2004)

Res judicata did not apply to IRS claim, where the plan's discharge provisions were found to be ambiguous.

In re Dynamic Brokers, Inc., 293 B.R. 489 (9th Cir. B.A.P. 2003)

Appropriate interest rate is the rate "the debtor would pay a commercial lender for a loan of equivalent amount and duration, considering the risk of default and any security." In re El Camino Real Landscape Maintenance Contractors, Inc., 818 F.2d 1503, 1504 (9th Cir. 1987). 6% for 240 months was appropriate in this case.

In re Silberkraus, 336 F.3d 864 (9th Cir. 2003)

Fact that the debtor filed a bankruptcy petition only two days before a state court was to schedule a trial date on a creditor's claims for specific performance; the admissions by the debtor and his counsel that reorganization was impossible over the objections of creditors; and the fact that bankruptcy could not have provided more value to the debtor than proceeding with the state court action support bankruptcy court's finding that filing was frivolous and for an improper purpose.

In re Sylmar Plaza, L.P., 314 F.3d 1070 (9th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003)

Chapter 11 plan was proposed in good faith where the sole purpose was to enable debtors to cure and reinstate an obligation, thereby avoiding contractual liability for default interest.

In re Henry Mayo Newhall Memorial Hospital, 282 B.R. 444 (9th Cir. B.A.P. 2002)

Bankruptcy court properly extended exclusivity period.

In re Southern Pacific Funding Corporation, 268 F.3d 712 (9th Cir. 2001)

Subordination clause in indenture agreement that preserved certain secured creditors' rights both pre- and post- bankruptcy did not violate § 365(e)(1) of the bankruptcy code.

In re Crystal Properties, Ltd., 268 F.3d 743 (9th Cir. 2001)

"Without notice or demand" provision in default interest clause of loan agreement did not alter requirement that holder of defaulted loan must carry out some affirmative act to exercise its option to accelerate the loan and invoke the default interest clause. Default interest rate did not come into effect until holder of the note first took affirmative action to put the debtor on notice that it intended to exercise its option to accelerate, and thus invoke the default rate.

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)

Listing of prepetition "songrights" in a value of "unknown" "was not so defective that it would forestall a proper investigation of the asset." Accordingly, the right to post-petition royalties from these assets vested in the debtor upon confirmation of his chapter 11 plan. Unpaid prepetition royalties did not vest in the debtor, because they were subject to a separate listing requirement as causes of action.

In re Hassen Imports Partnership, 256 B.R. 916 (9th Cir. B.A.P. 2000)

1) Debtor was not entitled to attorney fees under CCP § 1717, since the dispute in question was not an action on a promissory note, but an action on confirmation of a plan, which is governed by federal bankruptcy law; 2) bankruptcy court erred in finding that secured creditor was entitle to the default rate of interest in the note, since the creditor "failed to demonstrate that the default rate reasonably compensated it for losses arising from the default;" 3) secured creditor was entitled to fees under § 506(b)for pursuing collection of note from guarantors

In re Bartleson, 253 B.R. 75 (9th Cir. B.A.P. 2000)

Because the chapter 11 plan did not contain a provision enjoining collection activity by

creditors with respect to their nondischargeable claims, creditors were not precluded from pursuing their collection rights outside of the plan.

In re Fred Lowenchuss, 170 F.3d 923 (9th Cir. 1999) case 2

District Court properly vacated confirmation order where plan improperly excluded 8 million in assets.

Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434 (1999)

Shareholders may be barred from putting up new money to retain ownership of company following bankruptcy reorganization if others, including unsecured shareholders, were never allowed to propose alternative plans.

In re Duvar Apt. Inc., 205 B.R. 196 (9th Cir. B.A.P. 1996)

Transfer to shell corporation raises presumption of bad faith.

In re Kelley, 199 B.R. 698 (9th Cir. B.A.P. 1996)

Vague references in plan and disclosure statement not sufficient to avoid res judicata on counterclaims against secured creditor post-confirmation

In re Arnold and Baker Farms, 177 B.R. 648 (9th Cir. B.A.P. 1994), *aff'd*, 85 F.3d 1415 (9th Cir. 1996), *cert. denied*, 519 U.S. 1054 (1997)

Partial transfer of collateral in full satisfaction of debt failed to give creditor indubitable equivalent of secured claim.

In re Antiquities of Nevada, Inc., 173 B.R. 926 (9th Cir. B.A.P. 1994)

Debtor may not modify reorganization plan after fulfilling applicable statutory requirements to substantially consummate plan.

In re Hotel Associates of Tucson, 165 B.R. 470 (9th Cir. B.A.P. 1994)

Motive in creating an impaired class is irrelevant.

In re Boulders on the River, Inc., 164 B.R. 99 (9th Cir. B.A.P. 1994)

In this single asset, 100% plan:

(1) Converting construction financing to permanent with 25 year amortization and 7 year balloon was okay.

(2) No bad faith under § 1129(a)(3).

(3) 9% blended rate for cramdown interest was okay.

I.R.S. v. Creditors' Committee (In re Deer Park, Inc.), 10 F.3d 1478 (9th Cir. 1993)

Bankruptcy court confirmed liquidating Chapter 11 plan that sold all debtor's assets and distributed proceeds. Plan erroneously listed I.R.S. tax claim at $20,000 less than actual claim. amount. When shortfall was discovered, creditors' committee moved to modify plan to require

I.R.S. to first apply payments to the "trust fund" taxes for which debtor's president was personally liable under 26 U.S.C. §§ 6672 and 7501. Motion granted and affirmed under authority of *United States v. Energy Resources Co.*, *Inc.*, 495 U.S. 545 (1990). (Chapter 11 reorganization plan could require I.R.S. to allocate payments first to trust fund taxes even though this increased risk to I.R.S. that non-trust fund taxes may not be paid.) *Held*: Liquidation may be a form of reorganization and the continued participation of debtor's president in a planned liquidation may be necessary to maximize recovery for creditors.

In re L&J Anaheim Assoc., 995 F.2d 940 (9th Cir. 1993)

Creditor plan which requires property to be sold through bankruptcy trustee impairs creditor since it deprives him of state law contract rights, even if it enhances his position.

In re Wheeler Technology, Inc., 139 B.R. 235 (9th Cir. B.A.P. 1992)

Bankruptcy court has no power to remove a creditor from a creditor's committee.

In re Orange Tree Assoc., Ltd., 961 F.2d 1445 (9th Cir. 1992)

Must file complaint to revoke within 180 days of confirmation order, not order modifying plan.

Hay v. First Interstate Bank or Kalispell, N.A., 978 F.2d 555 (9th Cir. 1992)

Debtor barred from suing post-confirmation when it knew facts preconfirmation.

Great Western Bank v. Sierra Woods Group, 953 F.2d 1174 (9th Cir. 1992)

Fairness of a plan that includes "negative amortization" (see § 1129) must be determined on a case-by-case basis.

Official Committee of the Unsecured Creditors of White Farm Equipment Company v. United States, 111 B.R. 158 (N.D. Ill. 1990), *reversed*, 943 F.2d 752 (7th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992)

I.R.S. property tax discharged in first Chapter 11, making I.R.S. general unsecured creditor in second Chapter 11.

In re Mann Farms, Inc., 917 F.2d 1210 (9th Cir. 1990)

Where state court determination of lawsuit will not affect plan of reorganization, right is not preempted by plan.

In re Grimes, 117 B.R. 531 (9th Cir. B.A.P. 1990)

Chapter 12 filing not prohibited while Chapter 11 plan not substantially consummated.

In re Fowler, 903 F.2d 694 (9th Cir. 1990)

Reorganization cramdown rate using market formula approach must consider risk factors as well as rates for similar loans in the area. *See also In re Camino Real Maintenance Contractors, Inc.,* 818 F.2d 1503 (9th Cir. 1987).

In re Lenox, 902 F.2d 737 (9th Cir. 1990)

(1) Remand was warranted for bankruptcy court to take evidence as to feasibility of plan, and

(2) on remand, court was to enforce stipulation unless it found special circumstances justified course of action necessary to save farm and, if so, was to adopt measures that would give creditors the interest and principal which, under stipulation, they would have had by date loan was to be made current and was to shorten payment period under plan so that creditors could be repaid in 15 years rather than 23.

In re Rohnert Park Auto Parts, Inc., 113 B.R. 610 (9th Cir. B.A.P. 1990)

Plan impermissibly enjoined creditors from suing co-debtors

in absence of objection, court has no obligation to inquire into plan

In re J.J.Re-Bar Corp., 644 F.3d 952 (9th Cir 2011)

The IRS may pursue "Responsible Person" collection against Chapter 11 Debtor's principals despite confirmed plan's provision barring collection from 3rd parties. Plan provision violated Anti-Injunction Act, 26 U.S.C. §7421(a).

**SBRA**

We are waiting for appellate caselaw regarding the SBRA. Until then, a good resource is Bankruptcy Judge Paul Bonapfel's "A Guide To the Small Business Reorganization Act of 2019." A copy of the most recent version is attached. I will describe some SBRA cases within the 9th Circuit. See below.

In re Orange County Bail Bonds, Inc., 638 B.R. 137 (9th Cir. B.A.P. 2022)

Explains need for bankruptcy court to set a disposable income period under section 1191(c)(2).

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

Debtor has burden of establishing its eligibility for SubChapter V. Case also analyzes meaning of "engaged in commercial or business activities." The term "engaged in" is contemporary in focus and not retrospective. A debtor need not be maintaining its core or historical operations on petition date, but must be presently engaged in some type of commercial or business activity to satisfy § 1182(1)(A). If debtor is no longer operational, scope of commercial or business activities is very broadly defined, and subject to a totality of circumstances standard. Case discusses several examples. There is no "pursuit of profit" requirement.

## CHAPTER 12

### 1. Eligibility

In re Carolyn L. Davis, 778 F.3d. 809 (9th Cir. 2015).

The term "aggregate debts" in § 101(18)(A) for purposes of determining Chapter 12 eligibility includes liability for the unsecured portions of claims secured by real property, even when the debtor's personal liability was discharged in a prior Chapter 7.

**CHAPTER 13**

1. **Chapter 13 Plan and Modification**
2. **Chapter 13 Trustee**
3. **Child Support**
4. **Claim and issue preclusion - binding effect of plan**
5. **Direct payment of claims "outside" the plan**
6. **Dismissal or conversion**
7. **Disposable Income**
8. **Good Faith/Bad Faith**
9. **Tax debts**
10. **§ 109 - Eligibility**
11. **§ 1322**
12. **§ 1325**
13. **§ 1325 (hanging paragraph)**
14. **Student Loans**
15. **Fees**
16. **Discharge - § 1328**
17. **§ 1305**
18. **Misc**
19. **Motions to Value, Bad Faith and Effect on Eligibility**

**1. Chapter 13 Plan and Modification**

In re Sharp, __B.R.__ (9th Cir. B.A.P. 2025)

Chapter 13 debtor has limited options to reclaim property when a judicial foreclosure (here, under Washington state law) precedes the bankruptcy. Even when state law provides a statutory right of redemption, a bankruptcy filing may, at most, temporarily extend the state redemption period under section 108(b). Chapter 13 does not allow debtors to alter state law ownership rights in the foreclosed property.

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

Absent an objection by the 13 Trustee or an allowed, general unsecured creditor under § 1324(b)(4), bankruptcy court cannot deny confirmation because a plan proposes an estimated plan term. See Judge Stephen Johnson's decision in In re Roach, 20-51257 (Bankr. N.D.CA 2020) for good example of what constitutes a proper objection.

In re Garcia, 2020 Bankr.LEXIS 3583 (Bankr.AZ 2020)

13 debtor may include post-petition mortgage default under a modified plan.

In re Black, 609 B.R. 518 (9th Cir. B.A.P. 2019)

Post-petition sales proceeds of property that revested in debtor are not property of the estate and cannot be used to compel plan modification. Provides a good explanation of what

constitutes "property of the estate" in the 9th Circuit. For plan modification purposes, payments not complete when Debtor pays them early, unless plan is modified to shorten its term. Contrast with In re Berkley, below.

In re Berkley, 613 B.R. 547 (9th Cir. B.A.P. 2020)

Trustee may move to modify plan when debtor cashes in stock options earned post-petition.

In re Moreno, 622 B.R. 903 (Bankr. C.D.Ca. 2020)

Wife can treat an asset that became part of her bankruptcy estate after husband's earlier bankruptcy closed, and asset revested in the couple.

In re Fridley, 380 B.R. 538, 544 (9th Cir. B.A.P. 2007)

The "applicable commitment period" of § 1325(b)(1) has a temporal component. " A debtor desiring to prepay a chapter 13 plan and obtain an early discharge without paying allowed unsecured creditors in full must follow the § 1329 modification procedure prescribed by Rule 3015(g)."

In re Schlegal, 526 B.R. 333 (9th Cir. B.A.P. 2015)

Chapter 13 debtor must make plan payments for the time period in plan, and actually pay the percentage indicated in the plan to unsecured creditors.

In re Bea, 533 B.R. 283 (9th Cir. B.A.P. 2015)

Court may confirm a plan which does not offer adequate protection to a secured creditor as required by Chapter 13, but where the secured creditor does not object. Adequate protection is not a "self-executing" requirement of Chapter 13. The case has an interesting discussion of where the bankruptcy court should *sua sponte* raise objections to confirmation.

In re Brawders, 325 B.R. 405 (9th Cir. B.A.P. 2005), *aff"d,* 503 F.3d 856 (9th Cir. 2007)

Debtors could not alter taxing authority's lien rights on residence through a vague form plan provision that did not give adequate notice of debtor's intent. Thus, "the res judicata effect of the Plan did nothing to reduce the amount of Ventura's underlying tax assessments or affect Ventura's lien rights."

In re Sunahara, 326 B.R. 768 (9th Cir. B.A.P. 2005)

A debtor may modify a confirmed 36-month chapter 13 plan so as to pay it off in a single lump sum and receive an early discharge. Model plan which requires a 100% pay out to unsecured creditors if it extends less than 36 months is invalid.

In re Profit, 283 B.R. 567 (9th Cir. B.A.P. 2002)

1. Under 1329(b)(1), a modified plan must meet some of the same requirements as an original plan, including the 60-month duration limit.

2. The 60-month period begins to run from the date the first plan payment is due.

In re Mattson, 468 B.R. 361 (9th Cir. B.A.P. 2012)

Section 1329 does not require a threshold finding of an unanticipated change in income or expenses. Section 12329(b)(1) does not incorporate the disposable income test or the applicable commitment period criteria. A proposed plan modification still requires good faith.

In re Braker, 125 B.R. 798, (9th Cir. B.A.P. 1991)

A Chapter 13 plan may not cure and reinstates a mortgage subsequent to a pre-petition foreclosure sale, but prior to the expiration of a statutory right of redemption

**2. Chapter 13 Trustee**

In re Evans, 69 F.4th 1101 (9th Cir. 2023)

A Chapter 13 trustee is only entitled to receive their percentage fee if the Chapter 13 plan is confirmed. Section 1326(b)(2) does not violate the Chapter 13 trustee's due process rights. See In re Chapter 13 Trustee's Motions For Declaratory Relief, __B.R. __ (9th Cir. B.A.P. 2025).

In re Cohen, 305 B.R. 886 (9th Cir. B.A.P. 2004)

1. Chapter 13 trustee has standing to pursue avoiding actions for the benefit of the estate;

2. The right to receive a tort settlement fund is neither a "payment intangible" nor an equitable assignment**.**

In re Powers, 202 B.R. 618 (9th Cir. B.A.P. 1996)

Trustee need not show change in debtor's circumstances in order to move for modification of debtor's plan.

In re Andrews, 49 F.3d 1404 (9th Cir. 1995)

Chapter 13 trustee has standing to object if plan doesn't comply with Title 11, even if none of creditors object

In re Andrews, 155 B.R. 769 (9th Cir. B.A.P. 1993), *aff'd*. 49 F.3d 1404 (9th Cir. 1995)

Chapter 13 trustee has standing to object to plan extending beyond three years. Court properly denied confirmation for lack of cause.

**3. Child Support**

In re Foster, 319 F.3d 495 (9th Cir. 2003)

Interest on nondischargeable child support continues to accrue after a chapter 13 petition is filed and survives a chapter 13 discharge.

In re Pacana, 125 B.R. 19 (9th Cir. B.A.P. 1991)

Child support debt provided for in chapter 13 plan may be collected upon by claimant

outside of plan.

**4. Claim and issue preclusion - binding effect of plan**

United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S.Ct. 1367 (2010)

A student loan creditor whose proof of claim includes interest, but who receives adequate notice of a plan the terms of which do not provide for the payment of interest may be bound by it and have its claim covered by the debtor's discharge. The confirmation of the plan without a showing of undue hardship pursuant to an adversary proceeding was legal error, but does not void the confirmation order. However, bankruptcy courts have the authority and responsibility to deny confirmation of plans that do not comply with chapter 13.

Ellett v. Stanislaus, 506 F.3d 774 (9th Cir. 2007)

Franchise Tax Board was not bound by debtor's discharge for lack of proper notice, where debtor listed the wrong Social Security number on his bankruptcy petition and the wrong number appeared on his § 341(a) notice.

In re Lynch, 363 B.R. 101 (9th Cir. B.A.P. 2007)

Trustee should not have been compelled to abandon property. Even though the debtor valued the property at 560,000 as of the date of the filing of the chapter 13 petition, and the plan was confirmed without objection, that valuation was not binding on the trustee under § 348(f)(1), since no implicit valuation occurred. However, the relevant valuation date was the petition date, not the conversion date (absent a showing of bad faith).

In re Summerville, 361 B.R. 133 (9th Cir. B.A.P. 2007)

Where plan did not affect or address the validity of a note or deed of trust other than to cure arrearages and continue regular payments, debtor was not precluded from challenging the validity of note and deed of trust in subsequent state court action.

In re Ransom, 336 B.R. 790 (9th Cir. B.A.P. 2005)

Chapter 13 plan which prohibited student loan creditor from collecting accrued interest after completion of the plan was a de facto discharge of the student loan debt, for which an adversary proceeding was required and a finding of undue hardship. Thus, the provision is unenforceable.

In re Enewally, 368 F.3d 1165,1165 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 669 (2004)

"Although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor."

In re Repp, 307 B.R. 144 (9th Cir. B.A.P. 2004)

Chapter 13 debtor's plan could not discharge a partially-repaid student loan without giving the creditor the due process protections of an adversary proceeding.

In re Shook, 278 B.R. 815 (9th Cir. B.A.P. 2002)

Debtor who failed to object to secured claim based on judgment lien after repeated notices from chapter 13 trustee was barred by laches from objecting after claim was paid. Creditor's lien could not be avoided by plan alone, which in any event did not "provide for" the lien.

In re Pardee, 218 B.R. 916 (9th Cir. B.A.P. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999)

Student loan creditor waived claim to postpetition interest by failing to object to discharge provision of debtor's Chapter 13 plan before plan's confirmation.

"In summary, the bankruptcy court erred in concluding that a holder of a nondischargeable student loan was precluded from collecting postpetition interest on this debt if the creditor's allowed claim is paid in full pursuant to the Chapter 13 plan. We are bound by the Supreme Court's holding in *Bruning* and reject the bankruptcy court's reliance on *Wasson.*

"However, this error was harmless given the facts of this case. Although the Plan should not have been confirmed because it included the Discharge Provision, which was inconsistent with the Code, once confirmed, it was *res judicata* and binding on Appellant. Additionally, Appellant's failure to object to the Plan at the confirmation hearing constituted an implied acceptance of the Plan. By failing to appeal the Confirmation Order and having impliedly accepted the Plan, Appellant cannot now collaterally attack the Plan. Accordingly, we affirm."

**5. Direct Payment of Claims "Outside" the Plan**

In re Giesbrecht, 429 B.R. 682, 688 (9th Cir. B.A.P. 2010)

A bankruptcy court may exercise its discretion in determining when a debtor may make direct payments to creditors, since neither § 1322 nor § 1326 provides any guidance on the subject. Here, the bankruptcy court abused its discretion when it failed to articulate clear standards for refusing to allow such direct payments.

In re Mrdutt, 2019 Bankr. LEXIS 1587 (9th Cir. B.A.P. 2019)

Direct monthly payments under a Chapter 13 plan are payments under the plan for discharge purposes. But see: In re Dukes, 2018 WL 6367176 (11th Cir. 6.6.18), where 11th Circuit held that direct payments are not payments under a Chapter 13 plan and cannot be discharged.

**6. Dismissal or Conversion (see also separate "Dismissal" section)**

In re Powell, 644 B.R. 186 (9th Cir. B.A.P. 2022)

Section 1307(b) provides Chapter 13 debtors with an absolute right to dismiss their case, subject to the statutory exception (see In re Nichols). Fact that debtor was ineligible for 13 or acted in bad faith is irrelevant. Affirmed by Ninth Circuit, decision dated 10/1/24.

In re Nichols, 10 F.4th 956 (9th Cir. 2021)

Debtor has absolute right to dismiss Chapter 13 under § 1307(a). *In re Rosson, 545 F.3d 764 (9th Cir. 2008)* no longer good law.

In re Burton, 610 B.R. 633 (9th Cir. B.A.P. 2020)
Discusses standard for dismissing cases connected to marijuana cultivation.

In re DeFrantz, 454 B.R. 108 (B.A.P. 9th Cir. 2011)
Debtor has absolute right to convert from 13 to 7.

In re Marrama, 549 U.S. 365, 127 S.Ct. 1105 (2007)
Debtor forfeited his right to convert his case to chapter 13 where he did not qualify as a debtor because of his bad faith concealment of assets**. Still good law after Law v. Siegal?**

In re Sobczak, 369 B.R. 519, 518 (9th Cir. B.A.P. 2007)
Court should not have considered interests of the debtor in determining whether to dismiss under § 1307(c). It should only have considered the best interests of the estate and creditors.

In re Nelson, 343 B.R. 671 (9th Cir. B.A.P. 2006)
Dismissal for cause under § 1307(c)(5) requires not only a denial of confirmation**,** but denial of a motion to file an amendment or modification of the plan. Debtor had to be given an opportunity to file an amended plan before dismissal was proper.

In re Tran, 309 B.R. 330 (9th Cir. B.A.P. 2004), *aff'd,* 177 Fed. Appx. 754 (9th Cir. 2006)
Home refinancing proceeds revested in debtor after dismissal of chapter 13 petition; funds in chapter 13 trustee's hands had to be turned over to the debtor.

In re Leavitt, 171 F.3d 1219 (9th Cir. 1999)
Ch 13 bankruptcy debtor's concealment of assets and inflation of expenses could amount to bad faith warranting dismissal of petition with prejudice. To see factors that court should apply in determining bad faith, see also In re Feiling, 2013 WL 2451333.

In re Morimoto, 171 B.R. 85 (9th Cir. B.A.P. 1994)
Dismissed for bad faith for failure to file tax returns was appropriate.

In re Beatty, 162 B.R. 853 (9th Cir. B.A.P. 1994)
Debtors dismissal before the order of conversion was docketed was effective.

Harris v. Vegelahn, 575 U.S. 510, 135 S.Ct. 1929 (May 18, 2015).
When a chapter 13 debtor converts case to Chapter 7, the Chapter 13 trustee must turnover funds he/she holds to the debtor.

### 7. Disposable Income

In re Saldana, 122 F.4th 333 (9th Cir. 2024)
Voluntary retirement contributions to employer managed retirement plans from their disposable income calculation under Chapter 13. Decision reverses In re Parks, 475 B.R. 703 (9th Cir. B.A.P. 2012) and relies on Bankruptcy Code section 541(b)(7).

In re Rodriguez, 620 B.R. 94 (9th Cir. B.A.P. 2020)

Under § 1325(b), bankruptcy court sustained chapter 13 trustee objection to confirmation of a chapter 13 plan proposed by above-median income debtors because, in calculating their disposable income, they claimed monthly vehicle operation expenses over the amount specified in the applicable Local Standards published by the Internal Revenue Service. Court cannot ignore IRS amounts by consulting with IRS handbook.

In re Adinolfi, 543 B.R. 612 (9th Cir. B.A.P. 2016)

"Benefits received under the Social Security Act" should be read as "benefits received subject to the authority of, and in accordance with, 42 U.S.C.A. §§ 301-1397mm." Dissent argues that the Social Security Act is a "sprawling statute," and this definition excludes too much income under the means test.

In re Welsh, 711 F.3d 1120 (9th Cir. 2013)

All secured debt payments (other than secured debts on property to be surrendered or subject to lien strips) may be deducted on Means Test. Means Test does not require that secured asset be essential or necessary for debtor's life, and debtor's failure to use social security income is not a sign of bad faith.

In re Flores, 2013 U.S.App. LEXIS 18064 (9th Cir. 2013)

Ninth Circuit held that holding in In re Kagenveama, 541 F.3d 868 (9th Cir. 2008) regarding determination of length of Chapter 13 plan for above-median income debtors with negative disposable income survives Hamilton v. Lanning, 130 S.Ct. 2464 (2010).

Hamilton v. Lanning, 130 S.Ct. 2464 (2010)

The Supreme Court rejected the "mechanical application" of the means test as advocated by the Ninth Circuit in In re Kagenveama, 541 F.3d 858 (9th Cir. 2008) and held that the term "projected" meant exactly that: projected, and that this term is susceptible to foreseeable changes in a Chapter 13 debtor's income and expenses. The Supreme Court therefore allowed the Chapter 13 debtor to propose a monthly payment that reflected foreseeable changes in her monthly income or expenses.

In re Smith, 418 B.R. 359 (9th Cir. B.A.P. 2009)

In calculating projected disposable income, above-median-income debtors were not entitled to include as amounts contractually due to secured creditors payments on collateral that the debtors are surrendering.

In re Martinez, 418 B.R. 347 (9th Cir. B.A.P. 2009)

In calculating projected disposable income, above-median-income debtors were not entitled to include as amounts contractually due to secured creditors mortgage payments as to junior mortgages that had been stripped off.

Ransom v. FIA Card Services, 131 S.Ct. 716, 178 L.Ed. 2d 603 (2010)

A debtor must have a car loan or a lease payment to use the IRS' $471.00 National

Standard Deduction. This expense was not "applicable" when debtor does not have a loan or lease payment. The text of § 707(b)(2)(A)(ii)(I) applies to "applicable" expenses.

In re Wiegand, 386 B.R. 238 (9th Cir. B.A.P. 2008)

Official Form 22C, which allows an individual debtor in a chapter 13 case to deduct business expenses from income generated from a business**,** conflicts with § 1325(b)(2)(B), which allows the deduction of business income for purposes of determining disposable income, and is thus invalid.

In re Luedtke, 2014 WL 1386618 (9th Cir. B.A.P. 2014)

Court applied plain meaning of § 707(b)(2)(A)(ii)(I) and held that in an above median income case, a debtor cannot claim a $200 deduction as part of their monthly transportation expense as an "older vehicle operating expense." This expense is not part of the IRS National Standards and Local Standards, which generally control the expenses available for above median income debtors.

In re Hull, 251 B.R. 726 (9th Cir. B.A.P. 2000)

Debtor's community property interest under Washington law in the income of his nondebtor spouse is part of his "disposable income" and must be counted in calculating whether he meets the test of § 1322(a)(1) and § 1325(b)(1)(B).

In re Burgie, 239 B.R. 406 (9th Cir. B.A.P. 1999)

Nonexempt assets from sale of house not subject to inclusion in plan as disposable income. (Not clear from decision whether some other ground, such as liquidation test, might justify trustee
motion to modify plan).

In re McCullers, 451 B.R. 498 (N.D.Cal. 2011)

In calculating projected disposable income for Chapter 13 plan, voluntary contributions to retirement plan are not deductible as "reasonably necessary expenses."

In re Than, 215 B.R. 430 (9th Cir. B.A.P. 1997)

1. § 1329 does not require changed financial circumstances, but merely changed circumstances.

In re Parks, 475 B.R. 703 (9th Cir. 2012)

The B.A.P. held that the most reasonable interpretation of Bankruptcy Code § 541(b)(7)(A) is that a Chapter 13 debtor cannot exclude post-petition retirement contributions from their disposable income calculations, and that § 541(b)(7)(A) only excludes from property of the estate only those 401(k) contributions made before the petition date.

In re Scholz, 699 F.3d 1167 (9th Cir. 2012)

The anti-exclusion clause in the Railroad Retirement Act of 1974 did not allow the debtor

to exclude annuity payments from disposable income calculation.

**8. Good Faith/Bad Faith**

In re Villanuevo, 274 B.R. 836 (9th Cir. B.A.P. 2002)

Debtor's proposal to reduce chapter 13 repayment plan from 60 to 36 months, thereby reducing percentage to unsecured creditors from 50% to 19%, did not indicate bad faith or lack of best efforts.

In re Ho, 274 B.R. 867 (9th Cir. B.A.P. 2002)

1. "While a dispute as to liability will not "necessarily render a debt unliquidated," *In re Slack*, 187 F.3d at 1074, the nature of this dispute does." 2. Bankruptcy court abused its discretion in not applying all four of the *Eisen* factors in finding bad faith.

In re Scovis, 249 F.3d 975 (9th Cir. 2001)

"....[E]ligibility would normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." Court also assumed that a lien would be partially avoided under § 522(f), rendering the debtor over the unsecured debt limit.

In re Padilla, 213 B.R. 349 (9th Cir. B.A.P. 1997)

Timing of Chapter 13 case filed immediately after entry of adverse judgment in prior Chapter 7 case was not conclusive evidence of bad faith.

In re Eisen, 14 F.3d 469 (9th Cir. 1994)

Bad faith filing

**9. Tax Debt**

In re Jones, 657 F.3d 923 (9th Cir. 2011)

Because a California Franchise Tax Board debt did not fall within three-year lookback period of § 507(a)(8)(A)(ii), neither the unnumbered paragraph of § 507(a)(8) nor equitable tolling apply**,** and thus the tax was discharged in the debtor's chapter 7 case. Furthermore, because all estate property vested in the debtor upon plan confirmation, the FTB could have pursued collection of the tax debt as a postpetition debt not subject to the automatic stay or the debtor's chapter 13 case. Ninth Circuit did not resolve, however, ongoing dispute regarding extent to which property re-vests in debtor when plan provides for re-vesting under § 1327(b).

In re Joye, 578 F.3d 1070 (9th Cir. 2009)

Tax debt owed to California Franchise Tax Board was discharged, where the debtor properly listed the FTB in his schedules as being owed $10,000, even though the actual amount owed was over $26,000. Section 1305(a)(1) was not applicable, since the debt was incurred prepetition. ". . . [W]e hold that taxes become "payable" for purposes of section 1305(a)(1) when they are capable of being paid." here, the taxes were capable of being paid prepetition.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

U.S. I.R.S. v. Snyder, 343 F.3d 1171 (9th Cir. 2003)

Debtor's interest in a pension plan was not property of the estate, and thus it could not used to secure the IRS's claim for delinquent taxes in his chapter 13 case. This is so, even though the IRS is not subject to ERISA's antialienation provisions.

In re Bevan, 327 F.3d 994 (9th Cir. 2003)

Senior lienholder who bids in amount of deed of trust into foreclosure, takes possession of the property, then pays off amount of IRS lien is not equitably subrogated to the rights of the IRS in the debtor's chapter 13 case.

In re Beam, 192 F.3d 941 (9th Cir. 1999)

The court of appeals affirmed a judgment of the district court. The court held that a Ch. 13 bankruptcy trustee must honor an IRS notice of levy on funds deposited by the debtor toward a proposed plan that is not confirmed.

In re Greatwood, 194 B.R. 637 (9th Cir. B.A.P. 1996), *aff'd.* 120 F.3d 268 (9th Cir. 1997)

Tax protestor cannot maintain Chapter 13 proceedings to dispose of debt to IRS - statements in lieu of returns not adequate (In re Osborne, 76 F.3d 306 (9th Cir. 1996)

Prior to Bankruptcy Reform Act of 1994, Ninth Circuit case law dictated that, in Chapter 13 cases, IRS priority claim disallowed as untimely

In re Heath, 182 B.R. 557 (9th Cir. B.A.P. 1995)

In order to require Chapter 13 debtor to commit to plan all tax refunds debtor receives during plan's term, trustee must make minimal showing that debtor may receive tax refunds

**10. § 109**

In re Fountain, 612 B.R. 743 (9th Cir. B.A.P. 2020)

Good explanation of what constitutes a liquidated, non-contingent debt for 109(e) purposes, and when a court may look behind the schedules to determine eligibility.

In re Free, 542 B.R. 492 (9th Cir. B.A.P. 2015)

Where debtor had discharged personal liability on a fully underwater secured debt in a prior Chapter 7, that debt should not be included with other unsecured debts to determine eligibility under § 109.

In re Gwendolyn Washington, 602 B.R. 70 (9th Cir. B.A.P. 2019): Discharge of personal liability

of an underwater debt secured by a deed of trust does not create a general unsecured claim in the subsequent Chapter 13 part of a Chapter 20 collective filing.

In re Smith, 435 B.R. 637 (9th Cir. B.A.P. 2010)

Where debtor's schedules indicate that the value of a residence is less than the value of the first mortgage on the property, then any junior liens must be counted as unsecured debts for eligibility purposes under *Scovis, infra.* Holding a security interest on the petition date does not mean that a creditor is secured for purposes of the Bankruptcy Code.

In re Guastella, 341 B.R. 908 (9th Cir. B.A.P. 2006)

Tentative decision quantified the amount of the debt the debtor would be liable for in an amount certain. The debt was thus liquidated, since is was readily ascertainable. The court correctly looked beyond the schedules to determine the amount of the debt (which was listed as $0) and correctly determined that the schedules were not filed in good faith.

In re Scovis, 249 F.3d 975 (9th Cir. 2001)

"....[E]ligibility would normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." Court also assumed that a lien would be partially avoided under § 522(f), rendering the debtor over the unsecured debt limit.

In re Slack, 187 F.3d 1070, 1073-75 (9th Cir. 1999)

**". . .**[A] debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided."

In re Nicholes, 184 B.R. 82, 99-91 (9th Cir. B.A.P. 1995)

"Construing *Sylvester* with *Wenberg* and *Loya*, we hold that the fact that a claim is disputed does not per se exclude the claim from the eligibility calculation under § 109(e), since a disputed claim is not necessarily unliquidated. So long as a debt is subject to ready determination and precision in computation of the amount due, the it is considered liquidated and included for eligibility purposes under § 109(e) regardless of any dispute. On the other hand, if the dispute itself makes the claim difficult to ascertain or prevents the ready determination of the amount due, the debt is unliquidated and excluded from the § 109(e) computation."

In re Carty, 149 B.R. 601 (9th Cir. B.A.P. 1993)

109(g)- 180 day period not tolled or renewed between time of second filing and time when motion to dismiss heard, at least based on equities of the case (10 months lapse between second filing and motion to dismiss).

**11. § 1322**

Mission Hen, LLC v. Lee, __F.4th__ (9th Cir. 2025)

Section 1322(c)(2) allows for the modification of an entire claim that matures during the term of a Chapter 13 plan, rather than allowing only for modifcations of the terms of a payment

schedule.

In re Herrera, 422 B.R. 698 (9th Cir. B.A.P. 2010)

Optional plan addendum promulgated by the bankruptcy judges of the Central District of California did not violate RESPA, the separation of powers, or § 1325(b)(2)'s prohibition against modification of residential mortgages.

In re Frazier, 377 B.R. 621 (9th Cir. B.A.P. 2007)

Curing of a default as to a Montana contract for deed was governed by § 1322(b)(3)**,** not the 60-day limitation in § 108(b).

In re Enewally, 368 F.3d 1165 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 669 (2004)

Lien stripping cannot be accomplished under § 1322(b)(2) unless the lien will be paid off within the life of the plan.

In re Zimmer, 313 F.3d 1220 (9th Cir. 2002)

A wholly unsecured lienholder is not entitled to the protections of § 1322(b)(2); The holding of *In re Lam*, 211 B.R. 36 (9th Cir. B.A.P. 1997) approved.

In re Labib-Kiyarash, 271 B.R. 189 (9th Cir. B.A.P. 2001)

Student loan that will extend beyond the life of the plan is a "long-term debt" for purposes of § 1322(b)(5). Debtor could separately classify such a student loan and pay it in full "outside" the plan if the classification meets the fairness test under § 1322(b)(1).

In re Hill, 268 B.R. 548 (9th Cir. B.A.P. 2001)

Mother whose credit cards were used by debtor daughter was not "liable with" the debtor, and thus § 1322(b)(1) dealing with separate classification of co-debtor debt was inapplicable.

In re Renteria, 470 B.R. 838 (B.A.P. 9th Cir. 2012)

B.A.P. discusses three standards by which a Chapter 13 debtor may separately classify a consumer co-debtor claim. No consensus on what standard applies.

In re Lee, 215 B.R. 22 (9th Cir. B.A.P. 1997)

First deed of trust on real estate and appliances can't be stripped under 1322(b)(2)

In re Lam, 211 B.R. 36 (9th Cir. B.A.P. 1997)

Bankruptcy debtors entitled to treat wholly unsecured deed of trust as unsecured lien

In re Lievsay, 199 B.R. 705 (9th Cir. B.A.P. 1996), *cert. denied*, 522 U.S. 1149 (1998)

Boilerplate language in deed of trust does not eviscerate § 1322(b).

In re Reeves, 164 B.R. 766 (9th Cir. B.A.P. 1994)

§ 1322(b)(2) applies to nonpurchase money home loans.

In re Proudfoot, 144 B.R. 876 (9th Cir. B.A.P. 1992)

Garcia (sp?) Reaffirmed - cannot confirm a plan which calls for no regular payments pending sale of house without violating 1322(b)(2).

**12. § 1325**

Hamilton vs. Lanning, 130 S. Ct. 2464 (2010)

The United States Supreme Court rejected the "mechanical" application for above median income Chapter 13 debtors for determining "projected disposable income," and allows such Chapter 13 debtors to propose a monthly payment that reflects reasonable foreseeable changes in their income and expenses.

In re Pluma, 303 B.R. 444 (9th Cir. B.A.P. 2003), *affd,* 427 F.3d 1163 (9th Cir. 2005)

Under § 1325(a)(5)(B), bankruptcy court appropriately applied the "formula" approach for setting an interest rate, whereby a base rate is determined, and then increases the rate based on the risk of default by the debtor and the nature of the security. However, the court failed to consider all of the default risks with this particular debtor.

In re Cavanagh, 250 B.R. 107 (9th Cir. B.AP. 2000)

Under the amendments made to § 1325(b)(2)(A) by the Religious Liberty and Charitable Donation Protection Act of 1998, "a court is not supposed to engage in a separate analysis to determine whether charitable contributions up to fifteen percent are reasonably necessary for the debtor's maintenance and support." However, a court should look at the debtor's purpose in commencing or increasing the amount of tithing on the eve of or shortly after filing for bankruptcy for purposes of determining whether a chapter.

**13. § 1325 (hanging paragraph)**

In re Penrod, 611 F.3d 1158 (9th Cir. 2010)

1) A lender's payoff of the deficiency on the trade-in is not secured by the purchase money security interest in the new car, and is not thereby protected by the hanging paragraph.

2) "[T]he hanging paragraph protects that portion of the lender's debt allocable to the car purchased, and does not protect that portion of the debt that is allocable to negative equity."

In re Rodriguez, 375 B.R. 535 (9th Cir. B.A.P. 2007)

The "hanging paragraph" does not affect a 910 secured creditor's right to seek a deficiency claim upon surrender of the vehicle.

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. B.A.P. 2007)

Under the "hanging paragraph," chapter 13 debtor was required to pay the full contract price of his automobile. Trial court held that § 1322(b) remained applicable, and the debtor could alter the interest rate and monthly payments. The B.A.P. did not address this issue, since the

creditor did not pursue it on appeal.

### 14. Student Loans

In re Ransom, 336 B.R. 790 (9th Cir. B.A.P. 2005)

Chapter 13 plan which prohibited student loan creditor from collecting accrued interest after completion of the plan was a de facto discharge of the student loan debt, for which an adversary proceeding was required and a finding of undue hardship. Thus, the provision is unenforceable.

In re Pardee, 218 B.R. 916 (9th Cir. B.A.P. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999)

Student loan creditor waived claim to postpetition interest by failing to object to discharge provision of debtor's Chapter 13 plan before plan's confirmation.

"In summary, the bankruptcy court erred in concluding that a holder of a nondischargeable student loan was precluded from collecting postpetition interest on this debt if the creditor's allowed claim is paid in full pursuant to the Chapter 13 plan. We are bound by the Supreme Court's holding in *Bruning* and reject the bankruptcy court's reliance on *Wasson.*

"However, this error was harmless given the facts of this case. Although the Plan should not have been confirmed because it included the Discharge Provision, which was inconsistent with the Code, once confirmed, it was *res judicata* and binding on Appellant. Additionally, Appellant's failure to object to the Plan at the confirmation hearing constituted an implied acceptance of the Plan. By failing to appeal the Confirmation Order and having impliedly accepted the Plan, Appellant cannot now collaterally attack the Plan. Accordingly, we affirm."

In re Sperna, 173 B.R. 654, (9th Cir. B.A.P. 1994)

Nondischargeability of student loan not per se reasonable basis for discriminatory treatment of other unsecured debts in Chapter 13 proceeding.

### 15. Fees

In re Eliapo, 468 F.3d 592 (9th Cir. 2006)

1) No-look presumptive fees do not violate 11 U.S.C. § 330; 2) the bankruptcy court's criteria for awarding additional fees beyond the no-look fee did not violate § 330; and 3) the bankruptcy court did not abuse it's discretion in ruling on fees without a hearing.

In re Johnson, 344 B.R. 104 (9th Cir. B.A.P. 2006)

Chapter 13 plan providing that attorneys' fees remaining unpaid at the completion of the case would not be discharged is not inconsistent with any provision in Title 11.

In re Howard, 2018 Bankr. LEXIS 1356 (9th Cir. B.A.P. 2018)

Chapte3 13 fees awarded after discharge are administrative expenses that are discharged absent other provision in a plan. See In re Bingham, 2019 WL 2059604 (Bankr. N.D.Cal. 2018) for suggested "other" language.

### 16. Discharge - § 1328

Goudelock v. Sixty-01 Association Apartment Owners (In re Goudelock), 895 F.3d. 633 (9th Cir. 2018)

Postpetition condo association dues dischargeable under § 1328(a), even if they "run with the land." Ninth Circuit determined that such dues are still pre-petition claims.

In re Rivera, 2019 Bank. LEXIS 989 (Bankr. AZ 3/28/19)

Takes minority view that failure to make direct payments in a non-conduit plan, which are uncured at conclusion of the case will not prevent entry of discharge. Again, this is the minority view.

In re Waag, 418 B.R. 373 (9th Cir. B.A.P. 2009)

Under § 1328(a)(4), which excepts from discharge "restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury," doesn't not require that a judgment for damages be rendered prior to the petition date.

In re Ryan, 389 B.R. 710 (9th Cir. B.A.P. 2008)

Costs of prosecution are not criminal fines under § 1328(a)(3) and are thus dischargeable.

In re Hennessy, 2013 WL 393886 (Bankr. N.D. Cal. 2013)

Deceased Chapter 13 debtor not entitled to a hardship discharge.

### 17. § 1305

In re Joye, 578 F.3d 1070 (9th Cir. 2009)

Tax debt owed to California Franchise Tax Board was discharged, where the debtor properly listed the FTB in his schedules as being owed $10,000, even though the actual amount owed was over $26,000. Section 1305(a)(1) was not applicable, since the debt was incurred prepetition. ". . . [W]e hold that taxes become "payable" for purposes of section 1305(a)(1) when they are capable of being paid." here, the taxes were capable of being paid prepetition.

### 18. Misc

In re Berkley, 613 B.R. 547 (9th Cir. B.A.P. 2020)

A vesting provision in a confirmed Chapter 13 plan does not prevent creditor from moving under § 1329 to modify plan because of a debtor's unexpected increase in income. Compare with In re Black, 609 B.R. 518.

In re Herrera, 422 B.R. 698 (9th Cir. B.A.P. 2010)

Optional plan addendum promulgated by the bankruptcy judges of the Central District of California did not violate RESPA, the separation of powers, or § 1325(b)(2)'s prohibition against

modification of residential mortgages.

Till v. SCS Credit Corp., 124 S.Ct. 1951 (2004)

Formula approach for setting interest rate based on prime rate adjusted for risk of nonpayment was appropriate cramdown rate of interest.

In re Steinacher, 283 B.R. 768 (9th Cir. B.A.P. 2002)

Local LA rule requiring debtors to pay all past due mortgage payments from previous chapter 13 was invalid.

In re Slack, 187 F.3d 1070 (9th Cir. 1999)

Held that a debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided.

In re Soderlund, 236 B.R. 271 (9th Cir. B.A.P. 1999)

Unsecured portion of secured creditor's claim should be counted as unsecured debt for determining chapter 13 eligibility.

In re Beguelin, 220 B.R. 94 (9th Cir. B.A.P. 1998)

Chapter 13 creditor may recover interest at federal judgment rate from date of petition through and beyond plan's confirmation where estate was solvent.

"The bankruptcy court's oral order lifting the automatic stay clearly allowed Volcano to obtain a judgment in its pending state court action against the debtor that included an award of attorney's fees and costs. The order lifting the stay is AFFIRMED.

"The bankruptcy court's determination that Volcano was entitled to postpetition interest on its claim from the date of the debtor's petition through and beyond the effective date of the confirmed Chapter 13 plan ("gap interest") is AFFIRMED.

"The bankruptcy court's determination that the state law rate of interest was the "legal rate" applicable to Volcano's claim under § 726(a)(5) is REVERSED. We hold that "interest at the legal rate" under § 726(a)(5) is measured by the federal judgment rate. The matter is remanded for a recomputation...

In re Smith, 207 B.R. 888 (9th Cir. B.A.P. 1996)

Life insurance premiums may be necessary expense under chapter 13 even when not required by law

In re Beltran, 177 B.R. 905 (9th Cir. B.A.P. 1995), *reversed* 81 F.3d 167 (9th Cir. 1996)

State filed claim should have been allowed on authority of *In re Pacific & Atlantic Trading Co.*

In re Barnes, 32 F.3d 405 (9th Cir. 1994)

Court may not confirm plan of reorganization where value of property to be distributed during term of plan on account of allowed secured claim is less than allowed amount of claim

In re West, 5 F.3d 423 (9th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994)

The debtors' joint Chapter 13 case suspended the running of § 507(a)(7)(A)(ii)'s 240-day priority period from the date of the bankruptcy petition until six months after the case was dismissed pursuant to I.R.C. § 6503. The IRS claims are therefore entitled to priority.

In re Martin, 156 B.R. 47 (9th Cir. B.A.P. 1993)

1. 60 month period of second filing does not commence from date of first filing
2. Must be cause for cure period to extend beyond 36 months

In re Tucker, 989 F.2d 328 (9th Cir. 1993)

Where debtors concealed $7000, used 6500 to increase equity in house, findings required on creditor's objection.

In re Hobdy, 130 B.R. 318 (9th Cir. B.A.P. 1991)

Failure to notify creditor that arrearages as stated in plan would be binding - violation of due process

In re Laguna, 944 F.2d 542 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992)

In absence of language in promissory note, payment of interest on arrearages was a cure, not modification

In re Dale, 505 B.R. 8 (9th Cir. B.A.P. 2014)

Property of a Chapter 13 estate is governed by § 1306(a)(1), which is broader than § 541. Here, inheritance created by mother's death more than 180 days after petition was property of the Chapter 13 estate under § 1306(a)(1).

### 19. Motions to Value, "Lien Strips," Bad Faith and Effect on Eligibility

In re Jason Lee and Janice Chen, __B.R.__ (9th Cir. B.A.P. 2023)

Bankruptcy Code § 1322(c)(2) creates an exception to the general rule against modification of a loan secured solely by the debtor's residence and allow a debtor to bifurcate secured debt that matures during the plan term. Case also provides a good analysis of when third party contributions to a Chapter 13 plan are allowable.

Lopez v. Specialized Loan Service, et al., A.P. 19-03046 (Bankr. Ct., Eastern District of Virginia, 10/7/19)

Chapter 13 debtor may strip off fully unsecured deed of trust from real property when he only owns a joint tenancy interest and other joint tenant has not filed bankruptcy.

In re Chagolia, 544B.R. 676 (9th Cir. B.A.P. 2016)

In the absence of prejudicial delay, a motion to value and avoid the lien of a junior lienholder may be brought after discharge if the confirmed plan called for its avoidance and treated it as unsecured and if no prejudice to the junior lienholder will occur.

In re Benafel, 461 B.R. 581 (B.A.P. 9th Cir. 2011)

The date for determining whether a debtor's real property is her/her principal residence for purposes of § 1322(b)(2) is the petition date.

In re Blendheim, 803 F.3d 477 (9th Cir. 2015)

A Chapter "20" debtor may permanently void a lien upon the successful completion of a confirmed Chapter 13 plan irrespective of their eligibility to obtain a Chapter 13 discharge. A Chapter 13 filing after a debtor's receipt of a Chapter 7 discharge but before the Chapter 7 case is closed is not per se bad faith. The court should instead apply the bad faith test established by In re Leavitt, 171 F.3d 1219 (9th Cir. 1999). See also In re Boukatch, 533 B.R. 292 (BAP 9th Cir. 2015).

In re Smith, 435, B.R. 637 (B.A.P. 9th Cir. 2010)

A fully unsecured second deed of trust subject to a motion to value counts towards the § 109(e) unsecured debt ceiling.

In re Lepe, 470 B.R. 851 (B.A.P.) 9th Cir 2012)

Court must consider the totality of the circumstances when determining whether a Chapter 13 filed solely to strip off a junior deed of trust was filed in bad faith.

In re Dwight, 2013 Bankr. LEXIS (Bankr. N.D.Cal. 2013)

Petition date is appropriate date to value property in Chapter 13.

In re Gutierrez, 503 B.R. 458 (Bankr.C.D.Cal. 2013)

Petition date is appropriate date to value real property for purposes of a "lien strip" motion in a Chapter 13.

**CHAPTER 15**

In re Black Gold S.A.P.L. _B.R._ (9th Cir. B.A.P. 2022)

Bankruptcy Code § 1501 does not control recognition of a foreign entity. Sections 1515 - 1524 control. Moreover, misconduct/bad faith, standing alone, is not sufficient to invoke the public policy exception to recognition under § 1517/1506.

**CLAIMS**

1. **Definition**
2. **502(b)(2)**
3. **502(b)(6)**
4. **502(b)(7)**
5. **502(b)(9)**
6. **502(c) - Estimation**
7. **502(d)**
8. **502(e)(1)(b)**
9. **502(h)**
10. **502(j)**
11. **Claims Assignment and Trading**
12. **Contingent claims - definition**
13. **Effect of proof of claim; burden of proof; requirements for valid proof of claim; procedure**
14. **Environmental Claims**
15. **Informal and amended proofs of claim; reconsideration of claims**
16. **Tardily-filed claims; excusable neglect**
17. **Miscellaneous**

**1. Definition**

In re ZiLOG, Inc., 450 F.3d 996 (9th Cir. 2006)

1.) Federal law determines when a claim arises under the Bankruptcy Code; 2.) as is true of environmental claims, sex discrimination claims arise under the Bankruptcy Code once it is within the "fair contemplation" of the claimant; 3.) summary judgment in favor of the debtor holding that claimants' postconfirmation claims were not timely filed reversed; bankruptcy abused discretion in not finding excusable neglect for not timely filing prepetition claims.

In re Guastella, 341 B.R. 908 (9th Cir. B.A.P. 2006)

Creditor had a claim, even though a state court had only made a tentative decision on the lawsuit creditor had against the debtor as of the date of the filing of the petition.

In re Cossu, 410 F.3d 591 (9th Cir. 2005)

Insurance company had a right to payment under indemnity agreement with the debtor for losses sustained as a result of sales of unregistered securities for another company which was not disclosed to company, and may have had such a right as to lawsuits arising out of these sales.

**2. 502(b)(2)**

Thrifty Oil Co. v. Bank of America National Trust and Savings Assoc., 322 F.3d 1039 (9th Cir. 2003)

Termination damages under an interest swap agreement, entered into between a lender and a borrower as part of a larger financing transaction, may not constitute unmatured interest disallowed under § 502(b)(2) of the Bankruptcy Code.

In re Holm, 931 F.2d 620 (9th Cir. 1991)

Future profits were not unmatured interest excludable from creditor's claim. Informal proof of claim standards.

**3. 502(b)(6)**

In re El Toro Materials Co., Inc., 504 F.3d 978 (9th Cir. 2007), *cert denied,* 128 S.Ct. 1875 (2008)

The cap on damages from termination of a lease of real property does not cap collateral damage to the property.

In re JSJF Corp., 344 B.R. 94 (9th Cir. B.A.P. 2006), *aff'd,* 277 Fed.Appx. 718 (9th Cir. 2008)

Section 502(b)(6) only applies to damages from the termination of a lease. A lessor may have an un-capped claim for something other than such damages.

In re AB Liquidating Corp.**,** 416 F.3d 961 (9th Cir. 2005)

Security deposit on lease should be applied to the capped damages, rather than the gross claim.

In re Mayan Networks Corp., 306 B.R. 295 (9th Cir. B.A.P. 2004)

A draw upon a letter of credit given as security for a lease will be applied in partial satisfaction of the allowed claim under § 502(b)(6).

In re Arden, 176 F.3d 1226 (9th Cir. 1999)

§506(b)(6) cap is applicable to lessor's claim against debtor guarantor.

In re Lomax, 194 B.R. 862 (9th Cir. B.A.P. 1996)

Mid-Wilshire's election to terminate the lease as abandoned was an acceptance of the debtor's offer of surrender, restoring possession of the premises to the lessor, an triggering the limitations of damages to one year and unpaid rent to two months under § 502(b)(6). The state court's ruling did not preclude the bankruptcy court's hearing of these issues.

In re First Alliance Corp., 140 B.R. 531 (9th Cir. B.A.P. 1992)

§ 502(b)(6) - Postpetition rents do not qualify as credits against one year period. Case seems to hold that one year period runs from the date of rejection.

**4. 502(b)(7)**

In re Condor Systems, Inc. 296 B.R. 5 (9th Cir. B.A.P. 2003)

The § 507(b)(7) cap on allowable claims of terminated employees is calculated

mechanically as of the date of the filing of the petition and prepetition severance payments and pre-and postpetition draws on letters of credit may affect the amount of the claim but not the § 502(b)(7) cap.

In re Networks Electronics Corp., 195 B.R. 92 (9th Cir. B.A.P. 1996)

1. 502(b)(7) applies to both executory and nonexecutory contracts. Here, court finds executory contract even though employee retired nine years prior to bankruptcy

2. 502(b)(7) limits damages regardless of when termination occurs.

**5. 502(b)(9)**

In re Jackson, 541 B.R. 887 (9th Cir. B.A.P. 2015)

Deadline in § 502(b)(9) and FRBP 3002 does not apply to an amended proof of claim filed by the IRS when the IRS's original proof of claim was timely filed and provided "fair notice" that IRS would amend its claim to include exact amounts for unfiled tax years. BAP holds that amended claim relates back to original claim.

**6. 502(c) - Estimation**

In re Aquaslide 'N' Dive Corp., 85 B.R. 545 (9th Cir. B.A.P. 1987)

Bankruptcy court had right and duty to estimate personal injury claim brought against debtor.

**7. 502(d)**

In re MicroAge, Inc., 291 B.R. 503 (9th Cir. B.A.P. 2002)

§ 502(d) may be used to bar payment of administrative claims (such as the reclamation claim in this case), but not after the administrative claim has been allowed.

In re America West Airlines, Inc., 217 F.3d 1161 (9th Cir. 2000)

When a city fails to relinquish an avoidable tax lien, § 502(d) acts to disallow its claim, even if an avoiding action would have been barred by the § 546 statute of limitations.

In re KF Dairies, Inc., 143 B.R. 734 (9th Cir. B.A.P. 1992)

Time-bar statute inapplicable to defensive objections to avoidable transfers. § 546 does not prevent use of § 502(d) as a defense to claims, even where transfer has not been avoided.

**8. 502(e)(1)(B)**

In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988)

### 9. 502(h)

In re Laizure, 548 F.3d 693 (9th Cir. 2009)

Embezzlement claim that was paid off prior to bankruptcy was revived once claimant paid trustee for preference recovery, and thus claimant had a § 523(a)(4) cause of action against debtor. § 502(h) gives a creditor a claim against the estate and the debtor.

### 10. 502(j) - Reconsideration

In re Wylie, 349 B.R. 204 (9th Cir. B.A.P. 2006)

Failure to respond to objection to its claim and failure to establish an excuse for this failure, justified denial of the claim other than on the merits. Once ten days has passed, claimant's right to seek reconsideration under § 502(j) is gone. He is left to seek reconsideration under Rule 60(b), but is limited to the narrow grounds set forth in the rule. Claimant did not establish prerequisites for relief under Rule 60(b)(1), (b)(3), or (b)(6).

In re Cleanmaster Industries, Inc., 106 B.R. 628 (9th Cir. B.A.P. 1989)

§ 502(j). Motion to reconsider is same as Fed.R.Bankr.P. 9024/FRCP 60(b) motion, where appeal time has run.

In re James E. O'Connell Co., Inc., 893 F.2d 1072 (9th Cir. 1990)

§ 506(j). Recovery of expenses from Trustee - Burden of Proof.

In re Levoy, 182 B.R. 827 (9th Cir. B.A.P. 1995)

Motion to reconsider denial of a claim under Fed.R.Bankr.P. 3008 is timely, even though filed over one year after default.

### 11. Claims Assignment and Trading

In re Burnett, 306 B.R. 313 (9th Cir. B.A.P. 2004), *aff'd on other grounds,* 435 F.3d 971 (9th Cir. 2006)

"We hold that in the bankruptcy case of an individual consumer debtor, the transferee's refusal to disclose its purchase price for acquiring an account does not warrant disallowance of an otherwise valid claim."

In re Beugen, 99 B.R. 961 (9th Cir. B.A.P. 1989), *aff'd*, 930 F.2d 27 (9th Cir. 1991)

Claims may not be purchased for an improper purpose.

In re Fagerdala USA-Lompoc, Inc., 891 F.3d. 848 (9th Cir. 2018)

Bankruptcy Court may not designate claims for bad faith under § 1126(e) simply because a creditor offers to purchase only a subset of available claims to block a Chapter 11 plan, and/or blocking the plan will adversely impact the remaining creditors. Must be some evidence that the creditor is seeking to secure some untoward advantage over other creditors for some ulterior

motive.

### 12. Contingent claims - definition

In re Seko Investment, Inc., 156 F.3d 1005 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999)

Claims are contingent as to liability when the debtor's duty to pay arises only upon the occurrence of a future event that was contemplated by the parties at the time of the contract's execution. *See In re Sims,* 994 F.2d at 220, *cert. denied*, 510 U.S. 1049 (1994) (citing *In re All Media Properties, Inc.,* 5 B.R. 126, 132 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981)).

### 13. Effect of proof of claim; burden of proof; requirements for valid proof of claim; procedure

In re Ramirez, _B.R.__ (9th Cir. B.A.P. 2026)

Filing of a secured proof of claim does not, in and of itself, accelerate the underlying debt. "Disallowing" a secured proof of claim in a Chapter 7 case on the ground that the secured creditor should look to its collateral for payment does not extinguish the debt and does not void the lien under section 506(d). Case offers a good explanation of a bankruptcy court's "in rem" and "in personam" jurisdiction.

Bank of New York Mellon v. Lane (In re Lane), 589 B.R. 399 (9th Cir. BAP 2018)

Lack of standing is a substantive objection under § 502(b)(1). Denial of a claim based on lack of standing is not an adjudication of the validity of the underlying claim (in this case, a first deed of trust). BAP distinguished In re Blendheim, 803 F.3d 477 (9th Cir. 2015) on ground that § 506(d) only applies when a claim disallowance addresses the merits of the underlying debt. Lane also contains a good analysis of how to apply an attorney's fee clause in a note under Cal. Civil Code § 1717.

In re Garvida, 347 B.R. 697 (9th Cir. B.A.P. 2006)

Objection to proof of claim of secured creditor in chapter 13 case was correctly sustained, where creditor was given numerous opportunities to provide the debtor with an accounting of how their claim was calculated, but failed to do so, and the debtor provided evidence as to the correct amount of the claim.

In re Campbell, 336 B.R. 430 (9th Cir. B.A.P. 2005)

Interpreting *In re Heath, infra,* the B.A.P. held that a chapter 13 debtor's objections to claims which did not actually contest the debtor's liability or the amount of the claims were properly overruled, even if the claims were not supported by documentation as required by Bankruptcy Rule 3001(c).

In re Heath, 331 B.R. 424 (9th Cir. B.A.P. 2005)

"When a creditor files a proof of claim, that claim is deemed allowed under sections 501

and 502(c). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f)–it is not prima facie evidence of the validity and amount of the claim–but that by itself is not a basis to disallow the claim." Claims here were credit card claims.

In re State Line Hotel, Inc., 323 B.R. 703 (9th Cir. B.A.P. 2005), *vacated and remanded as moot,* 242 Fed.Appx. 460 (9th Cir. 2007)

Service of an objection to a proof of claim is governed by Bankruptcy Rule 3007, not 7004. Service of the objection on the person designated on the proof of claim as the notice recipient was sufficient.

In re Olshan, 356 F.3d 1078 (9th Cir. 2004)

IRS (and presumably other claimants) is not required to fix the amount of its claim in its proof of claim**.**

In re Dynamic Brokers, Inc., 293 B.R. 489 (9th Cir. B.A.P. 2003)

"Deemed allowed" claim may only be challenged over creditor's opposition by filing a claim objection**.**

Lundell v. Anchor Const. Specialists, Inc., 223 F.3d 1035 (9th Cir. 2000)

Debtor did not meet his production burden to rebut prima facie validity of proof of claim.

In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. B.A.P. 1998)

"The allegations of the proof of claim are taken as true if those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, the prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves."

In re Medina, 205 B.R. 216 (9th Cir. B.A.P. 1996)

IRS entitled to rely on presumptive validity of filed proof of claim.

In re MacFarlane, 83 F.3d 1041 (9th Cir. 1996), *cert. denied*, 117 S.Ct 1243 (1997)

Taxing authority has ultimate burden of proving its claim in bankruptcy proceeding**.**

In re Los Angeles International Airport Hotel Associates, 196 B.R. 134 (9th Cir. B.A.P. 1996), *aff'd*, 106 F.3d 1479 (9th Cir. 1997)

Rule 3001(c) provides that "[w]hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim." The failure to attach such a writing, when required, does not automatically invalidate, the claim; it does, however, deprive the claim of prima facie validity under Rule 3001(f). *In re Stoecker*, 5 F.3d 1022, 1027-28 (7th Cir. 1993); *Ashford v. Consolidated Pioneer Mortgage (In re Consolidated Pioneer Mortgage*), 178 B.R. 222, 226-27 (9th Cir. B.A.P. 1995).

In re Consolidated Pioneer Mortgage, 178 B.R. 222 (9th Cir. B.A.P. 1995), *aff'd*. 91 F.3d 151 (9th Cir. 1996)

1. Objecting party must produce evidence tending to defeat the claim that is of a probative force equal to that of the creditor's proof of claim.

2. Failure to attach writings to claim is not basis for denying it. Merely gives claim no prima facie validity.

In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995), *cert. Denied by Lowenschuss v. Resorts Intern., Inc., 517 U.S. 1243 , 116 S.Ct. 2497 (U.S. 1996)*

Error not to allow conditional withdrawal of claim.

Yun Hei Shin and Ramon Palm Lane v. Altman, (9th Cir. BAP), entered 4/20/17

Unpublished case that explains claim litigation evidentiary burdens of proof.

**14. Environmental Claims**

In re Jensen, 995 F.2d 925 (9th Cir.1993)

Origination for state agency's clean up of hazardous waste claim based on debtors' conduct rather than time of payment.

**15. Informal and amended proofs of claim; reconsideration of claims**

In re JSJF Corp., 344 B.R. 94 (9th Cir. B.A.P. 2006), *aff'd and remanded,* 277 Fed.Appx. 718 (9th Cir. 2008)

1) In considering an objection to an amended claim, the objecting party must "show more than simply having to litigate the merits of, or to pay, a claim–there must be some legal detriment to the party opposing." 2) Motion for reconsideration may not present new legal theories or arguments that could have been raised in the original claims proceedings.

In re Wheatfield Business Park, LLC, 308 B.R. 463 (9th Cir. B.A.P. 2004)

Under Bankruptcy Rule 5005, creditor timely filed informal proof of claim by delivering claim documents to United States trustee.

Civic Center Square, Inc. v Ford (In re Roxford Foods, Inc.), 12 F.3d 875 (9th Cir. 1993)

Trustee's Right to Notice of Adversary Proceeding

After Chapter 11 case converted to Chapter 7, plaintiff commenced an adversary proceeding against the trustee and two other creditors. The trustee was served but did not respond. Default judgment was entered against the trustee. Thereafter, plaintiff moved for summary judgment but did not serve trustee based on prior entry of default. Held, Trustee's motion to vacate summary judgment was granted based on failure to serve trustee. Trustee's informal contacts with plaintiff in the main bankruptcy case, where the same disputes were at issue, demonstrated a clear purpose to defend the adversary proceeding and were deemed to be an "appearance" under Fed.R.Civ.P. 55(b)(2).

In re Holm, 931 F.2d 620 (9th Cir. 1991)

Future profits were not unmatured interest excludable from creditor's claim. Informal proof of claim standards.

In re Fish, 465 B.R. 413 (9th Cir. B.A.P. 2011)

Standard for recognizing an informal proof of claim.

**16. Tardily-filed claims; excusable neglect**

In re ZiLOG, Inc., 450 F.3d 996 (9th Cir. 2006)

1.) Federal law determines when a claim arises under the bankruptcy code; 2.) as is true of environmental claims, sex discrimination claims arise under the bankruptcy code once it is within the "fair contemplation" of the claimant; 3.) summary judgment in favor of the debtor holding that claimants' postconfirmation claims were not timely filed reversed; bankruptcy abused discretion in not finding excusable neglect for not timely filing prepetition claims.

Pioneer Inv. Services Co. v Brunswick Assocs. Ltd Partnership, 507 U.S. 380 (1993)

4 part test to determine whether circumstances surrounding the party's omission constitutes "excusable neglect" (weakens In re Hammer's holding re "culpable conduct"):
1. Danger of prejudice to the debtor
2. The length of the delay and its potential impact on judicial proceedings
3. The reason for the delay, including whether it was within the reasonable control of the movant
4. Whether the movant acted in good faith.

In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000)

Statutory deadline for filing of IRS proof of claim was not equitably tolled, even though there was an improper dismissal of the case resulting from clerical error.

In re Osbourne, 76 F.3d 306 (9th Cir. 1996)

Tardily filed claims in chapter 13 cases are to be disallowed not merely given lower priority.

United States v. Towers (In re Pacific Atlantic Trading Co.), 33 F.3d 1064 (9th Cir. 1994)

The I.R.S. received timely notice of the bar date for filing claims in a Chapter 7 case but filed its § 507(a)(7) priority tax claim after the bar date. Th court held that the claim retained its priority status even though it was filed after the bar date. The court reasoned that subsection 726(a)(1), unlike subsections 726(a)(2) and (3), makes no distinction between timely and late claims, and that Congress intended priority claims to receive first distribution regardless of whether a proof of claim was filed timely or late.

In re Coastal Alaska Lines, Inc., 920 F.2d 1428 (9th Cir. 1990)

Relief denied to creditor who had knowledge of debtor's bankruptcy but did not file claim.

**17. Miscellaneous**

In re Chaussee, 399 F.3d 225 (9th Cir. B.A.P. 2008)

The act of filing a proof of claim in a bankruptcy case may not, alone, subject the claimant to liability for violation of state and federal fair debt collection laws.

Midland Funding v. Johnson, 137 U.S. 1407( May 15, 2017)

Filing of proof of claim that is time barred by applicable statute of limitations not a violation of the Fair Debt Collection Practices Act.

In re Sterba, 852 F.3d 1175 (9th Cir. 2017)

Interesting discussion of what statute of limitations applies to a proof of claim, and how to determine choice of law in this context.

In re Lopez, 372 B.R. 40 (9th Cir. B.A.P. 2007), *aff'd,* 550 F.3d 1202 (9th Cir. 2009)

Both pre- and post-B.A.P.CA, debtor is permitted to make direct payments on notes secured by deeds of trust on his residence directly to creditors, while simultaneously allowing him to pay his prepetition arrears on those notes via the trustee.

In re Ritter Ranch Development, L.L.C., 255 B.R. 760 (9th Cir. B.A.P. 2000)

Community development bondholders were not "creditors" of developer**.**

In re Gerwer, 253 B.R. 66 (9th Cir. B.A.P. 2000)

Estate distribution was an involuntary payment, thus prohibiting the debtor from directing that distribution be applied first to the nondischargeable portion of a debt. Creditor had the right to apply payment from estate to the dischargeable portion of the debt.

In re Cogar, 210 B.R. 803 (9th Cir. B.A.P. 1997)

Bank's unexercised rights as senior lienholder of property owned by third party do not make bank creditor of bankruptcy estate of junior lienholder**.**

In re Smith, 205 B.R. 226 (9th Cir. B.A.P. 1997)

Debtor not entitled to jury trial in adversary proceeding to contest IRS tax claim.

In re Irizarry, 171 B.R. 874 (9th Cir. B.A.P. 1994)

Equitable remedies of cancellation of grant deed and liens and recovery of property are not claims subject to discharge. State court litigation not barred by § 362 or 524.

Ratanasen v. State of California, Dept. of Health Services, 11 F.3d 1467 (9th Cir. 1993)

State filed claim against debtor-doctor, alleging Medi-Cal over billing. Claimant's use of a random sample audit of 300 files to prove claims arising from 8,761 total actual files was held valid. Each file did not have to be examined to prove amount of claim. Court upholds as a matter of law the use of statistical sampling and extrapolation, in publicly-funded reimbursement

programs.

In re Riverside-Linden Investment Co., 99 B.R. 439 (9th Cir. B.A.P. 1989), *aff'd*, 925 F.2d 320 (9th Cir. 1991)

General partner's partnership interest is not a claim.

**COLLATERAL ESTOPPEL & RES JUDICATA (ISSUE AND CLAIM PRECLUSION)**

In re Griffithe, __B.R.__(9th Cir. B.A.P. 2025)

Good discussion of elements of California state issue and claim preclusion. Claim preclusion (with regard to a California Superior Court judgment) does not apply to nondischargeability proceedings because non-dischargeability is an entirely separate determination. In contrast, issue preclusion does apply to non-dischargeability proceedings.

In re Censo, 638 B.R. 416 (9th Cir. B.A.P. 2022)

Discusses elements of federal claim preclusion.

In re Italiane, 632 B.R. 662 (9th Cir. B.A.P 2021)

Stipulated judgments under California law can be used for issue preclusion, and the stipulated judgment need not contain stipulated facts. Entry of a stipulated judgment necessarily included a finding that all the elements to establish that cause of action existed. Good analysis of grounds needed to give issue preclusive effect to stipulated judgment, including need to establish that parties intended to be bound by its terms.

In re Delannoy, 605 B.R. 572 (9th Cir. B.A.P. 2020)

Good analysis of 1) whether a conversion judgment can satisfy willful and malicious elements of § 523(a)(6) and 2) whether sale of debtor's appeal rights to the conversion judgment creditor affected creditor's rights to assert privity for purposes of applying issue preclusion.

Zuckerman v. Crigler, et. al. (In re Zuckerman), 613 B.R. 707 (9th Cir. B.A.P. 2020)

Good analysis of application of Cal. issue preclusion law to a 523(a)(2)(A) claim, where underlying state court case went to trial without defendant's participation. Also a good analysis of when a judgment based on admissions can use issue preclusion (look at comparison between Cal. and Federal law).

In re Tomkow, 563 B.R. 716 (9th Cir. B.A.P. 2017)

BAP examines applicability of issue preclusion when state court affirms only portion of underlying state court tort judgment to non-dischargeability action. See also *In re Javahery*, 2017 WL 971780 (9th Cir. BAP March 2017) for a recent application of issue preclusion.

In re Yu, 2016 Bankr.LEXIS 2956 (9th Cir. B.a.P. 2016)

Contrasts federal issue preclusion doctrine to California's issue preclusion doctrine.

Taylor v. Sturgell, 553 U.S. 880, 128 S.Ct. 2161 (2008)

Court rejects the application of the "virtual representation" doctrine to claim and issue preclusion as to nonparties except under narrow circumstances.

Kendall v. Visa U.S.A., Inc., 5118 F.3d 1042, 1050-51 (9th Cir. 2008)

Issue preclusion prevents a party from relitigating an issue decided in a previous action if four

requirements are met: "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action."" [citation omitted].

In re Cogliano, 355 B.R. 792 (9th Cir. B.A.P. 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her second claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

In re George, 318 B.R. 729 (9th Cir. B.A.P. 2004), *aff'd,* 144 Fed.Appx. 636 (9th Cir. 2005)*, cert. denied,* 546 U.S. 1094 , 126 S.Ct. 1068 (2006)

Claim preclusion barred debtor from pursuing a § 525 claim in bankruptcy court that could have been pursued in previous litigation dismissed with prejudice in federal court.

Miller v. U.S, 363 F.3d 999 (9th Cir. 2004)

Res judicata did not apply to IRS claim, where the plan's discharge provisions were found to be ambiguous.

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004)

Res judicata did not bar trustee from seeking to surcharge a debtor's wild card exemption based on under-reporting of assets, even though the trustee could have joined this action with complaint objecting to discharge upon which he prevailed.

In re Arneson, 282 B.R. 883 (9th Cir. B.A.P. 2002)

A § 523 judgment in a prior bankruptcy case has claim preclusion effect unless and until vacated.

Stratosphere Litigation L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137 (9th Cir. 2002)

Third party creditor was barred by res judicata from challenging bankruptcy court's confirmation of debtor's reorganization plan after party's predecessor had previously failed to object

Rein v. Providian Financial Corporation, 270 F.3d 895 (9th Cir. 2001)

Federal doctrine of claims preclusion requires a showing that: " 1)the parties are identical or in privity; 2)the judgment in the prior action was rendered by a court of competent jurisdiction; 3)the prior action was concluded to a final judgment on the merits; and 4) the same cause claim or cause of action was involved in both suits."

In re Wolfberg, 255 B.R. 879 (9th Cir. B.A.P. 2000)*, aff'd,* 37 Fed.Appx. 891 (9th Cir. 2002)

Debtor's attempt to assert a claim of homestead exemption after confirmation of a chapter 11 plan was barred by res judicata

In re DiSalvo, 219 F.3d 1035 (9th Cir. 2000)

An individual chapter 11 debtor who defended against a nondischargeability suit was barred by the doctrine of claim preclusion from advancing additional debtor-in-possession claims in the same forum.

Siegel v. Federal Home Loan Mortgage Corporation, 143 F.3d 525 (9th Cir. 1998)

Ruling allowing bankruptcy claim on note secured by deed of trust was res judicata in subsequent suit founded on theory that could possibly have supported objection to bankruptcy court claim. Claim that is deemed allowed has res judicata effect.

In re Universal Life Church, Inc., 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)

Application of collateral estoppel test in tax context**.**

In re Russell, 76 F.3d 242 (9th Cir. 1996)

The court of appeals reversed a decision of the Ninth Circuit B.A.P. The court held that a state court proceeding in which a final judgment was entered with regard to entities that individuals completely controlled, collaterally estopped those individuals from litigating a civil rights action concerning identical issues, even though judgment on its face was not applied to individuals. (Reversing 166 B.R. 901 (9th B.A.P. 1994) which held that no res judicata effect as to counterclaim, where counterclaim was reserved in consent judgment).

In re Pizante, 186 B.R. 484 (9th Cir. B.A.P. 1995), *aff'd*, 107 F.3d 878 (9th Cir. 1997)

Default judgment rendered because of failure to respond to request for admissions does not have collateral estoppel effect, since there were issues not actually litigated.

In re Ivory, 70 F.3d 73 (9th Cir. 1995)

Res judicata precludes a collateral attack on a Ch. 13 confirmation order, even if party was not a creditor and the defect was thus jurisdictional.

In re Berr, 172 B.R. 299 (9th Cir. B.A.P. 1994)

Consent judgment equals collateral estoppel only where parties so intend it.

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

State law of collateral estoppel applies in determination of fraud - 523(a)(4) action. Under this law, collateral estoppel bars relitigation when "(1) the issue decided in the prior action is identical to the issue presented in the second action, (2) there was a final judgment on the merits, and (3) the party against whom estoppel is asserted was a party...to the prior adjudication..." *Garrett v. City and County of San Francisco,* 818, F.2d 1515, 1520 (9th Cir. 1987)

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993), *aff'd* 59 F.3d 175 (9th Cir. 1995)

Order of confirmation constitutes a final judgment...Eubanks v. FDIC, 977 F.2d 166, 169 (5th Cir. 1992)Generally, four elements must be present in order to establish the defense of res judicata (1) the parties were identical in the two actions (2) the prior judgment was rendered by a court of competent jurisdiction (3) there was a final judgment on the merits, and (4) the same cause of action was involved in both cases.

In re Int'l Nutronics, Inc., 3 F 3d 306 (9th Cir. 1993), WITHDRAWN and superseded by 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994)

The doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered final judgment on the merits of the claim in a previous action involving the same parties or their privies. *In re Jensen*, 980 F.2d 1254, 1256 (9th Cir. 1992). Res judicata bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action *Clark v. Bear Starns & Co.*, *Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

Palomar Mobilehome Park Assoc, v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993)

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993) *aff'd.* 59 F.3d 175 (9th Cir. 1995)

Res judicata - confirmation order in Chapter 11

1. Parties identified
2. Prior judgment rendered by court of competent jurisdiction
3. There was a final judgment on the merits
4. The same cause of action was involved in both cases.

Nordhorn v. Ladish Co., Inc., 9 F.3d 1402 (9th Cir. 1993)

Identity of parties - res judicata - identity of claims

(1) in order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies. *Blonder-Tongue*

The Ninth Circuit determines whether or not two claims are the same for purposes of res judicata with reference to the following criteria:

(1) whether rights or interest established in the prior judgment would be destroyed or impaired by prosecution of the second action, (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right and (4) whether the two suits arise out of the same transactional nucleus of facts.

Western Systems, Inc. v Ulloa, 958 F.2d 864 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)

Bar applies even though facts on which new cause of action based not known

Mason v. Genisco Tech. Corp., 960 F.2d 849 (9th Cir. 1992)

Bar

Gilbert v. Ben-Asher, 900 F.2d 1407 (9th Cir. 1990), *cert. denied*, 498 U.S. 865 (1990)
Collateral estoppel and res judicata.

Bates v. Union Oil Co. Of California, 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992)
Offensive collateral estoppel - collateral estoppel effect of a District Court judgment vacated after settlement at appeal stage.

Eureka Fed Savings & Loan Assn. v. Amer. Cas. Co. Of Reading, Pa., 873 F.2d 229, 234 (9th Cir. 1989)
Collateral estoppel not available to resolve issues in a subsequent case when issues actually litigated in the earlier case were different.

In re Rahm, 641 F.2d 755, 757 (9th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981)
Prior judgment at most establishes a prima facie case of nondischargeability

In re Houtman, 568 F.2d 651 (9th Cir. 1978)

Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989)
Tentative ruling by state court judge as to what constitutes property of estate not collateral estoppel.

**COLLECTIVE BARGAINING AGREEMENTS - § 1113**

In re Rufener Constr., Inc., 53 F.3d 1064 (9th Cir. 1995)
1113 does not apply to Chapter 7 cases under §103.

In re Hoffman Bros. Packing Co., 173 B.R. 177 (9th Cir. B.A.P. 1994)
Cannot retroactively approve debtor's unilateral changes in CBA.

**COMMERCIAL PAPER**

In re Southern Pacific Funding Corporation, 268 F.3d 712 (9th Cir. 2001)

Subordination clause in indenture agreement that preserved certain secured creditors' rights both pre- and post- bankruptcy did not violate § 365(e)(1) of the bankruptcy code.

In re Crystal Properties, Ltd., L.P., 268 F.3d 743 (9th Cir. 2001)

"Without notice or demand" provision in default interest clause of loan agreement did not alter requirement that holder of defaulted loan must carry out some affirmative act to exercise its option to accelerate the loan and invoke the default interest clause. Default interest rate did not come into effect until holder of the note first took affirmative action to put the debtor on notice that it intended to exercise its option to accelerate, and thus invoke the default rate.

In re Bartoni-Corsi Produce, Inc., 130 F.3d 857 (9th Cir. 1997)

Under California law (3-419, 3-420) a bank does not convert a corporate bankruptcy debtor's check that lacks a payee endorsement by making a board-authorized deposit into the transferee's account.

In re Lee, 179 B.R. 149 (9th Cir. B.A.P. 1995) *aff'd* 108 F.3d 239 (9th Cir. 1997)

Cashier's check is transferred as of date of delivery, not date it's honored.

In re Nusor, 123 B.R. 55 (9th Cir. B.A.P. 1991)

What constitutes negotiable instrument; holder in due course.

**COMMUNITY PROPERTY - § 541(a)(2)(A),(B)**

In re Heilman, 430 B.R. 213 (9th Cir. B.A.P. 2010)

Where only one spouse files a chapter 7 bankruptcy, a community debt is discharged only as to the filing spouse. A subsequent dissolution decree that obligated the debtor to hold the nondebtor harmless as to the debt that was discharged did not create a new postpetition obligation, because it did not comply with the requirements for a reaffirmation agreement.

In re Brace, 979 F.3d 1228 (9th Cir. 2020)

When a married couple uses community funds to acquire property with JT title on or after 1/1/1975, the property is presumptively community property under Family Code § 760 in a dispute between the couple and a bankruptcy trustee. Brace partially overrules In re Summers, below. The JT titling of property acquired with CP funds on or after 1/1/1985 is not sufficient by itself to transmute CP into separate property.

In re Summers**,** 332 F.3d 1240 (9th Cir. 2003)

". . . [W]e conclude that a third part conveyed joint tenancy interests to Eugene and Marie Summers, a transaction to which the transmutation statute does not apply. . .The third-party deed specifying the joint tenancy character of the property rebutted the community property presumption, and rendered California's transmutation statute inapplicable." **But see** In re Valli, 58 cal. 4th 1396 (2014), which provides a thorough analysis of community property law as it affects property purchased during a marriage and held in one spouse's name..

In re Maynard**,** 264 B.R. 209 (9th Cir. B.A.P. 2001)

Nondebtor husband's interest in property did not prevent the bankruptcy court from avoiding secured creditor's lien on real property to the extent it exceeded the value of the property under § 506(d).

In re McIntyre, 222 F.3d 655 (9th Cir. 2000)

The IRS may levy upon ERISA-regulated pension benefits to satisfy a husband's tax debt against the claim that the wife has a vested interest in half of those benefits under California community property laws**.**

In re Been, 153 F.3d 1034 (9th Cir. 1998)

Under CA law, non-judicial foreclosure sale by senior lienholder terminates "sold-out" junior lienholder's secured interest in debtor's property and any remaining rights which might "arise out of" foreclosure proceeding.

**Effect of Tax Returns**

**1) pre-'85 transaction**

Nevins v. Nevins, 129 Cal.App.2d 150 (1954)

Separate federal income return was filed that did not include half of spouse's income even

though he was aware of existence of wife's income is highly probative of transmutation of cp interest in his spouse's income to his spouse's separate property.

In re Marriage of Weaver, 224 Cal.App.3d 478 (Cal App. 1990)

Clear and convincing evidence required to prove oral transmutation. Statements of testamentary intent are not sufficient.

**2) post-'85 transaction** - Civ. Code §5110.730(a) - express writing requirement.

In re Marriage of Lehman, 18 Cal.4th 169 (1998)

Ex-wife entitled to community property share of increased benefits her former husband gets by taking early retirement.

Estate of MacDonald, 51 Cal. 3d 262, 272 (1990)

Writing must contain language which expressly states that the characterization or ownership of the property is being changed.

In re Roosevelt, 87 F.3d 311 (9th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997)

Under CA law, a married person may transmute an asset, in which he has a cp interest**,** to separate property of his spouse if it is made in writing (marital agreement) by an express declaration by the spouse whose interest in the property is adversely affected.

In re Mantle, 153 F.3d 1082 (9th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999)

Non filing spouse's interest in sales proceeds from real property that has not been divided before bankruptcy is property of bankruptcy estate. Division of community property is what triggers reimbursement right under Fam. Code §2640.

In re Keller, 185 B.R. 796 (9th Cir. B.A.P. 1995)

In a non-dissolving marriage, cp is property of the estate (In re Teel, 34 B.R. 762, 764 (9th Cir. B.A.P. 1983) and §541(a)(2)(A),(B). When a bankruptcy petition is filed prior to the final disposition of a property between divorcing spouses, the cp comes within the jurisdiction of the bankruptcy court to assure fairness to the creditors of the individual spouses and the marital estate. Where the bankruptcy court has exclusive jurisdiction over its distribution, division of property by the state court is precluded: The jurisdiction of the bankruptcy court is exclusive because the initiation of divorce or dissolution proceedings does not terminate either spouse's management and control over cp by placing the cp in legis of the divorce court. (Teel 34 B.R. at 764, quoting 4 Collier on Bankruptcy 541.15 (15th ed 1983) Once dissolution has been accomplished, however, the final judgment is res judicata as to the division of property and is binding on the bankruptcy trustee. Paderewski, 564 F.2d at 1356. Property interests are created and defined by state law. Butner v. US, 440 U.S. 48, 55 (1979). The bankruptcy court therefore must look to state law to determine the nature of the estate's property rights. In the instant case, those rights were defined and circumscribed by the judgment of the Family Law Court.

In re Burg, 103 B.R. 222 (9th Cir. B.A.P. 1989)

Property purchased from commingled separate and community property is presumptively community property.

In re Spirtos, 56 F.3d 1007 (9th Cir. 1995)

Party to marital settlement agreement must comply with her obligations to creditors under agreement even though other party to agreement may have failed to perform

In re Gorman, 159 B.R. 543 (9th Cir. B.A.P. 1993)

Property once held as community property which is converted to joint tenancy is held as joint tenancy

In re Chenich, 87 B.R. 101 (9th Cir. 1988)

Community property passing to a spouse in a dissolution is shielded from liability on a judgment against other spouse entered after dissolution.

In re Marriage of Valli, 58 Cal.4th 1396 (2014)

Interesting discussion of community property and transmutation.

**COMPENSATION OF PROFESSIONALS**

1. **Bonuses**
2. **Chapter 7**
3. **Chapter 13**
4. **§ 329, Rule 2014, Rule 2016 and Disclosure**
5. **§ 326**
6. **§ 328**
7. **§ 330 and Lodestar Approach**
8. **§ 503(b)**
9. **Postpetition attorney fees– §§ 502(b), 506(b), etc.**
10. **§ 506(c)**
11. **§ 726(b)(5)**
12. **Time Sheets**
13. **Attorney fees under state law or federal bankruptcy law**
14. **Retainers**
15. **Carve-outs**
16. **Misc and Cal. Civil Code § 1717**

**1. Bonuses**

In re Meronk, 249 B.R. 208 (9th Cir. B.A.P. 2000), *aff'd*, 24 Fed.Appx. 737 (9th Cir. 2001)

Failure to make specific findings justifying bonus and failure to produce evidence that standard hourly rate did not fully compensate law firm required reversal of bonus award. Because firm declined a contingent fee arrangement that would have given them the amount they sought with bonus, and assured everyone that the hourly rate arrangement would result in less fees, they were judicially estopped from seeking more. The fact that the estate realized a surplus of $400,000 was immaterial.

In re Cedic Development Company, 219 F.3d 1115 (9th Cir. 2000)

$10,000 enhancement of debtor's attorney's fee was appropriate, where the firm's rates did not take into account the results obtained or the risk of nonpayment.

In re Music Merchants, Inc., 208 B.R. 944 (9th Cir. B.A.P. 1997)

Creditors' committee attorney has no right to receive enhanced compensation based on delay in bankruptcy court's approval of payment**.**

In re Manoa Finance Company, Inc., 853 F.2d 687 (9th Cir. 1988)

Blum/Delaware standard does allow for bonuses.

### 2. Chapter 7

In re Jastrem, 253 F.3d 438 (9th Cir. 2001)

In a chapter 7 bankruptcy in which the debtor is paying the filing fee by installments, an obligation for pre-petition legal services is subject to automatic stay and discharge.

In re Hines, 147 F.3d 1185 (9th Cir. 1998)

In Chapter 7 bankruptcy proceedings, automatic stay does not apply to attorney's efforts to collect previously agreed upon fees for postpetition services on behalf of debtor.

### 3. Chapter 13

In re Eliapo, 468 F.3d 592 (9th Cir. 2006)

1) No-look presumptive fees do not violate 11 U.S.C. § 330; 2) the bankruptcy court's criteria for awarding additional fees beyond the no-look fee did not violate § 330; and 3) the bankruptcy court did not abuse it's discretion in ruling on fees without a hearing.

### 4. § 329, Rule 2014, Rule 2016 and Disclosure

In re Triple Star Welding, 324 B.R. 778 (9th Cir. B.A.P. 2005)

Chapter 11 debtor's attorney who failed to file a Rule 2014 statement of disinterestedness was not entitled to any fees absent full disclosure. The court had no discretion to waive this requirement. Furthermore, the court should have consider potential conflicts and receipt of a possible preference, which did not need to be addressed through an adversary proceeding.

In re Basham, 208 B.R. 926 (9th Cir. B.A.P. 1997), *aff'd by* In re Byrne, 152 F.3d 924, (9th Cir. 1998)

No abuse of discretion in granting motion to disgorge attorneys fees where debtors' counsel failed to timely comply with requirements regarding disclosure of attorney compensation.

In re Monument Auto Detail, Inc., 226 B.R. 219 (9th Cir. B.A.P. 1998)

Law firm cannot receive payment for services to Chapter 11 debtor when firm fails to obtain bankruptcy court authorization for employment.

In re Lewis, 113 F.3d 1040 (9th Cir. 1997)

Fees of debtor's attorney need not be excessive to support disgorgement order for violation of disclosure and reporting requirements.

In re Park-Helena Corp., 63 F.3d 877 (9th Cir. 1995), *cert. denied by* Neber & Starrett, Inc. v. Chartwell Financial Corporation, 516 U.S. 1049 (1996)

Failure to provide details of retainer provided by debtor's president results in denying fee request - 2016(b)

Ivan W. Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.), 40 F.3d 1059

(9th Cir. 1994).

An attorney's undisclosed representation of the principals of a bankruptcy debtor corporation created a conflict of interest that warranted the disgorgement of a prepetition attorney's fee when there was no valid explanation for failure to obtain the court's approval in advance. The attorney's conflict of interest was plain and substantial and his failure to disclose this dual representation deprived him of any equitable claim to a retention of the fees for pre-petition services.

In re Glad, 98 B.R. 976 (9th Cir. B.A.P. 1989)

§ 329 required return of funds from nonlawyer where services were worthless.

**5. § 326**

In re Hokulani Square, Inc., 776 F.3d 1031, 2015 WL 305540 (9th Cir. 2015).

§ 326(a) does not permit a trustee to collect fees on a credit bid transaction in which the trustee disburses only property, not "moneys," to the creditor.

In re Jenkins, 130 F.3d 1335 (9th Cir. 1997)

§ 326(a) limits both trustee's and his paralegal's compensation

In re Financial Corporation of America, 114 B.R. 221 (9th Cir. B.A.P. 1990), *aff'd and remanded*, 946 F.2d 689 (9th Cir. 1991).

In a case that is converted from Chapter 11 to Chapter 7, the fees to be awarded to the two trustees are independent and the funds turned over to the Chapter 7 trustee are included in calculating the § 326(a) maximum on the Chapter 11 trustee's compensation. Failure to include such funds would undermine the independence of the two fees and blur the differences in the functions performed by the two trustees. However, the trial court still retains discretion to set the Chapter 11 or Chapter 7 trustee's fee, subject to the statutory maximum amount. Where, as in this case, the same individual is both the Chapter 7 trustee and the Chapter 11 trustee, the court may exercise discretion to award less than the statutory minimum set forth in Code § 326(a).

**6. § 328**

In re Circle K Corp., 279 F.3d 669 (9th Cir. 2002), *cert. denied,* 536 U.S. 959(2002)

"...[U]nless a professional's retention application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330."

In re Reimers, 972 F.2d 1127 (9th Cir. 1992)

Standard for altering court approved contingent fee is where original terms appear "to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."

In re Knudsen Corporation, 84 B.R. 668 (9th Cir. B.A.P. 1998)

Order permitting payment of professionals each month without prior court approval of billing statements was permissible.

**7. § 330**

In re TBH19, LLC, __B.R.__ (9th Cir. B.A.P. 2025)

Excellent analysis of application of § 330 to fee application of a 7 trustee's professionals.

In re Garcia, 335 B.R. 717 (9th Cir. B.A.P. 2005)

Fees of counsel for trustee for getting appointed and assisting in sale of real estate were properly denied, since they involved tasks the trustee was charged with performing. Disallowance of all fees for preparation of a stipulation and mutual release and for preparing a fee application was an abuse of discretion.

In re Strand, 375 F.3d 854 (9th Cir. 2004)

1. Interim fee awards are always subject to modification; 2. Fees of $19, 065 for counsel for the chapter 7 trustee properly were cut in half, where the estate would have received a maximum of $9000 to be divided between two creditors whose claims were nondischargeable.

In re Eliapo, 298 B.R. 392 (9th Cir. B.A.P. 2003)

The two-step process for awarding fees, whereby the judge first determined whether the services rendered were beyond what was customary in a chapter 13 case under the Northern District of California guidelines, and then determined what was appropriate under the lodestar approach, was in keeping with § 330.

In re Smith, 305 F.3d 1078 (9th Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003)

Test under § 330(a)(1) is whether services were reasonably likely to provide identifiable, tangible and material benefit to the estate, even if such benefits were not actually realized.

In re B.U.M. Intl., Inc. 229 F.3d 824 (9th Cir. 2000)

Financial consultant whose retention was only conditionally approved, subject to court approval of fees and costs, was not subject to § 328. Court's denial of all fees under § 330 was justified, where the consultant was found to be working on behalf of a principal, rather than the debtor.

In re Mednet, 251 B.R. 103 (9th Cir. B.A.P. 2000)

Test under § 330(a) is whether services rendered were reasonably likely to benefit the estate, not, as the Fifth Circuit has held, whether the services materially benefitted the estate.

In re Auto Parts Club, Inc., 211 B.R. 29 (9th Cir. B.A.P. 1997)

Law firm representing committee of creditors in bankruptcy case performed unnecessary services when it failed to scale back its efforts after decision to sell was made.

"Lobel failed to scale back its services once it became reasonably obvious that unsecured

creditors would not receive a distribution. However, the court did not make sufficient findings regarding why Lobel should receive no compensation for work performed after the decision to sell was made, or why Lobel's fees should be reduced for services performed prior to the decision to sell. We vacate and remand in order the for the court to make appropriate findings regarding the amount of the fee award.

In re Roderick Timber Co., 185 B.R. 601 (9th Cir. B.A.P. 1995)

Trustee time must be kept separately from attorney time where trustee serves as both (court says time sheets required from trustee in all cases).

In re Specialty Plywood, Inc., 166 B.R. 153 (9th Cir. B.A.P. 1994)

1. Advertising expenses for other clients in auction discounted.
2. Auctioneer only entitled to compensation *pro rata* with other administrative claimants.
3. Litigated issues as to fees were federal bankruptcy issues not subject to a contractual fee provision.
4. Legal fees for pursuing application were not expenses under § 330(a). Auctioneer who was hired to sell Chapter 11 debtor's assets was not entitled to reimbursement, as "actual, necessary expense," of the legal fees that it incurred in defending its fee before bankruptcy court; such legal fees were not required to accomplish the task for which auctioneer was hired, and amount of legal fees sought was based upon estimation and was not tied to auctioneer's actual expenses.

In re Dutta, 175 B.R. 41 (9th Cir. B.A.P. 1994)

Lumping and hourly rate discussed.

While a trial court need not necessarily explain its analysis in terms of elaborate mathematical calculations, for example, it must provide sufficient insight into its exercise of discretion to allow an appellate court to exercise its reviewing function. In the absence of such a sufficient explanation, the fee award must be remanded to provide such an explanation. D'Emanuele, 904 F.2d, 1379, 1385 (citing Cunningham v. County of Los Angeles, 879 F. 2d 481 (9th Cir. 1988), *cert. denied,* 493 U.S. 1035 (1990)).

In re Kitchen Factors, Inc., 143 B.R. 560 (9th B.A.P. 1992)

Where attorney spent 12000 to receive 12000, it was not error for the bankruptcy court to vary from the lodestar and award a percentage of the recovery

Lodestar the primary but not exclusive method for determining fees. Attorney must seek effort to reasonably expected recovery, not the potential recovery.

Unsecured Creditors' Committee v. Puget Sound Plywood, Inc., 924 F.2d 955 (9th Cir. 1991)

Attorney must consider maximum probable recovery in a given situation and must balance probable benefits with probable costs.

Baker Botts LLP v. Asarco, LLC, 135 S.Ct. 2158, 192 L.Ed.2d 208 (2015)

Bankruptcy Code § 330(a)(1) does not permit a bankruptcy court to award attorney's fees

for work performed in defending a fee application in court.

**8. § 503(b)**

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Sedona Institute, 220 B.R. 74 (9th Cir. B.A.P. 1998)

Creditors need not show independent allowable expenses under § 503(b)(3) to recover attorney's fees and costs for motion to appoint trustee or examiner with expanded powers under § 503(b)(4).

**9. Postpetition attorney fees – §§ 502(b), 506(b), etc.**

In re Baroni, 2017 WL 4404141(Bankr. C.D.CA 2017)

Analysis of when fees incurred by a creditor in post-confirmation but pre-discharge litigation are part of the creditor's pre-petition claim.

Penrod v. AmeriCredit Financial Services, Inc. (In re Penrod), 802 F.3d 1084 (9th Cir. 2015)

Chapter 13 debtor who prevails in a contract dispute on the basis of federal bankruptcy law (in this case, seeking to bifurcate a secured car claim over an objection involving the hanging paragraph in § 1325(a)(9)) may recover fees under California Civil Code § 1717. The Ninth Circuit provides a definition of when a claim is an "action on a contract." The Ninth Circuit held that this phrase should be liberally construed, and that an action is on a contract when a party seeks to enforce, or avoid enforcement of, the provisions of a contract. See also In re Bos, 818 F.3d 486 (9th Cir. 2016).

In re Hoopai, 581 F.3d 1090, 1098- (9th Cir. 2009)

1. § 506(b) "entitles oversecured creditors to enforce contractual attorneys' fees provisions and preempts state law on attorneys' fees."

2. ". . .§ 506(b) governs fees only "until the confirmation or effective date of the plan." The lender was not entitled to fees post-confirmation, because it was not the "prevailing party" as to the principal issue in dispute.

Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Electric Co., 549 U.S. 443 , 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007)

Disallowance of postpetition attorney fees on the grounds that the issues were not related to the bankruptcy was error. Court declines to consider whether § 506(b) would require a different result based on the creditor's unsecured status.

In re SNTL Corp., 380 B.R. 204 (9th Cir. B.A.P. 2007)

Attorneys fees arising out of a prepetition contract but incurred postpetition are allowable under the broad definition of claim.

In re Karmai, 316 B.R. 544 (9th Cir. B.A.P. 2004)

Mortgage lienholder entitled to attorney fees under § 506(b), regardless of § 506(c). Issue of whether the right to attorney fees was provided for in the loan agreements was waived by the debtor, since it wasn't raised in the bankruptcy court.

In re Atwood, 293 B.R. 227 (9th Cir. B.A.P. 2003)

Attorney fees under § 506(b) may be sought by way of a proof of claim, as opposed to an application under Bankruptcy Rule 2016, but the proof of claim must establish the reasonableness of the fees.

In re Connolly, 238 B.R. 475 (9th Cir. B.A.P. 1999)

Attorney's fee provision in security agreement did not serve as ground for awarding fees and costs to over secured creditor following its successful defense of adversary preference proceeding. §506(b).

In re Kord Enterprises II, 139 F.3d 684 (9th Cir. 1998) - § 506(b)

Under Bankruptcy Code, award of attorney fees to over secured creditor is not prohibited for issues peculiar to bankruptcy.

In re Alpine Group, Inc., 151 B.R. 931 (9th Cir. B.A.P. 1993)

1. In *Salazar*, this Panel articulated four elements in order to recover attorney's fees under § 506(b): (1) there is an allowed secured claim, (2) the creditor is over secured, (3) the fees are reasonable under the circumstances, and (4) the fees are provided for under the agreement

2. Secured creditor's status not determined for all purposes as of time of filing. Here, question of whether it was over secured should have been determined as of sale.

In re Southeast Company, 868 F.2d 335 (9th Cir. 1989)

§ 506(b) fees need not be paid out immediately, but may be added to principal.

**10. § 506(c)**

In re Debbie Reynolds Hotel and Casino, Inc., 255 F.3d 1061 (9th Cir. 2001)

1. Postpetition lender had no standing to object to $50,000 payment to debtor-in-possession's counsel out of proceeds of sale agreed to by another secured creditor;

2. Under 506(c), the party that has rendered a benefit to the secured creditor is properly reimbursed for that benefit out of secured collateral.

**11. §726(b)(5)**

In re Riverside-Linden Investment Co., 945 F.2d 320 (9th Cir. 1991)

Counsel for trustee not entitled to attorneys' fees charged in connection with trustee' excessive investigation of creditor

Denial of attorneys' fees in opposing objections to final fee application for winding up estate property disallowed; interest accrues from date of allowance

1. No cost benefit to investigating unsecured claim where estate was solvent and partners didn't object

2. Investigation into partners' assets unnecessary, since the partnership was solvent

**12. Time Sheets**

In re Mortgage & Realty Trust, 123 B.R. 626 (Bankr. C.D. Cal. 1991)

Investment bankers not entitled to indemnification or bonuses; must keep time sheets.

**13. Attorney fees under state law or federal bankruptcy law**

In re Deroche, 434 F.3d 1188 (9th Cir. 2006)

Debtor's counsel not entitled to attorney's fees in opposing Arizona Industrial Commission's priority claim, since only substantive bankruptcy law was involved in the action.

In re Hassan Imports Partnership, 256 B.R. 916 (9th Cir. B.A.P. 2000)

Debtor was not entitled to attorney fees under CCP § 1717, since the dispute in question was not an action on a promissory note, but an action on confirmation of a plan, which is governed by federal bankruptcy law.

In re Rothery, 200 B.R. 644 (9th Cir. B.A.P. 1996)

Action to avoid fraudulent transfer was not contract action and attorney's fee was therefore not warranted under state statute

In re Job, 198 B.R. 763 (9th Cir. B.A.P. 1996), *rev'd in part; vacated in part by In re Job*, 117 F.3d 1425 (9th Cir. 1997).

Pursuant to the California Supreme Court's recent decision in *Trope v. Trope*, we reverse the bankruptcy court's order awarding defendant Albertini attorney's fees for representation of himself. We affirm the bankruptcy court's order as to costs.

3250 Wilshire Boulevard Building v. W.R. Grace & Co., 990 F.2d 487 (9th Cir. 1993)

Where attorney's fees are not recoverable for a non-contract action under Cal. Civ. Code § 1717, they may nonetheless be recoverable under Cal. Code of Civ. P. § 1021, which permits attorney's fees agreements, but contains no restriction as to the nature of the lawsuits for which such fees may be recovered. "We conclude, therefore, that California law permits recovery of attorney's fees by agreement, for tort as well as contract actions."

California Civil Code § 1717, however, is not the only statute governing the recoverability of attorney's fees by agreement. Indeed, the district court specifically relied on California Code of Civil Procedure § 1021 when it awarded attorney's fees to MetLife. The section provides:

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Cal. Civ. Pro. Code § 1021 (West Supp. 1993). This statute permits attorney's fees agreements, but contains no restriction as to the nature of the lawsuits for which such fees may be recovered. Several recent California cases have underscored this view, holding that where attorney's fees are not recoverable for a non-contract action under section 1717, they may nonetheless be recoverable under section 1021. *Lerner v. Ward*, 16 Cal. Rptr. 2d 486, 489 (Ct. App. 1993); *Xuereb v. Marcus & Millichap, Inc.*, 5 Cal. Rptr. 2d 154, 157 (Ct. App. 1992), *rev. denied*, 1992 Cal. LEXIS 2447 (Cal. 1992). We conclude, therefore, that California law permits recovery of attorney's fees by agreement, for tort as well as contract actions.

### 14. Retainers

In re Dick Cepek, Inc., 339 B.R. 730 (9th Cir. B.A.P. 2006)

A bankruptcy court cannot force chapter 11 debtor's counsel to disgorge fees drawn from a prepetition retainer in which it holds a security interest to equalize the distribution of all chapter 11 administrative claimants under § 726(b). The case was remanded, however, to determine whether counsel in fact had a security interest in the retainer.

### 15. Carve-outs

In re Cooper Commons LLC, 512 F.3d 533 (9th Cir. 2008)

Counsel for former debtor-in-possession was not entitled to compensation from a carve-out negotiated by chapter 11 trustee for himself and his professionals, where the carve-out did not include debtor-in-possession counsel, and debtor-in-possession counsel had previously waived any entitlement to a carve-out.

In re KVN Corp., Inc., 514 B.R. 1 (9th Cir. B.A.P. 2014)

Chapter 7 trustee may sell underwater property and obtain carveout from secured creditor. Must overcome rebuttable presumption against such action by demonstrating that carveout will provide a meaningful distribution to unsecured creditors, terms of carveout have been fully disclosed to the court, and trustee has fulfilled his/her basic duties. SEE ALSO In re TBH 19, LLC, __B.R.__ (9th Cir. B.A.P. 2025): Excellent analysis of when carve-out is appropriate, and fact that 7 trustee's statutory commission exceeds carve-out does not necessarily justify a reduction in the commission or the other professional fees.

**16. Misc.**

In re Tredinnick, 264 B.R. 573 (9th Cir. B.A.P. 2001)

Debt arising from postpetition legal services by paralegal based on a prepetition contract with the debtor are not discharged**.**

In re Sanchez**,** 241 F.3d 1148 (9th Cir. 2001)

Debtor's attorney's collection of fee for postpetition services did not violate automatic stay where attorney had no reason to know bankruptcy court would determine fee was excessive.

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"...[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues....Ms. Renfrow is entitled to recover the attorney's fees she has incurred in litigating the validity and the amount of Mr. Draper's debts in the bankruptcy proceeding." She's also entitled to the attorney's fees she incurred in the state court proceedings before the bankruptcy was filed, and to reasonable costs in both the bankruptcy and state court action.

In re Elias, 188 F.3d 1160 (9th Cir. 1999)

The court of appeals affirmed a decision of the Bankruptcy Appeals Board. The court held that a bankruptcy court does not abuse its discretion in declining to decide a post-dismissal motion to enforce a fee agreement between a debtor and her attorney.

In re LCO Enterprises, Inc., 105 F.3d 665 (9th Cir. 1997)

Attorney's fees properly denied to prevailing litigant defending against trustee's designation of pre-petition lease payments as preferential transfers

In re Biggar, 110 F.3d 685 (9th Cir. 1997), as amended 5/6/97

Installment contract for legal services that calls for post-petition payments is dischargeable in bankruptcy.

In re Lazar, 83 F.3d 306 (9th Cir. 1996)

Court abuses its discretion by subordinating fees of bankruptcy debtors' counsel to claims of examiner and examiner's accountants.

S.E.C. v. Interlink Data Network of Los Angeles, Inc., 77 F.3d 1201 (9th Cir. 1996)

Advance deposit for future work was not earned on receipt, but was in the nature of a security retainer.

In re CIC Investment Corp., 192 B.R. 549 (9th Cir. B.A.P. 1996)

Panel holds that the bankruptcy court may, in its discretion, award compensation for services rendered up to the date the employment order was reversed. However, the court must

determine whether counsel's lack of disinterest impaired its representation of the estate such that compensation should be reduced or denied.

In re Sandoval, 186 B.R. 490 (9th Cir. B.A.P. 1995)

Individual attorney who did not directly receive the fee may be ordered to disgorge for incompetence.

First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.), 175 B.R. 52 (9th Cir. B.A.P. 1994)

Where a law firm had a secured claim against the chapter 11 debtor in possession, it was not disinterested and, therefore, was not qualified to serve as general counsel for the debtor in possession. Bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language.

In re Travel Headquarters, Inc., 140 B.R. 260 (9th B.A.P. 1992)

Bankruptcy court acted within discretion in awarding all fees to successor trustee because of administrative difficulties left by first trustee even though first trustee collected a lot of the money

In re Bybee, 945 F.2d 309 (9th Cir. 1991)

Attorney fees awarded to prevailing party where state law allowed them (fraudulent conveyance counts).

In re Brosio, 2014 Bankr. LEXIS 880 (9th Cir. B.A.P. 2014)

Creditor withdrew proof of claim after debtor's objects to it. Debtor not entitled to attorneys fees under Cal. Civil Code § 1717 since when an action is voluntarily dismissed, there is no "prevailing party."

In re Milton Poulos, Inc., 947 F.2d 1351 (9th Cir. 1991)

Attorneys who generate PACA trust funds are entitled to attorney fees out of the "common fund."

In re Marquam Investment Corp., 942 F.2d 1462 (9th Cir. 1991)

Insider to corporation that had been dodging judgment for 11 years donated its legal services, where no time-sheets, bills, etc. sent to debtor

In re Shirley, 134 B.R. 940 (9th Cir. B.A.P. 1992)

Attorney who was never appointed to represent debtor in possession and whose fees were denied cannot sue debtor in state court.

In re Riverside-Linden Inv. Co., 945 F.2d 320 (9th Cir. 1991)

Denial of attorney's fees incurred in opposing objections to final fee application for winding up estate properly disallowed; interest accrues from date of allowance; counsel for trustee not entitled

to attorney's fees charged in connection with trustee's excessive investigation of creditor.

In re Alcala, 918 F.2d 99 (9th Cir. 1990)

Attorney not employed by bankruptcy trustee could not recover fee for alleged post-petition services concerning a legal claim that was property of the bankruptcy estate; debtor attorney may be compensated only if services are rendered to estate; no attorney lien under California state law.

**COMPROMISE & SETTLEMENT**

In re Cellular 101, Inc., 539 F.3d 1150 (9th Cir. 2008)

A party's failure to timely inform the court of appeals of a settlement that it believes disposes of a pending appeal precludes the party from asserting the affirmative defense of settlement and release in a later proceeding.

In re Valdez Fisheries Development Ass'n, Inc., 439 F.3d 545 (9th Cir. 2006)

Where bankruptcy court issued an order approving a settlement agreement, and issued a second order dismissing the case but failing to retain jurisdiction to enforce the terms of the settlement, the court had no ancillary jurisdiction under *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375 (1994) to enforce the settlement.

In re Lanijani, 325 B.R. 282 (9th Cir. B.A.P. 2005)

". . .[W]hen a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B)."

In re Rains, 428 F.3d 893 (9th Cir. 2005)

Bankruptcy court correctly found that debtor was competent at the time he entered into a settlement, even though he had a stroke immediately after the meditation was completed.

In re Andreyev, 313 B.R. 302 (9th Cir. B.A.P. 2004)

Entry of judgment based upon the mistaken impression that the debtor had entered into a settlement agreement for $1000 in a credit card dischargeability action was erroneous.

In re Mickey Thompson Entertainment Group, Inc., 292 B.R. 415 (9th Cir. B.A.P. 2003)

Bankruptcy court abused discretion in approving trustee's settlement, where party offered trustee $45,000 more to purchase claims against insiders than the insiders offered.

Doi v. Halekulani Corp., 276 F.3d 1131 (9th Cir. 2002)

A party's affirmative response in open court to being asked if she agrees to the recited terms of a settlement agreement placed on the record constitutes a binding agreement to settle. Sanctions for reneging on the agreement were appropriate.

In re Guy F. Atkinson Company of California, 242 B.R. 497 (9th Cir. B.A.P. 1999)

Bonding companies, rather than trustee, may seek settlement of bankruptcy estate claims where sufficient reason exists to allow such relief and companies intend to maximize estate for benefit of all creditors.

In re Colortran, Inc., 218 B.R. 507 (9th Cir. B.A.P.1997)

Order denying uncontested compromise reversed.

In re Schmitt, 215 B.R. 417 (9th Cir. B.A.P. 1997)

Bankruptcy court properly approved compromise to avoid complex and probably unsuccessful litigation.

Ortloff v. Silver Bar Mines, Inc., 111 F.3d 85 (9th Cir. 1997)

In re Hunter, 66 F.3d 1002 (9th Cir. 1995)

Absent an allegation of fraud on the court, a party who enters into a settlement may not maintain an independent action to set aside the judgment unless he can fit within the parameters of Rule 60(b).

Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995)

Failure to reserve jurisdiction to enforce settlement left D. Court without jurisdiction to enforce.

In re Lendvest Mortgage, Inc., 42 F.3d 1181 (9th Cir. 1994)

Bankruptcy court must undertake an independent allocation of a settlement before it may conclude that a preferential transfer claim has been satisfied, either completely or partially.

Bance Do Brasil , S.A. v. Latian, Inc., 234 Cal.App.3d 973 (Cal.App. 1994), *cert. denied*, 504 U.S. 986 (1992); City Equities Anaheim v. Lincoln Plaza Dev. Co. (In re City Equities Anaheim, Ltd.), 22 F.3d 954 (9th Cir. 1994)

Bankruptcy court could appropriately enforce a settlement agreement by summary proceedings commenced by motion without necessity of an adversary proceeding, oral testimony or cross-examination where material facts concerning the existence or terms of a settlement were not in dispute.

In re City Equities Anaheim, Ltd, 22 F.3d 954 (9th Cir. 1994)

Settlement enforcement - settlement agreement may be summarily enforced where no material facts concerning the existence of terms of the agreement are in dispute.

Kokkonen v. Guardian Life Ins. Co of America, 511 U.S. 375, 114 S.Ct. 1673 (1994)

Court may not enforce a settlement agreement after case is dismissed unless agreement is incorporated into dismissal or court retains jurisdiction to enforce the agreement.

Texaco, Inc. v. Ponsoldt, 939 F.2d 794 (9th Cir. 1991)

Settlement agreement re sale or transfer of interest in real estate must be signed by party to be charged under Civ. Code 1624(c). Those not covered by the statute of frauds are still enforceable if common sense says they are divisible.

Wilkinson v. FBI, 922 F.2d 555 (9th Cir. 1991)

District courts have the inherent power to enforce settlement agreements.

In re MGS Marketing, 111 B.R. 264 (9th Cir. B.A.P. 1990)
Settlement of suit reversed for failure to show it was in best interest of estate.

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989)
Good faith settlement bars contribution.

In re A&C Properties, 784 F.2d 1377 (9th Cir. 1986), *cert. denied*, 479 U.S. 854 (1986)
Factors governing review of settlements.

Adams v. Johns-Manville Corp., 876 F.2d 702 (9th Cir. 1989)
Silence as acceptance and estoppel - Cal. Law.

In re Haynes, 97 B.R. 1007 (9th Cir. B.A.P. 1989)
Oral settlement agreement made on the record is binding.

**CONFLICT OF LAWS**

In re Miller, 292 B.R. 409 (9th Cir. B.A.P. 2003)

Nevada law applied to Nevada casino's adversary proceeding to recover gambling debts against California chapter 7 bankruptcy debtor.

In re Lindsay, 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)

Federal choice of law rules apply in bankruptcy. Rest 2d Confl. Of Laws applied - Texas law governed foreclosure of Texas real estate.

Rosenthal v. Fonda, 862 F.2d 1398 (9th Cir. 1988)

California governmental interest analysis - contracts**.**

**CONTEMPT**

In re Stasz, 387 B.R. 271 (9th Cir. B.A.P. 2008)

Failure to comply with repeated orders to appear at a Rule 2004 exam justified order of contempt and award of attorney fees as sanctions.

In re Hercules Enterprises, Inc., 387 F.3d 1024 (9th Cir. 2004)

In order to find civil contempt, "the bankruptcy court had to find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he did not comply."

UMW v. Bagwell, 512 U.S. 821 (1994)

Civil v. Criminal contempt.

In re Dyer, 322 F.3d 1178 (9th Cir. 2003)

"Serious" punitive damages may not be awarded under § 105 for civil contempt of the automatic stay by entities who are not individuals. Only compensatory sanctions, attorney fees and compliance with the stay may be awarded.

Balla v. Idaho State Bd of Corrections, 869 F.2d 461 (9th Cir. 1989)

Prerequisites for civil contempt**.**

Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186 (9th Cir. 2011).

Requests for contempt orders are contested matters which can be initiated by motion, not adversary proceedings.

In re Taggart, 139 S.Ct. 1795( 2019)

A contempt finding under § 105 for a violation of the discharge injunction requires that debtor demonstrate that there is no fair ground of doubt as to whether the order barred the creditor's conduct. "In other words, civil contempt may be appropriate if there is no objectively reasonable basis fsor concluding that the creditor's conduct might be lawful.

**CONTINUANCE**

In re La Sierra Financial Services, Inc., 290 B.R. 718 ( 9th Cir. B.A.P. 2002)

Court will not disturb a denial of a continuance for discovery unless the party shows actual and substantial prejudice.

In re Brewster, 243 B.R. 51, 57 (9th Cir. B.A.P. 1999)

"In reviewing a denial of a continuance, we consider four factors: (1) the extent of the appellant's diligence in efforts to be prepared for trial; (2) the likelihood that the need for a continuance would have been met if the continuance had been granted; (3) the extent to which a continuance would inconvenience the court and the opposing party; and (4) the amount of harm the appellant may have suffered as a result of the denial of the continuance. United States v. Mejia, 69 F.3d 309, 314 (9th Cir. 1995)."

In re Bittleman, 107 B.R. 230 (9th Cir. B.A.P. 1988)

Denial of one hour continuance to produce witnesses is abuse of discretion**.**

**CONTRACTS - California Law**

Humetrix, Inc. v. Gemplus S.C.A. 268 F.3d 210 (9th Cir. 2001)

"Under California law, a plaintiff tht prevails on a breach of contract claim "should receive as nearly as possible the equivalent of the benefits of performance," meaning the plaintiff should be put "in as good a position as he would have been had performance been rendered as promised." [citation omitted] This may include lost profits if the plaintiff can prove that the defendant's failure to perform caused the plaintiff to lose profits."

Vestar Development II, LLC v. General Dynamics Corp., 249 F.3d 958 (9th Cir. 2001)

Lost profits from agreement to negotiate sale of real property were too speculative to be allowed under Cal. Civ. Code § 3000 or § 3301.

In re Diego's Inc., 88 F.3d 775 (9th Cir. 1996)

Party is estopped from relying on statute of frauds as defense in action for breach of oral contract where other party turned down other offers in reliance on contract.

In re Ankeny, 184 B.R. 64 (9th Cir. B.A.P. 1995)

Parol evidence - integrated k, letter of intent as a contract - whether principal was liable.

Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272 (9th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993)

Parol evidence inadmissible when it contradicts the plain meaning of the contract.

Moore v. Pollock (In re Pollock), 139 B.R. 938 (9th Cir. B.A.P. 1992)

Severability of security agreement from lease

Whether multiple obligations in an agreement are severable is a question of state law. Under Cal. Law, this is a question of the parties intent based upon the substance and language of the agreement at issue. Keene v. Harling, 61 Cal.2d 318, 320 (1964); Gardinier, 831 F.2d at 976. The Gardinier court noted three factors that should be considered in analyzing whether obligations within an agreement are severable (1) whether nature and purpose of the obligations are different (2) whether consideration for the obligations is distinct and (3) whether obligation statute of frauds the parties are interrelated .

Schneider v. TRW, Inc., 938 F.2d 986 (9th Cir. 1991)

Wrongful termination.

Foley v. Interactive Data Corp. 47 Cal.3d 654 (1988)

Tort theories restricted in wrongful termination action**.**

Ins. Co. Of State of Pa. v. Assoc. Int'l Ins. Co., 922 F.2d 516 (9th Cir. 1990)

Contracts/insurance - although primary insurer breached notice provision in reinsurance k when faced with a claim, the reinsurer nonetheless was not relieved from its obligation under the

k because of its failure to show actual and substantial prejudice to maintain a late notice defense.

In re Mediscan Research, Ltd., 109 B.R. 392 (9th Cir. B.A.P. 1989), *aff'd*, 940 F.2d 558 (1991)
Impossibility - amendment to debtor's agreement ruled unenforceable for insufficient consideration and fraud.

Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990)
Cap on consequential damages can be removed if repair clause in contract fails of its essential purpose.

First Citizens Federal S&L Ass'n. v. Worthen Bank and Trust Co., 906 F.2d 427 (9th Cir. 1990)
Fiduciary relationship should not be inferred in bank loan participation agreements absent unequivocal language to that effect in the agreement.

**CONVERSION BETWEEN BANKRUPTCY CHAPTERS**

In re Castleman, 75 F.4th 1952 (9th Cir. 2023)

Post-petition, pre-conversion increases in the equity of an asset belong to the bankruptcy estate, not the debtors who, in good faith, convert their Chapter 13 case to a Chapter 7.

In re Owens, 552 F.3d 960 (9th Cir. 2009)

Bankruptcy court properly dismissed rather than converting chapter 11 case that was filed in bad faith as a litigation tactic. Although conversion might have benefitted moving party, the best interests of *all* creditors must be considered in converting or dismissing a case. here, creditors might have fared worse in chapter 7 because the chapter 7 discharge would have deprived them of access to the debtor's substantial future income.

In re Marrama, 549 U.S. 365, 127 S.Ct. 1105 (2007)

Debtor forfeited his right to convert his case to chapter 13 where he did not qualify as a debtor because of his bad faith concealment of assets. See In re Santos, 561 B.R. 825 (Bankr. C.D.Cal. 2017) for a recent application of *Marrama*. But still good law after Law v. Siegal? Look what has happened to In re Rosson.

In re Lynch, 363 B.R. 101 (9th Cir. B.A.P. 2007)

Trustee should not have been compelled to abandon property. Even though the debtor valued the property at 560,000 as of the date of the filing of the chapter 13 petition, and the plan was confirmed without objection, that valuation was not binding on the trustee under § 348(f)(1), since no implicit valuation occurred. However, the relevant valuation date was the petition date, not the conversion date (absent a showing of bad faith.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Captain Blythers, Inc., 311 B.R. 530 (9th Cir. B.A.P. 2004), *aff'd,* 182 Fed. Appx. 708 (2006).

Chapter 11 plan which dedicated the proceeds, if any, of a cause of action to payment of creditors revested in the chapter 7 estate upon conversion.

In re Consolidated Pioneer Mortgage Entities, 264 F.3d 803 (9th Cir. 2001)

Conversion from chapter 11 to chapter 7 was warranted where corporation charge with responsibility for liquidating bankruptcy estate caused unreasonable delay by failing to account to investors. Bankruptcy court's decision to convert will be reversed only if there is no evidence in the record upon which to rationally support it.

In re Johnston, 149 B.R. 158 (9th Cir. B.A.P. 1992)

Conversion of case from 11 to 7 four months after filing held to be proper. Bankruptcy court isn't required to wait a certain time to detriment of creditors before pulling the plug.

In re Plata, 958 F.2d 918 (9th Cir. 1992)

Monies held from post-petition earning by Chapter 12 trustee go back to debtor.

In re Levesque, 473 B.R. 331 (B.A.P. 9th Cir. 2012)

Chapter 7 Trustee has standing to object to re-opening of Chapter 7 case to convert to a Chapter 11.

In re Markosian, 506 B.R. 273 (9th Cir. B.A.P. 2014)

When a Chapter 11 debtor converts to Chapter 7, post-petition income is not part of the Chapter 7 estate. While there is no express provision for this in § 348 (compare to § 348(f)(1)(A)), court determines that since post-petition income is not property of the Chapter 7 estate under § 541(a)(6), and conversion does not change the petition date, post-petition income is not property of the estate when case is converted. **But see** In re Copeland, CV-18-03311 (D.Ariz. 2019): disagrees with BAP decision in Markosian, and holds that Chapter 11 post-petition income is property of the Chapter 7 estate upon conversion.

Harris v. Viegelahn, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015)

A Chapter 13 debtor who, in good faith, converts a confirmed Chapter 13 case to a Chapter 7 is entitled to a return of his undistributed post-petition wages held by the former Chapter 13 trustee.

Brown v. Barclay (In re Brown), 953 F.3d. 627 (9th Cir. 2020)

When 13 is converted to a 7, property that is fraudulently transferred by debtor during the 13 is constructively in the 13 debtor's possession and thus becomes property of the Chapter 7 bankruptcy estate under section 348.

**CONVERSION - STATE LAW**

CHoPP Computer Corp., Inc. v. U.S., 5 F.3d 1344, 1347 (9th Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)

California provides the relevant substantive law in this case. That state permits recovery on a conversion theory either for the wrongful taking or for the wrongful retention of property. *See Edwards v. Jenkins*, 7 P.2d 702, 705 (Cal. 1932). In order to maintain an action for conversion, ChoPP must show that it had title to or a right to possess the funds in the PaineWebber account. *Moore v Regents of the Univ. Of Cal.,* 793 P.2d 479, 488 (Cal. 1990); *Baldwin v Marina City Properties, Inc.,* 145 Cal. Rptr. 406, 416 (Cal. App. 1978). ChoPP's interest must have existed, if at all, at the time of the levy or at the time that ChoPP demanded return of the funds after entry of the final judgment in state court.

See also *In re Manser*, 99 B.R. 434 (9th Cir. B.A.P. 1989).

Rasmussen & Assoc., Inc. V. Kalitta Flying Services, Inc., 958 F.2d 896 (9th Cir. 1992)

In California, conversion requires ownership or right to possession of property, wrongful disposition of the property right and damages.

**COSTS - 28 U.S.C. §§ 1920 and 1927**

In re Sandoval, 186 B.R. 490 (9th Cir. 1995)

Bankruptcy court not court of U.S. for purposes of 28 U.S.C. § 1927. See *In re Perroton,* 958 F.2d 889 (9th Cir. 1992).

Haagen-Dazs Co., Inc.v. Double Rainbow, Gourmet Ice Cream, Inc., 920 F.2d 587 (9th Cir. 1990)

Xerox of documents necessarily used in case but not entered into evidence taxable as costs.

Alflex Corp. v Underwriters Lab Inc., 914 F.2d 175 (9th Cir. 1990), *cert denied*, 502 U.S. 812, 112 S.Ct. 61 (1991)

Taxing of costs for copies of depos and private service of process fees was proper.

**CREDIT CARDS**

In re Anastas, 94 F.3d 1280 (9th Cir. 1996)

In re Burdge, 198 B.R. 773 (9th Cir. B.A.P. 1996)

**CREDIT COUNSELING - § 109(h)**

Warren v. Wirum, 378 B.R. 640 (N.D. Cal. 2007)

1) Because credit counseling under § 109(h) is not jurisdictional, the debtor was judicially estopped from dismissing his case for failing to obtain it, citing *In re Mendz,* 367 B.R. 107 (9th Cir. B.A.P. 2007); 2) unless the debtor asks to be excused from filing payment advices or the trustee moves the court to decline from dismissing, the case is automatically dismissed, and the court may not retroactively waive the debtor's obligation to file payment advices.

In re Mendez, 367 B.R. 109 (9th Cir. B.A.P. 2007)

Pre-bankruptcy credit counseling is not a jurisdictional prerequisite, but an eligibility requirement subject to waiver and estoppel. Debtor waived strict compliance with credit counseling requirements, and could not use noncompliance offensively to obtain dismissal of her bankruptcy case.

**CREDITORS COMMITTEE**

In re Sufolla, Inc., 2 F.3d 977 (9th Cir. 1993)

Fn. 1: "A qualified implied authorization exists under 11 U.S.C. § 1103(c)(5)" for an initiation of an adversary proceeding by a creditors committee**.**

**DAMAGES**

In re First Alliance Mortg. Co., 471 F.3d 977, 998 (9th Cir. 2006)

"Under California law, punitive damages are appropriate where a plaintiff establishes by *clear and convincing evidence* that the defendant is guilty of (1) fraud, (2) oppression or (3) malice. Cal.Civ.Code §3294(a). According to the definitions provided in section 3294(c), a plaintiff may not recover punitive damages unless the defendant acted with intent or engaged in "despicable conduct"."

In re Lundell, 236 B.R. 720 (9th Cir. B.A.P. 1999)

Damage to estate from debtor's failure to deliver estate property to trustee not contingent on future determination of estate's insolvency.

Robi v. Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990)

Punitive damages - California law.

In re Sansone, 99 B.R. 981, 989 (Bankr.C.D. Cal. 1989)

Test for determining right to punitives - California law.

Professional Seminar Consultants, Inc. v. Sino Am. Technology Exchange Council, Inc. 727 F.2d 1470, 1476 (9th Cir. 1984)

Punitive damages

factors: 1) nature of defendant's acts, 2) amount of compensatory award, 3) defendant's wealth.

Adams v. Murakami, 54 Cal.3d 105, 109 (1991)

Punitive damages.

In re Wolverton Associates, 909 F.2d 1286 (9th Cir. 1990)

Punitive damages.

Neal v. Farmers Ins. Exchange, 21 Cal.3d 925 (1978)

Punitive damages.

**DEBT RELIEF AGENCIES– 11 U.S.C. §§ 526 - 528**

Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 130 S.Ct. 1324 (2010)

1. Attorneys who provide bankruptcy assistance are "debt relief agencies" under § 101(12A);

2. Section 526(a)(4) does not prohibit a debt relief agency from advising an "assisted person" to incur *any* new debt. Rather, it "prohibits debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." 130 S.Ct. at 1336.

3. Because § 528's requirements that a law firm identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services are "reasonably related to the [Government's] interest in preventing deception of consumers", those requirements are valid. 130 S.Ct. at 1340.

**DECLARATORY JUDGMENT**

Fireman's Fund, Inc. v. Ignacio, 860 F.2d 353 (9th Cir. 1988).

**DEEPENING INSOLVENCY DOCTRINE**

Smith v. Arthur Anderson LLP, 421 F.3d 989 (9th Cir. 2005)

"We need not make any general pronouncements on the deepening insolvency theory, not least because it is difficult to grasp exactly what that theory entails. . . .We do, however, agree with the Third Circuit's observation in *Lafferty* that 'prolonging an insolvent corporation's life through bad debt may' dissipate corporate assets and thereby harm the value of corporate property. 267 F.3d 350."

**DEFINITIONS**

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. B.A.P. 2007)

In a decision largely governed by Nevada law, court adopts the Restatement definition of "assignment."

In re Cellular 101, Inc., 377 F.3d 1092 (9th Cir. 2004)

For purposes of § 503(b)(3), entity was a creditor, even if it's claim was disputed.

In re Ritter Ranch Development, L.L.C., 255 B.R. 760 (9th Cir. B.A.P. 2000)

Community development bondholders were not "creditors" of developer**.**

In re Hilde, 189 B.R. 776 (9th Cir. B.A.P. 1995), *rev'd* 120 F.3d 950 (9th Cir. 1997)

Definition of statutory and judicial lien under California law - C.C.P. § 1800(a)(4), (a)(9).

In re Friedman, 126 B.R. 63 (9th Cir. B.A.P. 1991)

What constitutes an "insider" under 101 (31).

Reeves v. Teuscher, 881 F.2d 1495 (9th Cir. 1989)

For purposes of 1933/1934 Acts - ltd partnerships included.

**DISCHARGE AND DISCHARGEABILITY - General Principles- Collateral Estoppel, Res Judicata, Damages, Burden of Proof, Weighing Evidence, etc.**

1. **Attorney's Fees and § 523(d)**
2. **Cal. Civ. Code § 3287(a)**
3. **Cal. Civ. Code § 92848**
4. **Collateral Estoppel (also see separate section on Collateral Estoppel and Issue Preclusion)**
5. **Default Judgment**
6. **Extension of time to file Complaint/Equitable Tolling**
7. **Fraud**
8. **Fed. R. Bankr. P. 9006 under 4007(1)**
9. **FRCP 17(a)**
10. **Novation**
11. **Punitive Damages**
12. **Res Judicata**
13. **Rule 9(b) Fed.R. Civ.P. 15**
14. **§ 362**
15. **§ 509**
16. **§ 523**
17. **§ 523(a)(2)**
18. **§ 523(a)(4)**
19. **§ 523(b)**
20. **§ 1141(d)(3)**
21. **Waiver**
22. **Prejudgment/Postjudgment interest**
23. **Misc**

**1. Attorney's Fees and § 523(d)**

In re Bartenwerfer, 613 B.R. 730 (9th Cir. B.A.P. 2020)

While prevailing party bears burden of establishing fees stemming from the nondischargeable fraud liability, fee apportionment is not required if the issues in the various claims are so intertwined that it would be impracticable or impossible to separate the attorney's time into compensable and non-compensable units. When objecting to fees, must make sufficiently specific objections. While block billing may result in reductions for specific entries, it does not require disallowance of all fees.

In re Shannon, 553 B.R.380 (B.A.P. 9th Cir. 2016)

Suggests possibility that attorney's fees may be awarded in a § 523(a)(2)(A) case because such a case may partially be "on the contract" under Washington law. *But see In re Pho*, 2016 WL 1620375 (Bankr. N.D. Cal. 2016).

In re Bos, 818F.3d 486 (9th Cir. 2016)

Debtor found not be a "fiduciary" under § 523(a)(4) in an action premised on failure to pay ERISA benefits under union contract, which contains an attorneys' fee clause. Debtor denied fees since the adversary proceeding was not an "action on the contract" under Cal.Civ. Code § 1717,since it did not involve the enforceability of the union contract. Instead, adversary proceeding was decided on whether the Debtor was a fiduciary under ERISA.

In re Bertola, 317 B.R. 95 (9th Cir. B.A.P. 2004)

After Cohen v. de la Cruz, 523 U.S. 213 (1998), the determinative issue in awarding attorney fees to a dischargeability plaintiff under § § 523(a)(2) and (6) is whether the successful plaintiff could recover attorney fees in a non-bankruptcy court.

In re Davison, 289 B.R. 716 (9th Cir. B.A.P. 2003)

Debtor not entitled to collect attorney fees from creditor who lost dischargeability action, since the bankruptcy court was not enforcing or interpreting the contract that provided for fees when it found no fraud.

In re Hunt, 238 F.3d 1098 (9th Cir. 2000)

Award of attorney fees under § 523(d) justified where credit card plaintiff failed to present any evidence of intent not to repay. "Substantially justified" means that complaint has a reasonable basis in law and fact. "Special circumstances" has reference to "traditional equitable principles." Exception didn't apply here. No waiver of right under the statute, where claim raised in the pretrial order.

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"...[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues....Ms. Renfrow is entitled to recover the attorney's fees she has incurred in litigating the validity and the amount of Mr. Draper's debts in the bankruptcy proceeding." She's also entitled to the attorney's fees she incurred in the state court proceedings before the bankruptcy was filed, and to reasonable costs in both the bankruptcy and state court action.

In re Stine, 254 B.R. 244 (9th Cir. B.A.P. 2000), *aff'd*, 19 Fed.Appx. 626 (9th Cir. 2001)

Bankruptcy debtor's pro bono representation was not a special circumstance that precluded an award of attorney's fees after she prevailed in dischargeability proceeding. Secured debt on real property was a consumer debt under § 523(d).

In re Baroff, 105 F.3d 439 (9th Cir. 1997)

Prevailing party entitled to attorney's fees in dischargeability action when bankruptcy court applies state law to enforce settlement agreement that authorizes them.

In re Hashemi, 104 F.3d 1122 (9th Cir. 1996), *cert. denied,* 520 U.S. 1230, 117 S.Ct. 1824

(1997)

No right to jury trial in dischargeability proceedings, but could recover attorney fees.

In re Harvey (amended opinion), 172 B.R. 314 (9th Cir. B.A.P. 1994)

Award of attorney's fees against creditor who loses on nondischargeability complaint does not require finding of bad faith.

In re Gee, 173 B.R. 189 (9th Cir. B.A.P. 1994)

No right to attorney fees for dischargeability action.

In re Vasseli, 5 F.3d 351 (9th Cir. 1993)

§ 523(d) does not give a bankruptcy court power to award attorney fees incurred on appeal.

In re Kullgren, 109 B.R. 949, 953 (Bankr. C.D. Cal. 1990)

In order to prevail on a motion for attorney's fees under § 523(d), a debtor must prove that:

(1) the creditor requested a determination of the dischargeability of the debt,

(2) the debt is a consumer debt, and

(3) the debt was discharged.

In re Daecharkhom, 2014 WL 607688 (9th Cir. B.A.P. 2014)

When a debtor is entitled to fees because creditor's case lacked substantial justification and no special circumstances existed under § 523(d), then court must award reasonable fees, and it cannot apportion them.

In re Lionetti, 613 B.R. 13 (9th Cir. B.A.P. 2020)

To defeat a 523(d) motion, plaintiff must demonstrate substantial justification for both its legal and factual arguments. Provides good analysis of 523(d) elements.

**2. Cal. Civ. Code § 3287(a)**

In re Niles, 106 F.3d 1456 (9th Cir. 1997)

Cal. Civ. Code § 3287(a) allows prejudgment interest for damages certain, and is applicable because state law governs existence of a debt.

**3. Cal. Civ. Code § 92848**

In re Martin, 161 B.R. 672 (9th Cir. B.A.P. 1993)

Bonding company is subrogated to the rights of the creditor under Cal. Civ. Code 92848 in a dischargeability proceeding.

**4. Issue Preclusion/Collateral Estoppel**

In re Sabban, 600 F.3d 1219 (9th Cir. 2010)

Where state court did not find that damages were sustained by plaintiff because of unlicensed contractor's misrepresentations or fraud under California Business and Professions Code § § 7031(b) and 7160, § 523(a)(2) did not apply.

In re Hansen, 368 B.R. 868, 879-80 (9th Cir. B.A.P. 2007)

Claim preclusion did not apply to creditor's lawsuit objecting to discharge, where the trustee, who settled a separate lawsuit objecting to discharge, was not in privity with the creditor.

In re Lopez, 367 B.R. 99 (9th Cir. B.A.P. 2007)

1. The *Rooker-Feldman* doctrine does not override or supplant the issue and claim preclusion doctrines; 2. Issue preclusion applied in this § 523(a)(6) action, where the state court found that the debtor willfully and maliciously misappropriated customer lists.

In re Khaligh, 338 B.R. 817 (9th Cir. B.A.P. 2006)

Issues that were actually litigated and necessarily decided in the course of obtaining an arbitration award that was confirmed as a judgment by a California court are eligible for issue preclusive effect under California law. The defamation judgment was found to have preclusive effect under § 523(a)(6).

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. B.A.P. 2005)

Issue preclusion applied to state court judgment for compensatory damages. Court need not have found that the debtor obtained services directly through fraudulent conduct under § 523(a)(2).

Muegler v. Bening, 413 F.3d 864 (9th Cir. 2005)

"It is only the fact of an adverse fraud judgment, and nothing more, that is required for a debt to be nondischargeable." The debtor does not need to have received a benefit from the fraud.

In re Huang, 275 F.3d 1173 (9th Cir. 2002)

Waiver of discharge in settlement agreement was ineffective. The settlement agreement had no collateral estoppel effect under § 523(a)(2), where the settlement agreement omitted any mention of fraud or facts supporting fraud.

In re Roussos, 251 B.R. 86 (9th Cir. B.A.P. 2000), *aff'd*, 33 Fed.Appx. 365 (9th Cir. 2002)

Even though state court calculated fraud damages based on benefit of the bargain losses under California law, rather than out-of-pocket losses under federal law, collateral estoppel applied to the state court judgment.

In re Palmer, 207 F.3d 566 (9th Cir. 2000)

Default judgment in tax court did not have collateral estoppel effect, where debtor did

nothing in proceeding beyond filing petition for redetermination of tax liability. "Actually litigated" requirement not met.

In re Branam, 226 B.R. 45 (9th Cir. B.A.P. 1998), *aff'd*, 205 F.3d 1350 (9th Cir. 1999)

State court judgment for assault and battery collaterally estopped debtor from relitigating whether judgment arose from willful and malicious conduct.

In re Younie, 211 B.R. 367 (9th Cir. B.A.P. 1997), *aff'd*, 163 F.3d 609 (9th Cir. 1998)

State court judgment of fraud entitled to collateral estoppel effect precluding discharge

In re Lake, 202 B.R. 751 (9th Cir. B.A.P. 1996)

State court judgment not entitled to collateral estoppel effect in bankruptcy court if obtained through extrinsic fraud.

In re Bowen, 198 B.R. 551 (9th Cir. B.A.P. 1996)

Federal diversity judgment is subject to federal rule regarding collateral estoppel. Stipulated judgment met "actually litigated" requirement.

In re Green, 198 B.R. 564 (9th Cir. B.A.P. 1996)

Collateral estoppel applied to state fraud judgment.

In re Silva, 190 B.R. 889 (9th Cir. B.A.P. 1995)

Issues raised in unopposed summary judgment motion not "actually litigated" for purpose of collateral estoppel effect in later dischargeability action. Opinion does not mention Ninth Circuit Nourbaksh decision!

In re Kelly, 182 B.R. 255 (9th Cir. B.A.P. 1995), *aff'd*, 100 F.3d 110 (9th Cir. 1996)

Collateral Estoppel.

In order for a prior judgment to be entitled to collateral estoppel effect, five elements mst be met:

1) The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;

2) the issue must have been actually litigated in the former proceeding;

3) it must have been necessarily decided in the former proceeding;

4) the decision in the former proceeding must be final and on the merits; and

5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

*Clark v. Bear Stearns & Co., Inc.,* 966 F.2d 1318, 1320 (9th Cir. 1992); *Berr*, 172 B.R. at 306; *Gikas v. Zolin*, 25 Cal.Rptr.2d 500, 505 (1993) (quoting *Lucido v. Superior Court*, 272 Cal.Rptr. 767, 769 (1990), *cert denied*, 500 U.S. 920 (1991); *Gutierrez v. Superior Court*, 29 Cal.Rptr.2d 376, 378 (Cal.Ct.App. 1994), *cert denied*, 514 U.S. 1049 (1995) (quoting *Lucido*, 272 Cal.Rptr. at 769). See generally, 1B James W. Moore et al., Moore's Federal Practice 0.441-43 (2d ed. 1994).

The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the collateral estoppel effect. *Spilman v. Harley*, 656 F.2d 224, 227-28 (6th Cir. 1981); *Matter of Merrill*, 594 F.2d 1064, 1067 (5th Cir. 1979).

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

When debtor's fraud and breach of fiduciary duty have been fully and fairly litigated in state court prior to bankruptcy, the bankruptcy court may not invoke equitable powers to reject the dischargeability plaintiff's invocation of collateral estoppel.

Berr v. Federal Deposit Ins. Co. (In re Berr), 172 B.R. 299 (9th Cir. B.A.P. 1994)

Can a stipulated judgment for breach of contract damages, entered pursuant to a settlement agreement, have preclusive effect so as to collaterally estop the creditor from litigating nondischargeability for fraud under § 523(a)(2)(B) in the judgment debtor's subsequent bankruptcy case?

A 3-judge B.A.P. panel holds "perhaps" (and "perhaps not"), with three different opinions.

In re Nourbakhsh, 162 B.R. 841 (9th Cir. B.A.P. 1994), *aff'd*, 67 F.3d 798 (9th Cir. 1995)

Default judgment on issue of fraud has collateral estoppel effect.

In re Yarbrow, 150 B.R. 233 (9th Cir. B.A.P. 1993)

Collateral estoppel as to fraud.

**5. Default Judgment**

In re Munton, 351 B.R. 707 (9th Cir. B.A.P. 2006)

Affirmative defenses not raised in prior state court action in which default was taken against the debtor may not be raised in subsequent nondischargeability proceeding. Texas contractor's statute exhibited the characteristics of an express or technical trust for purposes of § 523(a)(4).

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. B.A.P. 2005)

Claim preclusion applied to state court's finding of punitive damages, even though the judgment was by default.

In re Garcia, 313 B.R. 307 (9th Cir. B.A.P. 2004)

Default judgment had preclusive effect, even if it didn't expressly state that the debt was nondischargeable.

In re Baldwin, 249 F.3d 912 (9th Cir. 2001)

State court default judgment in favor of plaintiff alleging intentional tort had preclusive

effect as to issue of willful and malicious injury in bankruptcy court nondischargeability action.

In re Harmon, 250 F.3d 1240 (9th Cir. 2001)
State court default judgment made no express finding with respect to fraud claim and therefore had no preclusive effect on fraud issue in nondischargeability action**.**

**6. Extension of time to file Complaint/Equitable Tolling**

In re Albert, 113 B.R. 617 (9th Cir. B.A.P. 1990)
Multiple extensions of dischargeability complaint filing dates permitted under Fed.R.Bankr.P.

In re Brown, 102 B.R. 187 (9th Cir. B.A.P. 1989)
Cannot extend time for filing dischargeability complaint once time has run (citing In re Price, 79 B.R. 888, 890 (9th Cir. B.A.P. 1988), *aff'd*, 871 F.2d 97 (9th Cir. 1989).

In re Neff, 824 F.3d 1181 (9th Cir. 2016)
One year look back provision in § 727(a)(2) is a statute of repose, not a statue of limitations, and is not subject to equitable tolling.

**7. Fraud**

In re Tobin, 258 B.R. 199 (9th Cir. B.A.P. 2001)
Fraudulent representation imputed to debtor as corporate alter ego not proper basis for nondischargeability determination absent evidence of debtor's personal, knowing involvement in fraudulent scheme.

In re Fischer, 116 F.3d 388 (9th Cir. B.A.P. 1997)
Express novation extinguishes bankruptcy creditor's fraud claim against debtor based on original contract

In re Saylor, 178 B.R. 209 (9th Cir. B.A.P. 1995), *aff'd*, 108 F.3d 219 (9th Cir. 1997)
Fraudulent transfer action created no debt against debtor, thus no dischargeability action.

In re Aubrey, 111 B.R. 268 (9th Cir. B.A.P. 1990)
State court judgment for fraud and willfulness nondischargeable in bankrupt's estate.

**8. Fed. R. Bankr. P. 9006 under 4007(1)**

In re Burns, 102 B.R. 750 (9th Cir. B.A.P. 1989)
Fed.R.Bankr.P. 9006 applies in calculating time under 4007(1).

### 9. FRCP 17(a)

In re Capobianco, 248 B.R. 833 (9th Cir. B.A.P. 2000)

Court properly allowed plaintiff to substitute as the real party in interest under FRCP 17(a) a sole proprietorship for a corporate entity as plaintiff in a dischargeability action, where debt was owed to sole proprietor, which was subsequently incorporated.

### 10. Novation

Archer v. Warner, 123 S.Ct. 1462 (2003)

"We conclude that the Archers' settlement agreement and releases may have worked a kind of novation, but that fact does not bar the Archers from showing that the settlement debt arose out of [fraud], and consequently is nondischargeable..."

### 11. Punitive Damages

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. B.A.P. 2005)

Claim preclusion applied to state court's finding of punitive damages, even though the judgment was by default.

In re Cantrell,329 F.3d 1119 (9th Cir. 2003)

State court necessarily decided issue of fraud by awarding punitive damages. Thus the debtor was precluded from relitigating this issue.

In re Molina, 228 B.R. 248 (9th Cir. B.A.P. 1998)

California court's bare finding of attorney "fraud" sufficient to establish that punitive damages award was not dischargeable in bankruptcy.

In re Giangrasso, 145 B.R. 319 (9th Cir. B.A.P. 1992)

State court jury's punitive damages award basis sufficiently unclear to defeat exception from bankruptcy dischargeability.

### 12. Claim Preclusion/Res Judicata

In re Jung Sup Lee, 335 B.R. 130 (9th Cir. B.A.P. 2005)

Claim preclusion applied to state court's finding of punitive damages, even though the judgment was by default.

Rein v. Providian Financial Corp., 270 F.3d 895 (9th Cir. 2001)

Where no court approval was obtained of either a settlement of an adversary proceeding nor a reaffirmation agreement, there was no final order and thus no claim preclusion.

In re Daily, 47 F.3d 365 (9th Cir. 1995)

Debtor agrees with creditor to allow RICO suit to go forward and have it be binding as to

dischargeability suit in Bankruptcy Court. Debtor then fails to comply with discovery and has default taken against him. Held, where debtor actively participated in case for two years, the "actual litigation" requirement is satisfied.

In re Daghighfekr, 161 B.R. 685 (9th Cir. B.A.P. 1993)

Default judgment as to damages rendered in state court is res judicata, citing *In re Comer*, 723 F.2d 737, 740 (9th Cir. 1984).

**13. Rule 9(b) Fed.R. Civ.P. 15**

In re Englander, 92 B.R. 425 (9th Cir. B.A.P. 1988)

Specificity of complaint - Rule 9(b) Fed.R.Civ.P. 15 governs as to amended complaint adding new allegations.

**14. § 362**

In re Gustafson, 934 F.2d 216 (9th Cir. 1991)

State is immune from money damages for stay violations under the 11th Amendment.

**15. § 509**

In re Hamada**,** 291 F.3d 645 (9th Cir. 2002)

Issuer of letter of credit to secure a surety bond paid on a nondischargeable judgment was not subrogated to the rights of the judgment holder. Issuers of letters of credit are not "liable with" the debtor, and thus § 509 does not apply; nor did the issuer meet the requirements for equitable subrogation under California law.

**16. § 523**

In re Arneson, 282 B.R. 883 (9th Cir. B.A.P. 2002)

A § 523 judgment in a prior bankruptcy case has claim preclusion effect unless and until vacated.

**17. § 523(a)(2)**

In re Anguiano, 99 B.R. 436 (9th Cir. B.A.P. 1989)

Only out-of-pocket damages awarded in this 523(a)(2) case, although benefit-of-bargain damages may be appropriate in a particular case.

**18. § 523(a)(4)**

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

Punitive damages not dischargeable under § 523(a)(4).

### 19. § 523(b)

In re Moncur, 328 B.R. 183 (9th Cir. B.A.P. 2005)

Debt that was declared nondischargeable in previous chapter 12 was nondischargeable in subsequent chapter 7, notwithstanding local form of discharge order that required the filing of a lawsuit in the chapter 7.

In re Paine, 283 B.R. 33 (9th Cir. B.A.P. 2002)

Most final judgments of nondischargeability rendered by bankruptcy courts, even if erroneous, are preclusive in subsequent bankruptcy cases under § 523(b).

### 20. § 1141(d)(3)

In re Dominguez, 51 F.3d 1502 (9th Cir. 1995)

Complaint objecting to discharge deficient under 1141(d)(3) (liquidating Chapter 11)

### 21. Waiver

In re Boni, 240 B.R. 381 (9th Cir. B.A.P. 1999)

Absent waiver, dischargeability of debt must be determined in adversary proceeding and not on motion.

In re Santos, 112 B.R. 1001 (9th Cir. B.A.P. 1990)

Waiver may be a defense to dismiss late-filed dischargeability complaint, where defense is not raised in answer.

### 22. Prejudgment/Post Judgment Interest

In re Weinberg, 410 B.R. 19, 37 (9th Cir. B.A.P. 2009)

"It is settled law that where a debt that is found to be nondischargeable arose under state law, "the award of prejudgment interest is also governed by state law." *In re Niles,* 106 F.3d 1456, 1463 (9th Cir. 1997).

In re Snapir, 2017 Bankr.LEXIS 3829 (9th Cir. BAP 2017)

For claims brought under federal law, the interest rate prescribed by federal law applies unless the equities require a different result (which will require a reasoned justification supported by substantial evidence). See also Elite of Los Angeles, Inc. v. Hamilton, BAP No. SC-17-1126 FBL and SC-17-1223: state interest awarded when pre-petition judgment obtained by creditor).

### 23. Misc

In re Hugger, 2019 WL 1594017 (9th Cir. B.A.P. 4/5/19)

Bankruptcy court denied motion to vacate Chapter 7 discharge dismiss case to allow

debtor to refile at a time when he could discharge taxes. BAP reaffirms that debtors lack standing to vacate discharge under section 727(d), and examines instances when court may vacate discharge under Rule 60(b).

In re Hamilton, 584 B.R. 310 (9th Cir. B.A.P. 2018)

State judgment interest rate applies if bankruptcy court is determining the dischargeability of a pre-petition state court judgment. When court determines the existence of the debt and its dischargeability, federal law governs pre and post-judgment interest rate.

In re Sasson, 424 F.3d 864 (9th Cir. 2005), *cert. denied*, Sasson v. Sokoloff, 547 U.S. 1206, 126 S.Ct. 2890 (2006)

A bankruptcy court has subject matter jurisdiction to enter a money judgment in a dischargeability proceeding, even though the underlying debt has been reduced to judgment in state court. The judgment was obtained in 1991, but the dischargeability action wasn't filed until debtor filed for bankruptcy in 2001. In finding that the debtor engaged in willful and malicious conduct in rendering the initial state court judgment uncollectible, the bankruptcy court renewed the 1991 judgment, and tacked on interest at the federal rate for the period from 1991.

In re Hercules Enterprises, Inc., 387 F.3d 1024 (9th Cir. 2004)

In order to find civil contempt, "the bankruptcy court had to find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he did not comply." Bankruptcy court had power to sanction for civil contempt, but not to make such sanction nondischargeable in future bankruptcies.

Banks v. Gill Distribution Centers, Inc., 263 F.3d 862 (9th Cir. 2001)

Claim established prepetition if the creditor brought a timely state court action to collect the debt, even if the debt has not been reduced to a state court judgment.

In re Myrvang, 232 F.3d 1116 (9th Cir. 2000)

The bankruptcy court has the discretion to discharge a portion of the nondischargeable debt in question. In re Taylor, 223 B.R. 747 (9th Cir. B.A.P. 1998) disapproved. But the imposition of a penalty provision if the debtor missed a payment was beyond the authority of the bankruptcy court.

In re Gerwer, 253 B.R. 66 (9th Cir. B.A.P. 2000)

Estate distribution was an involuntary payment, thus prohibiting the debtor from directing that distribution be applied first to the nondischargeable portion of a debt. Creditor had the right to apply payment from estate to the dischargeable portion of the debt.

In re Marino, 181 F.3d 1142 (9th Cir. 1999)

Dismissal of untimely complaint in defunct Ch. 11 proceeding did not bar filing another complaint for same cause in new Ch. 7 proceeding.

In re Cole, 226 B.R. 647 (9th Cir. B.A.P. 1998)

Debtor could not prospectively contract away right to seek bankruptcy discharge.

In re Duplante, 215 B.R. 444 (9th Cir. B.A.P. 1997)

Recent court of appeals decision changed pertinent law, justifying creditor's voluntary dismissal of adversary proceeding

In re Ota, 192 B.R. 545 (9th Cir. B.A.P. 1996)

Assignee of claim has standing to object to discharge.

In re Gergely, 186 B.R. 951 (9th Cir. B.A.P. 1995), *aff'd in part, rev'd in part* 110 F.3d 1448 (9th Cir. 1997)

Where state court complaint pled no nondischargeability cause of action, state statute of limitations barred subsequent nondischargeability complaint.

In re Lawler, 141 B.R. 425 (9th Cir. B.A.P. 1992)

Burden of proof in 727 cases is preponderance of evidence.

In re Fields, 926 F.2d 501 (5th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991)

Surety that paid taxes of debtor subrogated to the rights of the taxing authorities.

In re Combs, 101 B.R. 609 (9th Cir. B.A.P. 1989)

Dischargeability to be determined on basis of facts as of date of petition, not date of dischargeability trial.

In re Ellwanger, 89 B.R. 95 (9th Cir. B.A.P. 1988)

State court record makes prima facie case under *In re Houtman*, 568 F.2d 651 (9th Cir. 1978). This opinion was withdrawn from bound volume by order of Court dated Oct. 12, 1988. Subsequent opinion found at 105 B.R. 551 (9th Cir. B.A.P. 1989).

In re Lochrie, 78 B.R. 257 (9th Cir. B.A.P. 1987)

Exception to discharge to be strictly construed in favor of debtor.

In re Mi Jung Hong, 2014 Bankr. LEXIS 485 (Bankr. C.D.Cal. 2014)

Once Chapter 7 discharge is issued, debtor does not have authority to revoke her discharge and dismiss case.

Northbay Wellness Group, Inc. V. Beyries, 789 F.3d 956 (9th Cir. 2015)

Court may consider plaintiff's "unclean hands" when deciding whether to dismiss a non-dischargeability complaint. Court must balance the plaintiff's wrongdoing against that of the defendant. The doctrine should not be strictly enforced when to do so would frustrate a substantial public interest.

**DISCHARGEABILITY - Liability of Corporate Officer or Relatives for Acts of Corporation**

Barenwerfer v. Buckley, 598 U.S. 69 (2023)

Debts incurred by fraud cannot be discharged in bankruptcy regardless of whether the debtor is the party who committed the fraud. Look to common law to determine which parties can be held liable for the fraud.

In re Tsurukawa, 258 B.R. 192 (9th Cir. B.A.P. 2001)

"...[W]e hold that a marital union alone, without a finding of a partnership or other agency relationship between spouses, cannot serve as a basis for imputing fraud from one spouse to the other."

In re Cox, 41 F.3d 1294 (9th Cir. 1994)

Discharge granted to wife who was wholly uninvolved and unaware of husband's bad record keeping. Compare to Bartenwerfer v. Buckley, 598 U.S. 69 (2023): nondischargeable fraud under 523(a)(2)(A) also non-dischargeable against innocent partner.

In re Arm, 87 F.3d 1046 (9th Cir. 1996)

§ 523(a)(2)

Indirect benefit from fraud in which debtor participates is sufficient to find debt is nondischargeable.

In re Lauricella, 105 B.R. 536 (9th Cir. B.A.P. 1989)

Insufficient evidence to connect debtor with check kiting scheme of his corp.

In re Figge, 94 B.R. 654 (Bankr. C.D. Cal. 1988), *aff'd*, 928 F.2d 1136 (9th Cir. 1991)

Wife not liable for husband's participation in fraud.

In re Lansford, 822 F.2d 902, 904 (9th Cir. 1987)

Liability of wife for husband's fraud

In re Huh, 2014 WL 936803 (9th Cir. B.A.P. 2014)

Should an agent's fraud be imputed to his principal? The law may be changing post-*Bullock*. The B.A.P. held that "more than a principal/agent relationship is required to establish a fraud exception to discharge. While the principal/debtor need not have participated actively in the fraud for the creditor to obtain an exception to discharge, the creditor must show that the debtor knew, or should have known, of the agent's fraud." See also In re Shart, 505 B.R. 13 (Bankr. C.D. Cal. 2014). This case no longer good law under Bartenwerfer v. Buckley, __U.S.__ (2023)" nondischargeable fraud under 523(a)(2)(A) also non-dischargeable against innocent partner.

**DISCHARGEABILITY - Time for filing Nondischargeability Actions**

Kontrick v. Ryan, 124 S.Ct. 906 (2004)

Rule 4004(a) time limit is not jurisdictional, and may be waived by the debtor. Debtor might have raised the issue in his amended answer, or perhaps even at any time up to the time of trial, but failed to do so. Court does not decide whether the time limit might be softened on equitable grounds.

In re Staffer, 306 F.3d 967 (9th Cir.2002)

Under Bankruptcy Rule 4007(b), a non- § 523(c) dischargeability complaint can be brought at any time (except where laches is found). The case need not be reopened to bring a complaint.

In re Bryan, 261 B.R. 240 (9th Cir. B.A.P. 2001)

Genuine issue of material fact existed as to when complaint was submitted to bankruptcy court for filing. Court had a drop box system whereby anything left in the box "would be time-stamped with that day's date."

In re Williams, 185 B.R. 598 (9th Cir. B.A.P. 1995)

Some objective evidence is required to rebut mailbox presumption (clerk's declaration, mail stamped, etc.)

In re De la Cruz, 176 B.R. 19 (9th Cir. B.A.P. 1994)

Creditor's complaint to determine dischargeability of claim untimely despite her attorney's statement that he did not receive notice of meeting of creditors. Mailbox rule - excusable neglect does not apply under 4007(c).

In re Santiago, 175 B.R. 48 (9th Cir. B.A.P. 1994)

No time limit on filing action to determine dischargeability of unscheduled debt when creditor does not receive notice of proceedings.

In re Perle, 752 F.3d 1023 (9th Cir. 2013)

Creditor allowed to file a non-dischargeability action after bar date when creditor not listed on schedules, despite fact that creditor's former attorney knew of Chapter 7 filing. "An attorney given notice of a bankruptcy on behalf of a particular client is not called upon to review all of his/her files to ascertain whether any other client may also have a claim against the bankrupt."

In re Lawrence, 494 B.R. 525 (Bankr. E.D.Cal. 2013)

It is inherently frivolous to file a tardy non-dischargeability action? Here, the court held that it is frivolous unless the attorney has a non-frivolous argument that the statute of limitations was tolled for part of the period in question.

In re Halstead, 158 B.R. 485 (9th Cir. B.A.P. 1993), *aff'd*, 53 F.3d 253 (9th Cir. 1995)

Creditors who relied on filing-bar date stated in bankruptcy court's second notice extending complaint were entitled to equitable relief after notice was vacated. Must have at least 30 days to meet time limit.

In re Gordon, 988 F.2d 1000 (9th Cir. 1993)

Sixty day period runs from date first set for First Meeting of Creditors, not from date it is actually held.

In re Kennerley, 995 F.2d 145 (9th Cir. 1993)

Filing motion for relief is not the same as a complaint objecting to dischargeability or request for extension.

In re Marino, 37 F.3d 1354 (9th Cir. 1994)

Objection to sale does not constitute substantial compliance with time limits for filing § 523 complaint.

In re Dewalt, 961 F.2d 848 (9th Cir. 1992)

Dismissal of creditor's dischargeability complaint improper where notice of bankruptcy received only seven days before claim deadline bar.

In re Anwiler, 115 B.R. 661 (9th Cir. B.A.P. 1990), *aff'd,* 958 F.2d 925 (9th Cir. 1992), *cert. denied*, Anwiler v. Patchett, 506 U.S. 882 (1992)

"Unique circumstances" doctrine justified allowance of late filed dischargeability complaint. (Two notices, one in original court and one in second court.)

In re Albert, 113 B.R. 617 (9th Cir. B.A.P. 1990)

Multiple extensions of filing period okay.

In re Gunn, 111 B.R. 291 (9th Cir. B.A.P. 1990)

Amended creditor's complaint may relate back to original filing if no prejudice to debtor.

In re Bucknum, 105 B.R. 25 (9th Cir. B.A.P. 1989), *aff'd*, 951 F.2d 204 (9th Cir. 1991)

Scheduled creditor not entitled to rely o bankruptcy clerk's duty to notify as to when nondischargeability complaints are due.

In re Neese, 87 B.R. 609 (9th Cir. B.A.P. 1988)

Time for filing cannot be extended once sixty days has run.

In re Ricketts, 80 B.R. 495 (9th Cir. B.A.P. 1982)

Creditor who was not listed but had actual notice of the bankruptcy could not get extension to file complaint after time had run.

In re Hill, 811 F.2d 484, 487 (9th Cir. 1987)

No discretion to extend time for filing complaint once time has expired.

Anwar v. Johnson, 720 F.3d 1183 (9th Cir. 2013)

The bar date for non-dischargeability actions is strictly enforced, and not subject to any equitable exceptions.

Willms v. Rowe Sanderson III, 723 F.3d 1094 (9th Cir. 2013)

Bankruptcy Court cannot sua sponte extend bar date for a § 523 action when motion to extend only sought additional time to file a § 727 action. In addition, any motion to extend the bar date must establish cause, as required by Rule 4007.

**DISCHARGEABILITY - Effect on innocent spouse's property**

Bartenwerfer v. Buckley, 598 U.S. 69 (2023)

Husband's fraud will be imputed to co-debtor wife if they were partners in a business, even if she was unaware of fraud.

In re Soderling, 998 F.2d 730 (9th Cir. 1993)

Married California debtor's federal criminal restitution judgment nondischargeable as to community property.

In re Maready, 122 B.R. 378 (9th Cir. B.A.P. 1991)

Must determine whether a claim is a community claim before you can reach community property.

In re LaSuer, 53 B.R. 414 (Bankr. D. Az. 1985)

Dichargeability judgment against spouse may reach innocent spouse's postpetition community property but not her own property.

**DISCHARGEABILITY - 523(a)(1)**

In re Sienga, 619 B.R. 405 (9th Cir. BAP 2020); In re Berkovich, 619 B.R. 397 (9th Cir. BAP 2020)

These cases discuss the meaning of a California state tax return and the dischargeability of California state taxes under §523(a)(1). Collectively, the stand for the proposition that tax debts are not dischargeable under § 523(a)(1)(B) if the taxpayer failed to file a return, a report under RTC § 18622, or both. The case also has a good discussion regarding statutory construction and interpretation. Both cases were affirmed by the Ninth Circuit. In re Sienga, __F.4th__ (9th Cir. 2021), holding that the debtor's fax to the FTB of the IRS' changes to his federal tax liability did not constitute a return under In re Beard and In re Tonsberg. In re Berkovich, 15 F.4th 997 (9th Cir. 2021): adopted the BAP decision.

In re Smith, 828 F.3d 1094 (9th Cir. 2016)

Debtor's taxes arising from a late filed return were non-dischargeable under § 523(a)(1)(B)(i). To qualify as a tax return, a written document (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. A tax return filed several years after IRS communicated with the debtor and then assessed a deficiency is not an honest and reasonable attempt to satisfy tax law. The Ninth Circuit did not decide whether any post-assessment filing could be "honest and reasonable," and did not analyze the language in § 523(a)'s hanging paragraph. See also *In re Van Arsdale*, 2017 WL 2267021 (Bankr. N.D.Cal. May 2017) for application of *Smith*.

Severo v. C.I.R., 586 F.3d 1213 (9th Cir. 2009)

Debtors IRS tax debt was nondischargeable under § 523(a)(1)(A). The fact that their tax liability did not fall within § 523(a)(1)(B)(ii) doesn't matter, since the exceptions to discharge under this section are in the disjunctive.

In re Savaria, 317 B.R. 395 (9th Cir. B.A.P. 2004)

"We conclude that 11 U.S.C. § 523(a)(1)(B)(ii). . .applies to postpetition filing of a late return for prepetition taxes. Since the bankruptcy distribution priority created by 11 U.S.C. § 507(a)(8)(A)(iii) and the exception to discharge created by § 523(a)(1)(B) are mutually exclusive, it follows that the postpetition filing of a late income tax return does not promote the tax debt to priority status."

In re George, 361 F.3d 1157 (9th Cir. 2004)

Claim by California Uninsured Employers Fund against employer who failed to purchase workers' compensation insurance was not "excise tax" for purposes pf bankruptcy law.

In re Bliemeister, 296 F.3d 858 (9th Cir. 2002)

Following *DeRoche,* where employee was injured in 1993 and bankruptcy not filed until 1998, transaction occurred more than three years before bankruptcy.

In re DeRoche, 287 F.3d 751 (9th Cir. 2002)

A "transaction" under Arizona Special Fund is the act of employing a worker without carrying the required insurance when the worker is injured; the date of the transaction for purposes of determining the three-year period of nondischargeability under the bankruptcy code is the date on which the worker is injured.

In re Hatton, 220 F.3d 1057 (9th Cir. 2000)

Return filed by I.R.S. and agreed to by taxpayer did not satisfy statutory requirement for filing of return as prerequisite to dischargeability of tax debt.

In re Jackson, 184 F.3d 1046 (9th Cir. 1999)

Filing a return with the IRS was tantamount to filing with the FTB.

In re Nunez, 232 B.R. 778 (9th Cir. B.A.P. 1999)

Tax Forms filed by debtor after IRS independently calculated debtor's tax liability were "returns" for purposes of bankruptcy discharge statute.

In re Rowley, 208 B.R. 942 (9th Cir. B.A.P. 1997)

Husband and wife did not fail to file mandatory "return" for purposes of discharge by failing to notify state when I.R.S. imposes tax deficiency assessment.

In re Vitaliano, 178 B.R. 205 (9th Cir. B.A.P. 1995)

I.R.S. agent's report on changes in individual's tax returns not "notice" to state tax board for purposes of statute that sets time limits for board's assessing deficiency based upon changes.

"[O]ther than a tax specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of this case . . .

"The trial court rule that since the taxes were properly assessable (and did not come within the definition of 11 U.S.C. section 523(a)(1)(B) or (C)), they were allowed priority claims under 11 . . . "

In re Camilli, 94 F.3d 1330 (9th Cir. 1996), *cert. denied*, Camilli v. Industrial Com'n of Arizona, 519 U.S. 1113 (1997)

Claim by state agency for reimbursement of workers' compensation benefits paid to debtor's employee does not constitute nondischargeable excise tax. It is a fee.

In re Bracey, 170 B.R. 398 (9th Cir. B.A.P. 1994), *aff'd in part and reversed in part*, 77 F.3d 294 (9th Cir. 1996)

Discharge of Franchise Tax Board obligations - when a protest is "filed." See also In re King, 961 F.2d 1423 (9th Cir. 1992).

In re King, 122 B.R. 383 (9th Cir. B.A.P. 1991), *aff'd*, 961 F.2d 1423 (9th Cir. 1992)

Tax assessment not dischargeable when 60 day final period fell within 240 days of petition

In re George, 95 B.R. 718 (9th Cir. B.A.P. 1989), *aff'd*, George v. Calif. State Bd. Of Equalization, 905 F.2d 1540 (9th Cir. 1990)

Responsible officer liability is a nondischargeable tax.

In re Pitts, 497 B.R. 73 (Bankr. C.D.Cal. 2013)

IRS assessed unpaid payroll tax liability against a general partnership, but not the individual partners. Chapter 7 debtor, who was a former general partner, filed a Chapter 7 more than three years after the assessment, and filed a dec. relief action seeking to determine that the taxes are dischargeable. Debtor argued that since his liability stemmed from the partnership, California's three year statute of liability relating to a partner's liability for partnership debt applies, not the IRS' ten year statute. Court held that no separate assessment was required, and that ten year statute applied. When collecting taxes, the IRS is not bound by a statue statute of limitations.

In re Hawkins,769 F.3d. 662 (9th Cir. 2014)

Declaring a tax debt non-dischargeable under § 523(a)(1)(C) on the basis that the debtor "willfully attempted in any manner to evade or defeat such tax" requires a showing of specific intent to evade the tax. Mere showing of spending in excess of income is insufficient.

**DISCHARGEABILITY - 523(a)(2)**

In re Manion, __B.R.__ (9th Cir. B.A.P. 2025)

Explains standards applicable to a claim for fraudulent omissions under sectin 523(a)(2)(A). Also holds that a fraudulent omission regarding financial condition does not fall under sectino 523(a)(2)(B).

Bartenwerfer v. Buckley, 598 U.S. 69 (2023)

Fraud of partner can be imputed to innocent partner under Bankruptcy Code section 523(a)(2)(A) for dischargeability purposes.

In re Mcharo, 611 B.R. 657 (9th Cir. B.A.P. 2020)

Where a debtor has made a written application that includes financial information and promises to report any changes in that information, the debtor's failure to make such a report is not a statement respecting financial condition under section 523(a)(2)(B). Case also has a good analysis regarding statutory interpretation and right to rely on dictionary definition where the Code does not define a term.

Lamar, Archer & Cofrin, LLP v. Appling, 138 S.Ct. 1752 (2018)

A misrepresentation regarding a single asset may constitute a statement respecting the debtor's financial condition under § 523(a)(2)(B) that requires a writing.

Husky International Electronics, Inc. v. Ritz, 136 S.Ct. 1581 (2016)

"Actual fraud" under § 523(a)(2)(A) includes fraudulent conveyance schemes, even when those schemes do no involve a false representation made to the plaintiff creditor. Actual fraud need not be at the inception of the transaction.

In re Meyers, 869 F.3d 839 (9th Cir. 2017)

Applying *Husky*, court affirmed § 523(a)(2) actual fraud non-dischargeability judgment based on pre-petition fraudulent conveyances. Bankruptcy Court should have awarded damages based on the full amount of the initial fraudulent conveyance made by the debtor, where plaintiff had to trace funds through several transfers.

In re Weinberg, 410 B.R. 19 (9th Cir. 2009)

Under the five-part test of *In re Slyman,* 234 F.3d 1081 (9th Cir. 2001), court finds in favor of the defendant based on a failure to prove intent to defraud.

In re Boyajian, 564 F.3d 1088 (9th Cir. 2009)

For purposes of § 523(a)(2)(B), only the lender who extended the original credit need have reasonably relied on a false financial statement, not the assignee of the loan.

In re Sabban, 600 F.3d 1219 (9th Cir. 2010)

Where state court did not find that damages were sustained by plaintiff because of

unlicensed contractor's misrepresentations or fraud under California Business and Professions Code § § 7031(b) and 7160, § 523(a)(2) did not apply.

In re McGee, 359 B.R. 764, 771 (9th Cir. B.A.P. 2006)

Bankruptcy court properly denied default judgment for a payday lender on its dischargeability complaint, where it found at the prove-up hearing that justifiable reliance was a material fact at issue, given the loan's 190.37% interest rate.

In re Vee Vinhnee, 336 B.R. 437 (9th Cir. B.A.P. 2005)

Creditor's electronic business record were properly not admitted into evidence sua sponte, resulting in judgment for the debtor in this credit card case.

In re Cossu, 410 F.3d 591 (9th Cir. 2005)

Debt to insurance company (to extent the company had a valid claim) would be nondischargeable, where he falsely stated in a questionnaire that he was not selling unregistered securities and not engaged in any outside business.

Muegler v. Bening, 413 F.3d 864 (9th Cir. 2005)

"It is only the fact of an adverse fraud judgment, and nothing more, that is required for a debt to be nondischargeable." The debtor does not need to have received a benefit from the fraud.

In re Slyman, 234 F.3d 1081 (9th Cir. 2000)

"The five elements, each of which the creditor must prove by a preponderance of the evidence, are: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4)justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by it's reliance on the debtor's statement or conduct."

In re Stearman, 256 B.R. 788 (9th Cir. B.A.P. 2000)

Debtor did not have an intent to deceive when she signed a promissory note, where she was expecting to receive a large inheritance from which she could repay the loan. This was true even though she was insolvent at the time of the loan even accounting for the inheritance and was in chapter 13.

In re Kong, 239 B.R. 815 (9th Cir. B.A.P. 1999)

Even though gambler did not meet all of the Anastas factors (i.e. offer to enter into repayment plan, etc.), unreasonable belief in his ability to repay cash advances was not tantamount to fraud. No reckless indifference established.

In re Maldonado, 228 B.R. 735 (9th Cir. B.A.P. 1999)

Debtor may not discharge leaseback obligation if debtor could have anticipated that third party would rely on false financial information in deciding whether to take assignment of debt.

In re Ettell, 188 F.3d 1141 (9th Cir. 1999)

Court need not make findings as to all Daugherty factors in credit card cases.

In re Smith, 242 B.R. 694 (9th Cir. B.A.P. 1999)

Debtor could not discharge debt for purchase of business after presenting false financial statement during third-party meetings attended by seller.

In re Cobe, 229 B.R. 15 (9th Cir. B.A.P. 1998)

State Court award based on finding of intentional misrepresentation satisfied elements for nondischargeability.

In re Tallant, 218 B.R. 58 (9th Cir. B.A.P. 1998)

Attorney's failure to reveal $3 million in personal debts on law practice's profit and loss statement did not render statement materially false under 523(a)(2)(B). Debt found nondischargeable under (a)(2)(A).

In re Barrack, 217 B.R. 598 (9th Cir. B.A.P. 1998)

Creditor's claim for nondischargeability based on wilful and malicious injury not supported by same facts that failed to support claim that debtors misrepresented financial condition.

Cohen v. De La Cruz, 523 U.S. 213(1998)

Treble damages and costs awarded on account of debtor's fraud subject to exception from bankruptcy discharge.

In re Gergely,110 F.3d 1448 (9th Cir. B.A.P. 1997), *aff'd*, 11 Fed.Appx. 705 (9th Cir. 2000)

Debtor-physician not entitled to discharge of debt based on malpractice in performing procedure performed on creditor's mother because of misrepresentation.

In re Lund, 202 B.R. 127 (9th Cir. B.A.P. 1996)

Landlord's testimony that debtor tenants reneged on promise to pay back rent from lawsuit proceeds did not support nondischargeability of debt for fraud.

In re Anastas, 94 F.3d 1280 (9th Cir. 1996)

"We have previously held that reckless disregard for the truth of a representation satisfies the element that the debtor has made an intentionally false representation in obtaining credit. *Houtman v. Mann (In re Hautman)*, 568 F.2d 651, 656 (9th Cir. 1978). However, in applying the concept of reckless disregard for the truth of a representation in the case of credit card debt, we must be careful to keep in mind that the representation being made by the card holder is solely as to *intent* to repay, not as to the debtor's *ability* to repay. Thus, courts faced with the issue of dischargeability of credit card debt must take care to avoid forming the inquiry under section 523(a)(2)(A) as whether the debtor recklessly represented his financial condition. The correct inquiry is whether the debtor either intentionally or with recklessness as to its truth or falsity, made the representation that he intended to repay the debt.

"As we emphasized in *Eashai*, the other elements of fraud normally required in section 523(a)(2)(A) cases also apply in the case of credit card debt. *Eashai*, 87 F.3d at 1088. Thus, to find an individual credit card charge non-dischargeable the bankruptcy court must also find justifiable reliance by the card issuer on the card holder's representation of intent to repay, and must find that representation and the card issuer's reliance on it was the proximate cause of the credit card debt sought to be discharged. As we explained in *Eashai*, the credit card issuer justifiably relies on a representation of intent to repay as long as the account is not in default and any initial investigations into a credit report do not raise red flags that would make reliance unjustifiable. *Eashai*, 87 F.3d at 1091."

In re Eashai, 87 F.3d 1082 (9th Cir. 1996)

Kiting credit cards.

Field v. Mans, 516 U.S. 59(1995)

In re Arm, 87 F.3d 1046 (9th Cir. 1996)

"We make clear, what we have not held before, that the indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person. *See In re Ashley*, 903 F.2d 599, 604, n. 4 (9th Cir. 1990)."

In re Candland, 90 F.3d 1466 (9th Cir. 1996)

§ 523(a)(2)(B). Significant misrepresentations of financial condition of type which would generally affect lender's or guarantor's decision are "material" for purposes of nondischargeability.

In re Alvi, 191 B.R. 724 (Bankr. N.D. Ill. 1996)

(Ginsberg) *Mans* applied to credit card.

In re Lee, 186 B.R. 695 (9th Cir. B.A.P. 1995)

Credit card shopping spree. *In re Ward* disapproved.

In re Apte, 180 B.R. 223 (9th Cir. B.A.P. 1995), *aff'd*, 96 F.3d 1319 (9th Cir. 1996)

Justifiable reliance - (a)(2) and (6) not mutually exclusive.

In re Arm, 175 B.R. 349 (9th Cir. B.A.P. 1994), *aff'd*, 87 F.3d 1046 (9th Cir. 1996)

Benefit to debtor need not be direct.

In re Berr, 172 B.R. 299 (9th Cir. B.A.P. 1994)

FDIC can only rely on D'Oench Duhme doctrine where there is a disde agreement between the bank and the debtor.

In re Aboukhater, 165 B.R. 904 (9th Cir. B.A.P. 1994)

Conclusory allegations unsupported by specific facts justified dismissal.

In re Kim, 163 B.R. 157 (9th Cir. B.A.P. 1994), *aff'd*, 62 F.3d 1511 (9th Cir. 1995)

No new money requirement for an extension or renewal. Only need to show that it had valuable collection remedies at the time of the extension or renewal, that it did not exercise those remedies due to reliance on debtor's misrepresentations, and that those remedies lost value as a proximate result.

In re Yarbrow, 150 B.R. 233 (9th Cir. B.A.P. 1993)

Under the D'Oench, Duhme doctrine, bank does not need to prove reasonable reliance. Collateral estoppel applied as to fraud.

In re Begun, 136 B.R. 490, 494 (Bankr. S.D. Ohio 1992)

"False Pretense" involves an implied misrepresentation or conduct intended to create or foster a false impression . . . . A false pretense has been defined to include a "mute charade" where the debtor's conduct is designed to convey an impression without oral representation. . . . . A "false representation" on the other hand is an expressed misrepresentation.

In re Kirsh, 973 F.2d 1454 (9th Cir. 1992)

1. Test is justifiable reliance, not reasonable reliance; per curiam; judge concurring on grounds creditor had not reasonably relied.

2. § 523(a)(2)(B) only applies where the document sets forth the debtor's net worth or overall financial condition.

In re Siriani, 967 F.2d 302, 304 (9th Cir. 1992)

§ 523(a)(2)(B).

"This court has not previously ruled on what a creditor must prove in a nondischargeability action under section 523(a)(2)(B). However, we have held that, to recover under companion section 523(a)(2)(A), the creditor must show:

(1) a representation of fact by the debtor,
(2) that was material
(3) that the debtor knew at the time to be false,
(4)that the debtor made with the intention of deceiving the creditor,
(5) upon which the creditor relied,
(6) that the creditor's reliance was reasonable,
(7) that damage proximately resulted from the misrepresentation."

Same test applies in both (a)(2)(A) and (B) cases. *Siriani* concentrates on burden of proof regarding proximate cause - did creditor have reasonable prospects of collecting - and reasonable reliance.

In re Levy, 951 F.2d 196 (9th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)

Punitive damage award not excepted from discharge under § 523(a)(2).

In re Britton, 950 F.2d 602 (9th Cir. 1991)

Debtor's misrepresentation of himself as doctor rendered subsequent judgment against him

for fraud nondischargeable.

In re Franklin, 922 F.2d 536 (9th Cir. B.A.P. 1991)
Debtors could not invoke state's anti-deficiency judgment laws as defense to creditor's nondischargeability action for fraud - Creditor held guarantee secured by DOT on debtor's house.

In re Howarter, 114 B.R. 682 (9th Cir. B.A.P. 1990)
Creditor must prove reasonable reliance on debtor's misrepresentations to establish nondischargeability.

In re Neal, 113 B.R. 607 (9th Cir. B.A.P. 1990)
Cash loans not same as luxury goods and services for nondischargeability finding.

In re Hultquist, 101 B.R. 180 (9th Cir. B.A.P. 1989)
§ 523(a)(2)(A) - reasonable reliance - intent to deceive

In re Karelin, 109 B.R. 943 (9th Cir. B.A.P. 1990)
Debtor's withdrawal of funds beyond credit card limit ruled fraudulent.

In re Ashley, 903 F.2d 599 (9th Cir. 1990)
Judgment under § 523(a)(2) nondischargeable where debtor profits from loans he induced creditors to make to bankrupt corporation - Corporation, rather than debtor, received money. Review of right to fees under California law.

In re Ellwanger, 105 B.R. 551 (9th Cir. B.A.P. 1989)
Punitive damages discharged in § 523(a)(2).

In re Lewsadder, 84 B.R. 711 (Bankr. D. Or. 1988)

In re Rubin, 875 F.2d 755 (9th Cir. 1989)
Elements of § 523(a)(2); bad bookkeeping.

In re Dougherty, 84 B.R. 653 (9th Cir. B.A.P. 1988)
For credit card prerevocation charges to be found nondischargeable, card issuer had to prove that debt was incurred through actual fraud.

**DISCHARGEABILITY - 523(a)(3)**

Licup v. Jefferson Ave. Temecula LLC, __F.4th __ (9th Cir. 2024)

Outside of a no-asset bankruptcy, a debtor's failure to properly schedule a debt renders that debt nondischargeable in its entirety.

In re Nielsen, 383 F.3d 922 (9th Cir. 2004)

Citing the concurrence in *Beezley*, court holds that failure to schedule a creditor in a no-asset case does not make the debt nondischargeable.

In re Beaty, 306 F.3d 914 (9th Cir. 2002)

Laches is available as a defense in a § 523(a)(3) action, but the defendant must show extraordinary circumstances and a compelling reason why the action should be barred.

In re Staffer, 306 F.3d 967 (9th Cir.2002)

Under Bankruptcy Rule 4007(b), a § 523(a)(3) complaint can be brought at any time (except where laches is found). A case need not be reopened to bring a complaint.

In re Beezley, 994 F.2d 1433 (9th Cir. 1993)

Per curiam: Refusal to reopen proper where it would be a useless act, since listing creditor would not discharge the debt.

Concurrence: Reopening was useless because the case was no asset and no bar date and therefore creditor's debt was discharged under §§ 523(a)(3)(A) and 727(b).

In re Bowen,102 B.R. 752 (9th Cir. B.A.P. 1989)

In re Price, 871 F.2d 97 (9th Cir. 1989)

Notice to creditor's counsel = notice to creditor.

In re Lochrie, 78 B.R. 257 (9th Cir. B.A.P. 1987)

§ 523(a)(3)(b) does not create a separate exception from discharge merely for the debtor's failure to schedule a creditor. Instead, the creditor must also have a cause of action under § 523(a)(2), (4), or (6). "Creditor is required" to make a showing of material prejudice to avoid proving its claim under (2), (4), or (6).

In re Fauchier, 71 B.R. 212 (9th Cir. B.A.P. 1987)

Careless error in address on schedule is enough under § 523(a)(3). Must first decide § 523(a)(3) issue, then decide (2), (4), and (6).

In re Laczko, 37 B.R. 676 (9th Cir. B.A.P. 1984), *aff'd by In re Laczko*, 772 F.2d 912 (9th Cir. 1985), *and Laczko v. Gentram, Inc.*, 772 F.2d 912 (9th Cir. 1985)

Chapter 7 debtor may not reopen case to add creditors after time for filing document had passed.

**DISCHARGEABILITY– 523(a)(4)**

In re Peltier, 643 B.R. 349 (9th Cir. B.A.P. 2022)

Excellent explanations/definitions of the elements of non-dischargeable defalcation, larceny and embezzlement under (a)(4), and whether Oregon default judgment on elder abuse claims should be afforded issue preclusive effect.

In re Alle, 2017 Bankr.LEXIS 3642 (9th Cir. BAP 2017)

A managing member of a California LLC is a fiduciary under § 523(a)(4). Case also provides thorough analysis of what constitutes defalcation and embezzlement, and the need to examine state law to determine damages arising from a defalcation.

In re Double Bogey, 794 F.3d.1047 (9th Cir. 2015)

A finding that the debtors, who owned and operated a corporation, were the corporation's alter egos under CA law, was insufficient to show that the debtors themselves were fiduciaries under section 523(a)(4). The alter ego concept is a procedural devise and does not clearly and expressly impose trust obligations before the bad act behind the 523(a)(4) claim.

Bos v. Board of Trustees, 795 F.3d 1006 (9th Cir. 2015)

A debtor is not a fiduciary under § 523(a)(4) when he fails to make a contractually required contribution to an employee benefits trust under ERISA. Unpaid contributions are not plan assets. The Ninth Circuit agrees with the 6th and 10th Circuits.

In re Ormsby, 591 F.3d 1199 (9th Cir. 2010)

Without deciding whether federal law requires a finding of fraudulent intent as a prerequisite to finding larceny, court finds that state court judgment provides sufficient evidence of such intent, and thus larceny was demonstrated.

In re Weinberg, 410 B.R. 19 (9th Cir. 2009)

1) Arizona Trust Fund Doctrine, in which a corporate officer becomes liable to creditors when the corporation transfers assets to the officer while the company is insolvent, was an express trust for purposes of 523(a)(4). 2) Bankruptcy court properly applied the balance sheet test for determining insolvency.

In re Munton, 352 B.R. 707 (9th Cir. B.A.P. 2006)

Affirmative defenses not raised in prior state court action in which default was taken against the debtor may not be raised in subsequent nondischargeability proceeding. Texas statute contractor's statute exhibited the characteristics of an express or technical trust for purposes of § 523(a)(4).

In re Bigelow, 271 B.R. 178 (9th Cir. B.A.P. 2001)

Because money given to attorney-debtor was a classic retainer, the debtor was not required to deposit it in his trust account. Because there were no trust funds, 523(a)(4) was inapplicable.

In re Cantrell, 329 F.3d 1119 (9th Cir. 2003)

Corporate officer, director and/or controlling shareholder was not trustee of statutory trust under California law and therefore did not qualify as fiduciary for purposes of claim of non-dischargeability for fraud.

In re Jacks, 266 B.R. 728 (9th Cir. B.A.P. 2001)

Fiduciary duty owed by officers and directors of an insolvent corporation under California law was actionable under 523(a)(4), but only if the corporation was insolvent at the time of the defalcation.

In re Banks, 263 F.3d 862 (9th Cir. 2001)

When debtor/attorney placed the plaintiff/client's funds into his trust account, he became his client's fiduciary.

In re Hemmeter, 242 F.3d 1186 (9th Cir. 2001)

ERISA fiduciaries are fiduciaries within the meaning of 523(a)(4). However, no defalcation occurred, since the fiduciary's poor investments did not involve failure to account for or produce a beneficiary's funds.

In re Abrams, 229 B.R. 784 (9th Cir. B.A.P. 1999), *aff'd*, 242 F.3d 380 (9th Cir. 2000)

Second-tier general partner properly deemed fiduciary of first-tier limited partnership.

In re Stanifer, 236 B.R. 709 (9th Cir. B.A.P. 1999)

Debtor's breach of fiduciary duty with regard to pension benefits barred discharge of debt incurred as result of failure to share benefits with ex-spouse.

In re Wada, 210 B.R. 572 (9th Cir. B.A.P. 1997)

Travel agent's embezzlement of client monies precluded discharge

In re Gergely, 110 F.3d 1448 (9th Cir. B.A.P. 1997)

Med malpractice not subject to (a)(4) since there is no express trust

Bullock v. BankChampaigne, N.A., 133 S.Ct. 526 (2013)

Test for defalcation - A culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior.

In re Bugna, 33 F.3d 1054 (9th Cir. 1994)

Relationship of partner and real estate broker sufficient to satisfy 523(a)(4) re fiduciary capacity, citing *Woolsey*.

In re Evans, 161 B.R. 474 (9th Cir. B.A.P. 1993)

State court judgment finding a fiduciary relationship between plaintiff and defendant not collateral estoppel, where defendant real estate broker never held a trust res.

In re Stokes, 142 B.R. 908 (Bankr.N.D. Cal. 1992)

Lawyer is not a fiduciary to client under §523(a)(4) except as to client's money.

In re Rose, 934 F.2d 901, 903 (7th Cir. 1991)

"Larceny is proven for 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner"

In re Littleton, 942 F.2d 551 (9th Cir. 1991)

Definition of embezzlement

In re Baird, 114 B.R. 198 (9th Cir. B.A.P. 1990)

1. Arizona statutory trust sufficient to create a fiduciary relationship.
2. Defalcation committed.
3. Debtor as sole corporate officer responsible for final disbursement is liable.

In re Woosley, 117 B.R. 524 (9th Cir. B.A.P. 1990)

Debt incurred through fraud by real estate agent acting in fiduciary capacity nondischargeable. Fiduciary relationship found even though agent acting as loan broker. Without citing *Hooper*, case seems to hold that mere status as real estate broker and fiduciary status under California statutes is sufficient.

In re Hooper, 112 B.R. 1009 (9th Cir. B.A.P. 1990)

Mere status as real estate broker not sufficient to confer fiduciary status, where broker never held anything in trust or that debt done from any real estate transaction she brokered. (Check this sentence)

In re Hultquist, 101 B.R. 180, 185 (9th Cir. B.A.P. 1989)

Fiduciary status of corporate officer is not the same as a fiduciary under (a)(4).

In re Pedrazzini, 644 F.2d 756 (9th Cir. 1981)

California statutes do not impose fiduciary duty on general contractor.

Ragsdale v. Haller, 780 F.2d 794 (9th Cir. 1986)

Partners under California law are fiduciaries as to partnership property.

In re Short, 818 F.2d 693 (9th Cir. 1987)

Joint venturers under Washington law are fiduciaries as to joint property.

In re Schneider, 99 B.R. 974 (9th Cir. B.A.P. 1989)

Complete review of § 523(a)(4) - what is fiduciary capacity.

In re Graziano, 35 B.R. 589, 594 (Bankr. E.D.N.Y. 1983)

Embezzlement = "fraudulent appropriation by a person to whom such property has been

entrusted or into whose hands it has lawfully come."

In re Moxley, 589 F.3d 313 (9th Cir. 2013)

Debtor not a fiduciary under § 523(a)(4) as to withdrawal liability arising from an ERISA qualified collective bargaining agreement. Withdrawal liability does not arise until after expiration of the bargaining agreement, when the debtor no longer has a contractual obligation to contribute. Instead, it arises by statute and only at the time of non-payment. By contrast, a fiduciary duty under § 523(a)(4) must pre-date the wrongdoing.

In re Enea, 2013 U.S.Dist. LEXIS 42768 (N.D.Cal. 2013)

Liability based on alter ego theory will arise only after the wrongdoing, and therefore is in the nature of a constructive trust imposed by law after the wrongdoing. As such, fiduciary relationship did not exist before wrongdoing.

In re Houng, 499 B.R. 751 (C.D.Cal. 2013)

Only arbitration awards that are confirmed subject to issue preclusion. Under § 523(a)(4), the California trust fund doctrine creates a trust fund upon a corporation's insolvency, and any malfeasance after creation of trust fund can make a debtor (the CEO of the insolvent corporation) liable under § 523(a)(4), since trust was created upon insolvency and before the bad act. Compare In re Jacks, 266 B.R. 728 (9th Cir. B.A.P. 2001), and In re Moeller, 466 B.R. 525 (Bankr.S.D.Cal. 2012).

**DISCHARGEABILITY - § 523(a)(5)**

In re Cervantes, 219 F.3d 955 (9th Cir. 2000)
In re Leibowitz, 217 F.3d 799 (9th Cir. 2000)

An absent parent who owes money to a county for child support payments, but as to which no child support order has yet entered, may not discharge the debt in either a chapter 7 or chapter 13 case.

In re Seixas, 239 B.R. 398 (9th Cir. B.A.P. 1999)

Former spouse's contractual promise under marital settlement agreement to pay half of children's college education expenses constituted nondischargeable "child support" obligation.

In re Foross, 242 B.R. 692 (9th Cir. B.A.P. 1999)

Post-petition interest on nondischargeable child support debt is nondischargeable.

In re Lowenchuss, 170 F.3d 923 (9th Cir. 1999)

Where divorce court decided prepetition that wife was entitled to 38% of pension plan, no money judgment to discharge - property in plan belonged to wife.

In re Chang, 210 B.R. 578 (9th Cir. B.A.P. 1997) *reversed*, 163 F.3d 1138 (9th Cir. 1998), *cert. denied*, 526 U.S. 1149 (1999)

B.A.P. held that fees for evaluation and guardian *ad litem* services incurred during child custody trial were not child support and were therefore dischargeable. 9th Circuit reversed holding that (1) debts for professional fees and expenses arising from child custody proceeding were in nature of child support; (2) debts fell within child support discharge exception; and (3) father and guardian were entitled to priority in debtor's plan.

In re Jodoin, 209 B.R. 132 (9th Cir. B.A.P. 1997)

"The final determination of what portions of the judgment constitute nondischargeable alimony, support, or maintenance is a question of federal law. *Gionis v. Wayne (In re Gionis),* 170 B.R. 675, 681 (9th Cir. B.A.P. 1994) (citing *Shaver*, 736 F.2d at 1316); *see also Stout*, 691 F.2d at 861 (citing H.R. Rep. No. 95-595, at 364, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6320). Therefore, the labels used by the state court in determining the Judgment were not binding on the bankruptcy court. An independent review of the Judgment and factual inquiry into the true nature of any support was certainly within the power and discretion of the bankruptcy court. *Gionis*, 170 B.R. at 681; *Sweck v. Sweck (In re Sweck)*, 174 B.R. 532, 534 (Bankr. D.R.I. 1994) (The Code necessitates that the bankruptcy court 'determine the nature of the debts, regardless of the labels placed on them by the parties or the family court.'). However, '[w]here the award was rendered in a contested proceeding, another relevant fact is the intent of the state court.' *Gionis*, 170 B.R. at 682."

In re Maria G. Rivera, 832 F. 3d 1103 (9th Cir. 2016)

Debt to Orange County for food/clothing/personal supplies/medical expenses incurred while debtor's minor son was incarcerated are not domestic support obligations and therefore

dischargeable. Ninth Circuit explains when obligation to a governmental agency is a domestic support obligation. "Where the principal purpose of the County's custody over [debtor's] son is public safety, not the son's domestic well-being or welfare, the debt does not qualify as a domestic support obligation."

In re Sternberg, 85 F.3d 1400 (9th Cir. 1996), *overruled by* In re Bammer, 131 F.3d 788 (9th Cir. 1997)

Finding that debtor and former spouse intended to create a spousal support obligation is plausible in light of evidence of need for spousal support and "label" in marital settlement agreement.

In re Gendreau, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 532 U.S. 1005 (1998)

Order which purported to be a Qualified Domestic Relationship Order under ERISA created a property interest, not a debt, and thus could not be discharged.

In re Kritt 190 B.R. 382 (9th Cir. B.A.P. 1995)

Wife may claim former husband's marital settlement obligation as nondischargeable spousal support despite failure to claim payments as income on federal and state filings.

In re Gionis, 170 B.R. 675 (9th Cir. B.A.P. 1994), *aff'd*, 92 F.3d 1192 (9th Cir. 1996)

Wife's attorney's fees nondischargeable under the facts based on need.

In re Sirigusa, 27 F.3d 406 (9th Cir. 1994)

Where bankruptcy court discharged a 1.2 million dollar property settlement, it was not a violation of § 524 to seek a modification of the alimony in Domestic Relationship Court. Bankruptcy court properly abstained from § 523(a)(5) issue.

In re McCoy, 111 B.R. 276 (9th Cir. B.A.P. 1990)

Nondebtor spouse not liable for post-separation/pre-dissolution debts of debtor/spouse.

In re Combs, 101 B.R. 609 (9th Cir. B.A.P. 1989)

Eight factors for determining dischargeability.

Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984)

Standard for determining § 523(a)(5) cases.

In re Gibson, 103 B.R. 218 (9th Cir. B.A.P. 1989)

Attorney fees are not = alimony, etc.

In re Ashworth, 2013 Bankr. LEXIS 5256 (9th Cir. B.A.P. 12/16/13)

Key element in finding a DSO is whether the debt is in the nature of support. This is a bankruptcy, not a state law issue, and trial court, under In re Sternberg, should consider several factors, which this case discusses.

**DISCHARGEABLITY - § 523(a)(6)**

In re Rosario, __B.R.__ (9th Cir. B.A.P. 2025)

Vicarious liability will not support a 523(a)(6) claim. Section 523(a0(6) requires that the debtors themselves have the requisite intent and commit the tortious conduct.

In re Delannoy, 605 B.R. 572 (9th Cir. B.A.P. 2020)

Good analysis of 1) whether a conversion judgment can satisfy willful and malicious elements of § 523(a)(6).

In re Ormsby, 591 F.3d 1199 (9th Cir. 2010)

Reviewing the standard for liability under this section, the court found that the misappropriation of title plants from another title company constituted both a willful and a malicious injury.

In re Weinberg, 410 B.R. 19, 36 (9th Cir. B.A.P. 2009)

Dispute concerned a breach of an employment agreement without an associated tort, and thus was not covered by § 523(a)(6).

In re Suarez, 400 B.R. 732,734 (9th Cir. B.A.P. 2009)

A chapter 7 debtor may not discharge a judgment for attorneys fees and costs even if that is the only monetary liability imposed on her for contempt for violating a court order. Contempt is not per se nondischargeable under § 523(a)(6), but must be premised on willful and malicious conduct.

In re Baboza, 545 F.3d 702, 706 (9th Cir. 2008)

In granting summary judgment to the holder of a copyright infringement judgment under § 523(a)(6), the bankruptcy court erred in not making a specific finding of both a willful and malicious injury. "The malicious injury requirement is separate from the willful injury requirement." Moreover, "willful" for purposes of copyright infringement is different from "willful" for purposes of **§** 523(a)(6), since in the infringement context, recklessness may be sufficient to establish willfulness.

Lockerby v. Sierra, 535 F.3d 1038 (9th Cir. 2008)

Section 523(a)(6) only applies to conduct that is an intentional tort under state, and the intentional breach of a contract does not qualify as such under Arizona law.

Ditto v. McCurdy, 510 F.3d 1070, 1077 (9th Cir. 2007)

"The failure to obtain informed consent, without evidence of intent to injure, does not give rise to a willful and malicious injury within the meaning of § 523(a)(6)."

In re Sicroff, 401 F.3d 1101 (9th Cir. 2005), *cert. denied*, 545 U.S. 1139, 125 S.Ct. 2964 (2005)

State court judgment for libel was nondischargeable under 523(a)(6).

In re Peck, 295 B.R. 353 (9th Cir. B.A.P. 2003)

False accusations of child molestation were slanderous, and nondischargeable under § 523(a)(6).

In re Thiara, 285 B.R. 420 (9th Cir. B.A.P. 2002)

Failure to turnover insurance proceeds to secured creditor constituted a conversion under California law, but in the absence of a finding of subjective intent to harm, it could not be deemed a nondischargeable debt.

In re Su, 290 F.3d 1140 (9th Cir. 2002)

" § 523(a)(6) renders debt nondischargeable when there is either a subjective intent to harm, or a subjective belief that harm is substantially certain.**"** In order to prove maliciousness, there must be a wrongful act, done intentionally, which necessarily causes injury and is done without just cause or excuse.

In re Jacks, 266 B.R. 728 (9th Cir. B.A.P. 2001)

Summary judgment for the defendant should not have been granted, where there was a genuine issue of material fact as to whether the defendant intended to injure plaintiff in having a corporation issue a guarantee of his personal obligations.

In re Peklar, 260 F.3d 1035 (9th Cir. B.A.P. 2001)

"A judgment for conversion under California substantive law decides only that the defendant has engaged in the "wrongful exercise of dominion" over the personal property of the plaintiff. It does not necessarily decide that the defendant has caused "willful and malicious injury" within the meaning of § 523(a)(6)."

In re Jercich, 238 F.3d 1202 (9th Cir. 2001), *cert. denied*, 533 U.S. 930 (2001)

Although a simple breach of contract is not actionable under § 523(a)(6), "where an intentional breach of contract is accompanied by tortious conduct which results in willful and malicious injury, the resulting debt is excepted from discharge under § 523(a)(6)." Tortious conduct does not have to be independent of the breach of contract. Here, debtor was found to have the "clear ability" to pay wages, but willfully "chose not to."

"We hold...that under *Geiger,* the willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct."

In re Baldwin, 249 F.3d 912 (9th Cir. 2001)

Defendant in state court who defaulted to battery claim was collaterally estopped from discharging debt under § 523(a)(6). Participation in beating of plaintiff established that debtor intended to injure or knew that his conduct was substantially certain to lead to injury.

In re Bailey, 197 F.3d 997 (9th Cir. 1999)

No lien in settlement proceeds, therefore no property interest and no conversion.

In re Sarbaz, 227 B.R. 298 (9th Cir. B.A.P. 1998)

Geiger applied retroactively.

Kawaauhau v. Geiger, 523 U.S. 57(1998)

(a)(6) only covers acts done with the actual intent to cause injury. Negligence or recklessness not enough.

In re Bammer, 131 F.3d 788 (9th Cir. 1997)

Fraudulent conveyance judgment debt is dischargeable in bankruptcy absent finding of malicious intent. Reversed 11/20/97. No such thing as fraud committed with just cause or excuse.

In re Gergely, 110 F.3d 1448 (9th Cir. 1997)

Medical malpractice is not the same as willful and malicious injury - no certainty or near certainty that act would cause harm.

In re Saylor, 108 F.3d 219 (9th Cir. 1997)

Creditor has no property interest in remedies under state fraudulent transfer statute that supports exception from discharge of debt for willful and malicious injury to property.

In re Lund, 202 B.R. 127 (9th Cir. B.A.P. 1996)

Debtors who failed to act in maintaining condition of dwelling not liable under (a)(6).

In re Kelly, 182 B.R. 255 (9th Cir. B.A.P. 1995), *aff'd*, 100 F.3d 110 (9th Cir. 1996)

Attorney malpractice based on gross negligence does not constitute "willful and malicious injury" precluding discharge of resulting judgment debt.

In re Gee, 173 B.R. 189 (9th Cir. B.A.P. 1994)

Judgment for sex discrimination constitutes willful and malicious injury.

In re Florida, 164 B.R. 636 (9th Cir. B.A.P. 1994)

Debtor with RICO judgment against him; collateral estoppel as to all damages and attorney fees.

In re Zelis, 161 B.R. 469 (9th Cir. B.A.P. 1993), *aff'd in part, reversed in part*, 66 F.3d 205 (9th Cir. 1995)

Sanctions by state court met *Cecchini* test - affirmed, but the settlement with Pay as to second sanction satisfied Zelis' liability.

In re Riso, 978 F.2d 1151 (9th Cir. 1992)

Breach of right of first refusal was a breach of contract - "An intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct."

In re Britton, 950 F.2d 602 (9th Cir. 1991)

Punitive damages not discharged under § 523(a)(6). Review of standard.

In re Littleton, 942. F.2d 551 (9th Cir. 1991)
(a)(6) and (a)(4) - embezzlement

In re Itule, 114 B.R. 206 (9th Cir. B.A.P. 1990)
Willful conversion - calculation of damages.

In re Keller, 106 B.R. 639 (9th Cir. B.A.P. 1989)
§ 523(a)(6) - legal malpractice.

In re Littleton, 106 B.R. 632 (9th Cir. B.A.P. 1989), *aff'd*, 942 F.2d 551 (9th Cir. 1991)
Embezzlement. Failure to pay creditors according to terms of security agreement does not constitute willful and malicious injury.

In re Karlin, 112 B.R. 319 (9th Cir. B.A.P. 1989), *aff'd*, 940 F.2d 1534 (9th Cir. 1991)
Privacy right - intentional tort.

In re Strybel, 105 B.R. 22 (9th Cir. B.A.P. 1989)
Psychiatrist's sexual liaison with a patient is not a nondischargeable debt- no malice. Disagreed with by In re Pattison, 132 B.R. 449 (Bankr. D.N.M. 1991).

In re Sharp, 102 B.R. 764 (9th Cir. B.A.P. 1989)
(1) Whether the appellant committed a wrongful and intentional act;
(2) whether such action produced harm;
(3) whether such action was without just cause or excuse.
Failure to explain shortage in trust account invokes (a)(6) and turn over funds.

In re Manser, 99 B.R. 434 (9th Cir. B.A.P. 1989)
Willful and malicious conversion - definition. Declined to follow by In re McLaughlin, 109 B.R. 14 (Bankr. D.N.H. 1989)

In re Wood, 96 B.R. 993 (9th Cir. B.A.P. 1988)
Willful and malicious injury standard.

In re Ellwanger, 105 B.R. 551 (9th Cir. B.A.P. 1989)
Punitive damages not dischargeable.. (Note: Judge had written date of 7/7/88, but no decisions corresponded to this date.)

In re Cecchini, 780 F.2d 1440 (9th Cir. 1986)
Adopts Collier's definition of willful and malicious. Intentional injury which necessarily causes harm, committed without justification or excuse (overruled by In re Geiger, supra and not followed by BAP in In re Rosario due to US Supreme Court Bartenwerfer decision).

**DISCHARGEABILITY - 523(a)(7)**

In re Wike, __B.R.__ (9th Cir. BAP 2024)

Case provides an excellent review of recent (a)(7) caselaw. Fees owed by a debtor attorney to the Nevada State Bar were dischargeable under section 523(a)(7) because they represented the recovery of the costs of the State Bar disciplinary hearing.

Kassas v. State Bar of California, 49 F.4th 1158 (9th Cir. 2022)

Indebtedness arising from a disbarred attorney's obligations to reimburse the State Bar for payments made by the Client Security Fund are dischargeable under § 523(a)(7). Here, the restitution payments were compensation for actual loss.

In re Albert-Sheridan, 960 F.3d 1188 (9th Cir. 2020)

Discovery sanctions are dischargeable, and do not fall with § 523(a)(7). Three part test: the debt must 1) must be a fine, penalty or forfeiture; 2) be payable to and for the benefit of a governmental unit; and 3) not constitute compensation for actual pecuniary costs. Case contrasts In re Findley, and limits scope of Supreme Court case Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed. 2d 216 (1986). Case also has a good discussion why § 525 is not applicable.

In re Findley, 593 F.3d 1048, 1054 (9th Cir. 2010)

". . .[W]e conclude that, after the 2003 statutory amendments, attorney disciplinary costs imposed by the California State Bar Court pursuant to Cal. Bus. & Prof. Code § 6086.10 are excepted from discharge in bankruptcy pursuant to 11 U.S.C. § 523(a)(7)." *In re Taggart*, 249 F.3d 987 (9th Cir. 2001) is statutorily abrogated.

In re Scheer, 819 F.3d 1206 (9th Cir. 2016)

State bar association judgment requiring debtor attorney to repay fees to a client is not a non-dischargeable debt under § 523(a)(7). The debt is compensation for the client's "actual loss."

**DISCHARGEABILITY - § 523(a)(8)– Student loans**

In re Irigoyen, __B.R.__ (9th Cir. B.A.P. 2024)

An alleged student loan debt that is determined to be dischargeable after the entry of a Chapter 7 discharge is discharged as of the standard discharge date and not the date of the court order/judgment which determined that it did not fall within the section 523(a)(8) exception.The creditor may therefore be subject to contempt for violating the discharge injunction.

Hurley v. United States of America (In re Hurley), 601B.R. 529 (9th Cir. B.A.P. 2019)

Debtor's criminal conduct, which prevented him from practicing law and generating income, may prevent debtor from establishing "good faith" under *Brunner* standard.

In re Kashikar, 567 B.R. 160 (9th Cir. B.A.P. 2017)

BAP explains amended scope of § 523(a)(8), and holds that § 523(a)(8)(A)(ii) is not a catch-all provision designed to include every type of credit transaction that bestows an educational benefit on a debtor.

In re Christoff, 527 B.R. 624 (9th Cir. B.A.P. 2015)

Where the lender is neither a governmental unit nor a nonprofit institution, and funds were not received by the student debtor, the student loan is dischargeable.

In re Craig, 579 F.3d 1040 (9th Cir. 2009)

Bankruptcy court erred in finding that the debtor had $68 was contributing to a 401(k) could be used to repay a student loan, where the debtor's monthly expenses were $384 greater than her income. It also erred in relying on cases that impose a *per se* rule disallowing voluntary contributions to retirement plans contrary to the holding of *Hebbring v. U.S. Trustee,* 463 F.3d 902 (9th Cir. 2006).

In re Coleman, 560 F.3d 1000 (9th Cir. 2009)

Student loan undue hardship determinations are ripe for decision substantially in advance of completion of a chapter 13 plan.

McKay v. Ingleson, 558 F.3d 888 (9th Cir. 2009)

A student revolving credit account funded by her university was a student loan for purposes of this section.

In re Lewis, 506 F.3d 927 (9th Cir. 2007)

The 1998 amendments to § 523(a)(8) eliminating the seven-year exception to nondischargeability applied retroactively to student loans taken out prior to 1998 in a bankruptcy filed after the 1998 amendments.

In re Carnduff, 367 B.R. 120 (9th Cir. B.A.P. 2007)

A bankruptcy court has the power to grant a partial discharge of a student loan even when

the debtor's earning capacity is expected to improve, if that improvement will be insufficient for the debtor to pay the full balance without an undue hardship. But the burden is upon the debtor to establish undue hardship as to any portion of the debt sought to be discharged.

In re McBurney, 357 B.R. 536 (9th Cir. B.A.P. 2006)

Postpetition consolidation loan extinguished the debtor's liability on prepetition student loans and is not vulnerable to attack under § 523(a)(8).

In re Mason, 464 F.3d 878 (9th Cir. 2006)

Debtor, who was an attorney, failed to meet the good faith branch of the *Brunner* test, where, among other things, he did not attempt to take the bar exam a second time.

In re Nys, 446 F.3d 938, 941 (9th Cir. 2006)

Second prong of the *Brunner* test "does not require an exceptional circumstance beyond the inability to pay now and for a substantial portion of the loan's repayment period." In addition, ". . .the debtor cannot purposely choose to live a lifestyle that prevents her from repaying her student loans. Thus, the debtor cannot have a reasonable opportunity to improve her financial situation, yet choose not to do so." 446 F.3d at 946.

In re Howe, 319 B.R. 886 (9th Cir. B.A.P. 2004)

Application of IRS collection standards for determining whether the debtor could maintain a minimal standard of living under the Brunner test was erroneous.

In re Hawkins, 317 B.R. 104 (9th Cir. B.A.P. 2004), *aff'd,* 469 F.3d 1316 (9th Cir. 2006)

Contract of admission, whereby debtor agreed to practice medicine in Ohio in exchange for subsidies for her education, was not an educational loan or benefit.

In re Birrane, 287 B.R. 490 (9th Cir. B.A.P. 2002)

By failing to establish that she could not earn more money in future years, and failing to establish that she had maximized her income by seeking part time work and attempted to negotiate a repayment schedule under the Ford program, debtor failed to meet the second and third branches of the *Brunner* test.

In re Saxman, 325 F.3d 1168 (9th Cir. 2003)

Bankruptcy court has the power under § 105 to partially discharge a student loan, but only the portion which the debtor has proven imposes an undue hardship.

In re Blair, 291 B.R. 514 (9th Cir. B.A.P. 2003)

Court cannot grant partial discharge of a student loan unless it first finds undue hardship.

In re Rifino, 245 F.3d 1083 (9th Cir. 2001)

Student loan not dischargeable where debtor failed to show that hardship would persist for a significant portion of the repayment period.

In re Drysdale, 248 B.R. 386 (9th Cir. B.A.P. 2000), *aff'd*, 2 Fed.Appx. 776 (9th Cir. 2001)

Case law holding that student loan consolidation must be five years old to be eligible for discharge was applied retroactively.

In re Bernal, 207 F.3d 595 (9th Cir. 2000)

Assignee of student loan could not intervene, either permissively or as of right, in student loan dischargeability action, where default was entered before assignment. Assignee's only remedy was to obtain a substitution under Rule 25(c).

In re Nascimento, 241 B.R. 440 (9thCir. B.A.P. 1999)

Repayment of student loans would not result in undue hardship where debtor's budget retained ample room for "belt-tightening" and prospective child support obligation would last no more than several years.

In re Pena, 155 F.3d 1108 (9th Cir. 1998)

Under Bankruptcy Code, impossibility of both repaying government-guaranteed student loan and maintaining minimal living standard suffices to establish "undue hardship" exception to non-dischargeability by debtor who has tried to pay off loan.

In re Manriquez, 207 B.R. 890 (9th Cir. B.A.P. 1996)

Retroactive forbearance obtained more than seven years after student loans became due did not render loans nondischargeable

In re Thorson, 195 B.R. 101 (9th Cir. B.A.P. 1996)

Post due-date student loan deferment constitutes suspension of repayment deductible from repayment period when determining dischargeability of student loan debt

In re Pilcher, 149 B.R. 595 (9th Cir. B.A.P. 1993)

Statute applies even though loan only partially-funded by non-profit institution

In re Gustafson, 934 F.2d 216 (9th Cir. 1991)

State is immune from money damages for stay violation under the 11th Amendment.

In re Jorgensen, 479 B.R. 79 (9th Cir. B.A.P. 2012)

While bankruptcy court authorized to partially discharge student loan debt under § 105, such equitable authority was available only if the partially discharged debt satisfied all three prongs of the *Brunner* test.

In re Roth, 2013 WL 1623839 (9th Cir. B.A.P. 2013)

Debtor satisfied the good faith prong, even though she made no voluntary payments and refused to participate in the income based repayment plan. Debtor did what she could to maximize income and minimize expenses, and she did make involuntary payments through wage garnishment

and tax refund offsets.

In re Hosseini, 504 B.R. 558 (9th Cir. B.A.P. 2014)

Debtor who successfully discharged $280,000 in student loan debt sought attorneys' fees under the prevailing party clause in the note. B.A.P. held that Debtor was not entitled to recover his attorneys' fees, as the fee provision in the note was specific to the enforcement of the note's terms. Here, the debtor did not contest the note's terms.

**DISCHARGEABILITY - 523(a)(9) - Drunk Driving**

In re Steiger, 159 B.R. 907 (9th Cir. B.A.P. 1993)
criminal judgment meets requirements of (a)(9)

In re Hudson, 859 F. 2d 1418 (9th Cir. 1988)
claim need not be reduced to judgment prior to bankruptcy petition for statute to apply

**DISCHARGEABILITY - 523(a)(14)**

In re Dinan 448 B.R. 775 (B.A.P. 9th Cir. 2011)

Under Cohen v. de la Cruz, 523 U.S. 213(1998), fees awarded in connection with collection of non-dischargeable replacement debt is also non-dischargeable.

**DISCHARGEABILITY -523(a)(15)**

In re Dollaga, 260 B.R. 493 (9th Cir. B.A.P. 2001)

A person (in this case, the debtor's divorce lawyer)who is not a spouse, former spouse, or dependent of a debtor may not sue for nondischargeability under §523(a)(15).

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"...[I]f a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues....Ms. Renfrow is entitled to recover the attorney's fees she has incurred in litigating the validity and the amount of Mr. Draper's debts in the bankruptcy proceeding." She's also entitled to the attorney's fees she incurred in the state court proceedings before the bankruptcy was filed, and to reasonable costs in both the bankruptcy and state court action.

In re Myrvang, 232 F.3d 1116 (9th Cir. 2000)

In re Jodoin properly allocates the burden of proof under § 523(a)(15). The bankruptcy court has the discretion to discharge a portion of the debt in question. In re Taylor, 223 B.R. 747 (9th Cir. B.A.P. 1998) disapproved. But the imposition of a penalty provision if the debtor missed a payment was beyond the authority of the bankruptcy court.

In re Short, 232 F.3d 1018 (9th Cir. 2000)

1) Debt that was specifically incorporated into a decree of dissolution was "incurred in the course of a divorce or separation." 2) bankruptcy court properly took into account a live-in girl friend's income in determining whether the debtor had the ability to repay the debt.

In re Jodoin, 209 B.R. 132 (9th Cir. B.A.P. 1997)

Burden of proof between debtor and creditor - once plaintiff demonstrates that the debtor incurred the debt in connection with divorce, the burden shifts to the debtor to prove subsections (a) and (b). The word "unless" just prior to the subsection is crucial to this finding. It creates an exception within an exception.

In re Francis, 2014 Bankr. LEXIS 928 (9th Cir. B.A.P. 2014)

Hold harmless clause in a marital settlement agreement was an obligation to pay the ex-spouse the amount of the debts subject to the hold harmless clause, and this obligation was non-dischargeable under § 523(a)(15).

In re Gunness, 2014 Bankr. LEXIS 210 (9th Cir. B.A.P. 2014)

Debtor and her husband were sued by husband's first wife in family law court pre-petition, and she recovered a large judgment. Debtor then files a Chapter 7. First wife sued Debtor to determine whether the family law judgment was non-dischargeable. Court found that since the plaintiff was not the child, spouse or ex-spouse of the Debtor, §§ 523(a)(5) and (15) did not apply. While the court noted that sometimes the nature of the debt and who it affects determines whether

it is non-dischargeable under (a)(5) or (a)(15), in this instance, the court determined that it should not characterize the Debtor as effectively a spouse just because the Plaintiff named her as a defendant (along with her ex-husband) in the family law litigation.

**DISCHARGEABILITY - 523(a)(18)**

In re Foster, 319 F.3d 495 (9th Cir. 2003)

Interest on nondischargeable child support continues to accrue after a chapter 13 petition is filed and survives a chapter 13 discharge.

In re Leibowitz, 217 F.3d 799 (9th Cir. 2000)

Debtor could not discharge unaccrued child support obligation assigned to county where bankruptcy petition came after changes in welfare law designed to make such debts nondischargeable.

In re Cervantes, 219 F.3d 955 (9th Cir. 2000)

An absent parent who owes money to a county for child support payments, but as to which no child support order has yet entered, may not discharge the debt in either a chapter 7 or chapter 13 case.

**DISCHARGEABILITY - 523(a)(19)**

In re Stehrenberger, __B.R. __ (9th Cir. B.A.P. 2025)

A bankruptcy court may render the judgment, order, or decree that is an element of a claim under section 523(a0(19).

In re Rodriguez, __B.R.__ (9th Cir. B.A.P. 2023)

Once a determination of a securities violation has been made by a court, and proof of the entry of that order is tendered to the bankruptcy court, the debt is non-dischargeable under section 523(a)(19) without proof of any additional element or analysis. *In re Sherman* (see below) does not impose a primarily liable or most liable standard/requirement.

In re Sherman, 658 F.3d 1009 (9th Cir. 2011), *abrogated on other grounds by Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013)

Debtor who receives funds arising from a securities law violation may discharge resulting debt to the SEC if Debtor is not culpable for the wrongdoing.

**DISCHARGE- Objection to Discharge and Revocation**

In re Valdellon, __B.R.__ (9th Cir. B.A.P. 2025)

Emotional distress damages are compensable for discharge injunction violations.

Weil v. Elliot 859 F.3d 812 (9th Cir. 2017)

Limitation period in § 727(e)(1) is a statute of limitations and not a statute of repose. Accordingly it can be waived.

In re Retz, 606 F.3d 1189 (9th Cir. 2010)

1. Debtor who filed incomplete schedules that he failed to read before signing, and that failed to disclose numerous items of property and transfers, constituted false oaths under § 727(a)(4), where debtor knew they were inaccurate, but intended to amend them later. Reckless indifference to the truth constitutes evidence of fraudulent intent.

2. Debtor's transfer of his house to his brother and the transfer of estate property met the elements of § 727(a)(2).

3. Failure to satisfactorily explain the loss of assets justified denial of discharge under § 727(a)(5).

In re Ellison, 2016 LEXIS 3475 (Bankr.C.D.Cal. 2016)

Preferential transfers is the not the equivalent of transferring assets with the intent to hinder, delay or defraud under § 727(a)(2), but it may be considered as part of determining intent. *But see* dissent in *In re Cooke*, 2016 Bankr. LEXIS 2703 (9th Cir. B.A.P. 2016). Intend to hinder or intend to delay are separate, but sufficient findings of intent to deny discharge.

In re Caneva, 550 F.3d 755 (9th Cir. 2009)

Bankruptcy court properly denied debtor's discharge under § 727(a)(3) by summary judgment, where the debtor owned 15 business entities but had no records as to any of them. The debtor also had no documentation regarding a $500,000 brokerage fee for a $20 million loan. Debtor's conclusory statement in an affidavit that the circumstances of his businesses justified the absence of records was insufficient to rebut the plaintiff's prima facie case.

In re Khalil, 379 B.R. 163, 177 (9th Cir. B.A.P. 2007), *aff'd,* 578 F.3d 1167 (9th Cir. 2009)

"Debtor's discharge cannot be denied under § 727(a)(4) unless his false statements or omissions were made "knowingly and fraudulently." Recklessness by itself will not suffice, but recklessness combined with other circumstances can support an inference that he acted with knowing and fraudulent intent."

In re Beverly, 374 B.R. 221 (9th Cir. B.A.P. 2007), *aff'd in part and dismissed in part,* 551 F.3d 1092 (9th Cir. 2008)

Debtor who, by way of a marital settlement agreement, exchanged his right to proceeds from the sale of the marital residence for wife's interest in an exempt ERISA-qualified pension plan, made a transfer with intent to hinder, delay or defraud under both California's UFTA and §

727(a)(2). The combination of the size of the transfer and the fact that it left the debtor with no assets with which to pay the debtor put this case outside the realm of legitimate pre-bankruptcy planning.

In re Hansen, 368 B.R. 868 (9th Cir. B.A.P. 2007)

Debtor, who was an attorney, could not reasonably rely upon advice of counsel as to a deed of trust that was forged, and which purported to transfer to her mother a $115,000 security interest in her house; 2. Sheer number of inaccuracies in the schedules justified finding of knowing and fraudulent misrepresentations.

In re Roberts, 331 B.R. 876 (9th Cir. B.A.P. 2005), *aff'd,* 241 Fed.Appx. 420 (9th Cir. 2007)

Lack of finding that the debtor knowingly made a false oath in failing to disclose items of income, and lack of finding of actual fraudulent intent, required that the denial of debtor's discharge under § 727(a)(4) be reversed.

In re Nielsen, 383 F.3d 922 (9th Cir. 2004)

Citing with approval In re Bowman, 173 B.R. 922 (9th Cir. B.A.P. 2004), the court held that there must be a showing under § 727(d)(1) that fraud procured the discharge, rather than merely that "fraud was in the air."

In re Searles, 317 B.R. 368 (9th Cir. B.A.P. 2004), *aff'd,* 212 Fed.Appx. 589 (9th Cir. 2006)

(1) Adversary proceeding under 11 U.S.C. § 727 was not mooted by conversion of case to chapter 13; (2) court correctly denied debtor's discharge under §§ 727(a)(2) and (4); complete review of Ninth Circuit law regarding those sections.

In re Yadidi, 274 B.R. 843 (9th Cir. B.A.P. 2002)

Section 105 does not provide an independent ground for denying debtor's discharge.

In re Wills, 243 B.R. 58 (9th Cir. B.A.P. 1999)

§727(a)(4) and (2) standards: Value of nondisclosed assets not sole criteria to consider in determining whether nondisclosure warranted denial of discharge.

In re Lawson, 122 F.3d 1237 (9th Cir. 1997)

Subordination of deed of trust on bankruptcy debtor's property by parent in favor of private lender supports inference that debtor retained secret benefit in residual equity in property. Continuing concealment doctrine.

Transfer not immune even though it occurred more than one year prior to filing.

In re Mereshian, 200 B.R. 342 (9th Cir. B.A.P. 1996)

Oral disclosure of assets and transfers at creditors' meeting of assets and property transfers supported finding that no fraud was intended.

In re Bernard, 96 F.3d 1279 (9th Cir. 1996)

Debtor's removal of money from bank account to avoid enforcement of judgment for creditor constitutes fraudulent "transfer" that precludes discharge.

In re Roosevelt, 87 F.3d 311 (9th Cir. 1996), *opinion amended*, 98 F.3d 1169 (9th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997)

For purpose of statute denying discharge for fraudulent property transfers, transfer occurs when quitclaim deed transfer executed, not when it's recorded.

In re Cox, 41 F.3d 1294 (9th Cir. 1994)

Wife's reliance on husband's record keeping justified.

"As we stated in our earlier opinion in this case, '[t]he purpose of [section 727] is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs.' *In re Cox,* 904 F.2d at 1401 (internal quotations and citations omitted). The initial burden of proof under § 727(a)(3) is on the plaintiff. Fed.R.Bank.P. 4005. 'In order to state a prima facie case under section 727(a)(3), a creditor objecting to discharge must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions.' *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992). Once the objecting party shows that the debtor's records are absent or are inadequate, the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records. *Id.* At 1233; *Cox*, 904 F.2d at 1404 n. 5; *Matter of Horton*, 621 F.2d 968, 972 (9th Cir. 1980); *In re Lawler*, 141 B.R. 425, 428-29 (9th Cir. B.A.P. 1992)."

In re Kubick, 171 B.R. 658 (9th Cir. B.A.P. 1994)

Elements of § 727(a)(2) and (3) are listed in the disjunctive, and each provides a separate basis for the denial of debtor's discharge.

In re Bowman, 173 B.R. 922 (9th Cir. B.A.P. 1994)

"1. Section 727(d)(1)

As a general rule, to obtain relief under section 727(d)(1), the plaintiff must prove that the debtor committed fraud in fact. *Edmonds,* 924 F.2d at 180 (10th Cir. 1991). The fraud must be proven in the procurement of the discharge and sufficient grounds must have existed which would have prevented the discharge. *In re Topper*, 85 B.R. 167, 169 (Bankr. S.D. Fla. 1988). The plaintiff must also prove that it was unaware of the fraud at the time the discharge was granted. *Id.*

"If a creditor or any other party which might object to a debtor's discharge has knowledge of a possible fraud, the burden is on the objecting party to diligently investigate any possibility (*sic*) fraudulent conduct before discharge. If the party decides to wait until after discharge, that party risks dismissal of its section 727(d)(1) action. *See Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991).

"2. Section 727(d)(2)

"As a general rule, a plaintiff must prove that the debtor acquired to became entitled to acquire property of the estate (*sic*) and knowingly and fraudulently failed to report or deliver the property to the trustee, in order to obtain relief under section 727(d)(2). Both elements must be met and the plaintiff must prove that the debtor acted with the knowing intent to defraud. *In re Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992)."

In re Woodfield, 978 F.2d 516 (9th Cir. 1992)

"Badges of fraud" - § 727(a)(2) criteria.

In re Lawler, 141 B.R. 425 (9th Cir. B.A.P. 1992)

Burden of proof on obligation to discharge is preponderance.

In re Dietz, 914 F.2d 161 (9th Cir. 1990)

§ 727(d) revocation proper even though discharge had not yet been formally entered.

In re Cox, 904 F.2d 1399 (9th Cir. 1990)

727(a)(3). Husband and wife have shared duty to maintain records, but court may consider whether spouse had a right to rely on husband's or wife's bookkeeping.

In re Stevens, 107 B.R. 702 (9th Cir. B.A.P. 1989)

Where discharge has not yet entered but 4004 period has run, complaint should be brought under § 727(d).

In re Beugen, 99 B.R. 961 (9th Cir. B.A.P. 1989), *aff'd*, 930 F.2d 26 (9th Cir. 1991)

May not purchase claims for the purpose of objecting to discharge.

In re Adeeb, 787 F.2d 1339 (9th Cir. 1986)

§ 727(a)(2).

In re Neff, 824 F.3d 1181 (9th Cir. 2016)

The one year time limitation in § 727(a)(2) is not a statute of limitations and its not subject to equitable tolling.

**DISCHARGE, EFFECT OF DISCHARGE, AND DISCHARGE INJUNCTION - § 524**

In re Lacher, __B.R.__ (9th Cir. B.A.P. 2025)

The discharge injunction does not void a State Bar recommendation to disbar attorney from unethically contesting a discharged debt. The recommendation is not a judgment under § 524 and the discharge does not enjoin a State Bar disciplinary proceeding.

Cooper v. Social Security Administration (In re Cooper), __Fed.4th __ (9th Cir. 2025)

Recoupment exempts a debt from the automatic stay or discharge when the debt is inextricably tied up on the post-petition claim. Case contains a good explanation of recoupment. Recoupment requires that the claims or rights giving rise to recoupment must arise from the same transaction or occurrence that gave rise to the liability sought to be enforced by the bankruptcy estate. Bankruptcy courts should apply recoupment only when it would be ineuitable for the debtor to enjoy the benefits of the transaction without meeting its obligations.

In re R.S. Air, LLC, 651 B.R. 538 (9th Cir. B.A.P. 2023)

Discharge injunction does not protect a debtor's alter ego.

n re Reed, __B.R.__ (9th Cir. B.A.P. 2022)

Reiterates that the bankruptcy discharge only affects a debtor's personal liability, and does not affect a creditor's in rem rights, such as a lien created by a deed of trust. Enforcement of a foreclosure judgment, which determines the amount of the debt, does not violate the discharge injunction. Such a judgment does not extinguish the voluntary lien or turn it into a judicial lien. Case explains judicial and nonjudicial foreclosure options under California law.

In re Lockhart-Johnson, 631B.R. 38 (9th Cir. B.A.P. 2021)

Good discussion of what a creditor must do to avoid the consequence of the community property discharge under § 524(a)(3) where the debt is allegedly caused by the fraudulent conduct of the nondebtor spouse.

In re Mellem, 625 B.R. 172 (9th Cir. B.A.P. 2021)

Post discharge changes by mother of debtor to her revocable trust that reduced debtor's inheritance due to pre-petition loans made by mother to debtor do not violate the discharge injunction.

Sterling-Pacific Lending, Inc. v. Moser (In re Moser), __B.R._ (9th Cir. B.A.P. 2020)

Bankruptcy Court has discretion to make advance determination (i.e., declaratory relief) about the discharge injunction.

In re Taggart, 139 S.Ct. 1795 (2019)

A court may hold a creditor in civil contempt for violating the discharge if there is no fair ground of doubt as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful. *See* In re Taggart, 980 F.3d 1340 (9th Cir. 2020) for 9th

Circuit's decision on remand.

In re Marino, 577 B.R. 772 (9th Cir. BAP 2017)

Bank violated discharge injunction by sending numerous letters, that included account statements, notices of force-placed insurance, escrow statements, etc. even though some of these letters had bankruptcy collection disclaimers in small font.

In re Anh, 2017 Bankr.LEXIS 3805 (9th Cir. BAP 2017)

Post-discharge attempt to collect debts arising under a Tenancy In Common Agreement, where rights "run with the land" do not violate the discharge injunction.

In re Licea, 2018 Bankr.LEXIS 397 (Bankr. C.D.Cal. 2018)

Landlord's post-discharge lawsuit to collect post-discharge rent on a rejected lease (where debtor continued to occupy the property) did not violate the discharge injunction. Compare with In re Cowan, 2018 Bankr.LEXIS 746 (Bankr. Id. 2018).

In re Heilman, 430 B.R. 213 (9th Cir. B.A.P. 2010)

Where only one spouse files a chapter 7 bankruptcy, a community debt is discharged only as to the filing spouse. A subsequent dissolution decree that obligated the debtor to hold the nondebtor harmless as to the debt that was discharged did not create a new postpetition obligation, because it did not comply with the requirements for a reaffirmation agreement.

In re Kimmel, 378 B.R. 630 (9th Cir. B.A.P. 2007), *aff'd*, 302 Fed. Appx. 518 (9th Cir. 2009).

Section 524(a)(3) discharges community debts of both the debtor and nondebtor spouse, unless the creditor timely files a dischargeability action in the debtor's case. The injunction applies to after-acquired community property.

In re ZiLOG, Inc., 450 F.3d 996, 1007-1010 (9th Cir. 2006)

Court can infer knowledge of a discharge injunction from the fact that the creditor knew of the bankruptcy, but such an inference is a question of fact, not a presumption implied in law. "Knowledge of the injunction, which is a prerequisite to its willful violation, cannot be imputed; it must be found." See also In re Taggart, 548 B.R. 275 (BAP 9th Cir. 2016).

In re Ybarra, 424 F.3d 1018 (9th Cir. 2005), *cert. denied,* 547 U.S. 1163, 126 S.Ct. 2328 (2006)

"[W]e reaffirm that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'returns to the fray'. . . .Whether attorney fees and costs incurred pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and has thereby risked the liability of these litigation expenses." Discharge here did not apply to post-chapter 7 fees and expenses.

In re Gurrola, 328 B.R. 158 (9th Cir. B.A.P. 2005)

Equitable estoppel did not arise from the debtor's failure to raise his bankruptcy discharge as a defense to a collection action on a prepetition debt. The effect of a discharge is self-executing.

In re Garske, 287 B.R. 537 (9th Cir. B.A.P. 2002)

Debtor who opted to continue payments on vehicle upon which debt had been discharge was not the subject of unlawful harassment by creditor under § 524, where telephone calls merely sought payments as a condition to retaining the vehicle.

In re Bennett, 298 F.3d 1059 (9th Cir. 2002)

Case remanded to determine whether attorney fees should be awarded to the debtor as sanctions for having to defend a suit brought in violation of § 524

Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002)

§ 524 does not provide a private right of action for violation of the discharge injunction, although it can be enforced through contempt proceedings.

In re Bassett, 255 B.R. 747 (9th Cir. B.A.P. 2000), *aff'd in part, denied in part*, 285 F.3d 882 (9th Cir. 2002), *cert. denied*, 537 U.S. 1002 (2002)

There is no private right of action for violation of § 524, but the discharge injunction may be enforced through civil contempt proceedings.

In re Lawson, 122 F.3d 1237 (9th Cir. 1997)

§ 727(a)(2) - "Continuing concealment" found, even though transfer occurred more than one year prior to bankruptcy.

In re Hines, 147 F.3d 1185 (9th Cir. 1998)

Debt to attorney paid by post-dated checks for assisting in converting case from 13 to 7 was not discharged as a prepetition debt. *Hessinger* followed.

In re Watson 192 B.R. 739 (9th Cir. B.A.P. 1996), *aff'd*, 116 F.3d 488 (9th Cir. 1997)

Superior Court's determination that discharge injunction did not apply to postpetition debt had preclusive effect.

In re Cortez, 191 B.R. 174 (9th Cir. B.A.P. 1995)

Unavoided unperfected security interest survives discharge.

In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996)

§ 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. *American Hardwoods*, *Inc.*, 885 F.2d 621 (9th Cir. 1989). 1994 Asbestos Amendment. § 524(a) also cited as support.

In re Getzoff, 180 B.R. 572 (9th Cir. B.A.P. 1995)

Creditor may not recover on guaranty executed postpetition where guaranty was not made in compliance with requirements for reaffirming discharged debt.

Hedges v. Resolution Trust Corp (In re Hedges), 32 F.3d 1360 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995)

Debtor continued to reside in property after a foreclosure sale and then filed bankruptcy. The court held that the permanent injunction under § 524(a)(2) did not bar the purchaser at the foreclosure sale from evicting the debtor or collecting postpetition rent.

In re Beeney, 142 B.R. 360 (9th Cir. B.A.P. 1992)

"An action naming the debtor solely to establish the debtor's liability in order to collect on an insurance policy is not barred by Bankruptcy Code § 524."

Kathy B. Enterprises, Inc. v. United States, 779 F.2d 1413, 1414-15 (9th Cir. 1986)

Bankruptcy court not authorized to discharge debts of nondebtors

Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985)

Bankruptcy court cannot discharge liability of nondebtor as part of plan

In re Chionis, 2013 WL 6840485 (9th Cir. B.A.P. 2013)

A pre-petition waiver of discharge clause in a personal guarantee does not negate a creditor's knowledge of the discharge and thus his intent to violate the discharge injunction when he seeks to collect the debt post-discharge.

In re Kabiling, 552 B.R. 440 (9th Cir. B.A.P. 2016) and In re Taggart, 548 B.R. 275 (9th Cir. B.A.P. 2016)

Recent cases discussing contempt standard for violating discharge injunction.

**DISCOVERY– GENERALLY**

In re Michael Mastro, 585 B.R.587 (9th Cir. B.A.P. 2018)

Bankruptcy Judge is authorized to issue a consent directive.

Connecticut General v. New Images, 482 F.3d 1091 (9th Cir. 2007)

Court restates the five-part test for issuing a terminating sanction under Rule 37, and notes that the court should also consider whether lesser sanctions might work, whether it tried them and whether the court warned that terminating sanctions might be imposed. The test is not a mechanical one.

In re Khachikyan, 335 B.R. 121 (9th Cir. B.A.P. 2005)

Rule 9014(d), included in a 2002 amendment to the rule, is intended to require a trial when there is a genuine factual dispute. Furthermore, "[a]s a strategic matter, where one wants discovery in a contested matter, it is generally too late to wait to the day of the hearing on the merits to request to conduct discovery in the future."

Ortega v. O'Connor, 50 F.3d 778 (9th Cir. 1995)

Witnesses can be excluded for failure to exchange witness list.

Hyde & Drath v. Baker, 24 F.3d 1162 (9th Cir. 1994)

Before dismissing a complaint:

"*Wanderer* requires the district court to consider:

(1) the public's interest in expeditious resolution of litigation,

(2) the court's need to manage its dockets,

(3) the risk of prejudice to the party seeking sanctions,

(4) the public policy favoring disposition of cases on the merits, and

(5) the availability of less drastic sanctions.

*Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990)

No abuse of discretion for joint and several imposition of sanctions.

Holmgren v. State Farm Mutual Auto. Ins. Co., 976 F.2d 573 (9th Cir. 1992)

"Exhibits 92 and 93 meet the threshold requirements for qualification as work product: both are (a) documents sought by Holmgren that were (b) prepared for trial (c) by a representative of State Farm. They reflect the opinion of a State Farm adjuster on the range of potential liability. *See Reavis v. Metropolitan Property & Liability Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987) (recognizing opinion work product of adjusters handling claim).

"We agree with the several courts and commentators that have concluded that opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling. *See, e.g., Bio-Rad Labs., Inc. v. Pharmacia, Inc.*, 130 F.R.D. 116, 122 (N.D.Cal.1990)."

Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990)

Entry of default - standard for imposing under Rule 37.

In re (Subpoena served on the) California Public Utilities Commission, 892 F.2d 778 (9th Cir. 1989)

Work product, deliberational process, office reports.

**DISCRIMINATION**

In re Pamela Lacher, __B.R.__ (9th Cir. B.A.P. 2025)

A State cannot assert sovereign immunity under the 11th Amendment against an argument that it is violating § 525(a). The BAP panel held that Franceschi v. State Bar of California, 268 B.R. 219 (9th Cir. B.A.P. 2001) was no longer good law. See In re Wilke for elements of § 525(a).

In re Wike, __B.R.__ (9th Cir. BAP 2024)

Good analysis of elements of § 525(a).

In re Majewski, 310 F.3d 653 (9th Cir. 2002)

§ 525 is not applicable to a person who announces his intention to file for bankruptcy, but has not yet filed.

In re Turner, 199 B.R. 694 (9th Cir. B.A.P. 1996)

Because satisfaction of the debt is irrelevant for purposes of § 525(a), the court properly refused to hear evidence that the debt was satisfied. This conclusion encompasses Turner's contention that the court should not have dismissed her case before requiring the DRE to comply with her discovery requests. Since the court properly determined that there were no facts Turner could prove that would give her relief under § 525(a), discovery was irrelevant.

**DISMISSAL OF THE CASE - §§ 521(i), 707(a), 1112(b) and 1307(a)**

In re Powell, 644 B.R. 186 (9th Cir. B.A.P. 2022)

Section 1307(b) provides Chapter 13 debtors with an absolute right to dismiss their case, subject to the statutory exception (see In re Nichols). Fact that debtor was ineligible for 13 or acted in bad faith is irrelevant. Affirmed by Ninth Circuit, decision dated 10/1/24.

In re Duran, 630 B.R. 797 (9th Cir. BAP 2021)

Every dismissal, including a § 1307(b) motion to dismiss, triggers the § 349(a) issue of whether "cause" exits to order that dismissal be with prejudice. Does this still apply in light of 9th Circuit's Nelson decision, which allows for an automatic "dismissal" under § 1307?

In re Venegas, 623 B.R. 555 (9th Cir. B.A.P. 2020)

Good explanation of what constitutes "cause" under § 707(a) to dismiss a Chapter 7.

In re Harmon, 2021 Bankr.LEXIS 1960 (9th Cir. B.A.P. 7/20/21)

Unpublished case with 3 decisions regarding whether a 13 trustee must refund trustee's fees collected from debtor's plan payments upon pre-confirmation dismissal of case.

In re Nichols, 10 F.4th 956 (9th Cir. 2021)

Debtor has absolute right to dismiss Chapter 13 under § 1307(a). *In re Rosson, 545 F.3d 764 (9th Cir. 2008)* no longer good law.

Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017)

Structured dismissal of Chapter 11 improper when it violates priority rules under Chapter 11 without consent of parties.

In re Warren, 568 F.3d 1113 (9th Cir. 2009)

". . .[T]he bankruptcy court has discretion, *after* the passing of the forty-five day filing deadline set forth in § 521(i)(1), to "order otherwise" and thereby waive the § 521(a)(1) filing requirement."

In re Owens, 552 F.3d 960 (9th Cir. 2009)

Bankruptcy court properly dismissed rather than converting chapter 11 case that was filed in bad faith as a litigation tactic. Although conversion might have benefitted moving party, the best interests of *all* creditors must be considered in converting or dismissing a case. Here, creditors might have fared worse in chapter 7 because the chapter 7 discharge would have deprived them of access to the debtor's substantial future income.

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. B.A.P. 2008)

Dismissal of chapter 11 case was properly set aside, where order approving a settlement did not include a provision for dismissal of the case upon the occurrence of certain events, and the case was subsequently dismissed without notice to creditors. Court properly set aside the dismissal under Rule 60(b).

In re Hickman, 384 B.R. 832 (9th Cir. B.A.P. 2008)

Debtor's counterclaims to a creditor's claims in a non-dischargeability proceeding were not entitled to a jury trial in bankruptcy court, since they involved the restructuring of the debtor creditor relationship. Any jury trial right debtor may have had in another forum did not provide cause for dismissal of the bankruptcy case under § 707(a), where the debtor voluntarily submitted himself to the jurisdiction of the bankruptcy court and then failed to perform his statutory duties.

Warren v. Wirum, 378 B.R. 640 (N.D. Cal. 2007)

1) Because credit counseling under § 109(h) is not jurisdictional, the debtor was judicially estopped from dismissing his case for failing to obtain it, citing *In re Mendz,* 367 B.R. 107 (9th Cir. B.A.P. 2007); 2) unless the debtor asks to be excused from filing payment advices or the trustee moves the court to decline from dismissing, the case is automatically dismissed, and the court may not retroactively waive the debtor's obligation to file payment advices.

In re Mendez, 367 B.R. 109 (9th Cir. B.A.P. 2007)

Pre-bankruptcy credit counseling is not a jurisdictional prerequisite, but an eligibility requirement subject to waiver and estoppel. Debtor waived strict compliance with credit counseling requirements, and could not use noncompliance offensively to obtain dismissal of her bankruptcy case.

In re Sewell, 345 B.R. 174, 182 (9th Cir. B.A.P. 2006)

"Debtors' case was reinstated and the automatic stay was reimposed as of the time the Reinstatement Order was docketed, not when it was signed. . . The bankruptcy court had discretion to determine when Debtors' case was reinstated and the automatic stay was reimposed." Foreclosure sale was allowed to stand, as it occurred between the time the case was dismissed and the reinstatement order was docketed.

In re Sherman, 491 F.3d 948 (9th Cir. 2007)

Dismissal of chapter 7 for cause under § 707(a) is improper if the asserted "cause" is contemplated by another provision of the bankruptcy code, such as § 362.

In re Tennant, 318 B.R. 860 (9th Cir. B.A.P. 2004)

Court has the power under § 105 to dismiss a chapter 13 case sua sponte for failure to file schedules.

In re Bartee, 317 B.R. 362 (9th Cir. B.A.P. 2004)

A chapter 7 debtor does not have an absolute right to dismiss. The bankruptcy court did not abuse it's discretion in denying the debtor's motion, where the case had assets, the schedules were inaccurate and there was no basis for believing that creditors would be paid outside of bankruptcy.

In re Padilla, 222 F.3d 1184 (9th Cir. 2000)

1. Bad faith "as a general proposition does not provide "cause" to dismiss a Chapter 7 petition under § 707(a).

2. Credit card "bust out" did not constitute cause under § 707(a).

In re Elias, 215 B.R. 600 (9th Cir. B.A.P. 1997), *aff'd,* 188 F.3d 1160 (9th Cir. 1999)

Effect of dismissal of case - 349(b).

In re Leavitt, 171 F.3d 1219 (9th Cir. 1999)

Bankruptcy debtor's concealment and misuse of assets warranted dismissal of Chapter 13 case with prejudice.

In re Marsch, 36 F.3d 825 (9th Cir. 1994)

Having found that case was filed in bad faith, court abused discretion in staying dismissal for 60 days.

In re Eisen, 31 F.3d 1447 (9th Cir. 1994)

4 year delay in pursuing case justified alone dismissal. Court need not make findings as to each of 5 part test.

In re Leach, 130 B.R. 855 (9th Cir. B.A.P. 1991)

Denial of dismissal appropriate where IRS would be prejudiced since dismissal would allow debtor to refile subsequently and discharge the obligations. Abuse of discretion standard.

In re Hall, 15 B.R. 913 (9th Cir. B.A.P. 1981)

Trustee has standing to object to dismissal if creditors do not affirmatively consent. If they do, trustee may still object to recover fees.

**DISMISSAL OF ADVERSARY PROCEEDING/CONTESTED MATTER**

In re Alfahel, __B.R.__ (9th Cir. B.A.P. 2023)

Application of Rule 41(a)(1)(B) in contested matters.

In re Roessler-Lobert, 567 B.R. 560 (9th Cir. B.A.P. 2017); In re Tukhi, 567 B.R. 107 (9th Cir. B.A.P. 2017)

Discusses standard for when dismissal of an adversary proceeding is warranted due to "lack of prosecution" or failure to comply with local pretrial rules.

In re Slimane Djili, 2012 WL 5246510 (Bankr. N.D.Cal. 10/23/12)

Discusses standard for dismissing 727 ap under FRBP 7041. Requires appropriate notice and evidence that settlement benefits the bankruptcy estate and all other creditors.

**DISMISSAL - 707(b)**

Aspen Skiing Company v. Cherrett (In re Cherrett), 873 F.3d 1060 (9th Cir. 2017)

Whether a debt is consumer debt under § 707(b) depends on the debtor's intent when the loan is incurred.

In re Egebjerg, 574 F.3d 1045 (9th Cir. 2009)

A debtor's obligation to repay a loan taken from his retirement plan is not a debt, and thus cannot be deducted from his income as a secured debt under the means test. Without deciding whether "other necessary expenses" is a concept limited to the fifteen categories of expenses listed in the IRS manual, or the broader definition provided in that manual, the court finds that retirement loans fall under neither interpretation; nor do they qualify as a "special circumstance."

Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009)

Private disability insurance payments must be include in the calculation of current monthly income.

In re Ransom, 380 B.R. 799 (9th Cir. B.A.P. 2007), *aff'd*, 577 F.3d 1026 (9th Cir. 2009)

In determining "projected disposable income" of an above-median income debtor in a chapter 13 case, the means test does not permit the debtor to claim a vehicle ownership expense for a vehicle owned free and clear of any liens.

Hebbring v. U.S. Trustee, 463 F.3d 902 (9th Cir. 2006)

The Bankruptcy Code does not per se disallow voluntary contributions to a retirement plan as a reasonably necessary expense in calculating disposable income. Courts must examine the totality of the circumstances on a case-by-case basis, including age and financial circumstances. Debtor here only owed about $12,000 in unsecured debt and was only 33 years old.

In re Khachikyan, 335 B.R. 121 (9th Cir. B.A.P. 2005)

Debtor's filing of a chapter 7 case 17 months after accumulating about $120,000 in credit card debt is not a form of abuse that should overcome the presumption in favor of chapter 7 relief.

In re Voelkel, 322 B.R. 138 (9th Cir. B.A.P. 2005)

Bankruptcy court applied wrong standard in dismissing chapter 7 case for substantial abuse. Abuse must be clear, and debtor is not required to live at a subsidence level.

In re Price, 353 F.3d 1135 (9th Cir. 2004)

1. Real estate mortgages are included in the calculation of consumer debt under this section, regardless of whether they are to be discharged; 2. although the ability to pay debts in a chapter 13 case would, standing alone, justify dismissal under this section, it is not a per se rule. It is merely the most important consideration.

In re Harris, 279 B.R. 254 (9th Cir. B.A.P. 2002)

Evidence failed to establish substantial abuse under § 707(b)

In re Gomes, 220 B.R. 84 (9th Cir. B.A.P. 1998) - 707(b)

Debtors' ability to repay 43 percent of unsecured debt under three-year chapter 13 plan supported dismissal of Chapter 7 case for substantial abuse**.**

In re Kelly, 841 F.2d 908 (9th Cir. 1988) - § 707(b)

A finding that debtors are able to repay their debts as they came due or to fund a Chapter 13 plan = substantial abuse. Debtors had paid all unsecured debt prepetition except judgment for fraud. Court held mortgage debt = consumer debt.

In re Suttice, 2013 WL 100199 (Bankr. C.D.Cal. 2013)

Existence of Social Security benefits which creates a positive monthly cash flow for a Chapter 7 debtor is not grounds to dismiss a Chapter 7 case under § 707(b)(3).

**DUTIES OF THE DEBTOR - § 521**

In re Warren, 568 F.3d 1113 (9th Cir. 2009)

". . .[T]he bankruptcy court has discretion, after the passage of the forty-five day filing deadline set forth in § 521(i)(1), to "order[] otherwise" and thereby waive the § 521(a)(1) filing requirement."

In re Adair, 253 B.R. 85 (9th Cir. B.A.P. 2000)

Debtor had no ongoing duty to provide trustee with updated information regarding properly disclosed estate assets. (Case had been closed for 3 years).

**ELECTION OF REMEDIES**

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004)

"The doctrine of election of remedies prevents a party from obtaining double redress for a single wrong. . . .As a general rule, three elements must be present for a party to be bound to an election of remedies: (1) two or more remedies must have existed at the time of the election; (2) these remedies must be repugnant and inconsistent with each other, and (3) the party to be bound must have affirmatively chosen, or elected, between the available remedies.

Passanisi v. Merit-Mcbride Realtors, Inc., 190 Cal.App.3d 1496, 1506-1507 (1987)

Cal. Civ. Pro. § 726**.**

**ELIGIBILITY**

In re Hunt, 160 B.R. 131 (9th Cir. B.A.P. 1993)

Neither a non-business trust nor the trustee solely in a representative capacity are persons eligible for Chapter 11 protection.

In re Luna, 122 B.R. 575 (9th Cir. B.A.P. 1991)

Application of 109(g)(2) is discretionary.

In re Burton, 610 B.R. 633 (9th Cir. B.A.P. 2020)

Discusses impact of a debtor's connection with marijuana grow businesses on right to remain in a Chapter 13.

**ENVIRONMENTAL PROBLEMS IN BANKRUPTCY CASES**

In re Jensen, 995 F.2d 925 (9th Cir. 1993)

State had sufficient prepetition knowledge of debtor's potential liability to give rise to contingent prepetition claim for clean up costs.

**EQUAL ACCESS TO JUSTICE ACT - 26 U.S.C. 7430**

In re Cascade Roads, Inc., 34 F.3d 756 (9th Cir. 1994)

Because set-off claim was rooted in a tax claim, EAJA doesn't apply. Case remanded for consideration of sanctions under 26 U.S.C. 7430.

**EQUITABLE SUBORDINATION**

In re First Alliance Mortg. Co., 471 F.3d 977, 1006 (9th Cir. 2006)

"Where non-insider, non-fiduciary claims are involved, as is the case here, the level of pleading and proof is elevated: gross and egregious conduct will be required before a court will equitably subordinate a claim"

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998)

Mere undercapitalization of debtor is insufficient basis to equitably subordinate claims.

U.S. v. Noland, 517 U.S. 535 (1996)

May not equitably subordinate on a categorical basis. May not always need to show creditor misconduct as condition to equitable subordination.

In re Lazar, 83 F.3d 306 (9th Cir. 1996)

Three findings are generally required before equitable subordination will be granted:
1) that the claimant engaged in some type of inequitable conduct,
2) that the misconduct injured creditors or conferred unfair advantage on the claimant, and
3) that subordination would not be inconsistent with the Bankruptcy Code

In order to justify equitable subordination, the court is required to make specific findings and conclusions with respect to each of the requirements.

Stoumbos v. Kilimnik, 988 F.2d 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993)
1) claimant who is to be subordinated engaged in inequitable conduct,
2) the misconduct results in injury to competing claimants or an unfair advantage to the claimant
3) subordination is not inconsistent with bankruptcy law

Insider's action is subject to "rigorous scrutiny."

In re Fabricators, Inc., 926 F.2d 1458 (5th Cir. 1991)

Court found creditor/insider
1) engaged in inequitable conduct
2) which resulted in injury to creditors
3) equitable subordination consistent with provisions of the code.

In re Virtual Network Services Corp., 902 F.2d 1246 (7th Cir. 1990)

Equitable subordination not limited to situations of inequitable action

Matter of Clark Pipe and Supply Co., Inc., 893 F.2d 693 (5th Cir. 1990)

In re Universal Farming Industries, 873 F.2d 1334 (9th Cir. 1989)

**EQUITABLE SUBROGATION**

In re Deuel, 594 F.3d 1073, 1079 (9th Cir. 2010)

Equitable subrogation under California law allows " '[o]ne who pays, otherwise than as a volunteer, an obligation for which another is primarily liable,' to be 'given by equity the protection of any lien or other security for the payment of the debt to the creditor,' and to 'enforce such security against the principal debtor or collect the obligation from him.'" The doctrine did the unrecorded lien holder no good in this case, since it had refinanced a mortgage owed to it and recorded a deed of reconveyance; and the doctrine does not permit an injustice to be done to other interest holders, namely the trustee having bona fide purchaser status.

**ESTOPPEL - EQUITABLE AND JUDICIAL**

In re Lua, 2017 U.S.App.LEXIS 11452 (9th Cir. 2017)

Equitable estoppel requires (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was inducted to act on it. See also In re Quevarra, 638 B.R. 1202023 Bankr.LEXIS 2125 (9th Cir. B.A.P. 2022).

In re Hoopai, 581 F.3d 1090 (9th Cir. 2009)

Judicial estoppel not applied to lender's inconsistent claims to attorney fees under Hawaii law and § 506(b), since it did not seek a "second benefit" or "unfair advantage" from taking it's positions.

United Steelworkers of America v. Retirement Income Plan for Hourly-Rated Employees of, ASARCO, 512 F.3d 555 (9th Cir. 2008)

Three factors in determining whether to apply judicial estoppel:

1) Is the party's later position clearly inconsistent with its earlier position;
2) Whether the party achieved success in the prior proceeding; and
3) Whether the party asserting an inconsistent position would achieve an unfair advantage if not estopped. **See also In re Griffithe, __B.R.__ (9th Cir. B.A.P. 2025).**

In re An-Tze Cheng, 308 B.R. 448 (9th Cir. B.A.P. 2004), *aff'd and remanded,* I160 Fed.Appx. 644 (9th Cir. 2005)

Judicial estoppel did not apply to Chapter 11 debtors who asserted one value of a secured claim in their lien avoidance motion and a different value in their claim objection, since they were asserting their rights as debtors in the motion and their obligation as a trustee in the objection.

Hamilton v. State Farm Fire and Casualty Co., 270 F.3d 778 (9th Cir. 2001)

Debtor who failed to list insurance claim in bankruptcy schedules was judicially estopped from asserting that claim in subsequent lawsuit. "The application of judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different cases."

Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910 (9th Cir. 2001)

Promissory estoppel is a cause of action; equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have. Use of equitable estoppel to defeat a statute of frauds defense has no bearing on the damages plaintiff may recover.

Wyler Summit Partnership v. Turner Broadcasting Systems, Inc., 235 F.3d 1184 (9th Cir. 2000)

"The doctrine of judicial estoppel requires, inter alia, a knowing antecedent misrepresentation by the person or party alleged to be estopped and prevents the party from tendering a contradictory assertion to a court."

In re Meronk, 249 B.R. 208 (9th Cir. B.A.P. 2000), *aff'd*, 24 Fed.Appx. 737 (9th Cir. 2001)

Law firm judicially estopped from seeking bonus, where in its retention application, it represented that it's hourly rate arrangement would result in a larger estate than a contingent fee, but then sought a bonus that would have brought their fee to the level they would have received if they had accepted the contingent fee arrangement.

Granite States Ins. Co. v. Smart Modular Technologies, Inc., 76 F.3d 1023 (9th Cir. 1996)

Under Cal. law, the elements of equitable estoppel are:
1) the party to be estopped must be apprised of the facts;
2) must intend that his conduct shall be relied upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
3) must be ignorant of the true state of facts; and
4) must rely upon the conduct to his injury

See also Driscoll v. City of Los Angeles, 67 Cal.2d 297, 431 P.2d 245, 250 (Cal. 1967)

In re Canino, 185 B.R. 584 (9th Cir. B.A.P. 1995)

Equitable estoppel applied to exemption claim.

In re Heritage Hotel Partnership, 160 B.R. 374 (9th Cir. B.A.P. 1993), *aff'd*, 59 F.3d 175 (9th Cir. 1995)

Equitable estoppel:
1) party knew facts
2. Intended that his conduct be acted upon
3. Estopping party ignorant of true facts
4. Relied to his damage

See also *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555 (9th Cir. 1992).

In re Howell, 120 B.R. 137 (9th Cir. B.A.P. 1990)

Definition of equitable estoppel. Does not apply to govt. absent affirmative misconduct. See also *In re Santos*, 112 B.R. 1001, 1007-08 (9th Cir. B.A.P. 1990).

In re Growers-Ranchers, Ltd., 110 B.R. 915 (9th Cir. B.A.P. 1990); *aff'd*, 945 F.2d 1145 (9th Cir. 1991)

Agency director's promise not binding nor subject to estoppel when exceeding authority.

**EVIDENCE**

In re Vinhnee, 336 B.R. 437 (9th Cir. B.A.P. 2005)

Creditor's electronic business records were properly not admitted into evidence sua sponte, resulting in judgment for the debtor.

Sea-Land Service, Inc. v. Lozen International, LLC., 285 F.3d 808 (9th Cir. 2002)

1. Bills of lading are business records. Rule 803(6) allows the admission of business records when "two foundational facts are proved: (1) the writing is made or transmitted by a person with knowledge at or near the time of the incident recorded, and (2) the record is kept in the course of regularly conducted business activity." [citation omitted]

2. An internal company e-mail authored by one employee and forwarded by a second employee who incorporates and adopts the contents of the original message can be admissible as an adoptive admission under Federal Rules of Evidence 801(d)(2)(D).

In re Bennett, 298 F.3d 1059 (9th Cir. 2002)

Application of the parol evidence rule under California law.

Domingo v. T.K., 289 F.3d 600 (9th Cir. 2002)

Medical testimony inadmissible under *Daubert.*

In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. B.A.P. 1998)

Withdrawal of objection operates as a waiver on appeal. Must also state specific grounds for objection, and grounds must be correct.

FTC v. Figgie International, Inc., 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)

5 part test to FRE 803 (24)

Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272 (9th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993)

1) Under Cal. contract law, the parol evidence analysis governing this case is divided into two initial inquiries: (1) was the writing intended to be an integration, i.e., a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements; and (2) is the agreement susceptible of the meaning contended for by the party offering the evidence? *Gerdlund v. Electronic Dispensing*

2) However, Cal. Also recognizes one of the broad exceptions to the parol evidence rule. Because "[n]o contract should ever be interpreted and enforced with a meaning that neither party gave it," ...parol evidence may be introduced to show the meaning of the express terms of the written contract.

3) To avoid completely eviscerating the parol evidence rule, however, there must be reasonable harmony between the parol evidence and the integrated contract for the evidence to be admissible.

Tongil Co., Ltd. v. Vessel Hyundai Innovator, 968 F.2d 999 (9th Cir. 1992)
FRE 803(6) - may not use declarations to authenticate business records - must use live witnesses.

Cooper v. Firestone Tire and Rubber Co., 945 F.2d 1103 (9th Cir. 1991)
Evidence of dissimilar accidents admissible for impeachment.

Rogers v. Raymark Industries, Inc., 922 F.2d 1426 (9th Cir. 1991)
Exclusion of testimony - balancing FRE 702 and 403(b).

U.S. v. Hadley, 918 F.2d 848 (9th Cir. 1990)
Test for allowing prior bad acts into evidence - FRE 404(b)

In re Burg, 103 B.R. 222 (9th Cir. B.A.P. 1989)
Declarations may not substitute for direct evidence.

In re E.R. Fegert, Inc., 887 F.2d 955 (9th Cir. 1989)
Bankruptcy Court may take judicial notice of underlying records.

Oki America Inc. v. Microtech Int'l, Inc. 872 F.2d 312 (9th Cir. 1989)
Pleadings may give rise to admissible admissions despite the hearsay rule

In re Blumer, 95 B.R. 143 (9th Cir. B.A.P. 1988)
Judicial notice.

## EXECUTORY CONTRACTS § 365

### 1. General

In re Imperial Credit Industries, Inc., 527 F.3d 959 (9th Cir. 2008)

A chapter 7 debtor's obligation on a claim arising from a capital maintenance agreement with the FDIC under § 365(o) is not entitled to administrative expense priority, where it is specifically provided for under § 507(a)(9).

In re JZ L.L.C., 371 B.R. 412 (9th Cir. B.A.P. 2007)

Licensing agreement issued by debtor that was neither assumed nor assigned in chapter 11 case rides through the bankruptcy.

In re Pomona Valley Medical Group, Inc., 476 F.3d 665, 670 (9th Cir. 2006)

". . .[I]n evaluating the rejection decision, the bankruptcy court should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate. . . .It should approve the rejection of an executory contract under § 365(a) unless it finds that the debtor-in-possession's conclusion would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'"

Rejection of the contract does not otherwise affect the parties' substantive rights under the contract or state law. Claims under California Business and Professions Code survived motion to dismiss.

In re G.I. Industries, Inc., 204 F.3d 1276 (9th Cir. 2000)

Bankruptcy court could adjudicate validity of contract when considering proof of claim under executory agreement rejected by trustee.

In re AEG Acquisition Corp., 161 B.R. 50 (9th Cir. B.A.P. 1993)

Contract is not executory when all that is left for debtor to do is pay. Citing *In re Pacific Express, Inc.*, 780 F.2d 1482 (9th Cir. 1986).

In re Joshua Slocum, Ltd. 922 F.2d 1081 (3d Cir. 1990)

Shopping center defined.

In re Qintex Entertainment, Inc., 950 F.2d 1492 (9th Cir. 1991)

Executory k does not become asset of estate until it is assumed (licensing agreement).

In re Aslan, 909 F.2d 367 (9th Cir. 1990)

When debtor secures rejection of non-assumed executory contract under §365(g), date of breach is day immediately prior to filing of bankruptcy petition (definition of executory contract discussed).

In re Westworld Comm. Healthcare, Inc., 95 B.R. 730 (Bankr.C.D. Cal. 1989)

Right to attorney fees as "any pecuniary loss" under 365(b)(1)(B).

In re Sigel & Co., Ltd., 923 F.2d 142 (9th Cir. 1991)

Purchase of joint venture share prior to filing did not terminate agreement - debtor had power to cure default when the contract says nothing about cure of a breach.

In re Arizona Appetito's Stores, 893 F.2d 216 (9th Cir. 1990)

Timely motion to reject does not toll 60 days for motion to assume.

In re Elm, Inc., 942 F.2d 630 (9th Cir. 1991)

1. Court should order surrender of premises, if appropriate
2. Must determine interests if necessary to decide 365(d)(4) issues.

**2. Executory Contracts - Leases**

Bobka v. TMCC, 968 F.3d. 946 (9th Cir. 2020)

Explains differences between reaffirmation of secured debt and lease assumption of personal property under § 365(p). When a lease is assumed under § 365(p), it doesn't also have to be reaffirmed, and it survives discharge. Parties may voluntarily waive the specific requirements of § 365(p) and still have an assumed lease.

In re Onecast Media, Inc., 439 F.3d 558 (9th Cir. 2006)

"While rejection of a lease prevents the debtor from obtaining future benefits of the lease. . ., it does not rescind the lease or defeat any pending claims or defenses that the debtor had in regard to that lease." Where the landlord drew down entirely on a letter of credit purchased by the debtor and held by the landlord as security, the trustee was entitled to recover the difference between the landlord's damages and the balance of the amount drawn down, since that amount was property of the estate.

In re At Home Corp., 392 F.3d 1064 (9th Cir. 2004), *cert. denied,* 546 U.S. 814,126 S.Ct. 338 (2005)

". . . [A] bankruptcy court has the discretion to grant a motion to reject a nonresidential lease of real property retroactively. The retroactive date of rejection need not be on or after the date on which the landlord regains possession."

In re TreeSource Industries, Inc., 363 F.3d 994 (9th Cir. 2004)

Commercial property lessor's claim for damages arising from debtor's failure to remove a concrete pad were not entitled to administrative priority. The lease was breached only upon its rejection, not postpetition and pre-rejection. Thus damages were simply an unsecured claim.

In re BCE West, L.P., 319 F.3d 1166 (9th Cir. 2003)

Section 363(d)(3) does not apply to debtor lessors, only to non-debtor lessees.

In re LPM Corp., 300 F.3d 1134 (9th Cir. 2002)

Nothing in the language of § 365(d)(3) grants a commercial landlord's administrative claim superpriority status. Rather, it simply imposes a duty on a debtor to make its rental payments in a timely manner.

In re Cukierman, 265 F.3d 846 (9th Cir. 2001)

1. Obligations denominated in commercial lease as "further rent" were entitled to administrative priority under unexpired lease provision in bankruptcy code, even though obligations actually represented repayments of promissory notes.

2. Because no action or proceeding had been brought to enforce the terms of the lease or to declare the parties respective rights, the attorney fees clause in the lease was not applicable. Further, lessor was not entitled to interest on the unpaid lease obligations "because it is not an obligation under the lease."

In re George, 177 F.3d 885 (9th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000)

agreement in question was a "true" lease, thus §365(d)(4) applied. No waiver of automatic rejection by accepting payments

In re Building Block Child Care Centers, Inc., 234 B.R. 762 (9th Cir. B.A.P. 1999)

Commercial tenant required to cure pre-petition defaults to former landlord before assuming lease with successor landlord where first landlord expressly retained right to receive cure payments upon assumption.

In re Victoria Station, 875 F.2d 1380 (9th Cir. 1989)

60 day period for assumption of nonresidential lease may be extended more than once.

In re Lomax, 194 B.R. 862 (9th Cir. B.A.P. 1996)

Landlord's election to terminate lease was acceptance of debtor's offer of surrender, resorting premises to landlord and limiting damages under 502(b)(6).

In re Circle K Corp, 98 F.3d 484 (9th Cir. 1996)

The term "gross sales" included only commissions debtor received for ticket sales, not total sales price of ticket sales.

In re McSheridan, 184 B.R. 91 (9th Cir. B.A.P. 1995)

1) rent reserved under §502(b)(6)(A)

for a charge to constitute rent reserved under §502(b)(6)(A), a 3-part test must be met:

(1) charge must be (a) designated as "rent" or additional rent in the lease; or (b) be provided as the tenant's/lessee's obligation in the lease;

(2) the charge must be related to the value of the property or the lease thereon; and

(3) the charge must be properly classifiable as rent because it is a fixed, regular or periodic charge

2) triple net lease...

- damages for breach of covenants is not a separate claim from the termination

damages. In addition, the claim arising from breach of the lease conceptually encompasses all time intervals and treats the claim as if the breach occurred immediately prior to the filing of the bankruptcy case - see §502(g).

In re Westside Print Works, Inc., 180 B.R. 557 (9th Cir. B.A.P. 1995)

1. Bankruptcy Code gives lessor no independent right to recover attorneys' fees from debtor-in-possession of commercial property

2. Property tax and increased security provisions found to be ambiguous or waived.

Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9th Cir. 1994)

Lessor was entitled to an administrative expense claim for 60 days' rent at the contract rate because the trustee had an affirmative duty under §365(d)(3) to "perform all the obligations of the debtor" under the lease.

In re First Alliance Corp., 140 B.R. 531 (9th Cir. B.A.P. 1992)

Post-petition rents are not credits against damages in landlord's claim for debtor's rejection of pre-bankruptcy lease.

In re Pollock, 139 B.R. 938 (9th Cir. B.A.P. 1992)

Severability test. Sale of business sublease assumable by debtors if severable from note obligation.

In re Standor Jewelers West, Inc., 129 B.R. 200 (9th Cir. B.A.P. 1991)

A clause in a lease providing for a substantial portion of the lease appreciation upon assignment is invalid under §365(f).

In re Windmill Farms, 841 F.2d 1467 (9th Cir. 1988)

Under Cal. law a lease terminates for nonpayment of rent at least by the time the lessor files an unlawful detainer action, provided that a proper three-days' notice to pay rent or quit has been given, and the lessee has failed to pay the rent in default within the three-day period and further provided that the lessor's notice contained an election to declare the lease forfeited.

In re Port Angeles Waterfront Assoc, 134 B.R. 377 (9th Cir. B.A.P. 1991)

Once 60 days ran, lease terminated (waterfront project = lease). *In re Moreggia & Sons, Inc.*, 852 F.2d 1179 (9th Cir. 1988) distinguished.

Moreggia & Sons, Inc. 852 F.2d 1179 (9th Cir. 1988)

Lease that is more in the nature of a financing arrangement is excepted from 60 day requirement.

In re Orvco, Inc. 95 B.R. 724 (9th Cir. B.A.P. 1989)

1) While a non bankruptcy court must order the payment of rent due during 365(d)(3) 60 day period, that doesn't mean that amount due is all an administrative priority

2) After lease is rejected, if 363(d)(3) period rent remains unpaid, landlord does not have an

immediate right to payment...may be paid in administrative.

In re Texscan Corp., 107 B.R. 227 (9th Cir. B.A.P. 1989), *aff'd*. 976 F.2d 1269 (9th Cir. 1992)

Executory contract that expires postpetition but before motion to assume is filed cannot be assumed.

**3. Executory Contracts - Non-lease contracts**

In re Svenhard's Swedish Bakery, 2023 Bankr.LEXIS 2125 (B.A.P. 9th Cir. 2023)

Settlement agreement that required non-debtor party to provide debtor with a release after debtor finishes its settlement payments is not an executory contract (under Maryland law). The exchange of the release is a ministerial act and non-debtor party was not required to provide it until debtor made all of its payments. Case provides excellent analysis of what is an executory contract. BAP also held that a bankruptcy court is not required to determine the validity of the contract in question as part of its section 365 decision. Assumption/rejection of an executory contract is a summary proceeding. See Ninth Circuit's affirmance, which focused on what constitutes a financial accomodation." The Ninth Circuit states that a financial accommodation contract includes contracts to foreear or reduce payments to which one was otherwise entitled, if those contracts were agredd upon to aid a debtor's poor financial condition.

Mission Product Holdings, Inc. v. Tepnology, LLC, 139 S.Ct. 1652, 203 L.Ed2d 876 (2019)

Rejection of a trademark licensing agreement by debtor-licensor does not deprive licensee of its rights to use the trademark. A rejection breaches a contract but does not rescind it, and all rights that would ordinarily survive a contract breach remain in place.

In re Eutsler, 2017 Bankr. LEXIS 4442 (9th Cir. B.A.P. 2017)

Option agreement among shareholders of a closed corporation to purchase each other's shares upon certain conditions not an executory contract where option was not exercised before the petition date. Look at language that if an executory contract is not assumed or rejected, it rides through like other property of the estate. **Also look at footnote 9, which addresses whether an LLC operating agreement and options in general are executory contracts, and footnote 10, which briefly discusses whether a Chapter 13 plan may be modified to provide for the assumption or rejection of a previously omitted executory contract.**.

In re Southern Pacific Funding Corporation, 268 F.3d 712 (9th Cir. 2001)

Subordination clause in indenture agreement that preserved certain secured creditors' rights both pre- and post- bankruptcy did not violate § 365(e)(1) of the bankruptcy code.

In re Crow Winthrop Operating Partnership, 241 F.3d 1121 (9th Cir. 2001)

1) Issues of anti-assignment and change of ownership properly considered on motion rather than in an adversary proceeding; 2) bankruptcy court properly found that prohibition on change of ownership was an illegal anti-assignment clause under § 365(f).

In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999)

Ch. 11 bankruptcy debtor in possession may not assume executory contract made nonassignable by nonbankruptcy law due to materiality of nondebtor party's identity, unless nondebtor party consents. §365(c)(1)

In re Robert L. Helms Construction and Development Co., Inc., 139 F.3d 702 (9th Cir. 1998) *en banc*

It is a question of fact for bankruptcy court whether option contract to purchase real property is an executory contract that may be accepted or rejected by bankruptcy trustee.

In re The Circle K Corporation, 127 F.3d 904 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998)

Lease provision barring exercise of renewal option by lessee in default does not preclude defaulting Chapter 11 bankruptcy debtor from doing so

In re Claremont Acquisition Corporation, Inc., 113 F.3d 1029 (9th Cir. 1997)

Debtor car dealer's incurable nonmonetary default precludes assignment of dealership franchise agreement in bankruptcy proceeding. §356(b)(2)(d) only applies to monetary penalties not having to be cured.

In re CFLC, Inc., 174 B.R. 119 (N.D.Cal. 1994), *aff'd* 89 F.3d 673 (9th Cir. 1996)

Executory contracts are assignable in bankruptcy notwithstanding any contractual provision restricting assignment, unless the contract is of a kind that applicable law makes nonassignable. The court in disallowing the assignment followed the traditional federal rule of nonassignability of non-exclusive patent licenses absent the express consent of the patent holder.

In re Prize Frize, Inc., 32 F.3d 426 (9th Cir. 1994)

License fees were royalties for purposes of §363(n) and had to be paid if promisor elected to retain rights under contract.

In re Texscan Corp., 976 F.2d 1269 (9th Cir. 1992)

Retrospective insurance premium k between insurer and insured is not an executory k.

In re Sun Runner Marine, Inc., 945 F.2d 1089 (9th Cir. 1991)

Flooring agreement was an executory k but was not assumable because it constituted a financial accommodation.

In re Texscan Corp., 107 B.R. 227 (9th Cir. B.A.P. 1989), *aff'd.* 976 F.2d 1269 (9th Cir. 1992)

Executory contract that expires post-petition but before motion to assume is filed cannot be assumed.

In re Munple, Ltd., 868 F.2d 1129 (9th Cir. 1989)

Real estate Brokers commission earned prepetition is not an executory contract**.**

## EXEMPTIONS

1. **General**
2. **Homestead**
3. **Lien Avoidance**
4. **Retirement Accounts, Life Insurance and Annuities**
5. **Standing and Burden of Proof**
6. **Exemption planning**

### 1. General

Warfield v. Nance, __F.4th __ (9th Cir. 2025)

Claim preclusion did not bar a debtor from amended his exemptions schedule to seek a federal exemption after the bankruptcy court ruled that the previously claimed state exemptions were unavailable (this arises from an Arizona Bankruptcy Court ruling).

In re Massingale, 108 F.4th 1195 (9th Cir. 2024)

Applying due process, the Ninth Circuit held that Taylor and Schwab do not apply (i.e. a debtor's exemptions are dispositive once the deadline to object expires if no one files an objection) where the debtor make conflicting statements (here, in their schedules and the Chapter 11 plan/disclosure statement) regarding their exemption.

In re Guevarra, 638 B.R. 120 (9th Cir. B.A.P. 2022)

Equitable estoppel can be invoked to sustain objections to California exemptions. Need to distinguish between denying an exemption on bad faith grounds (see Law v. Siegel, 571 U.S. 415 (2014), which disapproves of this) and equitable estoppel.

In re Esquire, 998 F.3d 1088 (9th Cir. 2021)

Bankruptcy Court order sustaining objection to debtor's exemptions in a 13 case is preclusive to same exemptions asserted in the same case after conversion to Chapter 7.

In re Perez, 628 B.R. 327 (9th Cir. B.A.P. 2021)

Good case discussing a trustee's ability to object to a exemption under § 522(g). Trustee must prove 1) the debtor transferred the property in a way that invokes the trustee's avoidance powers; 2) the transfer was voluntary; and 3) the property was returned to the bankruptcy estate as the result of the trustee's efforts.

In re Wallwork, 616 B.R. 395 (Bankr. ID 2020)

Good case explaining how to establish domicile for purposes of § 522(b)(3)(A) and the application of § 522(o).

Lee v. Field (In re Adam Lee), 889 F.3d 639 (9th Cir. 2018)

Fraudulent conveyance adversary proceeding filed by Chapter 7 trustee within 30 days after

the meeting of creditors was a timely objection to debtor's objection. FRBP 4003 does not proscribe any specific form of a claim objection.

In re Wharton, 563 B.R. (9th Cir. B.A.P. 2017)

Trustee's inclusion of an objection to an exemption in his reply to opposition to his motion for turnover sufficient to constitute a timely objection to Debtor's exemption under FRBP 4003. BAP also addresses right to exempt property recovered by trustee under 522(g), and court holds that the trustee "recovered" the property. "The threat of avoidance powers to induce a debtor or transferee to return the property to the estate is sufficient." Under these facts, query as to whether the Trustee recovered anything, because he already had possession of the property (a car).

In re Stijakovich-Santilli, 542 B.R. 245 (9th Cir. B.A.P. 2015)

Trustee not barred from objection to homestead exemption more than 30 days after meeting of creditors where debtor fraudulently asserted the exemption under F.R.B.P. 4003(b)(2).

In re Leach, 595 B.R. 841 (Bankr. Idaho 2018)

Daughter's voluntary return of car to debtor parents before trustee's turnover demand allowed parents to amend schedules and exempt car, and trustee's objection under § 522(g) overruled.

In re Nicholson, 435 B.R. 622 (9th Cir. B.A.P. 2010)

Debtor initially listed stock in a corporation as being worth $0 and claimed no exemption in the asset. After the trustee solicited and received bids for the stock, debtor amended his exemption claim and asserted the full exemption amount for the stock. The trustee objected to the amendment on the grounds of bad faith. The B.A.P. held that although the bk court was not required to hold an evidentiary hearing on the objection, the court should have used the preponderance of the evidence standard, rather than requiring clear and convincing evidence, in overruling the objection.

Schwab v. Reilly, 560 U.S. 770, 130 S.Ct. 2652, 2669 (2010)

"Where, as here, a debtor accurately describes an asset subject to an exempt interest and on Schedule C declares the "value of [the] claimed exemption" as a dollar amount within the range the Code allows, interested parties are entitled to rely upon that value as evidence of the claim's validity. Accordingly, we hold that Schwab was not required to object to Reilly's claimed exemptions in her business equipment in order to preserve the estate's right to retain any value in the equipment beyond the value of the exempt interest."

In re Gebhart, 621 F.3d 1206 (9th Cir. 2011)

Post-petition appreciation of a fully exempted homestead accrues to the estate. Apply Reilly, the 9th Circuit held that "an exemption claimed under a dollar-value exemption statute is limited to the value claimed at filing. Any additional value in the property remains the property of the estate, regardless of whether the extra value was present at the time of the filing or whether the property increased in value after filing.

In re Applebaum, 422 B.R. 684 (9th Cir. B.A.P. 2009)

California's bankruptcy-only exemption statute is not preempted by the Bankruptcy Code and does not violate the Uniformity Clause.

In re Gould, 401 B.R. 415 (9th Cir. B.A.P. 2009), *aff'd,* 603 F.3d 1100 (9th Cir. 2010)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

In re Onubah, 375 B.R. 549 (9th Cir. B.A.P. 2007)

Although the debtor did not conceal his residence, his refusal to vacate it, his conversion of his case to a chapter 11 case, and his collusion with others to file an involuntary petition against himself justified the surcharge against his exemptions.

In re Urban, 375 B.R. 882 (9th Cir. B.A.P. 2007)

Section 522(b)(3), which allows states to opt out of the federal system but extends the domicile requirement from 180 to 730 days, does not violate the uniformity clause of the Constitution.

In re Konnoff, 356 B.R. 201, 208 (9th Cir. B.A.P. 2006)

"Although the petition determines the exemption rights of the debtor, where the state has opted out of the federal exemption scheme. . .it is the facts of the case and the state law applicable on the petition date that controls a debtor's exemption rights. . . .By allowing them to opt out of the federal exemption scheme, Congress has granted states the prerogative to determine the scope of, and limitations on, the exemptions their residents may claim in a bankruptcy case." Debtor could not claim homestead exemption under Arizona law, where he sold the house prepetition and failed to reinvest the proceeds in another home within 18 months, even though the 18 month period expired postpetition.

In re Cogliano, 355 B.R. 792 (9th Cir. B.A.P. 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her second claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004)

"We hold that the bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code."

In re Gose, 308 B.R. 41 (9th Cir. B.A.P. 2004)

California Code of Civil Procedure §§704.140(a) & (b) are properly read together, and

allow the exemption of settlement proceeds from a personal injury claim only to the extent necessary for the debtors' support.

In re Goswani, 304 B.R. 386 (9th Cir. B.A.P. 2003)

Debtor's right to amend their exemption schedule did not terminate upon closing the case. Here, debtor had claimed the 15,000 wildcard exemption. Upon reopening to avoid a judicial lien on the residence, the debtor substituted a $10 cash claim for a claim of $10 in exemption on their house.

In re Morgan-Busby, 272 B.R. 257 (9th Cir. B.A.P. 2002)

Thirty-day time period for objecting to objects also applies to objecting to the value of the property being claimed exempt. Here, the trustee did not object to the exemption claim in stock, but reserved the right to challenge debtors' valuation of the stock. Accordingly, the trustee had the right to sell the stock, pay the debtors the amount of their grubstake exemption, and keep any remaining proceeds.

In re Clark, 266 B.R. 163 (9th Cir. B.A.P. 2001)

"The non-specific claim of exemption gives the debtor no rights, legally or practically. It is mandatory under the language of the statute that the debtor file a list of the property he claims exempt....A list of property connotes a selection of specific properties. The claim to "other assets of the petitioner" does not comply with the statute."

In re Clark, 262 B.R. 508 (9th Cir. B.A.P. 2001)

Creditor's meeting was not concluded merely because trustee failed to vocalize continued date, where continued date had been announced at previous meeting and in writing thereafter.

In re Smith, 235 F.3d 472 (9th Cir. 2000)

1) Under Rule 2003(e), a § 341 meeting must be adjourned to a specific time; 2) conversion of the case from chapter 11 to chapter 7 does not restart the running of the 30-day period for filing objections to exemptions.

In re Reaves, 285 F.3d 1152 (9th Cir. 2002)

Debtor who claimed and was denied exemption in California state court levy proceeding could claim exemption under state exemption statute applicable only in bankruptcy cases. Entire amount of the $15000 wildcard exemption in CCP § 703.140(b)(2) could be used, even though the debtor was not a homeowner.

In re Wolfberg, 255 B.R. 879 (9th Cir. B.A.P. 2000), *aff'd*, 37 Fed.Appx. 891 (9th Cir. 2002)

Debtor's attempt to assert a claim of homestead exemption after confirmation of a chapter 11 plan was barred by res judicata.

In re Arnold, 252 B.R. 778 (9th Cir. B.A.P. 2000)

Debtors did not act in bad faith, nor prejudice creditors or trustee, by adding pre-existing personal injury lawsuit to exemption schedule three years after filing bankruptcy petition.

In re Smith, 235 F.3d 472 (9th Cir. 2000)

Adjournment "until further notice" of creditors' meeting did not result in conclusion of the meeting for purposes of filing timely objections under Rule 4003(b) merely because no future date was specified.

In re Wolf, 248 B.R. 365 (9th Cir. B.A.P. 2000)

Debtor's exemption rights with respect to estate property inherited after he filed for bankruptcy was governed by law in effect when petition was filed.

Preblich v. Battley, 181 F.3d 1048 (9th Cir. 1999)

(1) Time for objecting to exemption does not begin to run until debtor exemption list is "sufficient to notify the creditors and trustee exactly what property the debtor is claiming as exempt." 181 F.3d at 1052.

(2) Ruling on objection to exemptions is a final, appealable order.

In re Lares, 188 F.3d 1166 (9th Cir. 1999)

The court of appeals affirmed an order of the district court. The court held that the proceeds from the sale of a bankruptcy debtor's home are not protected from a lender's setoff based on a personal guarantee by a statute exempting them from attachment, execution, or forced sale.

In re Carter, 182 F.3d 1027 (9th Cir. 1999)

Under California law, sole shareholder of Subchapter S Corporation could qualify as its "employee" for purpose of state-law bankruptcy exemption for "employee earnings."

In re Sylvester, 220 B.R. 89 (9th Cir. B.A.P. 1998)

Bankruptcy debtor may exempt portion of attorney malpractice damages attributable to misappropriated personal injury settlement funds

In re Heintz, 198 B.R. 581 (9th Cir. B.A.P. 1996)

Where debtor got exemptions by default, brother had judicial lien on exempt property, but transferred it to trustee for benefit of the estate, held

1) § 551 does not exclude exempt property from presentation

2) § 522(h) doesn't apply because property claimed exempt wasn't exemptible - *In re Morgan*, 149 B.R. 147 (9th Cir. B.A.P. 1993)

In re Goldman, 70 F.3d 1028 (9th Cir. 1995)

"Gross annual income" in C.C.P. § 704.730(a)(3) means income over a calendar year, not 12 months prior to filing

In re Canino, 185 B.R. 584 (9th Cir. B.A.P. 1995)

No informal objection to exemption allowed under R. 4003 or § 105. Bad faith 105 argument not considered. Equitable estoppel applied to sale of car, where sale completed 8 days before time for objection to exemption ran.

In re Bernard, 40 F.3d 1028 (9th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995)

1) 30 day period for objecting to exemptions begins when the 341 meeting actual concludes, however, many sessions it takes.

2) An annuity is not exempt under 704.100(a) because it has no risks, citing *Pikush*, supra. It is not exempt in this case under 704.115, because it was not reasonably necessary for support of debtor or dependents.

In re Kahan, 28 F.3d 79 (9th Cir. 1994), *cert. denied,* 513 U.S. 1150, 115 S.Ct. 1100 (1995)

Trustee not barred from timely objecting to a debtor's amended schedule where debtor's initial schedules did not sufficiently notify trustee he was claiming more than a $45,000 exemption.

In re Mayer, 167 B.R. 186 (9th Cir. B.A.P. 1994)

Entitlement to homestead determined as of date bankruptcy filed, not date lien attached. At the date of the petition, the value of debtor's homestead exemption, calculated by deducting the amount of the liens from the value of the property, was approximately $34,000. Thus, there was no equity for the trustee. Thereafter, the value of the property skyrocketed and the trustee sold the property. The debtor claimed ownership of all of the net proceeds, arguing that the value of the trustee's interest must be determined as of the petition date.

The court held that because the trustee, not the debtor, owned the property, the trustee was entitled to postpetition appreciation. The court also held, following California law, that the amount of the homestead exemption must be determined as of the date of the sale by the trustee. Therefore, the debtor was entitled to the full amount of the $45,000 homestead exemption and the trustee was entitled to the balance.

In re Graziadei, 32 F.3d 1408 (9th Cir. 1994)

No bankruptcy jurisdiction over homestead property because "an action relating to homestead property could not conceivably have any effect" on the estate because the property is exempt from the estate.

In re Glass, 164 B.R. 759 (9th Cir. B.A.P. 1994), *aff'd*, 60 F.3d 565 (9th Cir. 1995)

522(g) - trustee "recovers" transfer even though he didn't file an avoidance action.

In re Pikush, 157 B.R. 155 (9th Cir. B.A.P. 1993), *aff'd*. 27 F.3d 386 (9th Cir. 1994)

Single premium annuity is not exempt as life insurance under § 704.100(c).

In re Catli, 999 F.2d 1405 (9th Cir. 1993)

Pederson overruled by *Farrey.*

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)

If trustee fails to object to exemption claim, it must be allowed.

In re Bronner, 135 B.R. 645 (9th Cir. B.A.P. 1992)

Failure to object to lawsuit did not revest lawsuit settlement proceeds in debtors.

In re Breen, 123 B.R. 357 (9th Cir. B.A.P. 1991)

Pickup truck was exempt tool of trade - lien avoided under § 522(f)(2).

In re Herman, 120 B.R. 127 (9th Cir. B.A.P. 1990)

Exemption determined as of date of petition.

In re Moffatt, 119 B.R. 201 (9th Cir. B.A.P. 1990), *aff'd.* 959 F.2d 740 (9th Cir. 1992)

Single premium immediate annuity not exempt (1) because it matured (2) not necessary for support of debtor and spouse (debtor orthodontist).

In re Homan, 112 B.R. 356 (9th Cir. B.A.P. 1989)

Nondebtor spouse could not claim state exemption under debtor/spouse's list of federal exemptions.

In re Kincaid, 917 F.2d 1162 (9th Cir. 1990)

Reversing a decision of the B.A.P. upholding a ruling of the bankruptcy court, the court of appeals held that the funds held by the administrator of an ERISA deferred salary plan could not be turned over to the trustee of an employee's bankruptcy estate.

In re Baldwin, 70 B.R. 612, 613 (9th Cir. B.A.P. 1987)

In re McNutt, 87 B.R. 84 (9th Cir. B.A.P. 1988)

Pick-up truck may be a tool of the trade; exemption may be combined with wild card - §522 (f)(2) applies.

In re Andermahr, 30 B.R. 532, 533 (9th Cir. B.A.P. 1983)

"An exemption should be allowed no matter when it is claimed absent a showing of bad faith by the debtor or prejudice to creditors."

'Simple delay in filing an amendment where, as here, the case is not closed does not alone prejudice creditors. Nor does prejudice to creditors occur merely because a claimed exemption, if held timely, would be granted." Id at 534, quoting *Matter of Doan*, 672 F.2d 831, 833 (11th Cir. 1982).

"A debtor does not need court permission to amend any of his schedules so long as the case is still open. Bankruptcy Rule 110. By its terms, the rule permits amendments 'as a matter of course'. Bankruptcy rule 110 is not inconsistent with the code and therefore governs practice under the code", Id. at 534.

In re Diener, 483 B.R. 196 (9th Cir. B.A.P. 2012)

Analysis of whether debtor could exempt, under California law, a lump sum payment of a Met Life account provided for in a marital settlement agreement as "spousal support" must be determined under California law, not federal bankruptcy law. B.A.P. applied basic California contract law to determine that there was no ambiguity in the MSA and that the payment was not spousal support.

In re Dunnaway, 466 B.R. 515 (Bankr. E.D.Cal. 2012)

Firearms, of reasonable value, when used for hunting, recreation, or protection was

exemptible household property under California law. Items that are reasonably necessary to a debtor's survival does not mean that they are indispensable.

In re Gutierrez, 2014 Bankr. LEXIS 427 (Bankr. E.D.Cal. 2014)

Amendments to exemptions may be disallowed if the debtors acted in bad faith or prejudice will result.

### 2. Homestead

In re Uriostegui, __B.R.__ (9th Cir. B.A.P. 2025)

For purposes of section 522(q)(1)(B)(ii), fraud must be in a fiduciary capacity, which requires an express or technical trust imposed before the wrongdoing that created the debt.

In re Masingale, __Fed.4th__(9th Cir. 2024)

9th Circuit carefully distinguishes Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) and holds, in the very specific circumstances of this case, that the fact that the debtors asserted a facially improper homestead exemption while they were in Chapter 11 (which, according to the 9th Circuit, means that the debtors owed a fiduciary relationship to their creditors) did not mean that the creditors' failure to object to the exemption during the Chapter 11 waived the Chapter 7 trustee's right to retain the sales proceeds above the exemption amount when he sold the property during the Chapter 7. This case may have limited precedential value give the change in the official form for Schedule C.

Mckee v. Anderson, 90 F.4th 1244 (9th Cir. 2024)

Good analysis of when a debtor may claim California's automatic homestead exemption when debtor is not residing in the property when the bankruptcy is filed.

In re Jaswinder Singh Bhangoo, 634 B.R. 80 (9th Cir. B.A.P. 2021)

Under California law, a person claiming the automatic homestead exemption who is not continuously residing in the property after the lien is recorded and at the time of the bankruptcy filing but asserts that his absence was "temporary" must demonstrate that they had a continuous intent to return to the homestead property throughout the absence. The case provides a good analysis of the automatic homestead exemption.

In re Anderson, 988 F.3d 1211 (9th Cir. 2021)

Court overruled 7 trustee objection to debtor's Washington homestead exemption. Exemption based on debtor's failure to continuously reside in the residence for six months after petition date. Court upheld the "snapshot rule," whereby exemption determined on the petition date. What's the impact on In Re Jacobsen, 676 F.3d 1193 (9th Cir. 2012)? See Jacobsen summary on page 220.

In re Nolan, 2021 U.S.Dist. LEXIS 27611 (C.D.Ca. 2021)

A Debtor may assert an automatic homestead in a residence that is titled as an irrevocable trust. Compare to In re Schaefers, 623 B.R. 777 (9th Cir. B.A.P. 2020).

In re Schaefers, 623 B.R. 777 (9th Cir. B.A.P. 2020)

Debtor may not assert a homestead in a residence owned by his LLC that was found to be his alter ego. Alter ego finding was based on his inequitable conduct; such conduct should not be used to establish an "equitable" interest in a home. Moreover, an interest in an LLC is a personal property interest.

In re Gilman, 2018 U.S.App.LEXIS 9245 (9th Cir. 2018)

Ownership of home is not necessary for homestead eligibility, as even a possessory interest may qualify. But also need an intent to continue to reside in the premises to qualify for a homestead.

In re Pass, 553 B.R. 749 (9th Cir. B.A.P. 2016)

Marital status is not necessarily fixed at the petition date for purposes of determining homestead exemption.

In re Weilert, 2016 Bankr. LEXIS 2538 (9th Cir. B.A.P. 2016)

Debtor who is beneficiary and trustee of a self-settled, revocable trust may assert a homestead exemption in residence and avoid a judicial lien under § 522(f).

In re Diaz, 547 B.R. 329 (BAP 9th Cir. 2016)- **BURDEN OF PROOF CASE**.

Debtor need not physically reside in the property on the petition date to assert a homestead exemption. Notwithstanding Rule 4003(c), where state exemption statute specifically allocates the burden of proof to the debtor, debtor has burden of proof to establish the exemption.

In re Elliott, 544 B.R. 421 (BAP 9th Cir. 2016)

Debtor may not assert a homestead exemption in property that he "concealed" on the petition date and that was "recovered" by the Chapter 7 trustee, under § 522(g)(1).

In re Greene, 583 F.3d 614 (9th Cir. 2009)

Debtor who owned vacant land for some 10 years prior to filing bankruptcy but then began residing in a tent just prior to filing and recorded a declared homestead was not subject to the $125,000 cap in § 522(p)(1). The statute is addressed to the acquisition of the property within 1215 days of bankruptcy, not the acquisition of the homestead exemption.

In re Cerchione, 414 B.R. 540 (9th Cir. B.A.P. 2009)

Debtors was entitled to a homestead exemption under Idaho law, even though the house wasn't completed, had not been occupied, and no homestead declaration was filed. They clearly intended to occupy the property as of the date of the bankruptcy petition, and did occupy it thereafter. The $100,000 from the sale of their residence which was paid to purchase the new residence was also covered by the exemption statute.

In re White, 389 B.R. 693 (9th Cir. B.A.P. 2008)

Arizona's 18-month temporary homestead for sale proceeds does not permit use of identifiable proceeds for purposes inconsistent with the statute (here, debtor invested the money in the stock market rather than a new homestead). Debtor, not trustee, bore risk of loss of such

proceeds, and the trustee could bring a turnover action at the end of the 18-month limit without objecting to the debtor's exemption claim.

In re Rabin, 359 B.R. 242 (9th Cir. B.A.P. 2007)

Debtors who were registered domestic partners California law were limited to a single homestead exemption in residential property in which they each held a one-half interest, when they each filed a separate chapter 7 petition.

In re Kelley, 300 B.R. 11 (9th Cir. B.A.P. 2003)

Homestead exemption properly denied, where debtor abandoned his otherwise valid declared homestead by renting out the property and living in rented premises for an extended period of time.

In re Farr, 278 B.R. 171 (9th Cir. B.A.P. 2002)

Under § 522(c), debtor was only entitled to his $100,000 homestead exemption, not to the entire value of the residence. Lien arising from nondischargeability judgment attached to nonexempt portion of homestead.

In re Viet Vu, 245 B.R. 644 (9th Cir. B.A.P. 2000)

Bankruptcy debtors not entitled to postpetition appreciation in value of residential property belonging to estate regardless of whether they had any equity when petition was filed.

In re Arrol, 170 F.3d 934 (9th Cir. 1999)

Debtor who lived in CA then moved back to home in Mich., then properly filed bankruptcy in CA, could claim $75,000 homestead on Mich. residence.

In re Cataldo, 224 B.R. 426 (9th Cir. B.A.P. 1998)

Under Hawaii law, tenancy by entireties fully exempt. No fraudulent pre-bankruptcy planning found.

In re Steward, 227 B.R. 895 (9th Cir. B.A.P. 1998)

Bankruptcy court properly determined that state-law homestead exemption applied in administratively consolidated bankruptcy cases where only one of two spouses chose federal exemption, i.e. 703.140 (husband) v. 704.730 (wife).

In re Michael, 163 F.3d 526 (9th Cir. 1998)

The court of appeals affirmed a judgment of the B.A.P. The court held that a bankruptcy debtor may amend the petition's schedules to add an exemption based on a post-petition homestead declaration.

Amiri v. Collection Bureau (In re Amiri), 184 B.R. 60 (9th Cir. B.A.P. 1995), contra, *In re Wilson*, 175 B.R. 735 (N.D. Cal. 1994), ***reversed*** 90 F.3d 347 (9th Cir. 1996)

A judicial lien does not impair a debtor's automatic homestead exemption for purposes of bankruptcy code §522(f)(1) (in effect for cases filed prior to 10/22/94) when there is little or no equity in the property.

In re Alsberg, 68 F.3d 312 (9th Cir. 1995), *cert. denied*, 517 U.S. 1168 (1996)

Debtor's right to exemption amount arises when house is sold; the estate retains the interest in the house until that time.

In re Jones, 180 B.R. 575 (9th Cir. B.A.P. 1995), ***reversed*** 106 F.3d 923 (9th Cir. 1997)

Cal law requires that debtor's surplus equity in homestead be determined as of date of filing of bankruptcy petition.

In re Hall, 1 F.3d 853 (9th Cir. 1993), ***superseded*****,** 42 F.3d 1399 (9th Cir. 1994)

Debtor claimed homestead exemption in chapter 11 under federal exemption statute claiming "all value in their homestead", (at the time 16,539). Case converted to Chapter 7, debtor amended exemption to claim under Washington statute. Amount of equity at the time: 95,000. Held: Chapter 11 claim of exemption took property out of estate - entire 95,00 goes to debtor.

In re Hyman, 123 B.R. 342 (9th Cir. B.A.P. 1991), *aff'd*. 967 F.2d 1316 (9th Cir. 1992)

1.) No presumption as to costs of sale being calculated into amount of equity for trustee
2.) Homestead attaches to equity rather than a physical asset
3.) Postpetition appreciation accrues to estate

Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242 (1992)

Applicable nonbankruptcy law includes ERISA's nonalienation provisions.

In re Reed, 940 F.2d 1317 (9th Cir. 1991)

Homestead attaches to sum of money - is not an interest in the property.
Joint tenancy v. Community property distinguished. Postpetition appreciation accrues to estate.

In re Gitts, 116 B.R. 174 (9th Cir. B.A.P. 1990) *aff'd.* 927 F.2d 1109 (9th Cir. 1991)

Post-petition filed homestead exemption enforceable against trustee's objection.

In re McFall, 112 B.R. 336 (9th Cir. B.A.P. 1990)

Homestead exemption not apportioned between spouses when one is bankruptcy debtor.

In re Cole, 93 B.R. 707 (9th Cir. B.A.P. 1988)

Homestead exemption - sale of house is legitimate Chapter 11 = forced sale.

In re Jacobsen, 676 F.3d 1193 (9th Cir. 2012)

Chapter 7 debtor lost exemption in proceeds of post-petition sale of homestead under CCP § 704.720(b) if proceeds not reinvested in new homestead within 6 months. Compare with In re Anderson, 988 F.3d 1211 (9th Cir. 2021), where court refused to extend Jacobsen to a Washington exemption.

Law v. Siegel, 134 S.Ct. 1188 (U.S. Supreme Court, 2014)

Bankruptcy Code does not authorize a Chapter 7 trustee to surcharge a California homestead exemption.

**3. Lien Avoidance--see under this topic heading, infra.**

**4. Retirement Accounts, Life Insurance and Annuities**

In re Hamlin, 465 B.R. 863 (B.A.P. 9th Cir. 2012)

Under Bankruptcy Code § 522(d), an inherited IRA may be claimed exempt.

In re Rucker, 570 F.3d 1155 (9th Cir. 2009)

Based on the totality of the circumstances, debtor's private retirement plan established under CCP § 704.115(b) was not designed and used primarily for retirement purposes, but rather was primarily designed and used to shield his assets from a large judgment creditor, even though the debtor never made large withdrawals from the plan.

In re Simpson, 557 F.3d 1010,1015 (9th Cir. 2009)

Under CCP § 704.100, "we conclude that the section applies categorically only to life insurance and that annuities are not included within the statute's reach." Single premium deferred annuity also didn't qualify as a private retirement plan under CCP 704.115, since it was not established or maintained by an employer.

Rousey v. Jacoway, 544 U.S.320, 125 S.Ct. 1561 (2005)

IRAs are exempt under 11 U.S.C. § 522(10)(E) of the federal exemptions.

In re Payne, 323 B.R. 723 (9th Cir. B.A.P. 2005)

"An annuity may be exempt life insurance under California law if it primarily contains attributes of life insurance. That determination is a factual one, to be made on a case-by-case basis." Factors include "whether the primary purpose of the annuity was for investment or life insurance."

In re Stern, 317 F.3d 1111 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1657 (2004)

Under Cal.Civ. Pro. Code §704.115(a), funds transferred from an IRA into a non-ERISA qualified pension plan after an adverse judgment was entered and immediately before filing for bankruptcy is insufficient as a matter of law to constitute a fraudulent transfer. The private retirement plan was ruled exempt.

In re Dudley, 249 F.3d 1170 (9th Cir. 2001)

An IRA may qualify for the exemption under § 704.115(a)(3) if the IRA was designed and used principally for retirement purposes, as opposed to only for retirement purposes.

In re Lieberman, 245 F.3d 1090 (9th Cir. 2001)

California's private retirement plan statute (Cal. Civ. Pro. Code § 704.115(a)) does not exempt an arrangement by an individual to use specified assets for retirement purposes.

In re Kim, 257 B.R. 680 (9th Cir. B.A.P. 2000), *aff'd*, 35 Fed.Appx. 592 (9th Cir. 2002)

Retirement funds in a retirement plan on the date of filing were exempt, even though they were transferred to an IRA the day after the petition was filed. Exemption rights are determined as

of the date of the filing of the petition.

In re Jacoway, 255 B.R. 234 (9th Cir. B.A.P. 2000), *aff'd,* 284 F.3d 1323 (9th Cir. 2002)

IRA was exempt even though debtor took monthly partial surrender payments prior to retirement, where the IRA was used principally for retirement purposes.

In re McKown, 203 F.3d 1188 (9th Cir. 2000)

California debtor's IRA was exempt from the bankruptcy estate under bankruptcy California exemption scheme (Cal Civ. P. § 703.140(a))**.**

In re Watson, 161 F.3d 593 (9th Cir. 1998)

The court of appeals affirmed a judgment of the B.A.P. The court held that ERISA does not exclude from the bankruptcy estate the profit-sharing plan of a corporation when the debtor is the sole shareholder and participant.

In re Metz, 225 B.R. 173 (9th Cir. B.A.P. 1998)

Company retirement plan became ERISA-qualified for exemption when sole owner-employee became joint owner with ex-spouse.

In re Friedman, 220 B.R. 670 (9th Cir. B.A.P. 1998)

Bankruptcy debtor could not claim state law exemption for pension plan funds borrowed from debtor's own company to pay household debts.

In re Moses, 215 B.R. 27 (9th Cir. B.A.P. 1997), *aff'd*, 167 F.3d 470 (9th Cir. 1999)

Debtor entitled to exemption for Keough plan set up by employer which contained enforceable anti-alienation provision.

In re Spenler, 212 B.R. 625 (9th Cir. B.A.P. 1997)

Income from IRAs not necessary for healthy 55 year old physician's support upon retirement.

In re Rawlinson, 209 B.R. 501 (9th Cir. B.A.P. 1997)

IRA exempt under Fed exemptions**.**

In re MacIntyre**,** 74 F.3d 186 (9th Cir. 1996)

Cal legislature exempted 'private retirement accounts' from a debtor's bankruptcy estate, and defined 'private retirement accounts' as (1) private retirement plans, (2) profit-sharing plans designed and used for retirement purposes, and (3) self-employed retirement plans and IRAS....(a)(3) is conditions "to the extent necessary" to provide for the retirement of the debtor and his dependents.

403(b) annuities are neither self-employed retirement plans nor IRAS thus not subject to 704.115(e) 'extent necessary' condition and are 704.115(1)(1) and thus fully exempt under 704.115(b).

In re Conner, 165 B.R. 901 (9th Cir. B.A.P. 1996), *aff'd.* 73 F.3d 258 (9th Cir. 1996), *cert. denied*,

519 U.S. 817 (1996)

Debtor's interest in ERISA plan exempt from bankruptcy estate regardless of debtor's control of assets in plan**.**

In re Turner, 186 B.R. 108 (9th Cir. B.A.P. 1995)

Annuity which has life insurance characteristics may be exempt under CCP 704.100(a) (*Pikush* distinguished).

In re Reed, 951 F.2d 1046 (9th Cir. 1991), *op* ***withdrawn*** *and superseded*, 985 F.2d 1026 (9th Cir. 1993)

Again interpreting Arizona law, court finds that debtor's control over trust makes it not a spendthrift trust and not exempt property under state statute, which is preempted under ERISA.

Pitrat v. Garlikov, 947 F.2d 419 (9th Cir. 1991), *superseded* 992 F.2d 224 (9th Cir. 1993)

1. Court refuses to follow *Lucas* adhered to *Daniel* in holding that ERISA is not applicable to nonbankruptcy law

2. Remands to determine if plan is spendthrift trust under state law (AZ)

3. ERISA's exemption is not an exemption under federal law for purposes of the federal exemption.

In re Cheng, 943 F.2d 1114 (9th Cir. 1991)

A corporate retirement plan under Cal. CCP § 704.115(a)(1) or (2) is not subject to the "extent necessary to provide for the support" language of §704.115(e) as are self-employed plans.

**5. Standing and Burden of Proof**

In re Noblit, 166 B.R. 906 (D. Az. 1994) *aff'd*. 72 F.3d 757 (9th Cir. 1995)

Creditor lacks standing to assert exempt status of preferentially transferred property as a defense against avoidance.

In re Alderman, 195 B.R. 106 (9th Cir. B.A.P. 1996)

Court's recognition of Ch 13 debtor's maximum homestead exemption does not bar recharacterization when debtors convert to Ch 7, i.e., value of homestead exemption not barred by Rule 4003.

In re Diaz, 547 B.R. 329 (9th Cir. B.A.P. 2016)

Notwithstanding B.R. 4003(c), party objecting to a claimed exemption has burden of proof where California law is the applicable law and provides that objecting party has the burden.

**6. Exemption planning**

In re Beverly, 374 B.R. 221 (9th Cir. B.A.P. 2007)

Debtor who, by way of a marital settlement agreement, exchanged his right to proceeds from the sale of the marital residence for wife's interest in an exempt ERISA-qualified pension plan made a transfer with intent to hinder, delay or defraud under both California's UFTA and §

727(a)(2). The combination of the size of the transfer and the fact that it left the debtor with no assets with which to pay the debtor put this case outside the realm of legitimate pre-bankruptcy planning.

In re Stern, 345 F.3d 1036 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1671 (2004)

Transfer of IRA assets into a non-qualified ERISA pension plan was not fraudulent.

**EXTENSION OF TIME (§ 108)**

In re 456 S. Western Ave., LLC, _B.R._ (9th Cir. B.A.P. 2021)

To preserve the enforceability of a timely recorded mechanic's lien under California law, the contractor must commence an action to foreclose the lien within 90 days of recordation. Section 108 does not extend the deadline to commence that litigation. Instead, creditors must rely on section 546(b) and give timely notice under that code section.

In re Swintek, 543 B.R.303 (BAP 9th Cir. 2015)

Section 108(c) may extend the duration of an ORAP lien.

**FOREIGN JUDGMENTS**

In re Hashim, 213 F.3d 1169 (9th Cir. 2000)

Bankruptcy court erred in denying comity to British court's unliquidated award of court costs and attorney fees.

**FORECLOSURE**

In re Garcia, __B.R.__ (0th Cir. B.A.P. 2026)

Provides a good explanation of procedures under Civil Code § 2924(m), and analyzes how to determine whether a foreclosure sale is "deemed final" under Civil Code § 2924(m)(c)(1). It notes that a trustee of a trust may qualify as an individual (i.e, natural person) prospective owner-occupant.

In re Reed, __B.R.__ (9th Cir. B.A.P. 2022)

Good explanation of California's judicial and nonjudicial sale process, and that obtaining a judgment in a judicial foreclosure action does not violate the one action rule.

In re Affordable Housing Development Corp., 175 B.R. 324 (9th Cir. B.A.P. 1994)

Bankruptcy court errs in concluding bankruptcy law requires creditor to exercise its power of sale in "commercially reasonable manner"

In re Madigan, 122 B.R. 103 (9th Cir. B.A.P. 1991)

Entry of default on a debt did not trigger single action rule.

In re Sandri, 501 B.R. 369 (Bankr. N.D.Cal. 2013)

Chapter 13 debtor did not have standing to state a claim for wrongful foreclosure based on the alleged improper securitization of his note and deed of trust. Bankruptcy Court disagreed with recent California state court decision, Glaski v. Bank of America, 2013 WL 4037310, which it believed was inconsistent with California precedent.

In re Takowsky, 2013 WL 5229748 (Bankr. C.D.Cal. 2013)

Bankruptcy Court discusses what damages are available for wrongful foreclosure claims

Zadrony v. Bank of New York, 720 F.3d (9th Cir. 2013).

Dismissal of claim of complaint under 12(b)(6) against MERS and Bank of New York

alleging that MERS lacked authority to serve as nominee of the beneficiary, that note and deed of trust were improperly assigned to Bank of New York, and that the parties had fraudulently misrepresented their ability to foreclose.

Coker v. JPMorgan Chase Bank, N.A., 62 Cal.4th 667 (2016)

Cal.Civ.Pr. Code § 580(b) - the anti-deficiency statute - applies to short sales.

Yvanova v. New Century Mortgage Corp., 62 Cal4th 919 (2016)

Wrongful foreclosure plaintiff can challenge a void, but not voidable assignment of note and deed of trust.

**FRAUD - CALIFORNIA LAW**

Atari Corp. v. Ernst & Whinney, 970 F.2d 641 (9th Cir. 1992), *amended and superseded on rehearing*, 981 F.2d 1025 (9th Cir. 1992)

Justifiable reliance requirement.

In re Jogert, Inc, 950 F.2d 1498 (9th Cir. 1991) - elements under Cal. Law

1) misrepresentation

2) knowledge of falsity of misrepresentation

3) intent to induce reliance

4) justifiable reliance

5) damages.

See also *Stewart v. Ragland*, (9th Cir. 1991) and *Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282 (9th Cir. 1988) - cannot claim reliance "when the plaintiff could have, through the exercise of reasonable diligence ascertained the truth of the matter."

In re Mediscan Research Ltd., 940 F.2d 558 (9th Cir. 1991)

Intentional concealment v. affirmative misrepresentation.

In re Northern Ca. Homes & Gardens, Inc., 92 B.R. 410 (9th Cir. B.A.P. 1988)

Elements of fraud - waiver - representation of opinion generally not actionable**.**

**FRAUDULENT TRANSFER**

In re Momentum Development, LLC, __.B.R.__ (9th Cir. B.A.P. 2023)

Under California law, the statute of limitations on a fraudulent transfer begins on the transfer date or on the date a judgment is entered against the debtor. See also analysis of California's statute of repose (Cal.Civ.Code section 3439.09( c)) which does not bar a fraudulent transactions so long as the transfer occurred less than 7 years before the bankruptcy petition filing.

In re Patow, 632 B.R. 195 (9th Cir. B.A.P. 2021)

Waiver of a beneficial interest under a trust before acceptable of that interest is a valid disclaimer and not a voidable transfer under California UFTA. Good analysis of what constitutes a "disclaimer" and when an interest is "accepted," which may result in a voidable transfer.

In re Medina, 619 B.R.236 (9th Cir. B.A.P. 2020)

Actual damages under California's Uniform Voidable Transactions Act is not an element of the cause of action.

In re CVAH, Inc., 570 B.R. 816 (Bankr.Id 2017)

Chapter 7 trustee may rely on statute of limitations available to any creditor holding an unsecured claim under § 544(b)(1), including the longer statutes available to the IRS under the Internal Revenue Code and the Federal Debt Collection Procedures Act.

In re Tracht Gut, LLC, 836 F.3d 1146 (9th Cir. 2016)

Regularly conducted tax default sales are not fraudulent transfers.

In re Ezra, 537 B.R. 924 (BAP 9th Cir. 2015)

One year period under Cal.Civ.Code § 3439.09(a)'s discovery rule does not commence until the plaintiff has reason to discover the fraudulent nature of the transfer.

In re JTS Corp., 617 F.3d 1102 (9th Cir. 2010)

Bankruptcy court properly found under 11 U.S.C. § 544(b) and Cal. Civ. Code § 3439.04 that transfer of property to the debtor's chairman, who paid only $10 million, was constructively fraudulent, based upon a reasonably equivalent value calculated at over $11.8 million (starting from a full fair market value of $15,760,000. The defendant, however, was entitled to a reduction in the amount of liability as a good faith transferee under § 3439.09(d), and should be credited both with the $10 million purchase price as well as the value of an option to repurchase he granted the debtor. He was also entitled to a credit for the settlement amounts paid by joint tortfeasors pursuant to Cal. Civil Code § 877. Ultimately, the defendant was found to owe nothing to the trustee for the conveyance.

In re Bledsoe, 569 F.3d 1106, 1112 (9th Cir. 2009)

". . .[W]e hold that a state court's dissolution judgment, following a regularly conducted contested proceeding, conclusively establishes "reasonably equivalent value" for the purpose of § 548, in the absence of actual fraud." This is true even though the dissolution judgment here was by default.

In re Slatkin, 525 F.3d 805 (9th Cir. 2008)

1) Plea agreement of debtor is admissible to demonstrate that debtor operated a Ponzi scheme with an intent to defraud, and that agreement conclusively established intent to defraud as to transfer of purported profits to investor defendants;

2) Debtor was not a stockbroker for purposes of § 546(e).

In re AFI Holding, Inc., 525 F.3d 700 (9th Cir. 2008)

Under California Civil Code § 3439.04, the good faith exception to actually fraudulent transfers is not barred as a matter of law because the right to rescission and restitution were "reasonably equivalent value" under In re United Energy Corp., 944 F.2d 589 (9th Cir. 1991).

In re First Alliance Mortg. Co., 471 F.3d 977, 1001 (9th Cir. 2006)

"The proper measure of damages in fraud actions under California law. . . is "out-of-pocket" damages. These are based on what was paid due to the fraud, as compared to what would have been paid absent the fraud."

In re Costas**,** 346 B.R. 198 (9th Cir. B.A.P. 2006)*, aff'd,* 555 F.3d 790 (9th Cir. 2009)

". . .[U]nder [Arizona] state law, a debtor's prepetition effective disclaimer of an inheritance is not avoidable as a fraudulent transfer under section 548." *In re Bright*, 241 B.R. 664 (9th Cir. B.A.P. 1999) is still good law.

In re Northern Merchandise, Inc., 371 F.3d 1056 (9th Cir. 2004)

No fraudulent transfer found, where loan was to shareholders, but proceeds went to the debtor and the loan was secured by the debtor's assets. Bank acted in good faith under § 549(c), since there was no evidence of fraud in structuring the transaction in this fashion.

Decker v. Advantage Fund Ltd., 362 F.3d 593 (9th Cir. 2004)

Unissued stock was not an interest in property of the debtor corporation for purposes of the fraudulent transfer claim.

In re Stern, 317 F.3d 1111 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1671 (2004)

Under Cal.Civ. Pro. Code § 704.115(a), funds transferred from an IRA into a non-ERISA qualified pension plan after an adverse judgment was entered and immediately before filing for bankruptcy is insufficient as a matter of law to constitute a fraudulent transfer. The private retirement plan was ruled exempt.

In re Roosevelt, 220 F.3d 1032 (9th Cir. 2000)

A wife who exchanges her interest in her husband's legal education for property conveyed to her by a bankruptcy debtor does not give property of value when the education was neither paid

for with community funds nor increased her husband's earning capacity during the marriage.

In re Bright, 241 B.R. 664 (9th Cir. B.A.P. 1999)

Washington state debtor's disclaimer of inheritance not "transfer" of property for purposes of federal bankruptcy law.

In re Heddings Lumber & Building Supply, Inc., 228 B.R. 727 (9th Cir. B.A.P. 1998)

Trustee claiming fraudulent and post-petition property transfer was required to prove that debtor had an interest in the transferred property.

In re Trujillo, 215 B.R. 200 (9th Cir. B.A.P. 1997), *aff'd*, 166 F.3d 1218 (9th Cir. 1998)

Debtors' transfer of property for no consideration was fraudulent conveyance. Transfer to relative "is trust."

In re Cohen, 199 B.R. 709 (9th Cir. B.A.P. 1996)

Car dealers who acted in good faith not liable for unknowing involvement in Ponzi scheme. ...although some of the transfers are avoidable under Bankruptcy Code §548, the dealers qualify for the safe harbor demarked by good faith and value given to the debtor and are entitled to retain the money they received.

In re Lindsay, 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)

Gross inadequacy of price is a ground only if state law so states.

Under *BFP*, Beneficial was entitled to judgment as a matter of law that the foreclosure sale was not a fraudulent conveyance, so long as "all the requirement statute of frauds the State's foreclosure law have been complied with." *BFP,* 114 S.Ct., at 1757. It could be set aside only if there were "irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law." *Id.*, Even if there were such an irregularity, that alone would not permit setting aside the foreclosure sale as a fraudulent conveyance. It would only destroy the

irrebuttability of the presumption that the price was "reasonably equivalent value." The transfer could then be avoided if the price received was not reasonably equivalent to "the price that would have been received if the foreclosure sale had proceed according to law."

In re Roosevelt, 176 B.R. 200 (9th Cir. B.A.P. 1994)

Property transferred by husband to wife (cp medical practice and law school education) not valued from creditor's viewpoint.

BFP v. RTC, 511 U.S. 531, 114 S.Ct. 1757 (1994) - equivalent value under se 548(a)(2)

In a real property foreclosure sale, 'reasonably equivalent value' as used in §548(a)(2), is conclusively deemed to mean the price in fact received at the foreclosure sale, if there is full compliance with the requirements of the state foreclosure laws. The proper std is not 'fair market value' which is defined in Black's Law Dictionary (and by most MAI appraisals) as the price obtained after ample negotiation between a willing buyer and a willing seller. The 548(a)(2) inquiry must consider the distress and state law time constraints of a foreclosure sale that affect price.). The Court declines to impose, as federal bankruptcy policy, "reasonable" foreclosure sale practices or procedures, which may vary from state to state. Congress is not presumed, by the phrase "reasonably equivalent value" either to upset 400 years of peaceful coexistence of fraudulent transfer law and foreclosure law, or to undermine the essential state interest in the security and stability of title to real estate.

In re Fair Oaks, Ltd., 168 B.R. 397 (9th Cir. B.A.P. 1994)

Creditor who receives a lien on real property on account of an antecedent debt of a third party does not hold the status of a bona fide encumbrancer for value under Ca law.

In re Prejean, 994 F.2d 706 (9th Cir. 1993)

1) Reasonably equivalent value must be analyzed from creditors' perspective;

2) Payment of a time-barred debt can constitute reasonably equivalent value under CFTA.

Stoumbos v. Kilimnik, 988 F.2d 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993)

Fraudulent transfer of business' goodwill by and to an insider.

In re VandeKamp's Dutch Bakeries, 908 F.2d 517 (9th Cir. 1990)

Transfers avoided under 548 are automatically preserved under 551.

In re United Energy Corp., 944 F.2d 589 (9th Cir. 1991)

Value given for payments in the form of release of restitution claims = reasonably eq value Ponzi scheme.

In re Agric. Research and Tech. Group, Inc, 916 F.2d 528, 531 (9th Cir. 1990)

A Ponzi scheme is "an arrangement whereby an enterprise makes payments to investors from the proceeds of a later investment rather than from profits of the underlying business venture." A "debtor's actual intent to hinder, delay or defraud may be inferred from the mere existence of a Ponzi scheme." *Id.* at 535.

Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988.)

Sale of debtor corp 2.5 yrs prior to filing of petition by means of lbo was not a fraudulent conveyance.

**FULL FAITH AND CREDIT**

Morgan Stanley Mortgage Capital Inc. v. Insurance Comm'r of State of California, 18 F.3d 790 (9th Cir. 1994)

No implied repeal of 1738 found.

Preclusive effect given to state court's decision that state insolvency court had jurisdiction over assets of entities affiliated with insolvent insurance company.

Section 1738 "commands a federal court to accept the [preclusion] rules chosen by the State from which the judgment is taken."....

**GUARANTORS**

In re SNTL Corp., 380 B.R. 204 (9th Cir. B.A.P. 2007), *aff'd,* 571 F.3d 826 (9th Cir. 2009).

A debtor's previously released liability as a guarantor of an affiliate's obligation is revived when the creditor compromised a preference action against it.

Star Phoenix Mining Company v. West Bank One, 147 F.3d 1145 (9th Cir. 1998)

Creditor that fails to preserve deficiency claim against debtor does not forfeit its right to collect remaining deficiency from guarantor

In re Alcock, 50 F.3d 1456 (9th Cir. 1995)

3-606: SBA's change of priority on real estate without notice discharged guarantor. No waiver of defense in loan documents.

Effectiveness of Guarantor Waivers.

1) Guaranty agreement was not enforceable after creditor non-judicially foreclosed on real estate collateral for the principal note. Citing *Cathay Bank v. Lee,* 14 Cal.App.4th 1533 (1993), the Court held that waiver of the "Gradsky" defense must inform the guarantor that the guarantor has rights of subrogation and reimbursement and that these rights will be destroyed by foreclosure. Despite express language in the guaranty (that lender may foreclose by nonjudicial sale, that such foreclosure would not affect the guarantor's liability, and that guarantor waives any defense based on loss of subrogation or reimbursement against borrower), this was held not to be an effective waiver. *Resolution Trust Corp. v. Titan Financial. Corp.*, 22 F.3d 923 (9th Cir. 1994)

2) Guaranty agreement held to be a sufficient waiver of the *Gradsky* defense where it stated that upon default the lender may elect to nonjudicially foreclose even if the effect is to deprive the guarantor of the right to collect reimbursement from the borrower. *In re Pon*, 164 B.R. 322 (Bankr. N.D. Cal. 1994) (Carlson, J.) (Decided before *Titan Financial. Corp.*)

3) The California legislature sought to put an end to this bickering over effective waivers. A waiver of a suretyship defense is effective whether or not it refers to statutory sections or judicial decisions. Moreover, the statute sets forth language which is deemed to be an effective waiver of the *Gradsky* defense based on the creditor's election of remedies. Cal. Civ. Code §2856 (effective 1/1/95).

In re Teerlink Ranch, Ltd., 886 F.2d 1233 (9th Cir. 1989)

Payment of a debt extinguishes guarantee.

**HESCA–CAL. CIVIL CODE § 1695 et seq.**

Hoffman v. Lloyd, 572 F.3d 999, 1001 (9th Cir. 2009)

"To effectuate its purpose, HESCA obligates a buyer of property that is in foreclosure to provide to the seller, among other things, notice of the seller's right to rescind the sale contract. . . .until a buyer complies with this obligation, the seller may cancel the sale contract." [Citations omitted]. A general release of all known and unknown claims under Cal. Civil Code § 1542 does not vanquish the buyers right to rescind the contract of sale under HESCA.

**IMMUNITY**

In re Harris, 590 F.3d 730 (9th Cir. 2009)

Bankruptcy court had "arising in" jurisdiction over an action against a chapter 7 trustee alleging breach of a postpetition settlement agreement, since the claim could not exist independently of a bankruptcy. Bankruptcy court erroneously dismissed this case under the *Barton* doctrine. The case was filed against the trustee without seeking permission of the appointing court, but was then removed to the appointing court. Thus, the Barton doctrine did not apply. Attorneys and trustee all had derived quasi judicial immunity**:** 1) they were acting within the scope of bankruptcy court authority; 2) plaintiff had notice of the claims they were making; 3) the notice set out the nature of their claims against the estate; and 4) the bankruptcy court approved these claims.

In re Cedar Funding, Inc., 419 B.R. 807, 823 (9th Cir. B.A.P. 2009)

Chapter 11 trustee had quasi-judicial immunity as to allegedly defamatory statements made in the course of performing his statutory duties, which were "inextricably intertwined with the court's functions in the chapter 11 process. . . ."

In re Castillo, 297 F.3d 940 (9th Cir. 2002)

Chapter 13 trustee had absolute quasi-judicial immunity for both scheduling and noticing a confirmation hearing.

In re Kashani, 190 B.R. 875 (9th Cir. B.A.P. 1995)

Trustee entitled to judicial immunity.

In re Jackson, 105 B.R. 542 (9th Cir. B.A.P. 1989)

Trustee entitled to judicial immunity.

**INJUNCTION (see also Preliminary Injunction)**

In re Excel Innovations, Inc., 502 F.3d 1086 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2080 (2008)

Distinguishing *Crown Vantage, infra,* the court held that "our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant."

In re Crown Vantage, Inc., 421 F.3d 963, 975 (9th Cir. 2005)

"The only requirement for the issuance of an injunction under § 105 is that the remedy conform to the objectives of the bankruptcy code." The standard for issuing a preliminary injunction does not apply to injunctions issued under § 105.

In re Manning, 236 B.R. 14 (9th Cir. B.A.P. 1999)

Bankruptcy court properly issued injunction barring state court action against creditor involved in foreign insolvency proceeding.

In re Pacific Land Sales, Inc., 187 B.R. 302 (9th Cir. B.A.P. 1995)

Bankruptcy Court has properly enjoined FCC and state court proceedings.

Amwest Mortgage Corp. v. Grady, 925 F.2d 1162 (9th Cir. 1991)

Permanent injunction of state court proceedings to protect res judicata effect of previous judgment - standard.

In re Lenox, 902 F.2d 737 (9th Cir. 1990)

§105 - Bankruptcy Court has the power sua sponte to reconsider any of its orders, and may even ignore stipulations upon showing that parties have not changed their position in reliance**.**

In re Reilly, 112 B.R. 1014 (9th Cir. B.A.P. 1990)

Orders enjoining debtors from filing documents - Protective injunctive order fails when debtors unable to defend against claims.

In re American Bicycle Association, 895 F.2d 1277 (9th Cir. 1990)

Anti-injunction Act precludes bankruptcy court from enjoining IRS from collecting responsible officer 100% penalty.

In re American Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989)

While Bankruptcy Court may issue preliminary injunction against collection efforts as to nondebtor corp. officers, court may not issue a permanent injunction.

In re Heincy, 858 F.2d 548 (9th Cir. 1988)

Bankruptcy Court has the power to enjoin state criminal proceedings...injunction issued is to restitution order did not comply with *Younger v. Harris*.

**INSURANCE**

Biltmore Associates v. Twin City Fire Ins. Co., 572 F.3d 663 (9th Cir. 2009)

The Ninth Circuit affirmed the dismissal of the case pursuant to Rule 12(b)(6). The court held that for purposes of the "insured versus insured" exclusion in the D & O policy, " the pre-filing company and the company as debtor-in-possession in chapter 11 are the same entity." Id. at 671.

Unified Western Grocers v. Twin City Fire, 457 F.3d 1106 (9th Cir. 2006)

Summary judgment dismissing a complaint for coverage under a D & O policy brought by a bankruptcy trustee was reversed. Although portions of the complaint fell within Cal. Ins. Code Section 533's exclusion for willful acts, the complaint also alleged negligence and breach of fiduciary duty which might be covered.

**INTELLECTUAL PROPERTY RIGHTS**

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

"...[A] security interest in a patent that does not involve a transfer of rights of ownership is a "mere license" and is not an assignment , grant or conveyance" within the meaning of 35 U.S.C. § 261. And because § 261 provides that only an "assignment, grant or conveyance shall be void" as against subsequent purchasers and mortgagees, only transfers of ownership interests need to be recorded with the PTO."

**INTEREST**

In re Beltway One Development Group, LLC, 547 B.R. 819 (9th Cir. B.A.P. 2016)

Oversecured creditor entitled to default interest rate during pendency of Chapter 11 case where plan did not "cure" the loan and no showing that rate was unenforceable under nonbankruptcy law, unreasonable or inequitable.

In re Weinberg, 410 B.R. 19, 37 (9th Cir. B.A.P. 2009)

"It is settled law that where a debt that is found to be nondischargeable arose under state law, "the award of prejudgment interest is also governed by state law." *In re Niles,* 106 F.3d 1456, 1463 (9th Cir. 1997)".

General Electric Cap. v. Future Media Productions, 547 F.3d 956 (9th Cir. 2008)

Where creditor's oversecured claim was paid in full out of the proceeds of an asset sale, rather than pursuant to a chapter 11 plan, and thus not subject to the "cure" provisions of § 1124 that a chapter 11 plan would allow, creditor was entitled to a default rate of interest. Court distinguishes the holding in *In re Entz-White Lumber and Supply, Inc.,* 850 F.2d 1338 (9th Cir. 1988), and disapproves of the holding in *In re Casa Blanca Project Lenders*, 196 B.R. 140 (9th Cir. B.A.P. 1996). *In re Entz-White* overruled in 2016 by *In re New Investments, Inc.*, 840 F.3d 1137 (9th Cir. 2016).

In re Slatkin, 525 F.3d 805, 820 (9th Cir. 2008)

". . .[W]hen a court has granted judgment on all substantive issues, the court has the authority to award prejudgment interest under [Cal. Civ. Code] § 3288."

Till v. SCS Credit Corp., 124 S.Ct. 1951 (2004)

Formula approach for setting interest rate based on prime rate adjusted for risk of nonpayment was appropriate cramdown rate of interest.

In re Cardelucci, 285 F.3d 1231 (9th Cir. 2002), *cert. denied*, 537 U.S. 1072 (2002)

Postpetition interest in a chapter 11 plan based on 11 U.S.C. § 726(a)(5) is to be calculated using the federal judgment interest rate under 28 U.S.C. § 1961 rather than the contract or state law rate.

In re Crystal Properties, Ltd., L.P., 268 F.3d 743 (9th Cir. 2001)

"Without notice or demand" provision in default interest clause of loan agreement did not alter requirement that holder of defaulted loan must carry out some affirmative act to exercise its option to accelerate the loan and invoke the default interest clause. Default interest rate did not come into effect until holder of the note first took affirmative action to put the debtor on notice that it intended to exercise its option to accelerate, and thus invoke the default rate.

In re Banks, 263 F.3d 862 (9th Cir. 2001)

"The federal prejudgment interest rate applies to actions brought under federal statute, such as bankruptcy proceedings, unless the equities of the case require a different rate."

In re Udhus, 218 B.R. 513 (9th Cir. B.A.P. 1998)

Bank not entitled to default rate of interest under either § 506(b) or § 1123.

In re Melenyzer, 143 B.R. 829 (Bankr. W.D Tex. 1992)

Interest under 726(a)(5) paid at federal judgment rate.

In re Camino Real Landscape Maintenance Contractors Inc., 818 F.2d 1503 (9th Cir. 1987)

Prevailing market rate applies re: discount rate for present value purposes.

In re Southeast Co., 868 F.2d 335 (9th Cir. 1989)

Interest in Ch. 11 - right to 506(b) interest.

In re New Investments, Inc., 840 F.3d 1137 (9th Cir. 1137)

Cure of default in Chapter 11 case requires default interest as applicable in underlying document, overruling In re Entz-White Lumber & Supply, Inc., 850 F.2d 1338 (9th Cir. 1988)

In re Nucorp Energy, Inc., 902 F.2d 729 (9th Cir. 1990)

1961 applies to pre-judgment interest.

In re Beverly Hills Bancorp, 752 F.2d 1334, 1339 (9th Cir. 1984)

No right to postpetition interest on claims.

**INVOLUNTARY PETITION**

In re King, __ B.R.__ (9th Cir. B.A.P. 2024)

Standing of a creditor who joins the petition under section 303( c) is measured as of the involuntary petition date. Fact that debt owed to joining creditor was satisfied post-petition does not prevent creditor from joining the petition. A creditor who is owed an unmatured debt may qualify as a joining creditor.

In re King, __B.R.__ (9th Cir. B.A.P. 2024)

Fully secured, nonrecourse creditors are countable creditors under section 303(b).

In re Bella Hospitality Group, LLC, 649 B.R. 200 (9th Cir. B.A.P. 2023)

Requirements of Bankruptcy Code section 303(b) are not subject matter jurisdictional, but rather substantive, and are waivable. Same is true regarding the procedural limitations in Bankruptcy Rule 1003(a).

In re QDOS, Inc., 607 B.R. 338 (Bankr. 9th Cir. 2019)

Denial of a motion to dismiss an involuntary (where putative debtor argues that there are an insufficient number of petitioning creditors) requires putative debtor to answer complaint and provide a list of creditors under Rule 1003(b). Case provides a good procedural roadmap for involuntaries.

In The Matter of 8Speed8, Inc., 921 F.3d 1193 (9th Cir. 2019)

Shareholder of corporation subject to a dismissed involuntary not entitled to damages under § 303(i) because it was not the debtor.

In re Southern California Sunbelt Developers, Inc., 608 F.3d 456 (9th Cir. 2010)

Bankruptcy court properly allowed attorney fees against petitioning creditors for the § 303

action as a whole, including fees incurred for litigating fee issues under § 303(i), since that section is a fee-shifting rather than a sanctions statute. The court also properly allowed pursuant to § 303(i) punitive damages, even in the absence of a finding of actual damages.

In re Maple-Whitworth, Inc., 556 F.3d 742 ( 9th Cir. 2009), *op. amended,* 559 F.3d 917 (9th Cir. 2009)

Even though the statute refers to "petitioners", there is no requirement that all petitioners be named in a § 303(i) motion for attorney fees. however, the B.A.P. erroneously applied the tort concept of joint and several liability to this provision, which was contrary to the individualized consideration that exercising discretion requires.

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Macke Intern. Trade, Inc., 370 B.R. 236 (9th Cir. B.A.P. 2007)

Bankruptcy court may award attorney fees to a debtor where case is dismissed pursuant to § 305(a), even if debtor meets all of the requirements for an involuntary under § 303. Case was properly dismissed under § 305, where debtor had done an assignment for the benefit of creditors six months before the involuntary was filed, and the petitioning creditor was the only creditor not to consent to the assignment.

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed from state court, since such actions were totally preempted by § 303(i).

Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701 (9th Cir. 2004)

Petitioning creditor has the burden of proof to rebut, under the totality of the circumstances, the presumption that the debtor should receive fees and costs where the involuntary petition is dismissed.

In re Focus Media, Inc., 378 F.3d 916 (9th Cir. 2004), *cert. denied,* 544 U.S. 968, 125 S.Ct. 1742 (2005)

1. Dollar amount threshold is satisfied if at least a portion of the claim is undisputed; 2. no evidence that affiliates transferred their claims in violation of Bankruptcy Rule 1003; 3. evidence supported finding that the debtor wasn't paying its debts as they came due.

In re Mike Hammer Productions, Inc., 294 B.R. 752 (9th Cir. B.A.P. 2003)

Non-petitioning creditors lack standing to seek damages under 11 U.S.C. § 303(i)(2). Only the debtor has standing to seek such damages.

In re Miles, 294 B.R. 756 (9th Cir. B.A.P. 2003), *aff'd,* 430 F.3d 1083 (9th Cir. 2005)

§ 302(i) preempts state tort remedies for bringing a wrongful involuntary petition.

In re Vortex Fishing Systems, Inc., 262 F.3d 985 (9th Cir. 2001), *amended and superseded*, 277 F.3d 1057 (9th Cir. 2002)

Proper test for determining whether alleged dispute justified involuntary bankruptcy petition was whether objective basis existed for either factual or legal dispute as to validity of debt.

In re Seko Investment, Inc., 156 F.3d 1005 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999)

"The existence of a counterclaim against a creditor does not automatically render the creditor's claim the subject of a 'bona fide dispute.' So long as the petitioning creditor has established that there is no dispute regarding the debtor's liability on the creditor's claim, the creditor has standing under §303(b)..." 156 F.3d at 1008.

In re Rothery, 143 F.3d 546 (9th Cir. 1998)

Bankruptcy court properly granted summary judgment in favor or the creditors on the issue of whether the debtor had only twelve creditors.

In re Quality Laser Works, 211 B.R. 936 (9th B.A.P. 1997), *aff'd*, 165 F.3d 37 (9th Cir. 1998)

Partnership's liquidating partner properly determined to be "custodian" for purposes of involuntary bankruptcy.

In re Federated Group, Inc., 107 F.3d 730 (9th Cir. 1997)

Joinder of indenture trustee to involuntary petition does not extinguish claims of debenture holders for purpose of "three petitioning creditors" retirement

**JURISDICTION - PERSONAL**

In re Etalco, 273 B.R. 211 (9th Cir. B.A.P. 2001)

Bankruptcy court in Washington state had no jurisdiction over out-of-state entity that entered into postpetition contract with Chapter 11 debtor. (Court seems to confuse venue with personal jurisdiction).

In re Tuli, 172 F.3d 707 (9th Cir. 1999)

Bankruptcy court must allow adversary plaintiff to establish "minimum contacts" with US when court sua sponte raised issue of personal jurisdiction over foreign government.

In re Pintlar, 205 B.R. 945 (Bankr.D. Idaho 1997)

New bankruptcy rule of personal jurisdiction over foreign residents applies to action pending on its effective date if it is "just and practicable".

In re PNP Holdings Corp., 184 B.R. 805 (9th Cir. B.A.P. 1995), *aff'd* 99 F.3d 910 (9th Cir. 1996)

Creditor consented to personal jurisdiction when it filed proof of claim. Rule may not apply if creditor contests personal jurisdiction prior to filing proof of claim**.**

**JURISDICTION – SUBJECT MATTER AND "STERN" CASES**

Talon Diversified Holdings, Inc. V. Forsythe, __F.4th__ (9th Cir. 2026)

Corporate authority to file for bankruptcy, while important and mandatory, is not jurisdictional.

In re Richards, __B.R.__ (9th Cir. B.A.P. 2023)

Party objecting to court's entry of final order on "non-core" matters must clearly object to entry, and if there is an undisputed assertion that claims are "core" this assertion constitutes consent.

In re Point Center Financial, Inc., 957 F.3d 990 (9th Cir. 2020)

Trustee's failure to assume the operating agreement by the bankruptcy court's deadline did not deprive the court of subject matter jurisdiction, and bankruptcy court authorized to extend deadline to assume/reject under Rule 9006. The operating agreement would remain part of the estate because rejection of an executory contract merely constitutes a breach. Good discussion of §1334 - which grants jurisdiction - and § 157 - which determines which court decides what.

Stern vs. Marshall, 121 S.Ct. 2594 (2011)

Bankruptcy Court, as an Article I court, lacked constitutional authority to enter a final judgment on tortious interference compulsory counterclaim against claimant, a core proceeding.

In re Bellingham Ins. Agency, Inc., 134 S.Ct. 2165, 189L.Ed.2d 83 (2014)

Bankruptcy Court may submit proposed findings of fact and conclusions of law to District Court even on "core claims" that fall within Stern v. Marshall holding. Supreme Court does not decide on whether parties may "consent" to a Bankruptcy Court entering a final judgment on "Stern" claims. Under present 9th Circuit caselaw, consent may give Bankruptcy Court ability to enter a final judgment. See underlying 9th Circuit Bellingham decision.

In re Deitz, 760 F.3d 1038 (9th Cir. 2014)

Bankruptcy Court has constitutional authority under Stern to enter final judgment in non-dischargeability adversary proceedings determining both the amount of damages and that the claims were excepted from discharge.

Wellness Int'l Network, Ltd v. Sharif, 2015 BL 164523,U.S., No. 13-935 (2015)

Bankruptcy Courts can decide claims they otherwise lack the constitutional authority to hear if the parties consent. Consent need not be express, but must be knowing and voluntary. See also In re Pringle, 495 B.R. 447 (9th Cir. B.A.P. 2013) for B.A.P. discussion on consent, which pre-dated Wellness.

In re EPD Investment Co., LLC, 821 F.3d 1146 (9th Cir. 2016)

Bankruptcy Court has discretion to deny enforcement of pre-petition arbitration agreement over fraudulent transfer claims. Applied standard in *In re Thorpe Insulation*, 671 F.3d 1011 (9th Cir. 2012).

In re Holcomb, 2018 Bankr.LEXIS 1256 (9th Cir. BAP 2018)

Bankruptcy Court lacked subject matter jurisdiction to decide Chapter 7 debtor's malpractice action against Chapter 7 attorney for post-petition work. BAP distinguished Schultz v. Chandler, 765 F.3d 945 (9th Cir. 2014), which determined that Bankruptcy Court had subject matter jurisdiction to resolve malpractice action against an appointed Chapter 11 professional.

In re Harris, 590 F.3d 730 (9th Cir. 2009)

Bankruptcy court had "arising in" jurisdiction over an action against a chapter 7 trustee alleging breach of a postpetition settlement agreement, since the claim could not exist independently of a bankruptcy. Bankruptcy court erroneously dismissed this case under the *Barton* doctrine. The case was filed against the trustee without seeking permission of the appointing court, but was then removed to the appointing court. Thus, the Barton doctrine did not apply.

In re Cedar Funding, Inc., 419 B.R. 807 (9th Cir. B.A.P. 2009)

Postpetition complaint against a chapter 11 trustee for defamation was a core proceeding, since it arose in the bankruptcy case, and the trustee's statements were made in furtherance of his statutory duties.

In re Healthcentral.Com, 504 F.3d 775 (9th Cir. 2007)

BLR 9015-2(b) improperly allowed the bankruptcy judge to certify that a proceeding was to be tried to a jury and thus the reference had to be withdrawn under 28 U.S.C. § 157(d). It thus ran afoul of the national rule, which requires that a party file a motion to withdraw and that the district court decide the motion. However, consistent with the Seventh Amendment, the bankruptcy judge may retain the proceeding until it is ready for trial.

Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007)

Debtors' inverse condemnation suit against the county fell within "related to" jurisdiction of the bankruptcy court, since the claims were property of the debtors' estates.

In re Valdez Fisheries Development Ass'n, Inc., 439 F.3d 545 (9th Cir. 2006)

Bankruptcy court did not have related to jurisdiction over a lawsuit between two creditors, where there was no confirmed plan and there was no claim that the dispute would have any effect upon the case, which was closed.

In re Rains, 428 F.3d 893 (9th Cir. 2005)

Bankruptcy court had jurisdiction to enforce a settlement agreement, even though the validity of the settlement was on appeal.

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed from state court, since such actions were totally preempted by § 303(i). Furthermore, siblings of debtors had no standing to bring an action under § 303(i).

In re Sasson, 424 F.3d 864 (9th Cir. 2005), *cert denied,* 547 U.S. 1206, 126 S.Ct. 2890 (2006)

A bankruptcy court has subject matter jurisdiction to enter a money judgment in a dischargeability proceeding, even though the underlying debt has been reduced to judgment in state court. The judgment was obtained in 1991, but the dischargeability action wasn't filed until debtor filed for bankruptcy in 2001. In finding that the debtor engaged in willful and malicious conduct in rendering the initial state court judgment uncollectible, the bankruptcy court renewed the 1991 judgment, and tacked on interest at the federal rate for the period from 1991.

In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir. 2005)

Tort and breach of contract action brought post confirmation by debtor and newly-formed corporation was within the bankruptcy court's subject matter jurisdiction. The "related to" test was too broad in this context; rather, the inquiry was whether there was a close nexus to the bankruptcy plan or proceeding. See also In re Ray, 624 F.3d 1124 (9th Cir. 2010) for explanation of all aspects of subject matter jurisdiction.

In re Birting Fisheries, Inc., 300 B.R. 489 (9th Cir. B.A.P. 2003)

Bankruptcy court had exclusive jurisdiction to collaterally attack state court order and review foreign-country judgment for conflict with either confirmed chapter 11 plan or Bankruptcy Code.

In re McCowan, 296 B.R. 1 (9th Cir. B.A.P. 2003)

"We hold that a bankruptcy court has ancillary jurisdiction to enforce its money judgments and retains such jurisdiction after the bankruptcy case is closed."

In re Canter, 299 F.3d 1150 (9th Cir. 2002)

District court improperly withdrew the reference under § 157(d) and enjoined municipal court unlawful detainer action

In re Graves, 279 B.R. 266 (9th Cir. B.A.P. 2002)

An injunction action under 11 U.S.C. § 110(j) is a core proceeding.

In re McGhan, 288 F.3d 1172 (9th Cir. 2002)

"Relying on *Gruntz v. County of Los Angeles,* 202 F.3d 1074 (9th Cir. 2000), we hold that state courts lack jurisdiction to determine whether a listed and scheduled creditor received adequate notice of discharge proceedings. We also hold that the state court lacked authority to modify the bankruptcy court's orders discharging Rutz's claim and permanently enjoining Rutz from collection on the debt."

In re Aheong, 276 B.R. 233 (9th Cir. B.A.P. 2002)

Bankruptcy court had both ancillary and "arising under" jurisdiction to reopen case and annul automatic stay.

In re Kieslich, 258 F.3d 968 (9th Cir. 2001)

IRS waived objection to bankruptcy court exercising noncore jurisdiction by failing to raise it before the bankruptcy court.

In re General Carriers Corp., 258 B.R. 181 (9th Cir. B.A.P. 2001)

Bankruptcy court had no jurisdiction to decide abstention motion as to state court action that had not been removed to bankruptcy court.

In re G.I. Industries, Inc., 204 F.3d 1276 (9th Cir. 2000)

Bankruptcy court could adjudicate validity of contract when considering proof of claim under executory agreement rejected by trustee.

In re Menk, 241 B.R. 896 (9th Cir. B.A.P. 1999)

Debtor's appeal was moot where debtor sought to avoid bankruptcy court's jurisdiction by contesting court's jurisdiction to reopen case for determination of whether debtor was excepted from discharge.

In re Mirzai, 236 B.R. 8 (9th Cir. B.A.P. 1999)

Bankruptcy court lacked jurisdiction to enter judgment where appeal from B.A.P. decision was pending before court of appeals.

In re Silva, 185 F.3d 992 (9th Cir. 1999)

The court held that under the Bankruptcy Code, core proceedings include a turnover request alleging that property in a third party's possession constitutes property of the bankruptcy estate.

In re Levander, 180 F.3d 1114 (9th Cir. 1999)

The Court held that a bankruptcy court had jurisdiction to amend its order awarding attorney fees to add a judgment-debtor under California law and its inherent power based on fraud perpetrated on the court.

In re Pavelich, 229 B.R. 777 (9th Cir. B.A.P. 1999)

Bankruptcy court had jurisdiction to enforce discharge in face of contrary state court judgment

In re Audre, Inc., 216 B.R. 19 (9th Cir. B.A.P. 1997)

bankruptcy court lacked jurisdiction to hear collateral attack on state court judgment even though judgment was on appeal and thus not final

In re ACI-HDT Supply Company, 205 B.R. 231 (9th Cir. B.A.P. 1997)

Bankruptcy Court lacked core jurisdiction over state law action for fraud.

In re Kennedy, 108 F.3d 1015 (9th Cir. 1997)

Bankruptcy court has jurisdiction to enter monetary judgment on disputed state court law claim in determining debt nondischargeable (9th Cir. 1997)

Hinduja v. Arco Products Co., 102 F.3d 987 (9th Cir. 1996)

Plaintiff not required to sue on stipulation for modifying stay in Bankruptcy court - could do so in District court

In re Yochum, 89 F.3d 661 (9th Cir. 1996)

Bankruptcy Court is a court of the U.S. for purposes of 26 U.S.C. 7430(c)(6)

In re Vylene Enterprises, Inc., 90 F.3d 1472 (9th Cir. 1996)

Adversary proceeding involving BREACH of a franchise agreement and BREACH of the implied covenant of good faith and fair dealing was a core proceeding under §157(b)(2)(M) since franchise agreements were property of the estate.

In re Casamont Investors, Ltd., 196 B.R. 517 (9th Cir. 1996)

Bankruptcy court abuses discretion by retaining jurisdiction over new adversary proceeding involving only state law after voluntary dismissal of bankruptcy case.

Celotex Corp. v. Edwards, 514 U.S. 300 (1995)

Execution on appeal bond was within Bankruptcy Court's related to jurisdiction - injunction issued to prohibit collecting on bond had to be heeded by Court of Appeals.

In re Davis, 177 B.R. 907 (9th Cir. B.A.P. 1995)

Supplemental jurisdiction - UMW v. Gubb.

In re Diversified Contract Services, Inc., 167 B.R. 591 (Bankr. N.D. Cal. 1994)

In re Ferrante, 51 F.3d 1473 (9th Cir. 1995)

Action on a trustee's surety bond = core proceeding.

In re Harris Pine Mills, 44 F.3d 1431 (9th Cir. 1995), *cert. denied*, 515 U.S. 1131 (1995)

Suit against trustee arising out of post-petition sale is a core proceeding.

In re Parker North American Corp., 24 F.3d 1145 (9th Cir. 1994)

Bankruptcy Court has jurisdiction over preference suit against RTC notwithstanding FIRREA, as least where RTC has filed a claim.

In re Int'l. Nutronics, Inc., 3 F.3d 306 (9th Cir. 1993), *withdrawn and superseded on rehearing by* 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994)

An antitrust action arising from a sale of an estate asset is not a core proceeding.

In re DeLorean Motor Co., 155 B.R. 521 (9th Cir. B.A.P. 1993)

Malicious prosecution suit against trustee who brought fraudulent transfer action against plaintiff = core proceeding.

In re Lawson, 156 B.R. 43 (9th Cir. B.A.P. 1993)

Bankruptcy court has jurisdiction to dispose of pending and ancillary matters after the dismissal of the bankruptcy case. Not conditioned on express language retaining jurisdiction at least as to ancillary matters such as execution on judgments.

In re Eighty South Lake, Inc., 81 B.R. 580 (9th Cir. B.A.P. 1987)

Court retains jurisdiction after dismissal to determine sanctions.

In re Carraher, 971 F.2d 327 (9th Cir. 1992)

Court may retain jurisdiction over adversary proceeding even though case has been dismissed.

In re Hall Bayoutree Assoc., Ltd., 939 F.2d 802 (9th Cir. 1991)

Not improper to withdraw reference by implication but must still have cause.

In re Castro, 919 F.2d 107 (9th Cir. 1990)

District Court in a noncore proceeding must make a de novo review of the case, including consideration of the record, to satisfy *Northern Pipeline*'s requirement that noncore issues are to be decided by an Article III judge.

American Principals Leasing Corp. v. U.S., 904 F.2d 477 (9th Cir. 1990)

Bankruptcy jurisdiction lacking over adjudication of tax consequences of partnership activities or non-debtor partners' tax liability. Section 505 does not extend to anyone but debtor.

In re American Hardwoods, 885 F.2d 621 (9th Cir. 1989)

*Pacor* standard adopted.

In re Balboa Improvements, Ltd., 99 B.R. 966 (9th Cir. B.A.P. 1989)

Dispute between real estate broker and debtor attorney = related to jurisdiction

In re Contractors Equipment Supply Co., 861F.2d 241 (9th Cir. 1988)

Bankruptcy court had jurisdiction to hear adversary proceeding between secured creditor and county agency since secured creditor did not own property - debtor still had interest in it.

Gonzales v. Parks,830 F.2d 1033 (9th Cir. 1987)

State courts preempted from hearing lawsuit based on bad faith filing in bankruptcy court.

In re Benny, 842 F.2d 1147 (9th Cir. Cir. 1988), cert denied 488 U.S. 1014 (1989)

Bankruptcy court did not have subject matter jurisdiction over wife in Chapter 7 case initiated by involuntary joint petition against husband and wife.

**JURY**

In re Hickman, 384 B.R. 832 (9th Cir. B.A.P. 2008)

Debtor's counterclaims to a creditor's claims in a non-dischargeability proceeding were not entitled to a jury trial in bankruptcy court, since they involved the restructuring of the debtor creditor relationship. Any jury trial right debtor may have had in another forum did not provide cause for dismissal of the bankruptcy case under § 707(a), where the debtor voluntarily submitted himself to the jurisdiction of the bankruptcy court and then failed to perform his statutory duties.

In re Healthcentral.Com, 504 F.3d 775 (9th Cir. 2007)

BLR 9015-2(b) improperly allowed the bankruptcy judge to certify that a proceeding was to be tried to a jury. It thus ran afoul of the national rule, which requires that a party file a motion to withdraw and that the district court decide the motion. However, consistent with the Seventh Amendment, the bankruptcy judge may retain the proceeding until it is ready for trial.

In re Smith, 205 B.R. 226 (9th Cir. B.A.P. 1997)

Debtor not entitled to trial by jury in adversary proceeding involving claims by IRS.

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

No right to jury where proof of claim filed.

In re Locke, 205 B.R. 592 (9th Cir. B.A.P. 1996)

No right to jury trial on issues of damages/liability in dischargeablity proceeding.

In re Clay, 35 F.3d 190 (5th Cir. 1994)

Bankruptcy court lacks essential attributes of judicial power and thus can only try jury trials upon consent.

In re Cinematronics, Inc., 916 F.2d 1444 (9th Cir. 1990)

Withdrawal of case to the district court proper because bankruptcy court could not conduct jury trial on noncore proceeding.

Mondor v. U.S. District Court for Cent. Dist. Of CA, 910 F.2d 585 (9th Cir. 1990)

Where a pre-removal jury demand would satisfy federal but not state requirements, that demand is incorporated into the federal record upon removal and is deemed to satisfy FRCP 38(b).

**LACHES**

Wyler Summit Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184 (9th Cir. 2000)

"Under California law, laches is available as a defense only to claims sounding in equity, not to claims at law. Wells Fargo Bank, N.A. v. Bank of America NT & SA, 38 Cal. Rptr. 2d 521, 530 (Cal. Ct. App. 1995)."

In re Roberts Farms Inc., 980 F.2d 1248 (9th Cir. 1992)

Miller v. Eisenhower Medical Center, 27 Cal.4th 614 (1980)

Laches elements under Ca. Law.

In re Smith, 2020 Bankr.LEXIS 1912 (Bankr. OR. 2020)

Laches is an affirmative defense to a § 522(f) motion.

**LANDLORD TENANT - CALIFORNIA LAW**

In re 240 North Brand Partners, Ltd., 200 B.R. 653 (9th Cir. B.A.P. 1996)

Debtor not entitled to modify lease to commercial property prior to approved foreclosure sale.

**LAW OF THE CASE DOCTRINE**

In re Commercial Money Centers, Inc., 392 B.R. 814, 832 (9th Cir. B.A.P. 2008)

Under the law of the case doctrine, bankruptcy court was not barred from considering an issue that was not specifically raised by the parties.

Wyler Summit Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184 (9th Cir. 2000)

Under the law of the case doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case...." "For the doctrine...to apply, the issue in question must have been decided explicitly or by necessary implication in [the] previous disposition." (citations omitted)

**LIEN AVOIDANCE - §§ 522(f) and (h) and 506(d)**

Barclay v. Boskoski (In re Barclay), 52 F.4th 1172(9th Cir. 2022)

Under § 522(f), debtor entitled to exemption that would apply in the absence of the judicial lien. So, present exemption statute applied and not the homestead amount when the judicial lien was created (under, *e.g*, CCP § 703.050(a)).

In re Hutchinson, 15 F.4th 1229 (9th Cir. 2021)

Chapter 7 debtor may not avoid a tax lien under § 522(h), because § 522(c)(2) prevents debtors from exempting property from properly filed tax liens. Decision gives good analysis of elements of § 522(h). In addition, tax lien on otherwise exempt property which is avoided by a 7 trustee under § 724(a) is preserved for the benefit of the estate, not the debtor.

In re Smith, 2020 Bankr.LEXIS 1912 (Bankr. OR. 2020)

Laches is an affirmative defense to a § 522(f) motion.

In re Elliot, 969 F.3d 1006 (9th Cir. 2020)

Chapter 7 debtor could not avoid a judgment lien under § 522(h) against an IRA and exempt the funds when judgment creditor fully satisfied its lien pre-petition. You may want to read Judge Montali's decision for a better explanation of the issue and law.

In re Lane, 959 F.3d 1226 (9th Cir.2020)

A bankruptcy court may not void a lien under § 506(d) when the secured claim is disallowed because the creditor who filed the proof of claim did not prove that it was entitled to enforce the secured debt. Lane distinguishes In re Blendheim, 803 F.3d 477 (9th Cir. 2015), where the proof of claim was disallowed on substantive grounds.

In re Weilert, 2016 Bankr. LEXIS 2538 (9th Cir. B.A.P. 2016)

Debtor who is beneficiary and trustee of a self-settled, revocable trust may assert a homestead exemption in residence and avoid a judicial lien under § 522(f).

In re Meyer, 373 B.R. 84 (9th Cir. B.A.P. 2007)

"[W]e hold that consensual liens against the entire fee must be netted out before computing the value of a debtor's fractional interest for purposes of avoiding judgment liens on which the co-owner is not liable."

In re Charnock, 318 B.R. 720 (9th Cir. B.A.P. 2004)

Plain meaning of § 522(f) required avoidance of judicial lien that was senior to a consensual lien.

In re Darosa, 318 B.R. 871 (9th Cir. B.A.P. 2004)

Mathematical formula for avoiding liens under § 522(f) cannot be altered to provide for potential subrogation between two judgment debtors in the future. It must be applied as written.

In re Villar, 317 B.R. 88 (9th Cir. B.A.P. 2004)

Service of a motion to avoid a judicial lien upon the creditor's P.O. box was insufficient under Bankruptcy Rule 7004(b)(3).

In re Zimmer, 313 F.3d 1220 (9th Cir. 2002)

A wholly unsecured lienholder is not entitled to the protections of § 1322(b)(2); The holding of *In re Lam*, 211 B.R. 36 (9th Cir. B.A.P. 1997) approved.

In re Chiu, 304 F.3d 905 (9th Cir. 2002)

Debtor who owned their house at the time a judgment lien was a fixed to it could avoid the lien, even though they no longer owned the house at the time the motion was filed.

In re Watts, 298 F.3d 1077 (9th Cir. 2002)

Overruling *In re Jones,* 106 F.3d 923 (9th Cir. 1997), a judgment lien attaches to a declared homestead regardless of whether there is surplus equity at the time the abstract of judgment is recorded.

In re Pederson, 230 B.R. 158 (9th Cir. B.A.P. 1999)

judgment lien that attached by virtue of preexisting judgment when debtor acquired homestead property was not avoidable.

In re Pike, 243 B.R. 66 (9th Cir. B.A.P. 1999)

Debtor's pre-bankruptcy homestead declaration not relevant in context of bankruptcy proceedings.

In re Been, 153 F.3d 1034 (9th Cir. 1998)

Under California law a non-judicial foreclosure sale by a senior lien holder terminates a "sold-out" junior lienholder's secured interest in the debtor's property and any remaining rights which might 'arise out of' the foreclosure proceedings. Thus §522(f)(c) didn't apply.

In re Toplitzky, 227 B.R. 300 (9th Cir. B.A.P. 1998)

Creditor may not retain lien against debtor's home by paying value of debtor's impaired equity exemption.

In re Stoneking, 225 B.R. 690 (9th Cir. B.A.P. 1998)

Debtor may avoid lien placed on community property residence which later became debtor's separate property following divorce.

In re Hanger, 217 B.R. 592 (9th Cir. B.A.P. 1997), *aff'd* 196 F.3d 1292 (9th Cir. 1999)

Debtors may partially avoid bank's judicial lien to extent lien impairs homestead exemption.

In re Foss, 200 B.R. 660 (9th Cir. B.A.P. 1996)

Lien against debtor's property created by divorce decree was not avoidable.

In re Barnes, 198 B.R. 779 (9th Cir. B.A.P. 1996)

Debtor cannot avoid former wife's judicial liens which fixed onto debtor's property interest in marital home during reordering of community property.

In re Wilson, 90 F.3d 347 (9th Cir. 1996)

Where debtor had undeclared homestead that had to be paid just ahead of judicial liens in the event of a forced sale, lien not impaired under pre-1994 law.

In re Barnes, 198 B.R. 779 (9th Cir. B.A.P. 1996)

In this pre-1994, California law matter, the debtor's new property interest in the house was created at the same time the November 1990 and December 1991 judgements came into being. Therefore, the liens evidencing these judgment did not fix onto the Debtor's reordered property interest and § 522(f)(1) is inapplicable. The liens are not avoidable. The June 1991 sanctions order was not directed ad dividing the community property. Therefore it did not attain lien status until Nelson recorded it, subsequent to the division of the community property. It fixed on the debtor's newly acquired interest in the house and thus was avoidable in bankruptcy.

In re Higgins, 201 B.R. 965 (9th Cir. B.A.P. 1996)

Debtors who lack equity in home may avoid creditor's judicial lien against property when lien impairs otherwise valid exemption

In re Nielsen, 197 B.R. 665 (9th Cir. B.A.P. 1996)

When calculating surplus equity in a jointly held residence, all prior liens must be deducted from the family of the property in its entirety, rather than from the debtor's fractional interest. If surplus equity exists in the property and the lien does not impair the exemption, then the lien cannot be avoided as a preference pursuant to §522(h)

In re Hastings, 185 B.R. 811 (9th Cir. B.A.P. 1995)

Even though judicial lien fixed on property before it was claimed exempt, and even though the lien would have priority over homestead under California law, it is still avoidable.

In re DeMarah, 62 F.3d 1248 (9th Cir. 1995)

Debtor may not avoid a tax lien (even the penalty portion) under § 522(h) and 724.

In re Morgan, 149 B.R. 147 (9th Cir. B.A.P. 1993)

Debtor's claim of exemption made valid through lack of timely objection subject to creditor's challenge at lien avoidance hearing.

Nobelman v. American Savings Bank, 508 U.S. 324, 113 S.Ct. 2106 (1993)
Section 1322(b)(2) prohibits a debtor from bifurcating an undersecured homestead mortgagee's claim into secured and unsecured claims under § 506(a).

In re Yerrington, 144 B.R. 96 (9th Cir. B.A.P. 1992), *aff'd*. 19 F.3d 32 (9th Cir. 1994)

*Sanderfoot* applied - Alaska law - lien not avoidable.

In re Patterson, 139 B.R. 229 (9th Cir. B.A.P. 1992)

Consensual lien, judicial lien, homestead, consensual lien, judicial lien, consensual lien

The formula set forth in *In re Kruger*, 77 B.R. 785, 788-89 (Bankr. C.D. Cal. 1987) provides the correct result in this case an in various other circumstances:

1. Subtract all liens from the value of the property;

2. If the total amount of the liens is equal to or less than the value of the property and there is a judicial lien, deduct from the amount of the judicial lien the claimed exemption less the amount of equity (if any) remaining in the property after step 1. The balance left is the amount of the judicial lien which remains on the property;

3. If the total of the liens is greater than the value of the property and if the liens which are equal to the value of the property are all voluntary liens, void all liens in excess of the value of the property

4. If the total of the liens is grater than the value of the property and the judicial lien was not voided in full in step 3, determine whether the judicial lien would be partially avoided under § 506(d):

a) if the judicial lien is not fully secured under § 506(a), void the unsecured portion and subtract the amount of the exemption from the secured portion. This is the remaining amount of the judicial lien. Then recalculate the total liens against the property (using the reduced judicial lien) and void any lien in excess of the value of the property.

b) if the judicial lien is fully secured under § 506(a), subtract the amount of the exemption from the amount of the judicial lien. The balance is the remaining amount of the judicial lien. Then recalculate the total liens against the property (using the reduced judicial lien) and void any liens in excess of the value of the property (footnotes omitted).

In re Hyman, 123 B.R. 342 (9th Cir. B.A.P. 1991), *aff'd* 967 F.2d 1316 (9th Cir. 1992)

1. Homestead refers to equity not a physical asset

2. Costs of sale are not included in equity calculation

In re Herman, 120 B.R. 127 (9th Cir. B.A.P. 1990)

522(f)(1) - undeclared homestead - judicial lien avoidable even if 1) no forced sale and 2) liens could not be enforced unless debtor had equity.

In re Lange, 120 B.R. 132 (9th Cir. B.A.P. 1990)

506(d) not available to debtor in Chapter 7 cases.

In re Galvan, 110 B.R. 446 (9th Cir. B.A.P. 1990)

Unsecured portion of judicial lien cannot remain as charge against property in which debtors have exemption rights.

In re Godfrey, 102 B.R. 769 (9th Cir. B.A.P. 1989)

A lien on real property arising from a dissolution of marriage is avoidable under §522(f)(1).

In re Garcia, 2013 U.S.App. LEXIS 4493 (9th Cir. 2013)

A debtor, who was a real estate broker, sought to exempt her Mercedes under the grubstake exemption, and to avoid a non-purchase money lien against it on the ground that it was tool of the trade. 9th Circuit held that debtor could apply the grubstake exemption to the car and then use section 522(f)(1) to avoid the lien. The Circuit Court remanded case for the bankruptcy court to determine of the car was a tool of the trade.

In re Kuiken, 484 B.R. 766 (9th Cir. 2013)

Under §522(f)(1), a debtor may not avoid a judicial lien on a homestead that he completely divests any interest in, and then reacquires it before filing a bankruptcy. In this instance, the lien was fixed when he reacquired his interest.

In re Frates, 2014 Bankr. LEXIS 983 (9th Cir. B.A.P. 2014)

Service of a 522(f) motion must be made under Federal Rules of Civil Procedure, not California Code of Civil Procedure.

Bank of America v. Caulkett, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015)

A Chapter 7 debtor cannot "strip off" a wholly-undersecured lien under Bankruptcy Code § 506(d); In re Concannon, 338 B.R. 90 (9th Cir. B.A.P. 2006), §506(d) cannot be used by a chapter 7 debtor to strip off a wholly unsecured nonconsensual lien.

**LIENS - CALIFORNIA LAW**

In re Conciecao**,** 331 B.R. 885 (9th Cir. B.A.P. 2005)

Abstract of judgment that did not contain the debtor's social security number was invalid under CCP § 674.

In re El Dorado Improvement Corp., 335 F.3d 835 (9th Cir. 2003)

Under California's mechanics lien law, a private work is "accepted" by a public entity Under Cal. Civ. Code § 3086 only if the approval results in the assumption of some public interest in it.

In re Burns, 291 B.R. 846 (9th Cir. B.A.P. 2003)

Creditor's service of Order to Appear for Examination on debtor alone was sufficient to create lien in debtor's settlement funds, even where funds were in possession of a third party.

In re Spirtos, 221 F.3d 1079 (9th Cir. 2000)

Under § 108(c), the period of duration of a judgment lien under CCP § 683.020 will not expire until 30 days after all the assets in the debtor's estate have been finally distributed.

In re Southern California Plastics, Inc., 165 F.3d 1243 (9th Cir. 1999)

Allowance of creditor's claim did not perfect prejudgment attachment lien.

Fleet Credit Corp. v. TML Bus Sales, Inc., 65 F.3d 119 (9th Cir. 1995)

Lien priorities arising out of bankruptcy and fraudulent transfer - CCP § 708.410.

In re Ralton, 139 B.R. 931 (9th Cir. B.A.P. 1992)

A charging order on a partnership = a judgment lien on debtor's partnership interest. Lien has priority over debtor-in-possession's hypo lien status.

Bluxome Street Assoc v. Fireman's Fund Ins. Co., 206 Cal. App. 3d 1149, 254 Cal. Rptr. 198 (Cal. App. 1988)

"Contractual lien" of attorney, even though unrecorded, has priority over judgment lien**.**

**LIS PENDENS**

Orange County v. Hong Kong & Shanghai Bank Corp. Ltd., 52 F.3d 821 (9th Cir. 1995)

Standard for expunging lis pendens.

Cal. Lis pendens statute requires the trial court to expunge the lis pendens if the "claimant has not established by a preponderance of the evidence the probable validity of the real property claim." Cal. Code Civ. Proc. §405.32 (1992). "Probable validity" meaning that "it is more likely than not that the claimant will obtain a judgment against the defendant on the claim." *Id* §405.3. Thus, like the statute at issue in *Dementus*, the California lis pendens statute requires the court to evaluate the merits of the underlying claim. Both the appellant in *Dementus* and the Partnership here argue that it had submitted sufficient evidence to establish the probably validity of its claim.

**MANDAMUS**

In re Salter, 279 B.R. 278 (9th Cir. B.A.P. 2002)

B.A.P. has authority to issue writs of mandamus**.**

**MARSHALLING OF ASSETS**

In re Brazier Forest Products, Inc., 921 F.2d 221 (9th Cir. 1990)

Marshaling is an equitable remedy and the decision to grant or deny marshaling of assets rests within the discretion of the trial court. *Eyre*, 218 P.2d at 898. Generally, marshaling may be invoked only: (1) on behalf of junior secured or lien creditors, (2) where the debtor has two distinct funds, and (3) where its operation would work no inequity upon the debtor or certain third parties. (Washington law)

**MEETING OF CREDITORS - § 341 AND RULE 2003**

In re Clark, 262 B.R. 508 (9th Cir. B.A.P. 2001)

Creditor's meeting was not concluded merely because trustee failed to vocalize continued date, where continued date had been announced at previous meeting and in writing thereafter.

In re Smith, 235 F.3d 472 (9th Cir. 2000)

1) Under Rule 2003(e), a § 341 meeting must be adjourned to a specific time; 2) conversion of the case from chapter 11 to chapter 7 does not restart the running of the 30-day period for filing objections to exemptions.

**MISCELLANEOUS**

Rigby v. Mastro, 585 B.R. 587 (9th Cir. B.A.P. 2018)

Bankruptcy Court has the authority to issue a "consent directive."

In re Consolidated Freightways Corp., 443 F.3d 1160 (9th Cir. 2006)

A federal common law rule for imposing constructive trusts on interline balances among carriers was not justified. State law would govern to determine interline balances.

In re Emerald Outdoor Advertising, LLC, 444 F.3d 1077 (9th Cir. 2006)

Deed of trust on Indian trust lands recorded perfected in accordance with Washington law had priority over subsequent lease recorded in appropriate Bureau of Indian Affairs title plant.

In re Marshall, 547 U.S. 293, 126 S.Ct. 1735 (2006)

Probate exception did not apply to deprive bankruptcy court of jurisdiction over widow's claim that her stepson tortiously interfered with her expectancy of inheritance.

In re Bryan, 261 B.R. 240 (9th Cir. B.A.P. 2001)

Genuine issue of material fact existed as to when complaint was submitted to bankruptcy court for filing. Court had a drop box system whereby anything left in the box "would be time-stamped with that day's date."

In re Bigelow, 179 F.3d 1164 (9th Cir. 1999)

In bankruptcy case, corporation's notice of appeal was not per se invalid for being filed by corporate officer, instead of by corporation's counsel of record.

In re Serrato, 117 F.3d 427 (9th Cir. 1997)

Appointed trustee is not an officer of the United States.

Hubbard v. U.S., 514 U.S. 695(1995)

Because a "bankruptcy court" is neither a "department" nor an "agency", statements made in bankruptcy papers are not covered by 18 U.S.C. § 1001.

In re Vasseli, 5 F.3d 351 (9th Cir. 1993)

Bankruptcy court has no authority to award fees for a frivolous appeal.

U.S. v. High Country Broadcasting Co., Inc., 3 F.3d 1244 (9th Cir. 1993), *cert. denied*, 513 U.S. 826 (1994)

Attempt by sole shareholder to intervene so that he could represent corp. was denied.

*Rowland v. Cal. Men's Colony*, 506 U.S. 194, 113 S.Ct. 716, 721 (1993)

Corp. may appear only through licensed counsel.

In re Hay, 978 F.2d 555 (9th Cir. 1992)

Failure to include counterclaim as to creditor in amendments to schedules bars suing creditor postconfirmation.

In re Perroton, 958 F.2d 889 (9th Cir. 1992)

Bankruptcy courts are not courts of the U.S. and cannot waive filing fees under 28 U.S.C. §1915.

Smith v. Frank, 923 F.2d 139 (9th Cir. 1991)

When is document deemed filed.

Bennett v. Williams, 892 F.2d 822 (9th Cir. 1989)

Trustee entitled to qualified immunity.

In re Godfrey, 102 B.R. 769 (9th Cir. B.A.P. 1989)

Pleading “filed” when clerk is given possession of it.

**MITIGATION OF DAMAGES**

Huntington Beach Union H.S. Dist. v. Continental Info Systems Corp., 621 F.2d 353, 357 (9th Cir. 1980)

Green v. Smith, 261 Cal.App.2d 392, 67 Cal. Rptr. 796 (Cal.App. 1968)

**NOTICE AND HEARING**

Ellett v. Stanislaus, 506 F.3d 774 (9th Cir. 2007)

Franchise Tax Board was not bound by debtor's discharge for lack of proper notice, where debtor listed the wrong Social Security number on his bankruptcy petition and the wrong number appeared on his § 341(a) notice.

In re Williams, 185 B.R. 598 ( 9th Cir. B.A.P. 1995)

Presumption of receipt of notice - an attorney's unequivocal declaration of non-receipt of notice is not sufficient to overcome the presumption of receipt created by a court clerk's certificate of mailing.

In re Ex-Cel Concrete Company, Inc., 178 B.R. 198 (9th Cir. B.A.P. 1995)

Notice to wrong counsel for Citicorp of a sale free and clear does not constitute notice.

In re The Two S Corp., 875 F.2d 240 (9th Cir. 1989)

No need to have a hearing where facts are undisputed and hearing would serve no purpose.

In re Downtown Investment Club, III, 89 B.R. 59 (9th Cir. B.A.P. 1988)

Failure to give general unsecured creditors notice re modification of plan makes it void under 9024 and 1127.

**PACA**

In re Country Harvest Buffet Restaurants, Inc., 245 B.R. 650 (9th Cir. B.A.P. 2000)

Restaurant chain qualifies as "dealer" for purposes of PACA trust provisions.

In re Altabon Foods, Inc., 998 F.2d 718 (9th Cir. 1993)

1) Pursuant to the PACA, the Secretary promulgated a regulation limiting trust coverage for private agreements to those which allowed no more than 30 days for payment

2) The PACA was silent on whether the Secretary could establish a maximum payment period for private agreements, but the legislative history made clear that Congress intended that the Secretary should do so.

3) That history also suggested that 30 days was a reasonable choice in light of the standards and practices of the produce industry.

**PARTNERSHIPS - CA LAW**

In re Fair Oaks, 168 B.R. 397 (9th Cir. B.A.P. 1994)

Property acquired by general partners before partnership documents signed = property acquired for the benefit of the partnership. All that's required is an intent to form a partnership.

Lund v. Albrecht, 936 F.2d 459 (9th Cir. 1991)

Partner breached fiduciary duty owed to another partner by failing to disclose offers on partnership realty for amounts greater than the value placed on it in their partnership dissolution negotiations.

**PENDENT/SUPPLEMENTAL JURISDICTION**

City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 118 S.Ct 523 (1997)

Court upholds exercise of supplemental jurisdiction under 1367 as to state law claim requiring department review of a local administrative agency.

Harrell v. 20th Cen. Ins. Co., 934 F.2d 203 (9th Cir. 1991)

Not an abuse to retain state claims even if federal claims are gone.

**PETITION PREPARERS**

In re Doser, 412 F.3d 1056 (9th Cir. 2005)

In a case involving We The People, the court held that § 110 was not vague or overbroad, and did not violate the First Amendment.

In re Reynoso, 315 B.R. 544 (9th Cir. B.A.P. 2004), *aff'd,* 477 F.3d 1117 (9th Cir. 2007)

The transformation of data into completed forms by providing software to debtors makes the software providers bankruptcy petition preparers; directing debtors to the applicable sections of the Cal. Cod of Civil Procedure also constituted the unauthorized practice of law; intentional concealment of preparers' involvement, among other things, constituted fraudulent, unfair or deceptive conduct.

In re Bankruptcy Petition Preparers, 307 B.R. 134 (9th Cir. B.A.P. 2004)

1. Selection and preparation of bankruptcy forms constituted practice of law.

2. Federal courts have inherent power to regulate practice in case before them. Bankruptcy court may require preparers to comply with state bar rules re: certification.

In re Graves, 279 B.R. 266 (9th Cir. B.A.P. 2002)

Bankruptcy court may raise § 110(j) injunctive relief sua sponte without an adversary proceeding being filed, but same protections afforded by an adversary proceeding must be given.

In re Crowe, 243 B.R. 43 (9th Cir. B.A.P. 2000), *aff'd*, 246 F.3d 673 (9th Cir. 2000)

Bankruptcy court had jurisdiction to hear US Trustee's adversary proceeding against bankruptcy petition preparer.

In re Crawford, 194 F.3d 954 (9th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000)

The court of appeals affirmed a judgment of the district court. The court held that a bankruptcy court does not violate constitutional or Privacy Act rights of a nonattorney bankruptcy petition preparer (BPP) by imposing a fine for the BPP's failure to disclose his social security number as required by 11 U.S.C. §110(c).

In re Agyekum, 225 B.R. 695 (9th Cir. B.A.P. 1998)

Lay bankruptcy petition preparer not permitted to retain fee in excess of amount allowed under local rules.

In re Fraga, 210 B.R. 812 (9th Cir. B.A.P. 1997)

Attorney's wholly owned corporation was "bankruptcy petition preparer"; corporation's attorney/owner was not.

**POST-CONFIRMATION MATTERS**

Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555 (9th Cir. 1992)

Failure to disclose lawsuit as asset in the bankruptcy barred suit filed 4 months after confirmation.

In re Ray, 624 F.3d 1124 (9th Cir. 2010)

Bankruptcy Court has circumscribed jurisdiction over post-jurisdiction proceedings. Inquiry for determining whether a Bankruptcy Court has "related-to" jurisdiction over a proceeding initiated after plan confirmation is narrower than the "conceivable effect or administration of the estate" test applied in pre-confirmation matters.

**POST-PETITION TRANSFERS - § 549**

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. B.A.P. 2008)

Court did not abuse discretion in vacating an order dismissing a chapter 11 case, and then avoiding a transfer to a law firm that occurred while the case was dismissed.

In re Straightline Investments, Inc,. 525 F.3d 870 (9th Cir. 2008)

Postpetition transfer by debtor of accounts receivable to a factor without bankruptcy court approval were avoidable under § 549(a). This is true regardless of whether they diminished the estate, the court declining to extend the diminution of the estate doctrine of § § 547 and 548 to § 549. They were not sales in the ordinary course of business, since they failed to meet both the vertical and horizontal dimension tests of § 363(c).The earmarking doctrine did not apply, because the money received by the debtor was not designated for a specific creditor. Recoupment did not apply, because it is an equitable doctrine, and the factor engaged in inequitable conduct.

In re Stanton, 303 F.3d 939 (9th Cir. 2002)

Debtors were guarantors on a factoring arrangement for their business. As additional security for payment, they pledged their house as security. The debtors subsequently filed a chapter 7 case. They continued their business's factoring arrangement, and incurred additional indebtedness that was not covered by the business's assets. The chapter 7 trustee sold their house, but the factor asserted its security interest in the proceeds in the amount of over $244,000 for postpetition indebtedness incurred by the nondebtor business.

Held: The factor's lien on the house was not avoidable under § 549, and the debtors were not required to seek court approval as to the postpetition encumbrances on their house under § 364.

In re Mitchell, 279 B.R. 839 (9th Cir. B.A.P. 2002)

The bona fide purchaser defense of § 549 (c) to a trustee's action to avoid a postpetition transfer does not provide an exception to the automatic stay. Purchaser out of a foreclosure that occurred a day after bankruptcy filed violated § 362.

In re Home America T.V.-Appliance Audio, Inc., 232 F.3d 1046 (9th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001)

"We hold that the bankruptcy trustee's action is barred by the statute of limitations applicable to her avoidance powers under § 549, notwithstanding that she seeks to exercise that authority in the context of a § 7422 tax refund suit."

In re Mora, 218 B.R. 71 (9th Cir. B.A.P. 1998), *aff'd* 199 F.3d 1024 (9th Cir. 1999)

Debtors made avoidable post-petition transfer of bankruptcy estate property by mailing pre-petition cashier's check for mortgage reduction which bank did not receive until after bankruptcy proceedings began

In re Geothermal Resources International, Inc., 93 F.3d 648 (9th Cir. 1996), *aff'd*, 182 F.3d 925 (9th Cir. 1999)

Postpetition long-term employment contract not avoidable under 549 to extent employee conferred value on company prior to entry of order for involuntary bankruptcy relief.

In re McConville, 84 F.3d 340 (9th Cir. 1996), *amended and superseded by* 97 F.3d 316 (9th Cir. 1996), *withdrawn and superseded by* 110 F.3d 47 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997)

Person who receives a deed of trust is not a "purchaser" under §549(c).

In re Shaw, 157 B.R. 151 (9th Cir. B.A.P. 1993)

A regularly conducted non-collusive tax sale is presumptively reasonable equivalent value under §548 but not "present fair equivalent value" under §549(c) which tolerates little deviation from fair market value.

In re KF Dairies, Inc., 143 B.R. 734 (9th Cir. B.A.P. 1992)

Even if time limits have run on 549 action, creditor's claim can still be reduced under 502(d).

In re Wolverton Associates, 909 F.2d 1286 (9th Cir. 1990)

Where no evidence debtor family-held corporation surrendered leasehold interest in property prior to filing bankruptcy petition family owner's transfer of proceeds from property sale after filing is voidable postpetition transfer.

In re Shamblin, 890 F.2d 123 (9th Cir. 1989)

Tax sale not a transfer of property of the estate since it merely created a lien. Thus 549 does not apply.

**PREEMPTION**

In re Applebaum, 422 B.R. 684 (9th Cir. B.A.P. 2009)

California's bankruptcy-only exemption statute is not preempted by the Bankruptcy Code and does not violate the Uniformity Clause.

In re Chaussee, 399 F.3d 225 (9th Cir. B.A.P. 2008)

The act of filing a proof of claim in a bankruptcy case may not, alone, subject the claimant to liability for violation of state and federal fair debt collection laws.

In re Tippett, 542 F.3d 684 (9th Cir. 2008)

The bankruptcy code does not preempt Cal. Civil Code § 1214, which renders an unrecorded conveyance void as to bona fide purchasers. The transfer of the debtor's property to the bankruptcy estate upon filing their chapter 7 case was such a transfer. Thus the debtors' unauthorized transfer of their home to a bona fide purchaser was covered by this statute.

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed from state court, since such actions were totally preempted by § 303(i). Furthermore, siblings of debtors had no standing to bring an action under § 303(i).

40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076 (9th Cir. 2003), *cert. denied,* 540 U.S. 983, 124 S.Ct. 469 (2003)

Section 362 preempts Cal. Rev. & Tax. Code § 3728. "Under the doctrine of "conflict preemption," preemption is implied where 'compliance with both federal and state regulation is physically impossible.'"

MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910 (9th Cir. 1996)

debtor's malicious prosecution action alleging defendants maliciously filed and pursued creditors' claims in it bankruptcy proceeding was preempted, and thus the district court properly determined that it lacked jurisdiction.

In re Baker & Drake, Inc., 35 F.3d 1348 (9th Cir. 1994)

Nevada tax laws not preempted by bankruptcy act.

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

The recording provisions in the Patent Act do not preempt the recording provisions of Article 9 of the UCC.

**PREFERENCES - § 547**

1. **Contemporaneous Exchange**
2. **Dishonored Check**
3. **Earmarking Doctrine**
4. **Insolvent Debtor**
5. **New Value**
6. **90-Day**
7. **§ 547(b)(5)**
8. **§ 547(c)**
9. **§ 547(c)(1)**
10. **§ 547(c)(2) and Ordinary Course of Business**
11. **§ 547(c)(3)**
12. **§ 547(c)(4)**
13. **§ 547(e)(1)(A)**
14. **§ 550**
15. **Cal. CCP § 488.500**
16. **Misc**

**1. Contemporaneous Exchange**

In re Cresta Technology Corp., 2018 Bankr.LEXIS 1057 (9th Cir. BAP 4/6/2018)

Transfer occurs when a check is honored, not delivered under § 547(c)(1).

In re Marino, 193 B.R. 907 (9th Cir. B.A.P. 1996), *aff'd* 117 F.3d 1425 (9th Cir. 1997)

§547(c)(1) - 14 day delay in perfection was contemporaneous exchange.

In re Upstairs Gallery, Inc., 167 B.R. 915 (9th Cir. B.A.P. 1994)

Settlement of payment in 1990 on a debt created by a 1988 lease was transfer of an antecedent debt. The debt arose in 1988, not 1990, thus no contemporaneous exchange.

In re Laguna Beach Motors, Inc., 148 B.R. 317 (9th Cir. B.A.P. 1992)

Contemporaneous exchange - DePrizio rejected under these acts.

**2. Dishonored Check**

In re JWJ Contracting Co., Inc., 371 F.3d 1079 (9th Cir. 2004)

Creditor's acceptance of what turned out to be dishonored check, in exchange for new value given to debtor, transformed what would have been a contemporaneous exchange for new value into an avoidable credit transaction.

In re Lee, 108 F.3d 239 (9th Cir. 1997)

No transfer of debtor's property occurs at time of delivery of subsequently dishonored personal check.

A cashier's check that was used to replace a dishonored check and was received on the 90th day before the bankruptcy petition was filed was a preferential transfer. A transfer by a cashier's check occurs on the date of delivery unlike the transfer of other checks where the transfer takes place when the bank honors the check.

1. Cashier's check is property of the debtor
2. Cashier's check is transferred upon delivery, not issuance
3. §547(c)(1) - dishonor knocks a transfer out of this section - dishonor can mean a check returned to maker
4. §547(c)(4) - where check dishonored, delivery of a check thereafter does not relate back to that transaction

The payment was not a contemporaneous exchange, because that defense cannot involve a dishonored check. Dishonor changes the nature of the transaction from one intended as a contemporaneous cash exchange to a credit transaction.

Nor was the new value defense available. Such defense requires that new value be given after the transfer occurs. Here, the transfer of the cashier's check took place after the delivery of the goods..

Earmarking doctrine discussed.

**3. Earmarking Doctrine**

In re Adbox, Inc., 488 F.3d 836 (9th Cir. 2007)

1. A trustee who has brought a preference action on behalf of the estate is not an "opposing party," and thus counterclaims that could have been brought against the debtor prior to its bankruptcy were properly dismissed; 2. Trustee bears initial burden of proof to establish that funds were part of the bankruptcy estate. the burden then shifts to the defendant to show that there was an agreement with a lender to pay funds to a particular creditor.

In re Superior Stamp & Coin Co., Inc., 223 F.3d 1004 (9th Cir. 2000)

After debtor borrowed money to pay specific debt, bank's advancement of payments to debtor rather than directly to creditor did not preclude application of earmarking doctrine to prevent recovery by bankruptcy trustee.

In re Kemp Pacific Fisheries, Inc., 16 F.3d 313 (9th Cir. 1994)

Check that was honored was preference even though account may not have had sufficient funds to cover check. Earmarking doctrine discussed.

### 4. Insolvent Debtor

In re DAK Industries, Inc., 170 F.3d 1197, 1199 (9th Cir. 1999)

To succeed in a preference action, a trustee must show, *inter alia*, that the debtor was insolvent at the time of the contested transaction. 11 U.S.C. §547(b). The Bankruptcy Code defines insolvency, for a corporation, as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation..." 11 U.S.C. §101(32). Although the Code does not define "fair valuation," courts have generally engaged in a two-step process of analysis. *See, e.g., Matter of Taxman Clothing Co.,* 905 F.2d 166, 169-70 (7th Cir. 1990). First, the court must determine whether a debtor was a "going concern" or was "on its deathbed." Second, the court must value the debtor's assets, depending on the status determined in the first part of the inquiry, and apply a simple balance sheet test to determine whether the debtor was solvent. *Id.* at 170.

In re Sierra Steel, Inc., 96 B.R. 275 (9th Cir. B.A.P. 1989)

Insolvency

### 5. New Value

In re AEG Acquisitions Corp., 161 B.R. 50 (9th Cir. B.A.P. 1993)

New value; DePrizio; option contract.

In re Nucorp Energy, Inc., 902 F.2d 729 (9th Cir. 1990)

'New value' exception to §547(b) applies to avoidance of preferential transfer if creditor can show lien attached to property of value - property here found to be valueless.

In re E.R. Fegert, Inc., 88 B.R. 258 (9th Cir. B.A.P. 1988), *aff'd* 887 F.2d 955 (9th Cir. 1989)

Release of lien - §547(c)(1) - new value.

### 6. 90 - Day

In re Smith's Home Furnishings Inc., 265 F.3d 959 (9th Cir. 2001)

Trustee required to show that creditor was under secured at some point during the preference period in order to avoid payments made by debtor to floating lien creditor during 90-day prepetition preference period.

In re Greene, 223 F.3d 1064 (9th Cir. 2000)

Rule 9006 does not apply to the 90 day preference period.

In re Bergel, 185 B.R. 338 (9th Cir. B.A.P. 1995)

Procedural bankruptcy rules do not extend 90-day period for voiding transfers when 90th day falls on Saturday, Sunday, or legal holiday.

In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994)

Funds which debtor had no right to which were transferred within 90 days held in constructive trust for transferee and were not property of the debtor.

### 7. § 547 (b)(5)

In re Tenderloin Health, 849 F.3d 1231 (9th Cir. 2017)

Bankruptcy court may consider a hypothetical preference action within a hypothetical Chapter 7 to determine if (b)(5) is satisfied. A debtor's transfer of funds from an escrow account to a bank account over which the bank has a setoff right constitutes a transfer under § 547.

In re Powerine Oil Co., 59 F.3d 969 (9th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996)

Fact that defendant could have drawn on letters of credit, and thus received no more than it would have received in a Chapter 7 is irrelevant. Only refer to what debtor would receive from the estate, not some outside source. §547(b)(5).

**8. § 547(c)**

In re National Lumber and Supply, Inc. 184 B.R. 74 (9th Cir. B.A.P. 1995)

1. §547(c) defenses must be pled specially or are waived

2. §547(c)(2) and (4) reviewed.

**9. § 547(c)(1)**

In re Walker, 77 F.3d 322 (9th Cir. 1996)

§547(c)(1) 10 day v. 30 days under Idaho law.

Bankruptcy code's definition of when transfer perfected trumps state law.

In re E.R. Tegert, Inc., 887 F.2d 955 (9th Cir. 1989)

Payment of subs by general to government project is covered by §547 (c)(1).

**10. § 547(c)(2) and Ordinary Course of Business**

In re Healthcentral.com, 504 F.3d 775 (9th Cir. 2007)

Genuine issues of material fact precluded granting of motion for summary judgment as to ordinary course defense under the pre-2005 versions of both § 547(c)(2)(B) and (C).

In re Ahaza Systems, Inc., 482 F.3d 1118, 1126 (9th Cir. 2007)

1. When there is no past debt between the parties with which to compare the challenged one, the instant debt should be compared to the debt agreements into which we would expect the

debtor and creditor to enter as a part of their ordinary business operations. 2. When the debt has been restructured, the court should look at both the original and revised agreement to determine the nature of the debt.

Union Bank v. Wolan, 502 U.S. 151(1991)

Payments on long and short term debt may qualify for ordinary course of business exception.

In re Hessco Industries, Inc., 295 B.R. 372 (9th Cir. B.A.P. 2003)

Defendants failed to prove the ordinary course defense, where there was no evidence presented of "terms to which similarly situated parties adhere."

In re Jan Weilert RV, Inc., 326 F.3d 1028 (9th Cir. 2003)

Under §547(c)(2)(C), a court cannot limit "ordinary business terms" to the average transactions in the industry, but must consider the broad range of terms encompassing the practices employed by similarly situated debtors and creditors facing the same or similar problems.

In re Kaypro, 218 F.3d 1070 (9th Cir. 2000)

Whether restructuring agreements are a common industry practice and are thus subject to the ordinary course of business defense was a triable issue of fact. Evidence established that the debtor was insolvent.

In re Grand Chevrolet, Inc., 25 F.3d 728 (9th Cir. 1994)

§547(c)(1) and (c)(2) - sight draft and time automobile purchase drafts

To qualify of the ordinary course exception, a creditor must prove by a preponderance of the evidence that (1) the debt and its payment are ordinary in relation to past practices between the debtor and the creditor, and (2) the payment was ordinary in relation to prevailing business standards. *In re Food Catering & Housing*, 971 F.2d at 398

Among the factors courts consider in determining whether transfers are ordinary in relation to past practices are (1) the length of time the parties were engaged in the transactions at issue, (2) whether the amount or form of tender differed from past practices, (3) whether the debtor or creditor engaged in any unusual collection or payment activity, and (4) whether the creditor took advantage of the debtor's deteriorating financial condition, *See In re Richardson*, 94 B.R. 56, 60 (Bankr.E.D. Pa. 1988).

In re Food Catering & Housing, Inc. 971 F.2d 396 (9th Cir. 1992)

Ordinary course of business exception.

In re Powerine Oil Co., 126 B.R. 790 (9th Cir. B.A.P. 1991)

1. 'Debt' arises upon shipment tor delivery of goods, not installation or acceptance

2. Where there was no evidence that late payments followed practice of parties, no ordinary course of business.

In re CHG International, Inc., 897 F.2d 1479 (9th Cir. 1990)

Long-term debt payment not included within ordinary course of business exception under §547(c)(2).

In re Seawinds Ltd., 888 F.2d 640 (9th Cir. 1989)

§547(c)(2) - ordinary course of business.

In re Loretto Winery, Ltd. 107 B.R. 707 (9th Cir. B.A.P. 1989)

Objective standard - ordinary course of business - §547(c)(2).

In re Pioneer Technology, Inc., 107 B.R. 698 (9th Cir. B.A.P. 1988)

Presumption of insolvency - summary judgment, ordinary course of business - hypothetical liquidation - §547(c)(2).

**11. § 547(c)(3)**

In re Taylor, 390 B.R. 654 (9th Cir. B.A.P. 2008)

A security interest that was not perfected within 20 days was a preferential transfer, even though the creditor attempted to perfect within the 20-day period of the statute but did not do so until the 21st day. Idaho state statute that allowed a second 20-day period to correct mistakes was trumped by § 547(c)(3).

**12. § 547(c)(4)**

In re IFRM, Inc., 52 F.3d 228 (9th Cir. 1995)

§547(c)(4) - complete review.

**13. § 547(e)(1)(A)**

In re Lane, 980 F.2d 601 (9th Cir. 1992)

§547(e)(1)(A) - Lis Pendens = transfer where underlying suit is for a fraudulent transfer.

**14. § 550**

In re Mill Street, Inc., 96 B.R. 268 (9th Cir. B.A.P. 1989)

Collection agency is an initial transferee from whom preference can be collected. §550.

**15. Cal. CCP § 488.500**

In re Wind Power Systems, Inc., 841 F.2d 288 (9th Cir. 1988)

Date of creation of lien - Cal. C.C.P. §488.500.

### 16. Miscellaneous

In re Liu, 2020 Bankr.LEXIS 419 (9th Cir. B.A.P. 2/11/2020)

Good analysis of relate back case law for pre-judgment liens and standing issues.

In re Cresta Technology Corp., 2018 Bankr.LEXIS 1057 (9th Cir. BAP 4/6/2018)

Transfer occurs when a check is honored, not delivered.

In re Silverman, 616 F.3d 1001 (9th Cir. 2010)

Criminal restitution payments (here to the California State Compensation Insurance Fund) are recoverable as preference payments. Allowing recovery of preferences will not interfere with the state's criminal proceedings, since the debtors will stay have to satisfy the restitution order as a nondischargeable debt.

In re SNTL Corp., 571 F.3d 826 (9th Cir. 2009)

A debtor's previously released liability as a guarantor of an affiliate's obligation is revived when the creditor compromised a preference action against it.

In re Ahaza Systems, Inc., 482 F.3d 1118, 1126 (9th Cir. 2007)

1. When there is no past debt between the parties with which to compare the challenged one, the instant debt should be compared to the debt agreements into which we would expect the debtor and creditor to enter as a part of their ordinary business operations. 2. When the debt has been restructured, the court should look at both the original and revised agreement to determine the nature of the debt.

In re Incomnet, Inc., 463 F.3d 1064 (9th Cir. 2006)

Universal Service Administrative Company, to which all telecommunication providers must contribute under the 1996 Telecommunications Act, was not a mere conduit, but instead met the "dominion" and thus received preferential transfers.

In re Enterprise Acquisition Partners, Inc., 319 B.R. 626 (9th Cir. B.A.P. 2004)

Corporation solely-owned by an insider of the debtor is not a per se insider under § 101(31).

In re Superior Fast Freight, Inc., 202 B.R. 485 (9th Cir. B.A.P. 1996)

Voluntary renewal fee with professional listing service was not payment of debt and was not subject to avoidance.

In re Futoran, 76 F.3d 265 (9th Cir. 1996)

Bankruptcy debtor's payment to ex-wife in exchange for cancellation of marital termination agreement is preference recoverable by trustee.

Taylor Assoc. v. Dramant (In re Advent Management Corp.), 178 B.R. 480 (9th Cir. B.A.P. 1995), *aff'd* 104 F.3d 293 (9th Cir. 1997)

Transfer of property subject to a constructive trust as a preference

In an action to recover a preference, the court held that property subject to a constructive trust is the property of the debtor until the beneficiary establishes the existence of the trust. The court distinguished the *Mitsui Mfg. Bank v. Unicom Computer Corp.* (In re Unicorn Computer Corp.), 13 F.3d 321 (9th Cir. 1994) by finding that it was limited to circumstances where, unlike the case under review, the recipient of the transfer was also the beneficiary of the constructive trust.

In re Loken, 175 B.R. 56 (9th Cir. B.A.P. 1994)

State's extended perfection grace period not applicable to extend bankruptcy code's ten-day grace period for perfecting security interest in property.

Parker N. Am. Corp. v. Resolution Trust corp. (In re Parker N. Am. Corp.), 24 F.3d 1145 (9th Cir. 1994)

FIRREA's impact on preference claims - financial institution reform, recovery and enforcement act did not preclude jurisdiction by a bankruptcy court over a preference action against an institution for which the RTC as receiver had filed a proof of claim arising out of the same transaction as the alleged preference.

In re LCO Enterprises, 12 F.3d 938 (9th Cir. 1993)

1. Date for determining preferences may take into account postpetition facts
2. No implied immunity for preference attack for prepetition rent settlement
3. Landlord' rent concession incorporated into Chapter 11 plan precluded from recovery as preferential transfers.

In re Mantelli, 149 B.R. 154 (9th Cir. B.A.P. 1993)

Payment of money to satisfy civil contempt order = preference. Criminal restitution and *In re Nelson*, 91 B.R. 904 (N.D. Cal. 1988) discussed

Fact that debt was nondischargeable does not mean she received more than she would have received under the distributive portions of the code.

In re Comark, 145 B.R. 47 (9th Cir. B.A.P. 1992)

Repurchase agreement repayment treated as settlement payment to preclude avoidance of transaction under §547.

In re Jenson, 980 F.2d 1254 (9th Cir. 1992)

Perfection and priority attachment lien relates back to date writ issued.

In re Bullion Reserve of No. America, 922 F.2d 544 (9th Cir. 1991)

Debtor - 1.5 million to personal account. K has money transferred to his account and uses it to buy stock in K&M's names. Stock then pledged to D as security for the loan - held

1. M is not an initial transferee therefore it is irrelevant that transfer was for his benefit

2. M is not an immediate or mediate transferee, because money never transferred to his account.

In re California Trade Technical Schools, Inc., 923 F.2d 641 (9th Cir. 1991)

A debtor's deposit of nontrust funds into a trust account by way of restitution may constitute a preference.

In re CHG Intern. Inc., 897 F.2d 1479 (9th Cir. 1990)

Antecedent debt - whether a debt is current or antecedent depends upon when it was incurred. A debt is incurred when the debtor first becomes legally obligated to pay.

In re R&T Roofing Structures and Commercial Framing, Inc., 887 F.2d 981 (9th Cir. 1989)

Prepetition seizure of bank out by IRS may be preference.

In re Ehring, 91 B.R. 897 (9th Cir. B.A.P. 1988), *aff'd* 900 F.2d 184 (9th Cir. 1990)

Transfer occurred at time of perfection, not foreclosure sale.

In re Nucorp Energy, 92 B.R. 416 (9th Cir. B.A.P. 1988) (see also 902 F.2d 729 (9th Cir. 1990))

Transfer occurred when check honored, not delivered.

In re Lewis W. Shustleff, Inc. 778 F.2d 1416 (9th Cir. 1985)

Liquidation test.

In re Adamson Apparel (Stahl v. Simon), 785 F.3d 1285 (9th Cir. 2015)

When an insider guarantor of debt has a good faith reason for waiving his indemnification rights against the debtor in bankruptcy and takes no subsequent actions to negate the economic impact of the waiver, he is not a "creditor" under section 547 and is absolved of any preference

liability. There is much bankruptcy court authority outside of the 9th Circuit to the contrary, holding that such a waiver is void as against public policy.

**PRELIMINARY INJUNCTION**

In re Excel Innovations, Inc., 502 F.3d 1086 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2080 (2008)

Distinguishing *Crown Vantage,* the court held that "our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant."

In re Focus Media, Inc., 387 F.3d 1077 (9th Cir. 2004), *cert. denied,* 544 U.S. 92, 125 S.Ct. 1674 (2005)

". . .[W]e hold that where, as here, a party in an adversary bankruptcy proceeding alleges fraudulent conveyance or other equitable causes of action, *Grupo Mexicano* does not bar the issuance of a preliminary injunction."

Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878 (9th Cir. 2003)

"To obtain a preliminary injunction, a party must make a clear showing of either (1)a combination of probable successes on the merits and a possibility of irreparable injury, or (2) that its claims raise serious questions as to the merits and that the balance of hardships tips in its favor."

S.O.C., Inc., v. County of Clark, 152 F.3d 1136 (9th Cir. 1998), *amended by* 160 F.3d 541 (9th Cir. 1998)

To succeed on this appeal from the district court's denial of preliminary injunctive relief, Appellants "must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor." Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir.1991).

CHoPP Computer Corp v. U.S., 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)

In addition to civil contempt, damages may also be awarded for violation of a preliminary injunction.

Big Country Foods, Inc. v. Board of Education, 868 F.2d 1085 (9th Cir. 1989)

Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935 (9th Cir. 1987)

**PRETRIALS**

Ortega v. O'Connor, 50 F.3d 778 (9th Cir. 1995), *aff'd,* 146 F.3d 1149 (9th Cir. 1998)

Exclusion of witnesses for failure to serve list on opposing attorney improper where proof of service filed showing service (N.D. Cal. Rules interpreted).

Rogers v. Raymack Industries, Inc., 922 F.2d 1426 (9th Cir. 1991)

Rule 16 of the FRCP provides that a final pretrial order controls the subsequent course of action in a trial unless modified "to prevent manifest injustice." *See* FRCP 16(e). Local Rule 235-8 of the Northern District of California incorporates Federal Rule 16 and provides that "the parties shall, not less than seven calendar days prior to the date on which the trial is scheduled to commence...exchange copies of all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at the trial other than for impeachment or rebuttal."

We have applied a 3-part test to determine whether a party may present new evidence or testimony not contained in the pretrial order. Modification is permitted only when (1) the opposing party would not sustain substantial injury, (2) refusal might result in injustice, and (3) inconvenience to the court is slight. (cites omitted).

**PRIORITY CLAIMS**

In re Jones, 420 B.R. 506 (9th Cir. B.A.P. 2009)

Because a California Franchise Tax Board debt did not fall within three-year lookback period of § 507(a)(8)(A)(ii), neither the unnumbered paragraph of § 507(a)(8) nor equitable tolling apply**,** and thus the tax was discharged in the debtor's chapter 7 case. Furthermore, because all estate property vested in the debtor upon plan confirmation, the FTB could have pursued collection of the tax debt as a postpetition debt not subject to the automatic stay or the debtor's chapter 13 case.

In re Consolidated Freightways Corp. of Delaware, 564 F.3d 1161 (9th Cir. 2009)

Section 507(a)(5) covers those who rendered service within 180 days prior to the filing of the petition, regardless of whether they are retired or not. The dollar limit in this section is an aggregate limit, not an individualized recovery per employee.

In re Lorber Industries of California, 564 F.3d 1098 (9th Cir. 2009)

Reimbursement amounts for workers' compensation claims owed to the California Self-Insurer's Security Fund are not in the nature of an excise tax.

In re Imperial Credit Industries, Inc., 527 F.3d 959 (9th Cir. 2008)

A chapter 7 debtor's obligation on a claim arising from a capital maintenance agreement with the FDIC under § 365(o) is not entitled to administrative expense priority, where it is specifically provided for under § 507(a)(9).

In re Salazar, 430 F.3d 992 (9th Cir. 2005)

". . . [W]e hold that"deposit" as used in 11 U.S.C. § 507(a)(6) may include the advance handing over of full payment for consumer goods or services. . . ."

In re Irvine-Pacific Commercial Insurance Brokers, Inc., 228 B.R 245 (9th Cir. B.A.P. 1998)

Employee who resigned and later obtained a judgment against debtor employer for wrongly withheld vested deferred compensation was entitled to claim attorneys fees under employment contract. Elements of §502(a)(7) - doesn't apply to former employees.

In re Elsinore Corporation, 228 B.R. 731 (9th Cir. B.A.P. 1998)

Holding company's continued operation defeated employee's assertion of priority status, based on subsidiary's cessation of operations.

In re Hovan, Inc., 96 F.3d 1254 (9th Cir. 1996)

State's claim for unpaid tax penalties not entitled to priority.

In re Camilli, 94 F.3d 1330 (9th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997)

Employer's statutorily imposed debt to state for workers' compensation benefits paid to injured employee constitutes nondischargeable "tax."

In re Stone, 6 F.3d 581 (9th Cir. 1993)

The court of appeals affirmed in part and reversed in part and held that the State of Alaska could properly condition the sale of a liquor license upon satisfaction of the seller's obligation to pay municipal and state taxes, but could not create a property interest in the license in a third-party creditor in derogation of a prior federal tax lien. *See also In re Kimura*, 969 F.2d 806 (9th Cir. 1992).

In re Roth American, Inc. 975 F.2d 949 (3rd Cir. 1992)

No superpriority for prepetition wage claim.

In re Rau, 113 B.R. 619 (9th Cir. B.A.P. 1990)

"Debtor's business" includes aggregate of all of debtor's businesses.

In re Peaches Records & Tapes, Inc., 102 B.R. 193 (9th Cir. B.A.P. 1989)

Under secured creditor not entitled to interest on superpriority claim.

**PRIVILEGE–California law**

In re Cedar Funding, Inc., 419 B.R. 807 (9th Cir. B.A.P. 2009)

Chapter 11 trustee's statements made in the course of performing his statutory duties were entitled to the litigation privilege under Cal. Civ. Code § 47(b), and thus the debtor could not maintain his defamation action against him.

**PROPERTY OF THE ESTATE**

1. **Constructive Trust**
2. **11 U.S.C. § 541(c)(2)**
3. **§ 541(a)**
4. **§ 541(a)(6)**
5. **§ 541(a)(7)**
6. **§ 362**
7. **§ 363**
8. **Taxes**
9. **Other Trusts**
10. **Letters of Credit**
11. **Miscellaneous**
12. **See also the "Community Property" section on page 96**

**1. Constructive Trust**

In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. B.A.P. 1994)

Following *Uniform*, court finds that check made out to third party which ends up in debtor's account is subject to constructive trust, assuming it can be traced.

In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994)

Property mistakenly paid to debtor held in constructive trust.

In re California Trade Technical Schools, 923 F.2d 641 (9th Cir. 1991)

1. Money held for student loans was held in express trust, and as such training and commingling are irrelevant. But where money was not restored to trust account, no constructive trust available And where money was transferred to restore trust account within 90 days, it was an avoidable preference.

In re Seaway Express Corp., 912 F.2d 1125 (9th Cir. 1990)

Bankruptcy creditor not permitted to remove property from estate by asserting constructive trust on real property purchased with secured asset. Real property given to debtor prepetition to pay an account receivable in which creditor had a security interest.

**2. 11 U.S.C. §541(c)(2)**

In re Cogliano, 355 B.R. 792 (9th Cir. B.A.P. 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her secured claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

In re Lowenschuss, 171 F.3d 673 (9th Cir. 1999), *cert. denied*, 528 U.S. 877 (1999)

Under 11 U.S.C. §541(c)(2) a debtor's interest in a trust may be excluded from the bankruptcy estate only if the trust contains a transfer restriction and that restriction is enforceable under applicable non-bankruptcy law.

In re Conner, 165 B.R. 901 (9th Cir. B.A.P. 1994), *cert. denied*, 519 U.S. 817 (1996)

Voluntary contribution by an employee/debtor to an ERISA qualified plan, which could be withdrawn at any time, were not poe under 541(c)(2) citing *In re Reuter*, 11 F.3d 850 (9th Cir. 1993)

Patterson v. Shumate, 504 U.S. 753 (1992)

541(c)(2) ERISA - qualified pension funds are not property of the estate.

In re Jordan, 914 F.2d 197 (9th Cir. 1990)

Trust with restrictions to compensate debtor's personal injury is not a spend thrift trust and thus not excluded from estate.

**3. § 541(a)**

Kasolas v. Aurora Capital Advisors (In re Robert S. Brower, Sr.), unpublished 9th Cir. Decision filed on June 4, 2024

Where debtor is a shareholder in a corporation, property of the estate does not include corporate property. Under California law, a shareholder simply has an expectancy in corporate property or earnings and becomes the owner of a portion of each only when the corporation is liquidated by action of the directors or when a portion of the corporation's earnings is segregated and set aside for dividend payments.

In re Magnacom Wireless, LLC, 503 F.3d 984, 990 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2076, 170 L.Ed.2d 793 (2008)

". . .[O]nce an FCC license is cancelled, a licensee no longer has any right derived from that license and therefore has no entitlement to the proceeds from the auction of a new license."

In re Raintree Healthcare Corp., 431 F.3d 685 (9th Cir. 2005)

Medicare reimbursement funds that accrued up to the date of the bankruptcy petition were property of the estate. Assignee of the debtor's Medicare number which was transferred the day before the bankruptcy was not entitled to the reimbursements under Arizona law.

In re Jess, 169 F.3d 1204 (9th Cir. 1999)

9th Cir affirmed a B.A.P. judgment, holding that under §541(a) the bankruptcy estate includes the portion of an attorney-debtor's contingent fee payment that is attributable to pre-petition work.

**4. § 541(a)(6)**

In re Johnson, 178 B.R. 216 (9th Cir. B.A.P. 1995)

Compliance with an anti-competition agreement is not "services performed" for purposes of § 541(a)(6).

In re FitzSimmons, 725 F.2d 1208 (9th Cir. 1984)

541(a)(6) - postpetition services of sole proprietor v. product of his employee's efforts.

**5. § 541(a)(7)**

In re Carroll, 903 F.2d 1266 (9th Cir. 1990)

8% to debtor on management contract = poe under 541(a)(7).

In re Neidorf, 534 B.R. 369 (9th Cir. B.A.P. 2015)

Post-petition payment made by bank under national consent order regarding foreclosures not property of the estate when consent order entered post-petition. Fact that chapter 7 bankruptcy estate had an interest in the residence insufficient where qualifying events giving rise to debtor's right to receive funds arose post-petition.

**6. § 362**

In re Pintlar Corp., 205 B.R. 945 (Bankr.D. Idaho 1997)

The liability portion of a corporate bankruptcy and D&O policy is not property of the estate, thus 362 is inapplicable.

**7. § 363**

In re Gerwer, 898 F.2d 730 (9th Cir. 1990)

Trustee in bankruptcy in liquidation or reorganization may compel turnover of property from secured creditor in possession prior to default. Issue arose in context of motion to sell under § 363

**8. Taxes**

Nichols v. Birdsell, 491 F.3d 987 (9th Cir. 2007)

A debtor's pre-bankruptcy application of their right to tax refunds to post-bankruptcy tax obligations constitutes an asset that must be turned over to the bankruptcy trustee.

U.S. I.R.S. v. Snyder, 343 F.3d 1171 (9th Cir. 2003)

Debtor's interest in a pension plan was not property of the estate, and thus it could not used to secure the IRS's claim for delinquent taxes in his chapter 13 case. This is so, even though the IRS is not subject to ERISA's antialienation provisions.

In re Lambert, 283 B.R. 16 (9th Cir. B.A.P. 2002)

Money paid to taxpayer under 2001 federal tax cut statute constituted advance refund of year-2001 taxes, not payment attributable to 2000 tax year.

Begier v. I.R.S., 496 U.S. 53, 110 S.Ct. 2258 (1990)

Trust fund taxes set aside by the debtor prepetition not poe - held in trust for I.R.S. - U.S. v. Randall overruled. - Contra *In re Slugg's Chicago Style*.

In re Sluggo's Chicago Style, Inc., 94 B.R. 625 (9th Cir. B.A.P. 1988), *aff'd* 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)

Pre-petition security deposit for taxes is property of the estate.

**9. Other Trusts - Also see separate Trust section.**

In re Reynolds, 867 F.3d 1119 (9th Cir. 2017)

When a chapter 7 debtor has right, as of the petition date, to payments from a spendthrift trust which are being paid solely from the trust's principal, the bankruptcy estate is entitled to full amount of distribution to be paid as of the petition date. Estate, however, may not access any portion of that money to extent debtor/beneficiary needs it for his support or education (if the trust states that these funds are to be used for that purpose). Bankruptcy estate may also reach 25% of expected future payments from the trust, reduced by amount debtor/beneficiary needs to support himself and his dependents.

In re Brace, 979 F.3d 1228 (9th Cir. 2020)

When a married couple uses community funds to acquire property with JT title on or after 1/1/1975, the property is presumptively community property under Family Code § 760 in a dispute between the couple and a bankruptcy trustee. Brace partially overrules In re Summers (discussed on page 96 of this outline). The JT titling of property acquired with CP funds on or after 1/1/1985 is not sufficient by itself to transmute CP into separate property. See also Community Property section on page 96.

In re Anderson, 5723 B.R. 743 (9th Cir. B.A.P. 2017)

Where the debtors are real estate agents entitled to a commission on a sale that will close post-petition, commission is estate property if it is "sufficiently rooted in the pre-bankruptcy past."

In re Pettit Oil Company, 575 B.R. 905 (9th Cir. B.A.P. 2017)

Trustee's rights to proceeds of a sale of consigned goods may be senior to the consignor's rights under Article 9 of the U.C.C.

In re Cutter, 398 B.R. 6, 19-20 (9th Cir. B.A.P. 2008)

1. Property which the debtor transferred to a self-settled trust became property of the estate. "While California law recognizes the validity of spendthrift trusts, any spendthrift provisions are invalid when the settlor is a beneficiary."

2. "If. . .the trust agreement allows the debtor-beneficiary to exercise control over and reach trust property contributed by others, the estate is entitled to the maximum amount that the trust could pay or distribute to the debtor-beneficiary."

In re Schmitt, 215 B.R. 417 (9th Cir. B.A.P. 1997)

The court did not abuse its discretion in approving the compromise. The debtor's interest in the revocable trust was not estate property and had little value at the time of the bankruptcy filing. Hence, the probability of successful litigation was low. There were several complex disputed issued which would have made litigation somewhat costly. Applying the *Woodson* criteria, the compromise was in the best interest of the creditors. Further, it was fair and equitable for the creditors. The fact that the full Trust documents were not provided for the bankruptcy court's review does not justify reversal.

In re Neuton, 922 F.2d 1379 (9th Cir. 1990)

25% interest in spendthrift trust - while the trust does not escape the reach of the bankruptcy estate by virtue of its contingent nature, it is not property of the estate insofar as it enjoys spendthrift status. However, 1/4 of Neuton's interest in future payments under the trust is unprotected except to the extent that such sum is deemed necessary for the support of appellant or of his dependents.

In re Fitzsimmons, 896 F.2d 373 (9th Cir. 1990)

Bankruptcy trustee cannot reach debtor- beneficiary's interest in trust containing forfeiture-in-alienation clause.

In re B.I. Financial Services Group, Inc., 854 F.2d 351 (9th Cir. 1988)

Funds pooled in an investment account are property of the estate - no showing of express trust under California law.

### 10. Letters of Credit

In re Onecast Media, Inc., 439 F.3d 558 (9th Cir. 2006)

Where the landlord drew down entirely on a letter of credit purchased by the debtor and held by the landlord as security, the trustee was entitled to recover the difference between the landlord's damages and the balance of the amount drawn down, since that amount was property of the estate.

### 11. Misc

In re Castleman, __F.4th__ (9th Cir. 2023)

The post-petition, pre-conversion increase in equity in property of the Chapter 13 estate is property of the Chapter 7 estate when Chapter 13 debtors, in good faith, convert to a Chapter 7.

In re Brown, 953 F.3d 617 (9th Cir. 2020)

A pre-petition fraudulent conveyance remains property of the estate after the bankruptcy case is converted from Chapter 13 to Chapter 7 under Bankruptcy Code § 348(f)(1)(A).

In re Cofer, 625 B.R. 194 (Bankr. ID 2021)

Upon conversion from 13 to 7 under Bankruptcy Code § 348, appreciation of property during the Chapter 13 belongs to the debtor. For opposing view, see In re Castleman, 2021 Bankr.LEXIS 1517 (Bankr. W.D.Wash. 6/4/21).

In re Howrey, LLP, __F.3d.__ (9th Cir. 2020)

Under D.C. law, hourly billed client matters are not property of the law firm bankruptcy estate.

Wilson v. Rigby, 909 F.3d 306 (9th Cir. 2018)

Bankruptcy exemptions are fixed as of the petition date, and this rule determines not only what exemptions a debtor may claim, but also the value that a debtor is entitled to claim in her exemptions. Post-petition appreciation of property is part of the bankruptcy estate, and debtor may not amend exemption to claim appreciation.

In re Sorensen, 586 B.R. (B.A.P. 9th Cir. 2018).

Applying California law, pawned property is not excluded automatically from the bankruptcy estate under § 548(b)(8) absent relief from the automatic stay to allow applicable notice period to run (see Cal.Fin.Code § 21201(f).

In re Schmitz, 270 F.3d 1254 (9th Cir. 2001)

Fishing quota rights enacted after the debtor filed chapter 7 were not property of bankruptcy estate where rights were calculated based on prepetition fishing history and constituted mere possibility when petition was filed.

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)

Listing of prepetition "songrights" in a value of "unknown" "was not so defective that it would forestall a proper investigation of the asset." Accordingly, the right to post-petition royalties from these assets vested in the debtor upon confirmation of his chapter 11 plan. Unpaid prepetition royalties did not vest in the debtor, because they were subject to a separate listing requirement as causes of action.

In re Pettit, 217 F.3d 1072 (9th Cir. 2000)

Supercedes as bond held in district court registry released to judgment holder before chapter 11 was filed did not become property of the debtor's estate, and thus judgment holder did not violate automatic stay. Property became judgment holder's as of date order signed releasing funds, not date the check was received.

In re Moses, 167 F.3d 470 (9th Cir. 1999)

Debtor's "Keogh" plan with valid anti-alienation provision does not qualify as property of bankruptcy estate.

In re Tully, 202 B.R. 481 (9th Cir. B.A.P. 1996)

Real estate commission pending in escrow at time debtor filed bankruptcy petition was pre-petition earnings

In re Harrell, 73 F.3d 218 (9th Cir. 1996)

Court errs in holding that bankruptcy trustee may sell debtor's revocable opportunity to renew season tickets - not a property interest under Arizona law.

In re Chappel, 189 B.R. 489 (9th Cir. B.A.P. 1995)

Under Cal. Law, right to probate estate occurs as of time of death. Prepetition decedent's estate = property of the estate.

In re Hammon, 180 B.R. 220 (9th Cir. B.A.P. 1995)

Cash deposit posted by debtor contractor in lieu of payment bond constitutes asset of estate, although creditors may have an equitable interest in it.

In re Wu, 173 B.R. 411 (9th Cir. B.A.P. 1994)

Insurance commissions - postpetition services by debtor. The property analysis under *Ryerson* and *Fitzsimmons* is to first determine whether any postpetition services are necessary to obtaining the payments as issue, If not, the payments are entirely 'rooted in the pre-bankruptcy past" *Ryerson* 732 F.2d at 1426, and the payments will be included in the estate. If some postpetition services are necessary, then courts must determine the extent to which the payments are attributable to the post-petition services and the extent to which the payments are attributable to prepetition services. That portion of the payment allocable to postpetition services will not be property of the estate. That portion of the payments allocable to prepetition services or property will be property of the estate.

In re Sluggo's Chicago Style, 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 784 (1991)

Bankruptcy estate encompasses certificate of deposit provided as required security by debtor business for payment of California sale and use taxes.

In re Anchorage Nautical Tours, 102 B.R. 741 (9th Cir. B.A.P. 1989)

Oral assignment of right to insurance proceeds took property out of estate.

Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989)

Contractor's license bond is not property of the estate.

In re Contractors Equip. Supply Co., 861 F.2d 241 (9th Cir. 1988)

Accounts receivable subject to security interest is property of the estate.

Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988)

Bankruptcy trustee has no authority to pursue claims on behalf of third parties.

In re Hernandez, 483 B.R. 713 (B.A.P. 9th Cir. 2012)

The B.A.P. provides an expansive definition of property of the bankruptcy estate and holds that a debtor's "bundle of rights in property" must be identified on a case-by-case basis. This case determined whether cash in a bank account that was levied upon by a Sheriff's Office pre-petition remained property of the estate notwithstanding the levy. Because funds arose from social security benefits, which are always exempt, the B.A.P. held that the funds held by the Sheriff were still property of the estate.

In re Eberts, 2014 Bankr. LEXIS (Bankr. C.D.Cal. 2014)

Bankruptcy Court applied California's Moore/Marsden rule, which holds that "when community funds are used to make payments on property purchased by one of the spouses before marriage the rule developed through California decisions gives to the marital community a pro

tanto community property interest in the real property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds. Accordingly, bankruptcy courts may apply this rule to determine what is property of the bankruptcy estate.

In re Perl, 811 F.3d 1120 (9th Cir. 2016)

Debtor did not have an interest in real property after foreclosure and unlawful detainer judgment which involved a writ of possession. Automatic stay did not prevent post-petition enforcement of writ.

**PROPERTY, REAL and PERSONAL - California Law**

In re Tippett, 542 F.3d 684 (9th Cir. 2008)

The bankruptcy code does not preempt Cal. Civil Code § 1214, which renders an unrecorded conveyance void as to bona fide purchasers. The transfer of the debtor's property to the bankruptcy estate upon filing their chapter 7 case was such a transfer. Thus the debtors' unauthorized transfer of their home to a bona fide purchaser was covered by this statute.

In re Oakmore Ranch Mgmt., 337 B.R. 222 (9th Cir. B.A.P. 2006)

Presumption under Cal. Evidence Code § 662 that owner of legal title to property was beneficial owner was rebutted, where payees of note were debtor's children, who did not have the financial ability to acquire the property that was the subject of the note.

In re Emery, 317 F.3d 1064 (9th Cir. 2003)

When a borrower executes a deed of trust assigning to the lender the borrower's rights in any cause of action, the lender is not entitled to retain settlement proceeds the borrower gains from such an action, when the borrower is not in default.

In re Summers**,** 278 B.R. 808 (9th Cir. B.A.P. 2002)*, aff'd*, 332 F.3d 1240 (9th Cir. 2003)

Property held as joint tenants by husband and wife with their daughter was held in tenancy by the entirety under California law, not as community property. Presumption of title controls over community property presumption, even though community property was used to purchase the property. **But See** In re Valli, 58 Cal.4th 1396 (2014), and In re Brace, 978 F.3d 1228 (9th Cir. 2020), which criticize and refuse to follow Summers.

In re First T.D. & Investment, Inc. 253 F.3d 520 (9th Cir. 2001)

Assignment of collateral notes and trust deeds to investors may be perfected in California without possession and thus cannot be avoided under the strong arm clause.

In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. B.A.P. 1998)

Lenders' acceptance of deed of trust did not extinguish claims against debtor for constructive fraud in obtaining loan under anti-deficiency statute.

In re Wolverton Assoc., 909 F.2d 1286 (9th Cir. 1990)

What constitutes a surrender of property.

Abrenilla v. China Ins. Co. Ltd., 870 F.2d 548 (9th Cir. 1989)

What is a fixture.

**REAFFIRMATION**

Bobka v. TMCC, 968 F.3d 946 (9th Cir. 2020)

Lease assumption under § 365(p) remains enforceable following discharge even if lease assumption was not "reaffirmed" under § 524(c).

In re Blixseth, 684 F.3d 865 (9th Cir. 2012)

Debtor's failure to reaffirm lien on personal property, along with Chapter 7 trustee's failure to act under § 521(a)(6) removes personal property form the bankruptcy estate. See also §§ 362(h)(1) and 362(h)(2).

In re Dumont, 383 B.R. 481, 489 (9th Cir. 2009)

"Ride through" option under pre-B.A.P.CPA law (*In re Parker,* 139 F.3d 668 (9th Cir. 1998)) was eliminated in 2005. *"At least where the debtor has not attempted to reaffirm,* our decision in *Parker* has been superceded by B.A.P.CPA." (Emphasis added)

In re Bennett, 298 F.3d 1059 (9th Cir. 2002)

Absent a valid reaffirmation agreement, an agreement to repay a discharged debt is unenforceable under section 524(a)(2), regardless of California law to the contrary

In re Bassett, 285 F.3d 882 (9th Cir. 2002), *cert. denied*, 537 U.S. 1002 (2002)

Right-to-rescind statement in reaffirmation agreement was clear and conspicuous.

In re Lopez, 274 B.R. 854 (9th Cir. B.A.P. 2002), *aff'd,* 345 F.3d 701 (9th Cir. 2003), *cert. denied*, 1245 S.Ct. 2015 (2004)

"A post-discharge agreement between a debtor and the holder of a secured claim which does not comply with the requirements of section 524(c) cannot be valid or enforceable where the consideration is based in part on a discharged debt."

Rein v. Providian Financial Corporation, 270 F.3d 895 (9th Cir. 2001)

Reaffirmation agreement entered into by debtor during prior bankruptcy proceedings was not final judgment on the merits for purposes of determining dischargeability in a subsequent bankruptcy, and thus could not be given res judicata effect, where it was unaccompanied by a court order.

In re Bassett, 255 B.R. 747 (9th Cir. B.A.P. 2000), *cert. denied*, 537 U.S. 1002 (2002)

Reaffirmation agreement which did not recite right to rescind in conspicuous type was invalid.

In re Reinertson, 241 B.R. 451 (9th Cir. B.A.P. 1999)

Debtors could not be relieved of agreement reaffirming belatedly-perfected security interest in vehicle where debtors sought relief more than one year after agreement's approval by bankruptcy court.

In re Watson, 192 B.R. 739 (9th Cir. B.A.P. 1996), *aff'd.* 116 F.3d 488 (9th Cir. 1997)

Settlement agreement to release prepetition liability on note, confirm in rem liability on accounts receivable and create a new debt does not equal a reaffirmation contract.

**REBUTTAL v. IMPEACHMENT**

Sterkel v. Fruehauf Corp., 975 F.2d 528 (8th Cir. 1992)

**RECLAMATION**

In re Brown & Cole Stores, LLC, 375 B.R. 873 (9th Cir. B.A.P. 2007)

Secured creditors are entitled to the administrative expense priority allowed by § 503(b)(9). Because such claims arise prepetition, they may be subject to setoff under § 553(a) if all of the requirement of the statute are met.

In re MGS Marketing, 111 B.R. 264 (9th Cir. B.A.P. 1990)

Summary of law in context of a compromise and approval which the B.A.P. reversed - no written demand for reclamation

In re Coast Trading Co., Inc., 744 F.2d 686 (9th Cir. 1984)

**RECUSAL**

In re Basham, 208 B.R. 926 (9th Cir. B.A.P. 1997), *aff'd*, In re Byrne, 152 F.3d 924 (9th Cir. 1998)

Reasonable person test.

In re Goodwin, 194 B.R. 214 (9th Cir. B.A.P. 1996)

1. 144 does not apply to bankruptcy judges

2. Alleged ex parte contract with attorney to make sure court was notified if party appeared so security could be arranged was not a ground for recusal under § 455.

Liteky v. U.S., 510 U.S. 540 (1994)

(1) Judicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion

(2) Opinions formed by the judge on the basis of facts or events occurring in the course of the current or prior proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. at 1157.

Yagman v. Republic Ins., 987 F.2d 622 (9th Cir. 1993)

Recusal issue raised based on judge's conduct in previous cases.

In re Georgetown Park Apartments, Ltd., 143 B.R. 557 (9th Cir. B.A.P. 1992)

Standard reviewed

28 U.S.C. § 455(a) is applicable to bankruptcy judges pursuant to bankruptcy rule 5004(a). This provision imposes a self-imposing duty on a judge, but its provision may be asserted by a party. *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980). The bias which mandates recusal must be one which is personal and must stem from extra-judicial source. *United States v. Carignan*, 600 F.2d 762, 764 (9th Cir. 1979), *Unites States v. Conforts*, at 869. Knowledge obtained in earlier

proceedings in the same case is not extra-judicial. *Unites States v. Winston,* , at 223. Nor may a judge's views on legal issues serve as a basis for disqualification. *United States v. Conforte*, at 882

Generally, the judge whose recusal is sought is required to review the recusal affidavit to determine whether it is legally sufficient, assuming the truth of the allegations therein. If the judge determines that the allegations are legally sufficient, then the motion must be referred to another judge. *See United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980), 28 U.S.C. § 144. A reasonable person standard applies *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980)**.**

**REMEDIES**

In re Egbe, 107 B.R. 711 (9th Cir. B.A.P. 1989)

Creditor has cumulative remedies so that suit on a note will not eliminate his secured status as to a car**.**

**REMOVAL & REMAND**

In re Caesars Entertainment Operating Company, 588 B.R. 233 (B.A.P. 9th Cir. 2018)

Bankruptcy Court did not abuse discretion in deciding remand motions before transfer motions. Only remand motions based on grounds in 28 U.S.C. § 1447(c) are immune from appellate review.

In re Curtis, 571 B.R. 441 (9th Cir. B.A.P. 2017)

Debtor cannot remove case pending in District Court to Bankruptcy Court under 28 U.S.C. § 1452.

City & County of San Francisco v. PG & E Corp., 433 F.3d 1115 (9th Cir. 2006), *cert. denied,* 549 U.S. 882, 127 S.Ct. 208 (2006)

1. "Section 1452(b) does not deprive appellate courts of jurisdiction to review whether the action was properly removed in the first instance." 2. § 1447(d) does not preclude review of a district court's decision not to remand where the district court finds subject matter jurisdiction. 3. A lawsuit brought under Cal. Bus. & Prof. Code § 17200 seeking an injunction and restitution constitutes a police of regulatory power matter that is not subject to removal under § 1452(a).

Security Farms v. International Brotherhood of Teamsters, 124 F.3d 999, 1009-10 (9th Cir. 1997),

District court's denial of abstention treated as a decision not to remand, since after the removal of the proceeding to federal court, the state court action was extinguished. "Section 1334(c) abstention should be read in pari materia with section 1452(b) remand, so that the former applies only in cases in which there is a related proceeding that either permits abstention in the interests of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2)."

In re Conejo Enterprises, Inc., 96 F.3d 346 (9th Cir. 1996)

Remand order based on abstention not appealable.

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995)

If an order remands a removed bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject matter jurisdiction, a court of appeals lacks jurisdiction to review the order under §1447(d). That section, a provision of the general removal statute, bars appellate review of any "order remanding a case to the State court from which is was removed." Under *Thermtron Products, Inc. v. Hermansdorfer*, 483 U.S. 336, 345-346 (1976) *abrogated by* Quackenbush v. Allstate Ins. Co., 116 S.Ct. 1712 (1996); §1447(d), must be read *in part materia* with §1447(c), so that only remands based on the grounds recognized by §1447(c), i.e., a timely raised defect in removal procedure or lack of subject mater jurisdiction, are immune from review under §1447(d). Section 1447(d) bars review here, since the District Court's order remanded the case to "the State court from which it was removed," and untimely removal is precisely the type of removal defect contemplated by §1447(c). The same conclusion pertains regardless of whether the case was removed under § 1441(a) or §1452(a). Section 1447(d) applies "not only to remand[s]...under [the general removal statute], but to orders of remand made in cases removed under any other statutes." *United States v. Rice*, 327 U.S. 742, 752. Moreover, there is no indication that Congress intended §1452 to be the exclusive provision governing removals and remands in bankruptcy or to exclude bankruptcy cases from §1447(d)'s coverage. Although §1452(b) expressly precludes review of certain remand decision in bankruptcy cases, there is no reason §§1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. The Court must, therefore, give effect to both.

**RE-OPENING CASE - Sec. 350(b)**

In re Cambridge Land Co., II, 626 B.R. 319 (9th Cir. 2021)

Reopening of dismissed case will not allow bankruptcy estate to administer assets under § 349(b).

In re Yussoupova, 2016 Bankr.LEXIS 965 (9th Cir. B.A.P. 2016)

Laches not grounds for denying motion to re-open case. It may be considered when court considers substantive motion after case re-opened.

In re Lopez, 283 B.R. 22 (9th Cir. B.A.P. 2002)

Cause of action not listed by debtor in her schedules that might have value justified reopening of case, regardless of the fact that the time for revoking the debtor's discharge had past.

In re Staffer, 306 F.3d 967 (9th Cir. 2002)

Bankruptcy court erred in refusing to reopen closed case to allow unscheduled creditor to file a complaint under § 523(a)(3).

In re Paine, 250 B.R. 99 (9th Cir. B.A.P. 2000)

Debtor has no standing to challenge order reopening case.

In re Abbott, 183 B.R. 198 (9th Cir. B.A.P. 1995)

A motion to reopen is simply a mechanical device which can be brought ex parte and without notice. *In re Daniels*, 34 B.R. 782, 784 (9th Cir. B.A.P. 1983). It has no independent legal significance and determines nothing with respect to the merits of the case. *In re Germaine*, 152 B.R. 619, 624 (9th Cir. B.A.P. 1993). The order denying the motion to set aside did not diminish Earlene's property, increase her burdens or detrimentally affect her rights. She was not a "person aggrieved" by that order. The order left Earlene to defend the fraudulent transfer complaint. It did

not prevent here from asserting any claims or defenses. Earlene has no standing to appeal the order reopening the case.

In re Cisneros, 994 F.2d 1462 (9th Cir. 1993)

It was not an abuse of discretion for a bankruptcy court to reopen a closed bankruptcy case to vacate its order granting a discharge that was entered by virtue of a mistake of fact. Pursuant to § 350(b), the bankruptcy court had the discretion to reopen the case, which gave it legal authority to vacate the discharge order.

In re Beeney, 142 B.R. 360 (9th Cir. B.A.P. 1992)

Reopening of case unnecessary to name debtor in a suit to recover insurance proceeds

In re Ricks, 89 B.R. 73 (9th Cir. B.A.P. 1988)

Standard for reopening to avoid lien under § 522(f).

In re Daniels, 34 B.R. 782 (9th Cir. B.A.P. 1983)

Case may be reopened without notice or hearing.

In re Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982)

Case cannot be reopened if it has been dismissed -- only if it has been closed. Motion to vacate dismissal must be filed within one year.

**ROOKER-FELDMAN AND BARTON DOCTRINES**

Akhlaghpour v. Orantes, __F.4th __ (9th Cir. 2026)

Good explanation of Barton Doctrine. Holds that a bankruptcy court may provide Barton permission after a case in another forum has been initiated. Good explanation of the Rooker-Feldman doctrine. Holds that motion to seek Barton permission after a state court dismissed litigation due to the failure to obtain Barton permission before commencing the state court litigation does not violate the Rooker-Feldman doctrine.

In re Wike, __B.R.__ (9th Cir. BAP 2024)

Rooker-Feldman Doctrine does not bar bankruptcy court from reviewing state court's analysis of Bankruptcy Code section 525. Case provides a good description of the scope of the doctrine.

Reusser v. Wachovia Bank, N.A., 525 F.3d 855 (9th Cir. 2008)

Debtors' claims under 42 U.S.C. § 1983 brought in United States District Court constituted a *de facto* appeal of a state court default judgment, and were barred by the *Rooker-Feldman* doctrine.

Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007)

Doctrine only applies where the plaintiff asserts legal errors by the state court and seeks relief from a state court judgment. Doctrine did not apply in this case, because there was no state court judgment.

In re Lopez, 367 B.R. 99 (9th Cir. B.A.P. 2007)

1. The *Rooker-Feldman* doctrine does not override or supplant the issue and claim preclusion doctrines; 2. Issue preclusion applied in this § 523(a)(6) action, where the state court found that the debtor willfully and maliciously misappropriated customer lists.

In re Harbin, 486 F.3d 510, 519 (9th Cir. 2007)

Doctrine did not prevent a bankruptcy court from considering the affect of a state court appeal on the debtor's chapter 11 plan.

In re Williams, 280 B.R. 857 (9th Cir. B.A.P. 2002)

Under Rooker-Feldman doctrine, state court decision was binding on bankruptcy case even though decision was still on appeal and not final for claim-preclusion purposes under California law.

**RULE 4 & 7004 - SERVICE OF PROCESS**

In re Domingo, 2017 Bankr.LEXIS 4401 (9th Cir. BAP 2017)

Complaint dismissed for failure to serve within time limits of 7004(m).

In re Frates, 2014 Bank. LEXIS 983 (th Cir B.A.P. 2014):

Service of a § 523(f) motion must be done under Fed. Rules of Bankruptcy Procedure, not under California Code of Civil Procedures.

In re Peralta, 317 B.R. 381 (9th Cir. B.A.P. 2004)

"The mailing of a properly addressed and stamped item creates a rebuttable presumption that the addressee received it. . . .A certificate of mailing raises the presumption that the documents sent were properly mailed and received."

In re Focus Media, Inc., 387 F.3d 1077 (9th Cir. 2004), *cert. denied,* 544 U.S. 923, 125 S.Ct. 1674 ( 2005)

"We hold today that in an adversary proceeding in bankruptcy court, a lawyer can be deemed to be the client's implied agent to receive service of process when the lawyer repeatedly represented that client in the underlying bankruptcy case, and where the totality of the circumstances demonstrates the intent of the client to convey such authority."

In re Villar, 317 B.R. 88 (9th Cir. B.A.P. 2004)

Service of a motion to avoid a judicial lien upon the creditor's P.O. box was insufficient under Bankruptcy Rule 7004(b)(3).

In re La Sierra Financial Services, Inc., 290 B.R. 718 ( 9th Cir. B.A.P. 2002)

Movant not entitled to the presumption of proper service under the mailbox rule, where motion was mailed to 1 Rolling View Lane instead of 3 Rolling View Lane.

In re Sheehan, 253 F.3d 507 (9th Cir. 2001)-Rule 4(m)

Excusable neglect standard of Bankruptcy Rule 9006(b) applies to Rule 4(m). "...[I]f good cause is shown, a court shall extend the service period under Rule 4. If good cause is not shown, the court has the discretion to extend the time period. In addition, the court may extend the time limit upon a showing of excusable neglect under 9006(b)."

In re DeVore, 223 B.R. 193, 196-97 (9th Cir. B.A.P. 1998)

"Mailing a notice by first class mail to a party's last known address is sufficient to satisfy due process. *See* In re Eagle Bus Mfg., Inc., 62 F.3d 730, 736 (5th Cir.1995). In Eagle Bus, a creditor who failed to keep the debtor apprised of changes in her mailing address was "herself to blame" for not receiving notice of the claims bar date. Eagle Bus, 62 F.3d at 736. Here, the debtor left her address of record in 1994. The case remained open until 1 November 1996, yet she did not file a change of address with the court until September of 1997. LBR 105(e) provides in relevant part: "It shall be the responsibility of the debtor ... to ensure that the ... master mailing list ... [is] complete and correct." Arguably, Marshack had actual knowledge of DeVore's new address, if it is assumed he received the copy of her 4 August letter. However, the pleadings were served by trustee's counsel, who, not unreasonably, served the addresses on the court's mailing matrix, which the debtor had not updated.

Additionally, the debtor's letter of 4 August indicates she knew the trustee intended to file a motion to reopen the case to administer the state court litigation proceeds. "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led." In re Gregory, 705 F.2d 1118, 1123 (9th Cir. 1983). The trustee's motion was filed and served on 12 August 1997; DeVore or her counsel could have obtained copies of the relevant documents from the court's file in time to respond. Moreover, Anderson had actual notice of the order before the appeal period expired (indeed, before the written order had been entered). While it appears he unsuccessfully attempted to obtain a copy of the order, the record does not indicate any further attempts to do so or why these were or were not fruitful."

In re Bertain, 215 B.R. 438 (9th Cir. B.A.P. 1997) - Rule 4(m)

No abuse of discretion to toll 120-day period for service of adversary complaint during interval between dismissal and reinstatement of complaint.

In re Pacific Land Sales, Inc., 187 B.R. 302 (9th Cir. B.A.P. 1995)

Defective service of process may be waived either intentionally or through estoppel.

In re Levoy, 182 B.R. 827 (9th Cir. B.A.P. 1995)

1. Debtor effectively serves government with objection to claim by mailing to Attorney General without street address or zip code

2. Personal jurisdiction existed once IRS filed claim.

In re Waldner, 183 B.R. 879 (9th Cir. B.A.P. 1995)

Bankruptcy claimant fails to show good cause for untimely service of adversary complaint when service by mail available at all times.

In re Cossio, 163 B.R. 150 (9th Cir. B.A.P. 1994), *aff'd.* 56 F.3d 70 (9th Cir. 1995)

When it found that there has been defective service of process, the judgment is void: "A person is not bound by a judgment in litigation to which he or she has not been made party by service of process." *Mason v. Genisco Technology Corp*, 960 F.2d 849, 851 (9th Cir. 1992). However, debtor's attorney who did not update address in file was properly served at old address under 7004 (b)(9).

In re Van Meter, 175 B.R. 64 (9th Cir. B.A.P. 1994)

Creditor's service of unissued and unfiled copies of summons and adversary complaint supports vacation of default judgment and dismissal...under 1990 version of R.4(j)

But see *In re Barr*, 217 B.R. 626, 629 (Bankr.W.D. Wa 1998) for statement of rule after amendments to FRCP 4(m).

Boudette v. Barnette, 923 F.2d 754 (9th Cir. 1991)

FRCP 4(j) - dismissal appropriate - no good cause shown.

**IRS**

In re Morrell, 69 B.R. 147 (N.D. Cal 1986)

Without proper service, court lacks jurisdiction.

**RULE 8**

In re Dominguez, 51 F.3d 1502 (9th Cir. 1995)

Discharge memo that was filed at confirmation is deemed complaint objecting to discharge**.**

**RULE 9(b)**

Vess v. Ciba-Geigy Corp., USA, 317 F.3d 1097 (9th Cir. 2003)

In a case where fraud is not an essential element of a claim, only allegations of fraudulent conduct must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b); allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a).

**RULE 11 and other SANCTIONS**

In re Nakhuda, 544 B.R. 886 (9th Cir. 2016)

Sua Sponte sanctions issued by court under Rule 9011 must meet "akin to contempt" standard.

In re Blue Pine Group, Inc., 457 B.r. 64 (B.A.P. 9th Cir. 2011), affirmed in part and reversed in part, 526 F.App'x 768 (9th Cir. 2013).

Unauthorized bankruptcy filing may constitute sanctionable behavior against debtor's counsel.

In re Nguyen, 447 B.R. 268 (B.A.P. 9th Cir. 2011)

Bankruptcy Court's failure to apply ABA Standards when sanctioning an attorney is not an abuse of discretion, modifying In re Crayon, 192 B.R. 970 (B.A.P. 9th Cir. 1998).

In re Nakhuda, 544 B.R. 886 (BAP 9th Cir. 2016)

Court-initiated sanctions under Rule 9011 requires a higher standard akin to contempt due to the lack of the 21-day safe harbor provision . Cannot use an objective reasonableness standard, and requires more than ignorance or negligence on the attorney's part.

In re Lehtinan, 564 F.3d 1052 (9th Cir. 2009)

Bankruptcy court was authorized to suspend an attorney from practice under its inherent authority to sanction for bad faith conduct.

In re Brooks-Hamilton, 400 B.R. 238 (9th Cir. B.A.P. 2009)

After remand to the bankruptcy court for further findings, the B.A.P. remanded once again to determine, in accordance with the 4-part test of *In re Crayton, infra* whether the six-month suspension imposed on the attorney in question was appropriate**.**

In re Stasz, 387 B.R. 271 (9th Cir. B.A.P. 2008)

Failure to comply with repeated orders to appear at a Rule 2004 exam justified order of contempt and award of attorney fees as sanctions.

Hale v. United States Trustee, 509 F.3d 1139 (9th Cir. 2007)

Bankruptcy court did not abuse discretion in sanctioning counsel for repeatedly assisting pro se debtors without appearing as counsel and without performing critical and necessary services.

In re Brooks-Hamilton, 329 B.R. 270 (9th Cir. B.A.P. 2005), *aff'd in part, rev'd in part, remanded,* 271 Fed.Appx. 654 (2008).

Bankruptcy court did not abuse discretion in imposing a six-month suspension from practice.

In re Hercules Enterprises, Inc., 387 F.3d 1024 (9th Cir. 2004)

In order to find civil contempt, "the bankruptcy court had to find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be

sanctioned if he did not comply." Bankruptcy court had power to sanction for civil contempt, but not to make such sanction nondischargeable in future bankruptcies.

In re DeVille, 361 F.3d 539 (9th Cir. 2004)

Bankruptcy court properly sanctioned attorneys pursuant to its inherent power, but the B.A.P. was correct that neither that power nor B.R. 9011 authorized punitive sanctions.

In re Silberkraus, 336 F.3d 864 (9th Cir. 2003)

Fact that the debtor filed a bankruptcy petition only two days before a state court was to schedule a trial date on a creditor's claims for specific performance; the admissions by the debtor and his counsel that reorganization was impossible over the objections of creditors; and the fact that bankruptcy could not have provided more value to the debtor than proceeding with the state court action support bankruptcy court's finding that filing was frivolous and for an improper purpose. Rule 9011(c)(1)(A)'s safe harbor provision does not apply to the filing of the initial petition.

In re Dyer, 322 F.3d 1178 (9th Cir. 2003)

"Serious" punitive damages may not be awarded under § 105 for civil contempt of the automatic stay by entities who are not individuals. Only compensatory sanctions, attorney fees and compliance with the stay may be awarded. The bad faith required to find a violation of the automatic stay is something less than what's required to impose *Chambers* sanctions. Nor can punitive sanctions be awarded under the court's inherent power to sanction.

Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. (1991)

In re Larry's Apartment, L.L.C., 249 F.3d 832 (9th Cir. 2001)

Bankruptcy court must apply federal law in determining what sanctions are to be imposed for conduct by attorney or party in bankruptcy court litigation.

Estrada v. Speno and Cohen, 244 F.3d 1050 (9th Cir. 2001)

District court may order a default judgment without considering alternative sanctions when a party willfully, repeatedly, and persistently disobeys court orders to attend court proceedings.

Primus Automotive Financial Services, Inc. v. Batarse, 115 F.3d 644 (9th Cir. 1997)

Court must make finding of bad faith as a condition to awarding sanctions under *Nasco*

In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996)

*Chambers* sanctions may be imposed by bankruptcy court even on a nonparty. *Sequoia* legislatively overruled

Trulis v. Barton, 67 F.3d 779 (9th Cir. 1995)

Rule 11 - *Nasco* and § 1927 sanctions for continuing lawsuit without client authority, etc.

Ortega v. O'Connor, 50 F.3d 778 (9th Cir. 1995)

There is no dispute that, in a proper case, a trial court may exclude a party's witness as a sanction for failure to comply with a pretrial order. See FRCP 16(f); *Ackley v. Western Conf. Of Teamsters,* 958 F.2d 1463, 1471 (9th Cir. 1992); *United States v. Valencia*, 656 F.2d 412, 415 (9th Cir. 1981).

In re Marsch, 36 F.3d 825 (9th Cir. 1994)

Distinguishing *Townsend*, court finds that a filing may be filed for an improper purpose, even if it isn't frivolous. A restitutionary award compensating the opposing party for unnecessary litigation expenses - as opposed to a punitive fine paid to the court - is a particularly appropriate sanction in cases involving manipulative petition filed principally for purposes of delay and harassment

Hedges v. RTC, 32 F.3d 1360 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995)

Rule 9011 was amended from "bankruptcy court" to "judicial officer" so District Courts may now impose sanctions in bankruptcy appeals

Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993)

1. Burden of proof is on sanctionee to prove inability to pay

2. The district court did not abuse its discretion in basing the sanctions on the attorney fees reasonably incurred by the defendants in defending the lawsuit. In a case like this, where the original complaint is the improper pleading, all attorney fees reasonably incurred in defending against the claims asserted I the complaint form the proper basis for sanctions. *See Lockary v. Kayfetz*, 974 f.2d 1166, 1176-77 (9th Cir. 1992) (approving a Rule 11 sanction based on the attorney fees incurred to combat the improper pleading).

Combs v. Rockwell Int'l Corp., 927 F.2d 486 (9th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991)

Falsifying deposition transcripts is good cause for dismissal.

Lockary v. Kayfetz, 974 F.2d 1166 (9th Cir. 1992), *cert. denied*, 508 U.S. 931 (1993)

*Nasco* sanctions reviewed

Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992), *cert. denied*, 506 U.S. 915 (1992)

In determining whether to dismiss a case for failure to comply with a court order, the district court must weigh five factors including

(1) the public's interest in expeditious resolution of litigation;

(2) the court's need to manage its docket;

(3) the risk of prejudice to the defendants

(4) the public policy favoring disposition of cases on their merits and

(5) the availability of less drastic alternatives

*Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24.

Although it is preferred, it is not required that the district court make explicit findings in order to show that it has considered these factors and we may review the record independently to determine if the district court has abused its discretion *Malone*, 833 F.2d at 130. *Henderson* at 1424.

Business Guides, Inc. v. Chromatic Commun. Enterprises, Inc., 111 S.Ct. 922 (1991)

Party held to reasonable inquiry standard, even though it did not sign pleading

*Business Guides* - 892 F.2d 802 (9th Cir. 1989), *aff'd*, 498 U.S. 533, 111 S.Ct 922 (1991) - reasonable inquiry - objective standard applied (complete review).

Cooter & Gell v. Hartmarx Corp. 496 U.S. 384 (1990)

1. Rule 41 (a)(1) dismissal does not deprive court of jurisdiction to decide Rule 11 issue
2. Abuse of discretion standard of review applies to all aspects of Rule 11 award.
3. Rule 11 does not authorize District Court to impose attorney fee incurred on appeal.

U.S. v. Stringfellow, 911 F.2d 225 (9th Cir. 1990)

Failure to cite relevant authority does not alone justify imposition of sanctions.

Townsend v. Holman Consulting Corp., en banc, 929 F2d 1358 (9th Cir. 1990)

Sanctions may be imposed for failure to conduct reasonable investigation before filing complaint, *Murphy* overruled - complete review of Rule 11 9th Cir. Cases.

In re Fitzsimmons, 920 F.2d 1468 (9th Cir. 1990)

Failure to request transcript and post fee for 8 months = bad faith. No need ton consider alternative sanctions when bad faith involved.

Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990), *cert. denied*, Lewis & Co. v. Thoeren, 498 U.S. 1109 (1991)

Dismissal appropriate for outrageous conduct.

Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470 (9th Cir. 1990)

Uncertainty of B.A.P. decision's binding effect on circuit precludes sanctioning party seeking contrary result. Issue: whether creditor can sue for fraudulent conveyances.

Maisonville v. F2 America, Inc., 902 F.2d 746 (9th Cir. 1990), *cert. denied*, Dombroski v. F2America, Inc., 498 U.S. 1025 (1991)

FRCP 11 sanction proper for attorney's failure to make reasonable inquiry before filing factually frivolous motion for reconsideration.

In re Donovan, 871 F.2d 807 (9th Cir. 1989)

Failure to prosecute B.A.P. appeal - dismissed as sanction; failure to consider alternatives.

West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (9th Cir. 1990)

Party cannot avoid dismissal by arguing that her attorney is to blame - complete non-cooperation justified dismissal under Rule 41.

Hamilton Copper & Steel Corp. v. Primary Steel, Inc., 898 F.2d 1428 (9th Cir. 1990)

When is dismissal appropriate for failing to abide by court instructions.

In re Villa Madrid, 110 B.R. 919 (9th Cir. B.A.P. 1990)

Sanctions on attorney for filing client's bad faith bankruptcy petition.

Hudson v. Moore Business Forms, Inc. 898 F.2d 684 (9th 1990)

Lack of opportunity to respond orally before Rule 11 sanctions imposed does not violate due process if attorney had full opportunity to respond in writing - duty to mitigate.

In re Karelin, 109 B.R. 943 (9th Cir. B.A.P. 1990)

FRCP 16(f) - no abuse is excluding evidence not exchanged with the other side.

Zambrano v. City of Tustin, 885 F.2d 1473 (9th Cir. 1989)

Court may impose sanctions for violation of local rules only upon showing of bad faith, willful disobedience, or gross negligence or recklessness.

In re Balboa Improvements, Ltd., 99 B.R. 966 (9th Cir. B.A.P. 1989)

Court may award sanctions even if it lacks subject matter jurisdiction.

Greco v. Stubenberg, 859 F.2d 1401 (9th Cir. 1988)

District court properly dismissed appeal for failure to meet deadlines.

In re Bersher Investment, 95 B.R. 126 (9th Cir. B.A.P. 1988)

Failure of debtor's counsel to notify movant that he would not opposed motion justifies sanctions.

King v. Idaho Funeral Service Assoc, 862 F.2d 744 (9th Cir. 1988)

In re Asher Film Ventures Int'l., Inc., 89 B.R. 80 (9th Cir. B.A.P. 1988)

Sanctions against attorney for pleadings upheld.

In re Akridge, 89 B.R. 66 (9th Cir. B.A.P. 1988)

Union's prosecution of 523(a)(6) case against a strike breaker was for purposes of harassment only.

In re Webre, 88 B.R. 242 (9th Cir. B.A.P. 1988)

Relitigation of issues decided solely for harassment.

Zaldivar, v. City of L.A., 780 F.2d 823, 828 (9th Cir. 1986)

**RULE 12**

Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009)

1) Concept that the court must accept all of the allegations in the complaint as true does not apply to legal conclusions couched as factual allegations.

2) Only a complaint that states a plausible claim for relief will survive a Rul 12(b)(6) motion. Whether a complaint states such a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)

". . .[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)

A motion to dismiss under Rule 12(b)(6) that is supported by extraneous materials cannot be regarded as one for summary judgment until the court acts to convert the motion by indicating that it will not exclude those materials from consideration; until the district court has so acted, a plaintiff is free to file a proper notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

Swierkiewicz v. Sorema N.A.,534 U.S. 506 (2002)

Plaintiff need not plead sufficient facts to prove a prima facie case. Court may dismiss a case under Rule 12(b)(6) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)

McHenry v. Renne, 84 F.3d 1172 (9th Cir. 1996)

The court of appeals affirmed a district court order. The court held that the dismissal of complaint for failure to contain a short and plain statement of the plaintiffs' claims and failure to give the defendants fair opportunity to frame responsive pleadings is not an abuse of discretion where the plaintiffs were given two opportunities to amend.

Costlaw v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986)

District court may dismiss a complaint sua sponte as untimely so long as the defendant has not waived the defense.

In re Kubick, 171 B.R. 658 (9th Cir. B.A.P. 1994)

A complaint that merely recites statutory language fails to state a claim

In re Aboukhater, 165 B.R. 904 (9th Cir. B.A.P. 1994)

Standard for dismissal - 523 & 727 complaint.

Price v. State of Hawaii, 939 F.2d 702 (9th Cir. 1991), *cert. denied*, 503 U.S. 938 (1992)

(Citing *Jones v. Comm Redev. Agency*, 733 F.2d 646, 649, (9th Cir. 1984).

**RULE 13–COUNTERCLAIM AND CROSS-CLAIM**

In re Adbox, Inc., 488 F.3d 836 (9th Cir. 2007)

A trustee who has brought a preference action on behalf of the estate is not an "opposing party," and thus counterclaims that could have been brought against the debtor prior to its bankruptcy were properly dismissed.

**RULE 15**

Willard v. Lockhart-Johnson, __B.R.__ (9th Cir. B.A.P. 2021)

Good description of Rule 15's liberal standard regarding amending a complaint.

Ditto v. McCurdy, 510 F.3d 1070, 1077; 1079 (9th Cir. 2007)

No error in not allowing a plaintiff to amend her complaint to restore § 727 allegations 15 months after the original complaint was filed. Four factors used to determine the propriety of the amendment: bad faith, undue delay, prejudice to the opposing party, and futility of the amendment.

Amerisourcebergen Corp. v. Dialysis West, Inc., 445 F.3d 1132 (9th Cir. 2006)

". . .[A] district court need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile."

In re Markus, 313 F.3d 1146 (9th Cir. 2002)

Untimely complaint objecting to dischargeability does not relate back to a motion brought by a creditor that references only objections to discharge.

In re Sarbaz, 227 B.R. 298 (9th Cir. B.A.P. 1998)

Pursuant to Fed. R. Civ. P. 15(b), as incorporated by Fed. R. Bankr. P. 7015, a party can give implied consent to adjudication of issues not raised by the pleadings. Furthermore, while it may have been prudent for Feldman to move to amend his pleadings, the "failure to so amend does not affect the result of the trial of these issues." Fed.R.Civ.P. 15(b). Additionally, consent is generally found when evidence relating to issues that are beyond the pleadings is introduced without objection. 6A Wright, Miller and Kane, Federal Practice and Procedure, § 1493, at 24 (2d ed.1990). Feldman introduced evidence consistent with his opening statement and relevant to the Section 523(a)(6) claim. Sarbaz did not object. Sarbaz implicitly consented to adjudication of the claim under Section 523(a)(6). The court did not err in considering that Section.

In re Magno, 216 B.R. 34 (9th Cir. B.A.P. 1997)

Creditor's untimely amended complaint seeking exception to discharge for wrongful death judgment did not "relate back" to original complaint objecting to discharge due to debtor's concealment of assets. 727 originally pled. 523(a)(6) added past deadline.

In re Jodoin, 209 B.R. 132 (9th Cir. B.A.P. 1997)

Not error to hold part of the state court marital dissolution judgment was nondischargeable under bankruptcy code section when complaint only stated cause of action under different section - relation back

Lindauer v. Rogers, 91 F.3d 1355 (9th Cir. 1996)

The court of appeals affirmed a district court order. The court held that after final judgment has been entered, a FRCP 15(a) motion to amend a complaint may be considered only if the judgment is first reopened under Rule 59 or 60.

In re Dominguez, 51 F.3d 1502, 1510 (9th Cir. 1995)

"We permit relation-back if the new claim arises from the same "conduct, transaction or occurrence" as the original claim. *Percy v. SF Gen. Hospital*, 841 F.2d at 978. We will find such a link when 'the claim to be added will likely be proved by the 'same kind of evidence' offered in support of the original pleading. *Id.* (quoting *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir. 1966))."

Texaco, Inc. v. Ponsoldt, 939 F.2d 794 (9th Cir. 1991)

Test:

1. Undue delay
2. Bad faith
3. Futility of amendment
4. Prejudice to the opposing party

*see also* In re Rogstad 126 F.3d 1224 (9th Cir. 1997) (quoting *Conley*)

Jackson v. Bank of Hawaii, 902 F.2d 1385 (9th Cir. 1990)

Standard for allowing or disallowing amended complaint.

Miles v. Dept of the Army, 881 F.2d 777 (9th Cir. 1989)

Relation back - filing amended complaint after dismissal.

**RULE 17**

In re Hashim, 379 B.R. 912, 914 (9th Cir. B.A.P. 2007)

"If a court does not authorize a creditor under 11 U.S.C. § 503(b)(3) to recover, for the benefit of the estate, property that was transferred or concealed by the debtor, the Federal Rules of Civil Procedure 17(a) and 19(a) require that the court realign as plaintiff a bankruptcy trustee who is a defendant."

In re Capobianco, 248 B.R. 833 (9th Cir. B.A.P. 2000)

Court properly allowed plaintiff to substitute as the real party in interest under FRCP 17(a) a sole proprietorship for a corporate entity as plaintiff in a dischargeability action, where debt was owed to sole proprietor, which was subsequently incorporated.

**RULE 19 - INDISPENSABLE PARTY**

Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991)

In re Hashim, 379 B.R. 912, 914 (9th Cir. B.A.P. 2007)

"If a court does not authorize a creditor under 11 U.S.C. § 503(b)(3) to recover, for the benefit of the estate, property that was transferred or concealed by the debtor, the Federal Rules of Civil Procedure 17(a) and 19(a) require that the court realign as plaintiff a bankruptcy trustee who is a defendant."

**RULE 20**

Coughlin v. Rogers, 130 F.3d 1348 (9th Cir. 1997)

Plaintiffs improperly joined, where transactions involved did not have similarity in factual background.

**RULE 24 – INTERVENTION**

Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002)

For permissive intervention under FRCP 24(b), all that is necessary is that the intervener's claim or defense and the main action have a question of law or fact in common.

In re Bernal, 207 F.3d 595 (9th Cir. 2000)

Assignee of note's motion to intervene properly denied, where default was entered against assignor. Assignee's sole remedy was to move for substitution under Rule 25(c).

Smith v. Marsh, 194 F.3d 1045 (9th Cir. 1999)

"[T]he requirements of Rule 24(a)(2) may be broken down into four elements, each of which must be demonstrated in order to provide a non-party with a right to intervene: (1) the application must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court."

**RULE 36**

Conlon v. U.S., 474 F.3d 616 (9th Cir. 2007)(citing Hadley with approval).

Hadley v. U.S., 45 F.3d 1345 (9th Cir. 1995)

"Two requirements... must be met before an admission may be withdrawn: (1) presentation of the merits must be subserved, and (2) the party who obtained the admission must not be prejudiced by the withdrawal."

**RULE 37**

Nilsson v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)

Default judgment and dismissal of counterclaim upheld.

Toth v. TWA, Inc., 862 F.2d 1381 (9th Cir. 1988)

Sanctions under 37(b)(2) distinguished from 37(d).

**RULE 41**

Rose Court v. Select Portfolio, __ Fed. 4th __ (9th Cir. 2024)

There are four elements that must be met to trigger the two-dismissal rule: 1) the plaintiff voluntarily dismissed an action in either state or federal court; 2) thereafter the plaintiff voluntarily dismissed a second action pending in federal court, 3) the two dismissals concerned the same claim; and 4) the plaintiff seeks to raise the twice-dismissed claim again in federal court. Claims are the "same if they arise out of the same transaction or occurrence and the claim could have or wa raised in the preceding action.Two dismissal rule applies even to a defendant who was not previously named if that defendant is substantially the same as the defendant dismissed.

In re Alfahel, 651 B.R. 381 (9th Cir. B.A.P. 2023), aff'd, Ninth Circuit, decision dated 5/20/2024

Application of Rule 41(a)(1)(B) in contested matters.

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)

A motion to dismiss under Rule 12(b)(6) that is supported by extraneous materials cannot be regarded as one for summary judgment until the court acts to convert the motion by indicating that it will not exclude those materials from consideration; until the district court has so acted, a plaintiff is free to file a proper notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

Commercial Space Mgmt. Co., Inc., v. Boeing Co., Inc., 193 F.3d 1074 (9th Cir. 1999)

The court of appeals affirmed a judgment of the district court in part and vacated in part. The court held that a Rule 41(a)(1) dismissal is effective on filing and no court order is required, and filing a notice of voluntary dismissal with the court automatically terminates the action as to the defendants who are subjects of the notice.

Pedrina v. Chun, 987 F.2d 608 (9th Cir. 1993)

Rule 41(d)(1) permits a plaintiff to dismiss less than all defendants without court order

Morris v. Morgan Stanley & Co., 942 F.2d 648 (9th Cir. 1991)

Factors in dismissal for failure to prosecute under Rule 41(b):

1. The court's need to manage its docket
2. The public interest in expeditious resolution of litigation
3. The risk of prejudice to defendants from delay,
4. The policy favoring disposition of cases on their merits *Citizens Utilities Co. v. American Tel & Tel Co.,* 595 F.2d 1171, 1174 (9th Cir. 1979) *cert denied*, 444 U.S. 931 (1979)**.**

Lake at Las Vegas Investors Group, Inc. v Pacific Malibu Development Corp., 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992)

Two dismissal sub - 41(a).

**RULE 50**

Janes v. Wal-Mart Stores, Inc., 279 F.3d 883 (9th Cir. 2002)

A motion for summary judgment or a trial brief does not satisfy the requirement that a motion for judgment as a matter of law must be made before the close of evidence under Federal Rules of Civil Procedure 50.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)

"Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"....[T]he court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." The standard under the rule "mirrors" the standard under Rule 56.

Schudel v. General Electric Co., 120 F.3d 991 (9th Cir. 1997)

JNOV**.**

**RULE 52**

Ritchie v. U.S., 451 F.3d 1019 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1337, 167 L.Ed.2d 84 ( 2007)

"Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact. . . .In deciding whether to enter judgment on partial findings under Rule 52(c)**,** the district court is not required to draw any inferences in favor of the non-moving party; rather, the district court may make findings in accordance with its own view of the evidence.**"**

**RULE 54**

In re Linton, _B.R._ (9th Cir. B.A.P. 2021)

Good explanation of what constitutes a Rule 54 motion as opposed to a Rule 60 motion, what constitutes a judgment as opposed to an order (for the purposes of explaining that a judgmment under Rule 9001(7) is appealable, not a simple order), and when and how a judge gets to change their mind - Rule 16, 9023, 9024.

Miles v. State of California, 320 F.3d 986 (9th Cir. 2003)

Costs under Rule 54(d) may not be awarded where an underlying claim is dismissed for lack of subject matter jurisdiction, as the dismissed party is not a "prevailing party" under the rule.

In re Belli, 268 B.R. 851 (9th Cir. B.A.P. 2001)

B.A.P. lacked jurisdiction over bankruptcy court partial summary judgment order that lacked express Rule 54(b) certification.

In re Bowen, 198 B.R. 551 (9th Cir. B.A.P. 1996)

Certification is proper if it will aid "expeditious decision" of the case.

In re Lindsay, 59 F.3d 942 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)

54(b) judgment gives the prospective appellant an election to appeal at that time or later, when the entire case is over; such a judgment is "final as to the claims and parties within its scope, and could not be reviewed as part of an appeal from a subsequent judgment as to the remaining claims and parties" *Williams v. Boeing Co.*, 681 F.2d 615 (9th Cir. 1982). The court making a Rule 54(b) determination "should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order." *Morrison-Knudsen v. Archer* 655 F.2d 962, 965 (9th Cir. 1981).

Texaco, Inc. v. Pensoldt, 939 F.2d 794 (9th Cir. 1991)

Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519 (9th Cir. 1987)

Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 468 (9th Cir. 1987)

Arizona State Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038 (9th Cir. 1991)

If complaint seeks only on legal right, court ruling on one of several theories of recovery (here punitive damages) does not meet standard

Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989)

Certification under Rule 54(b).

In re Aviva Gelato, Inc., 94 B.R. 622 (9th Cir. B.A.P. 1988) *aff'd*, Kirtley v. Aviva Gelato, Inc., 930 F.2d 27 (9th Cir. 1991)

Taxing costs - abuse of discretion standard.

**RULE 55**

In re McGee, 359 B.R. 764, 771 (9th Cir. B.A.P. 2006)

"The factors to be considered for entry of a default judgment include (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rule of Civil Procedure favoring decisions on the merits."

In re First T.D. & Investment , Inc., 253 F.3d 520 (9th Cir. 2001)

Bankruptcy court abused discretion by entering final default judgments that directly contradicted its earlier ruling in the same action as to answering defendants.

In re Lam, 192 F.3d 1309 (9th Cir. 1999)

The court of appeals dismissed an appeal from a judgment of the B.A.P. The court held that a bankruptcy creditor forfeits the right to appeal from the entry of a default by not seeking relief in the court where the default was entered.

In re Beltran, 182 B.R. 820 (9th Cir. B.A.P. 1995)

Bankruptcy court may consider debtor's testimony in creditor's prove up hearing on motion for default judgment

In re Kubrick, 171 B.R. 658 (9th Cir. B.A.P. 1994)

When considering entry of a default judgment, the court should consider the following factors:

(1) the possibility of prejudice to the plaintiff,

(2) the merits of the plaintiff's substantive claim,

(3) the sufficiency of the complaint,

(4) the sum of money at stake in the action

(5) the possibility of a dispute concerning material facts

(6) whether the default was due to excusable neglect and

(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits *Eitel v. Mccoool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

In re Roxford Foods, Inc., 12 F.3d 875 (9th Cir. 1993)

Failure to give notice of entry of default violated due process.

In re Villegas, 132 B.R. 742 (9th Cir. B.A.P. 1991)

No discharge judgment against creditor without hearing on evidence. Court has broad discretion to require evidentiary hearing as prerequisite to entry of default judgment.

In re Hammer, 112 B.R. 341 (9th Cir. B.A.P. 1990), *aff'd* 940 F.2d 524 (9th Cir. 1991)

Debtor's own negligence and lack of meritorious defense defeats motion to set aside default judgment.

Yusov v. Yusuf, 892 F.2d 784 (9th Cir. 1989)

Default judgment as a sanction approved against a party who has willfully and consistently failed to obey court orders and procedures.

Ringgold Corp. v Worrall, 880 F.2d 1138 (9th Cir. 1989)

Notice required for default - notice to lawyer.

In re Campbell, 105 B.R. 19 (9th Cir. B.A.P. 1989)

Default judgment entered after no proper service is void (i.e., summons expired under 7004(f)).

Alan Neuman Prod. Inc. v. Albright, 862 F.2d 1388 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989).

In re Stuart, 88 B.R. 247 (9th Cir. B.A.P. 1988)

Need for "prove-up."

Nilsson v. Louisiana Hyrolec, 854 F.2d 1538 (9th Cir. 1988)

Court can condition setting aside default upon payment of moving party's attorney fees and costs.

**RULE 56 - SUMMARY JUDGMENT**

In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008)

Complete review of the summary judgment standard.

Swedberg v. Marotzke, 339 F.3d 1139 (9th Cir. 2003)

A motion to dismiss under Rule 12(b)(6) that is supported by extraneous materials cannot be regarded as one for summary judgment until the court acts to convert the motion by indicating that it will not exclude those materials from consideration; until the district court has so acted, a plaintiff is free to file a proper notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

Under Rule 56, the moving party has the initial burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The responding party then has the burden of producing evidence of "specific facts showing there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) The Supreme Court in Anderson went on to say that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that

is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

Fairbank v. Wunderman Cato Johnson, 212 F.3d 528 (9th Cir. 2000)

Standard for granting summary judgment--differences between federal and California standard meant that court district court could reach merits of motion after case was removed from state court.

Leslie v. Grupo ICA, 198 F.3d 1152 (9th Cir. 1999)

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a federal civil action, summary judgment cannot be based on contradictions between the nonmoving party's unsworn statements and subsequent sworn testimony and declarations that seek to explain the prior statements.

General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct 512 (1997)

Issue of whether expert evidence is admissible is not an issue of fact.

In re Rothery, 143 F.3d 546 (9th Cir. 1998)

Bankruptcy court may convert motion to dismiss into summary judgment motion after evidence has been submitted and all issues have been raised and contested.

In re Rogstad, 126 F.3d 1224 (9th Cir. 1997)

Error to grant summary judgment even if there is no response, where moving party hasn't established that it's entitled to judgment as a matter of law.

In re Rothery, 143 F.3d 546 (9th Cir. 1998)

Debtor not entitled to notice before Rule 12(b)(6) motion is converted into motion for summary judgment.

Jacobson v. AEG Capital Corp, 50 F.3d 1493, 1496 (9th Cir. 1995)

Judicial notice of records and transcript of bankruptcy proceeding convert 12(b) motion into one for summary judgment.

In re Harris Pine Mills, 44 F.3d 1431 (9th Cir. 1995), *cert. denied,* 515 U.S. 1131, 115 S.Ct. 2555 (1995)

Failure of defendants to meet burden of showing GIMF as to fraud claims resulted in summary judgment against them.

Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery, 44 F. 3d 800 (9th Cir. 1995), *cert. denied*, 516 U.S. 864 (1995)

No error in granting sua sponte summary judgment for a nonappearing party.

School District No. IJ v. AC and S, Inc. 5 F3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)

Failure to attach documents to affidavits as required in 56(e) justified court's failure to consider them.

Bryant v. Ford Motor Co., 886 F.2d 1526 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990)

Summary judgment proper when opponent failed to file affidavit seeking continuance to allow discovery under 56(f).

In re Bishop, 856 F.2d 78 (9th Cir. 1988)

De novo review of summary judgment.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)

Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

**RULE 58- B.R. 9021**

In re Garland, 295 B.R. 347 (9th Cir. B.A.P. 2003)

Under pre-12/1/2002 Rule 9021, four-page order that did not include a separate judgment and was not effective until the court denied a motion to set aside the earlier order by way of a minute order.

In re Schimmels, 85 F.3d 416 (9th Cir. 1996)

Summary judgment order which included no opinion or memorandum is a final separate order under B.R. 9021.

Hollywood v. City of Santa Maria, 886 F.2d 1228 (9th Cir. 1989)

For purposes of Rule 59 motion, order which contains explanatory material is docketed and is served meets separate order requirement of rule 58.

Carter v. Beverly Hills S&L Assoc., 884 F.2d 1186 (9th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990)

Rule 60(b) motion filed 18 mos. after judgment noted in minute book not untimely, because judgment not entered.

Noli v. CIR, 860 F.2d 1521 (9th Cir. 1988)

No need for judgment on separate document, where debtors were present when automatic stay lifted.

**RULE 59**

In re International Fibercom, Inc., 503 F.3d 933, 944 (9th Cir. 2007)

"Under Rule 59(a), made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 9023, a court has discretion to reopen a judgment if one has been entered,

take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions [citations omitted]**. . .**The bankruptcy court did not abuse its discretion in denying [the] request for a full evidentiary hearing. There was adequate factual basis for the bankruptcy court's decision."

In re Captain Blythers, Inc., 311 B.R. 530 (9th Cir. B.A.P. 2004)**,** *aff'd,* 182 Fed. Appx. 708 (2006).

The rules do not recognize a motion for reconsideration. Since the motion in question was brought within 10 days of entry of judgment, it is considered a motion to amend findings under Rule 52, or a motion to alter or amend judgment under Rule 59.

In re Brewster, 243 B.R. 51 (9th Cir. B.A..P 1999)

Rule 59(e) motion for reconsideration tolled time for appeal of order confirming reorganization plan.

In re Weisberg, 193 B.R. 916 (9th Cir. B.A.P. 1996), *aff'd in part, rev'd in part*, 136 F/3d 655 (9th Cir. 1998), *cert. denied*, Wolkowitz v. Shearson Lehman Bros., Inc., 525 U.S. 826 (1998)

"There are three grounds for granting new trials under 59(a)(2):

1. Manifest error of law,
2. Manifest error of fact, and
3. Newly discovered evidence *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978) (citing 6A Moore's Federal Practice at ¶59.07 at 59-94).

In re Carolina Triangle Ltd., 166 B.R. 411 (9th Cir. B.A.P. 1994)

A postjudgment motion that could have been brought under Rule 59(e) is properly construed as a 59(e) motion if brought within 10 days of the judgment.

U.S. v. RG & B Contractors, Inc., 21 F.3d 952 (9th Cir. 1994)

10 day rule applies, even the attorney fees not yet awarded.

In re Levine, 162 B.R. 858 (9th Cir. B.A.P. 1994)

Limitations period for reconsideration motion runs from entry of formal written order rather than from entry of minute order.

The 9th Cir. treats a timely filed motion for reconsideration as a motion to amend a judgment *In re Crystal Sands Properties,* 84 B.R. 665, 668 n. 3 (9th Cir. B.A.P. 1988) *But see* In re Donovan*,* 871 F. 2d 807 (9th Cir. 1989).

School District IJ v. AC and S, Inc. 5 F3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994)

Court may reconsider its grant of summary judgment under either FRCP 59(e) or 60(b)

Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *See All Hawaii Tours Corp. v. Polynesian Cultural Center*, 116 FRD 645, 648 (D. Hawaii 1987) *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988), published at 861 F.2d 536 (withdrawn from bound volume). There may also be other, highly unusual, circumstances warranting reconsideration.

The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into "newly discovered evidence." *See Waltman v. International Paper Co.*, 875 F.2d 468, 473-74 (9th Cir. Cir 1989) materials available at time of filing opposition to summary judgment would not be considered with motion for reconsideration). *Trentacosta v. Frontier Pac Aircraft Indus. Inc.*, 813 F.2d 1553, 1557 and n.4 (9th Cir. 1987) court did not abuse its discretion in refusing to consider affidavits opposing summary judgment filed late). *Frederick S. Wyle Professional Corp. V Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) evidence available to party before it filed its opposition was not "newly discovered evidence" warranting reconsideration of summary judgment ).

Jones v. Aero/Chem Corp., 921 F.2d 875 (9th Cir. 1990)

Newly discovered evidence does not warrant new trial in absence of showing that outcome would be different.

Adriana Int'l. Corp. v. Thoeren, 913 F.2d 1406, 1416 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)

10 day time limit applies to motion to reconsider amended judgment.

Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S.Ct. (1989)

**RULE 60(b)**

In re Linton, __B.R.__ (9th B.A.P. 2021)

Good explanation of differences between Rule 59 and Rule 60 motions.

United Student Aid Funds, Inc. v. Espinosa, -U.S.-, 130 S.Ct. 1367, 1377 (2010)

". . .Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain typ of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard."

In re AVI, Inc., 389 B.R. 721, 724 (9th Cir. B.A.P. 2008)

Dismissal of chapter 11 case was properly set aside, where order approving a settlement did not include a provision for dismissal of the case upon the occurrence of certain events, and the case was subsequently dismissed without notice to creditors. Court properly set aside the dismissal under Rule 60(b).

In re International Fibercom, Inc., 503 F.3d 933 (9th Cir. 2007)

Bankruptcy court properly set aside an order approving the assumption of an executory contract under Rule 60(b)(6) based upon an error of law, i.e. that the workers compensation contract was not executory, even though the order was set aside two years after it was entered. The assumption motion also violated the court's local rule requiring conspicuous notice that a claimant is taking a security interest in prepetition assets to secure a post-petition debt.

In re Wylie, 349 B.R. 204 (9th Cir. B.A.P. 2006)

Failure to respond to objection to its claim, and failure to establish an excuse for this failure, justified denial of the claim other than on the merits. Once ten days has passed, claimant's right to seek reconsideration under § 502(j) is gone. He is left to seek reconsideration under Rule 60(b), but is limited to the narrow grounds set forth in the rule. Claimant did not establish prerequisites for relief under Rule 60(b)(1), (b)(3), or (b)(6).

In re Peralta, 317 B.R. 381 (9th Cir. B.A.P. 2004)

"The three factors to consider with respect to vacating a default judgment are; (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether reopening the default judgment would prejudice the plaintiff." The concept of culpable conduct is coextensive with excusable neglect. Prejudice can be established from the legal expense to the opposing party in having to address defenses that are meritless.

In re Williams, 287 B.R. 787 (9th Cir. B.A.P. 2002)

Motion to set aside default judgment brought 81 days after movant knew of judgment being entered was untimely.

Laurino v. Syringa General Hospital, 279 F.3d 750 (9th Cir. 2002)

"Rule 60(b)(1) provides that a court may relieve a party from a final judgment on the basis of excusable neglect. ' [T]he determination of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.' " [citation omitted]

Community Dental Services v. Tani, 282 F.3d 1164 (9th Cir. 2002)

"...[W]here the client demonstrated gross negligence on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6)."

Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884 (9th Cir. 2001)

"While an attorney's egregious failure to read and follow clear and unambiguous rules might sometimes be excusable neglect, "mistakes construing the rules do not usually constitute 'excusable' neglect."

Bellevue Manor Assos. v. U.S., 165 F.3d 1249 (9th Cir. 1999) (Rule 60(b)(5))

In re Mulvania, 214 B.R. 1, (9th Cir. B.A.P. 1997)

In re Virtual Vision, Inc., 124 F.3d 1140 (9th Cir. 1997)

Creditor's own collapse is insufficient ground for failing to comply with discovery request in bankruptcy proceeding. Entry of default proper. Rule 60(b) motion denied.

Briones v. Riviera Hotel & Casino, 116 F.3d 379 (9th Cir. 1997)

*Pioneer Inv. Services* standard for excusable neglect applies to Rule 60(b).

(Duwamish Indian Tribe) U.S. v. State of Washington, 98 F.3d 1159 (9th Cir. 1996), *cert. denied*, 522 U.S. 806 (1997)

In re Negrete, 183 B.R. 195 (9th Cir. B.A.P. 1995), *aff'd.* 103 F.3d 139 (9th Cir. 1996)

Untimely motion for reconsideration of fee order must show exceptional or extraordinary circumstances.

In re Hunter, 66 F.3d 1002 (9th Cir. 1995)

"Independent action" to relieve party of a judgment from a settlement was without jurisdiction basis.

In re Weston, 41 F.3d 493 (9th Cir. 1994)

Motion for rehearing filed by attorney for nonparty tolls time limit for appeal from sanctions order against them. Motion for reconsideration filed by one tolls appeal time for all.

Kyle v. Campbell Soup Co., 28 F.3d 928 (9th Cir. 1994), *cert. denied*, 513 U.S. 867 (1994)

Mistake of law (i.e., time limits under Rule 6(b)) does not constitute excusable neglect.

U.S. v. RG & B Contractors, 21 F.3d 952 (9th Cir. 1994)

60(b)(1) - error caused by corp restructuring not excusable neglect *Pioneer Inv. Services* discussed.

In re Cossio, 163 B.R. 150 (9th Cir. B.A.P. 1994), *aff'd.* 56 F.3d 70 (9th Cir. 1995)

Debtor's attorney who did not update address and was served at old address was properly served under B.R. 7004(b)(9).

Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993)

4 part test to determine whether circumstances surrounding the party's omission constitutes "excusable neglect" (weakens In re Hammer's holding re "culpable conduct"):

1. Danger of prejudice to the debtor
2. The length of the delay and its potential impact on judicial proceedings
3. The reason for the delay, including whether it was within the reasonable control of the movant
4. Whether the movant acted in good faith

See also In re Nunez, 196 B.R. 150 (9th Cir. B.A.P. 1996).

In re Golob, 146 B.R. 566 (9th Cir. B.A.P. 1992)

Not use Rule 60(b)(6) if (1)(2)(3) are available. Because they were, 1 year statute barred motion.

U.S. v. Alpine Land & Reservoir co., 984 F.2d 1047 (9th Cir. 1993), *cert. denied,* 510 U.S. 813, 114 S.Ct. 60 (1993)

60(b)(6) only available under extraordinary circumstances. Need to show "injury and that circumstances beyond its control prevented timely action to protect its interests."

In re Atkins, 134 B.R. 936 (9th Cir. B.A.P. 1992)

Rule 60(b) cannot be used as a substitute for an appeal. May not reargue the merits of a final order.

In re Hammer, 940 F.2d 524 (9th Cir. 1991)

Test for setting aside default judgment; may be weakened by Pioneer Services, supra.

Jones v. Aero/Chem Corp., 921 F.2d 875 (9th Cir. 1990)

60(b)(2) - Test for finding misconduct regarding discovery:

1. Due diligence in discovery requests by plaintiff ?

2. Actual or constructive knowledge of missing documents by defendant ?

3. Defendant did not divulge existence.

Transgo Inc. v. Ajac Transmission Parts Corp, 911 F.2d 363 (9th Cir. 1990)

60(b)(5) Test for changed circumstances in fact or law.

In re Cleanmaster Industries, Inc., 106 B.R. 628 (9th Cir. B.A.P. 1989)

Affidavits did not establish why they could not have been discovered at trial, thus not newly discovered evidence. See *School District 15* (under rule 59 re summary judgment).

Nevitt v. U.S., 886 F.2d 1187 (9th Cir. 1989)

One year statute of limitations for (b)(1), (2) or (3).

Alexander v. Robertson, 882 F.2d 421 (9th Cir. 1989)

"Fraud" sufficient to set aside judgment must result in damage to the moving party.

Gregorian v. Izvestra, 871 F.2d 1515 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989)

Culpability required to deny setting aside default.

In re Donovan, 871 F.2d 807 (9th Cir. 1989)

Motion to reconsider dismissal is deemed motion under Rule 60(b). Thompson v. Housing Authority, 782 F.2d 829, 832 (9th Cir. 1986), *cert. denied*, 479 U.S. 829, 107 S.Ct. 112 (1986).

In re Martinelli, 96 B.R. 1011 (9th Cir. B.A.P. 1988)

Advice of counsel must be grossly negligent to constitute extraordinary circumstances under Rule 60(b)(6).

**RULE 62 - B.R. 9024 -Motion for Stay Pending Appeal**

Hilton v. Braunskill, 481 U.S. 770, 107 S.Ct.2113 (1987)

4 part test - all parts to be met with evidentiary showing

"Different rules of procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See FRCP 62(c); Fed. Rule Ap. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. (cites omitted)."

In re Ho, 265 B.R. 603 (9th Cir. B.A.P. 2001)

A bankruptcy court retains jurisdiction to enter a stay pending appeal, and such motions must ordinarily first be brought in the bankruptcy court. Once the bankruptcy court has decided the stay issue, it may not reconsider the motion after the appeal is brought.

**RULE 68**

Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997)

The judgment did not clearly and unambiguously waive or limit attorneys' fees as it wa silent on the subject. A rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorneys' fees, does not preclude the plaintiff from seeking attorneys' fees when the underlying statute does not make attorneys' fees a part of costs. On remand, the district court was required to consider the Nusoms' fee request on the merits.

**BANKRUPTCY RULE 1009(a)**

In re Olson, 253 B.R. 73 (9th Cir. B.A.P. 2000)

Chapter 13 debtor could not amend petition to add spouse as co-debtor.

**BANKR. RULE 3008**

In re Consolidated Pioneer Mortg., 178 B.R. 222 (9th Cir. B.A.P. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996)

Motion for reconsideration of claim subject to same requirements as Rule 60 and 59**,**

**BANKR. RULE 7001**

In re Cogliano, 355 B.R. 792 (9th Cir. B.A.P. 2006)

The denial of the debtor's first amended claim of exemption did not preclude her assertion in her second claim of exemption that her IRA was not property of the estate. Neither issue preclusion nor claim preclusion applied, since the issue of property of the estate was not necessarily decided in the initial exemption decision. Further, the issue of property of the estate had to be decided by way of an adversary proceeding, not a contested matter.

In re Colortran, Inc., 218 B.R. 507, 510-11(9th Cir. B.A.P. 1997) Bankruptcy court erred by invalidating absent shipper's lien without notice and an adversary proceeding in otherwise uncontested compromise hearing.

In re Lyons, 995 F.2d 923 (9th Cir. 1993)

Trustee is required to file a complaint to sell under § 363(h). No authority for granting approval by motion.

**BANKR. RULE 7054(b)**

Renfrow v. Draper, 232 F.3d 688 (9th Cir. 2000)

"Unlike the principle that attorney's fees cannot be awarded, there is no bankruptcy law policy against the granting of costs to a prevailing party for expenses in litigating federal law questions in a bankruptcy proceeding."

**BANKR. RULE 9006**

In re Dwyer, 426 F.3d 1041 (9th Cir. 2005)

Day after Thanksgiving is a California holiday.

Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004), *cert. denied*, 544 U.S. 961, 125 S.Ct. 1726 (2005)

A lawyer in a large law firm, who delegated the task of calculating the deadline for filing a notice of appeal to a nonlawyer calendering clerk, is subject to the excusable neglect standard, where the clerk miscalculated the time.

In re Sheehan, 253 F.3d 507 (9th Cir. 2001)-Rule 4(m)

Excusable neglect standard of Bankruptcy Rule 9006(b) applies to Rule 4(m). "...[I]f good cause is shown, a court shall extend the service period under Rule 4. If good cause is not shown, the court has the discretion to extend the time period. In addition, the court may extend the time limit upon a showing of excusable neglect under 9006(b)."

**BANKR. RULE 9010**

In re America West Airlines, 40 F.3d 1058 (9th Cir. 1994)

Partner may not represent partnership without a lawyer**.**

**BANKR. RULE 9014**

In re Khachikyan, 335 B.R. 121 (9th Cir. B.A.P. 2005)

Rule 9014(d), included in a 2002 amendment to the rule, is intended to require a trial when there is a genuine factual dispute. Furthermore, "[a]s a strategic matter, where one wants discovery in a contested matter, it is generally too late to wait to the day of the hearing on the merits to request to conduct discovery in the future."

In re Nunez, 196 B.R. 150 (9th Cir. B.A.P. 1996)

Ambiguous local rules do not require lien creditor to notice hearing on objection to debtor's motion to avoid abstract of judgment

**SANCTIONS**

In re Frantz, __B.R.__ (9th Cir. B.A.P. 2024)

Good discussion of bankruptcy court's inherent sanction authority and standard for imposing Rule 9011 sanctions when imposition of sanctions raised by the court. When court initiates Rule 9011 sanctions, standard is akin to contempt. In addition, counsel's disagreement with BAP decision not necessarily grounds to impose sanctions.

n re Gil Alberto De Jesus Gomez, III, 592 B.R. 696 (9th Cir. B.A.P. 2018)

Court has inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct. Must find bad faith, conduct tantamount to bad faith, or recklessness with an additional factor such as frivolousness, harassment, or an improper purpose. Bankruptcy Court must make an explicit finding of the above.

Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178 (2017)

When awarding fees under its inherent sanction power, there must be causal link between the litigant's misbehavior and the legal fees paid by the opposing party.

In re Blue Pine Group, Inc., 448 B.R. 267 (B.A.P. 9th Cir. 2011), affirmed in part and vacated in part, 562 Fed.Appx 768 (2013)

Unauthorized bankruptcy filing may constitute sanctionable behavior against debtor's counsel.

In re Nguyen, 447 B.R. 268 (B.A.P. 9th Cir. 2011)

Bankruptcy Court's failure to apply ABA Standards when sanctioning an attorney is not an abuse of discretion, modifying In re Crayon, 192 B.R. 970 (B.A.P. 9th Cir. 1998).

In re Nakhuda, 544 B.R. 886 (BAP 9th Cir. 2016)

Court-initiated sanctions under Rule 9011 requires a higher standard akin to contempt due to the lack of the 21-day safe harbor provision .  Cannot use an objective reasonableness standard, and requires more than ignorance or negligence on the attorney's part.

**SEALING DOCUMENTS**

Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995)

The factors relevant to a determination of whether the strong presumption of access is overcome include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990) (*citing Valley Broadcasting,* 798 F.2d at 1294). After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture. *Valley Broadcasting*, 798 F.2d at 1295.

In re Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994)

Documents containing promotional agreement were properly sealed under § 107(b).

Valley Broadcasting Co. v. U.S. D. Court of Nevada, 798 F.2d 1289 (9th Cir. 1986)

EEOC v. The Erection Co., 900 F.2d 168 (9th Cir. 1990)

Unsealing of documents - court's refusal to do so reviewable for abuse of discretion.

**SECTION 105(a)--Equitable powers of the Bankruptcy Court**

Law v. Siegel, 571 U.S. 415 (2014)

Section 105 cannot be used to contradict express terms of another Bankruptcy Code section.

In re Excel Innovations, Inc., 502 F.3d 1086 (9th Cir. 2007), *cert. denied,* 128 S.Ct. 2080, 170 L.Ed.2d 816 (2008)

Distinguishing *Crown Vantage, infra,* the court held that "our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant."

In re Crown Vantage, Inc., 421 F.3d 963, 975 (9th Cir. 2005)

"The only requirement for the issuance of an injunction under § 105 is that the remedy conform to the objectives of the bankruptcy code." The standard for issuing a preliminary injunction does not apply to injunctions issued under § 105.

In re Beaty, 306 F.3d 915,922 (9th Cir. 2002)

"[A] bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be inconsistent with the Bankruptcy Code."

In re Yadidi, 274 B.R. 843 (9th Cir. B.A.P. 2002)

Section 105 does not provide an independent ground for denying debtor's discharge.

**SECURED TRANSACTIONS**

**1. Article 9**

**1(a). Assignment**

**2. 9-105**

**2a. 9-109**

**3. 9-201**

**4. 9-203**

**5. 9-504(3)**

**6. CCP § 726**

**7. CCP § 780**

**8. CCP § 1717**

**9. Michigan Law**

**10. Perfection of Security Interest**

**11. § 506**

**12. § 506(a)**

**13. § 506(b)**

**14. § 506(c)**

**15. § 552(b)**

**16. 35 U.S.C. § 261**

**17. Washington Law**

**18. Tracing of proceeds**

**19. § 1325 (hanging paragraph)**

**20. Ipso facto clauses**

**21. Misc**

**1. Article 9**

In re Penrod, 611 F.3d 1158, 1163 (9th Cir. 2010)

Negative equity on trade-in vehicle that was rolled into the amount financed for purchase of the new vehicle was not sufficiently connected to the purchase price to establish a purchase money security interest. "A seller or lender can obtain a purchase money security interest only for new value, and closely related costs. Old value simply does not fit within that rubric."

In re Commercial Money Centers, Inc., 392 B.R. 814 (9th Cir. B.A.P. 2008)

A surety bond was a supporting obligation, not an "instrument" under Nevada 9-102(1).

In re Pacific/West Communications Group, Inc., 301 F.3d 1150 (9th Cir. 2002)

Security interest in general intangibles did not extend to commercial tort causes of action under old Article 9. Under California's 2001 version of Article 9, a security interest may be taken in proceeds of a tort action.

In re CFLC, Inc., 166 F.3d 1012 (9th Cir. 1999)

Mere sending of preprinted invoices without further agreement between parties did not create Art. 9 security interest.

**1a. Assignment**

In re Trejos, 374 B.R. 210, 215 (9th Cir. B.A.P. 2007)

Purchase money character of security interest not affected by an assignment.

**2. 9-105**

In re Omega Environmental, Inc., 219 F.3d 984 (9th Cir. 2000)

Bank perfected its security interest in a certificate of deposit through possession under Virginia's 9-304 and 305, because a certificate of deposit is an instrument under 9-105, even though it bears the legend "nontransferable".

In re Kirkland, 91 B.R. 551 (9th Cir. B.A.P. 1988), *aff'd.* 915 F.2d 1236 (9th Cir. 1990)

1. Guarantors are entitled to notice of sale of collateral under 9-105(1)(d)

2. Waiver of right ineffective prior to default.

**2a. 9-109**

In re Commercial Money Center, Inc., 350 B.R. 465 (9th Cir. B.A.P. 2006)

Payment streams stripped from equipment leases are payment intangibles, even though the underlying leases are chattel paper. As such, they were subject to automatic perfection under section 9-303(3), but only if the assignment of the payment stream was a true sale. Assignments here were loans, not sales.

**3. 9-201**

In re Coupon Clearing Services, Inc., 113 F.3d 1091 (9th Cir. 1997)

Secured creditor had given debtor adequate right in the collateral to meet 9201. Coupon cash not subject to trust or bailment.

**4. 9-203**

In re Bakersfield Westar Ambulance, 123 F.3d 1243, (9th Cir. 1997)

1. Bank may obtain a security interest in its own customer's deposit account under Article 9. The security interest attaches to the customer's general intangible against the bank.

2. However, the description in the security agreement was inadequate under 9-203.

**5. 9-504(3)**

In re Alcock, 50 F.3d 1456 (9th Cir. 1995)

Guarantor could be discharged because of SBA's subordination of its lien priority without notice to guarantor.

**6. CCP § 726**

In re Kearns, 314 B.R. 819 (9th Cir. B.A.P. 2004), *aff'd,* 201 Fed. Appx. 473 (9th Cir. 2006).

Lender retained enforceable lien on borrower's real property after exercising nonjudicial foreclosure against vehicle; "one-action/security first" rule not violated.

Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230 (9th Cir. 1994)

Receiver's sale of townhouse and furniture and payment of the proceeds to the secured creditor was not a violation of California CCP § 726. The creditor did not obtain a personal money judgment against the debtor or execute on unencumbered assets. There is no rule that prohibits a secured creditor from collecting on its "additional" collateral before foreclosing on its "primary" real property security. See Cal. Complaint. Code § 9501(4) (the mixed collateral statute).

Metropolitan Life Ins. Co. v. Sunnymead Shopping Ctr. Co. (In re Sunnymead Shopping Ctr. Co.), 178 B.R. 809 (9th Cir. 1995)

Creditor's acceptance of adequate protection payments does not violate the one-action rule. Relying in part on *Bayside Developers*, the B.A.P. has ruled that the secured creditor's acceptance during the Chapter 11 case of cash collateral rents as a form of adequate protection is to an "action" within the meaning of Cal. CCP § 726, which would later bar foreclosure on the real property or a deficiency judgment. Acceptance of rent payments as adequate protection does not violate the "one action" or "security first" principles of § 726.

Great Am. First Sav. Bank v. Bayside Developers, 43 F.3d 1230 (9th Cir. 1994)

Receiving proceeds of additional collateral does not violate one-action rule.

### 7. CCP § 780

In re Prestige Limited Partnership-Concord, 234 F.3d 1108 (9th Cir. 2000)

Secured creditor who violated CCP § 780 by pursuing a guarantor who was deemed just another co-obligor on the note still retains an unsecured claim against the debtor. The deficiency claim was not waived under CCP § 580(a) because the property was not sold.

### 8. CCP § 1717

In re Hassen Imports Partnership, 256 B.R. 916 (9th Cir. B.A.P. 2000)

1) Debtor was not entitled to attorney fees under CCP § 1717, since the dispute in question was not an action on a promissory note, but an action on confirmation of a plan, which is governed by federal bankruptcy law; 2) bankruptcy court erred in finding that secured creditor was entitle to the default rate of interest in the note, since the creditor "failed to demonstrate that the default rate reasonably compensated it for losses arising from the default;" 3) secured creditor was entitled to fees under § 506(b)for pursuing collection of note from guarantors.

### 9. Michigan Law

In re Turley, 172 F.3d 671 (9th Cir. 1999)

Share in racing association is not a "certificated security" under Art. 8 of the UCC (Michigan law).

### 10. Perfection of Security Interest

In re Global One Media, Inc., __ B.R.__ (9th Cir. B.A.P. 2025)

Under UCC, perfection of a security interest in personal property generally requires perfection in the state where the debtor is "located."

In re Commercial Money Centers, Inc., 392 B.R. 814 (9th Cir. B.A.P. 2008)

Secured creditor did not perfect security interest in equipment lease payments by possession under 9-313 or by filing a financing statement.

In re First T.D. & Investment, Inc. 253 F.3d 520 (9th Cir. 2001)

Assignment of collateral notes and trust deeds to investors may be perfected in California without possession and thus cannot be avoided under the strong arm clause.

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

Creditor perfected security interest in debtor's patent by filing financing statement with California Secretary of State rather than with Patent & Trademark Office.

In re Southern California Plastics, Inc., 165 F.3d 1243 (9th Cir. 1999)

Allowance of claim is not equivalent to a judgment for purposes of perfecting an attachment lien. Attachment liens "can be created and continue to exist only in the cases and to the extent to which the California Legislature by statutory enactment has authorized their creation and continued existence."

In re Vigil Bros. Construction, Inc., 193 B.R. 513 (9th Cir. B.A.P. 1996)

Significant assignment of accounts receivable to creditor triggers commercial requirement to perfect security interest

In re Cortez, 191 B.R. 174 (9th Cir. B.A.P. 1995)

Secured creditor's unperfected and unavoided deed of trust survives discharge order

Mastro v. Witt, 39 F.3d 238 (9th Cir. 1994)

Security interest in proceeds of a land sale contract is a general intangible which must be perfected by filing a UCC financing statement with the secretary of state. Recording the security interest in the county real property records will not perfect lien.

In re Park at Dash Point, L.P., 985 F. 2d 1008 (9th Cir. 1993)

Prospective statutory amendment providing for perfection of mortgagee/assignee's security interest in rents may be applied retroactively.

In re Raiton, 139 B.R. 931 (9th Cir. B.A.P. 1992)

Security interest in stock - how perfected by possession.

In re Hillside Associates Ltd Partnership, 121 B.R. 23 (9th Cir. B.A.P. 1990), *appeal dismissed*, 990F.2d 1258 (9th Cir. 1933)

Lien against nursing home's contract rights not perfected against patient revenues.

In re Copper King Inn, Inc., 918 F.2d 1404 (9th Cir. 1990)

Creditor did not have a perfected security interest in bankrupt debtor's property because financing statement did not mention its name.

In re Boogie Enterprises, Inc., 866 F. 2d 1172 (9th Cir. 1989)

Financing statement describing collateral for loan as "personal property" was insufficient under California law, to perfect creditor's security interest in proceeds of lawsuit settlement.

In re Softalk Publ. Co., Inc., 856 F.2d 1328 (9th Cir. 1989)

Financing statement that contained no description of the collateral, but only identified proceeds from the collateral was insufficient to perfect security interest under California law.

**11. § 506**

In re Pletz, 221 F.3d 1114 (9th Cir. 2000)

Under Oregon law, chapter 13 debtor's interest in property held by debtor and nondebtor spouse as tenants by the entirety had to be valued under § 506 to reflect concurrent interests of both spouses.

**12. § 506(a)**

In re 1441 Veteran St., 154 F.3d 1103 (9th Cir. 1998), *cert. denied*, 144 F.3d 1288 (9th Cir. 1998)

The court of appeals reversed a judgment of the district court. The court held that under §506(a), a debtor cannot "strip down" a creditor's lien based on the valuation of an asset for reorganization purposes, when the bankruptcy court denies confirmation of the reorganization plan and allows the creditor to pursue its state-law remedies.

**13. § 506(b) (see also attorney fees, supra)**

In re Imperial Coronado Partners, Ltd., 96 B.R. 997 (9th Cir. B.A.P. 1989)

506(b) - prepayment premium may be allowed as a reasonable fee.

**14. § 506(c)**

In re Los Gatos Lodge, Inc., 278 F.3d 890 (9th Cir. 2002)

A bankruptcy trustee may not surcharge a creditor under § 506(c) after the creditor's secured claim has been disallowed.

In re Debbie Reynolds Hotel and Casino, Inc., 255 F.3d 1061 (9th Cir. 2001)

1. Postpetition lender had no standing to object to $50,000 payment to debtor-in-possession's counsel out of proceeds of sale agreed to by another secured creditor;

2. Under 506(c), the party that has rendered a benefit to the secured creditor is properly reimbursed for that benefit out of secured collateral.

Hartford Underwrites Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S.Ct. 1942 (2000)

Only a trustee may invoke § 506(c) to charge a secured creditor with the expenses of preserving the estate, not an administrative claimant.

In re Compton Impressions, Ltd., 217 F.3d 1256 (9th Cir. 2000)

Services sought to be surcharged by the debtor-in-possession under § 506(c) were not necessary, nor did they quantifiably benefit the bank, nor did the bank consent to the charges.

Hartford Underwrites Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S.Ct. 1942 (2000)

Only a trustee may invoke § 506(c) to charge a secured creditor with the expenses of preserving the estate, not an administrative claimant.

506(c) -

In re Palomar Truck Corp., 951 F.2d 229 (9th Cir. 1991), *cert. denied*, 506 U.S. 821 (1992)

In re Glasply Marine Industries, Inc., 971 F.2d 391 (9th Cir. 1992)

In re Jenson, 980 F.2d 1254 (9th Cir. 1992)

In re Cascade Hydraulics and Utility Service, Inc., 815 F.2d 546 (9th Cir. 1987)

In re James E. O'Connell Co., Inc., 893 F.2d 1072, 1074 (9th Cir. 1990).

**15. § 552(b)**

In re Skagit Pacific Corp., 316 B.R. 330 (9th Cir. B.A.P. 2004)

**"**Proceeds of post-petition accounts receivable do not fall within the § 552(b) proceeds exception."

In re Northview Corp., 130 B.R. 543 (9th Cir. B.A.P. 1991)

Revenues from hotel are accounts, not rents for purposes of § 552(b).

In re Bering Trader, Inc. 944 F.2d 500 (9th Cir. 1991)

Prepetition security interest in accounts, general intangibles and proceeds does not extend to rents received postpetition under a vessel subcharter. Security interest in "accounts" is not the same as a security interest in "rents" for purposes of § 552(b).

**16. 35 U.S.C. § 261**

In re Cybernetic Services, Inc., 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002)

"...[A] security interest in a patent that does not involve a transfer of rights of ownership is a "mere license" and is not an assignment , grant or conveyance" within the meaning of 35 U.S.C. § 261. And because § 261 provides that only an "assignment, grant or conveyance shall be void" as against subsequent purchasers and mortgagers, only transfers of ownership interests need to be recorded with the PTO."

**17. Washington Law**

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998)

Under Washington law, security agreement that grants interest in "inventory" or "accounts receivable" presumptively includes after-acquired inventory or accounts receivable.

In re Heide, 915 F.2d 531 (9th Cir. 1990)

Right to receive payments under real estate contract subject to perfection under Article 9 (Washington law).

### 18. Tracing of proceeds

In re Skagit Pacific Corp., 316 B.R. 330 (9th Cir. B.A.P. 2004)

Because secured creditor did not use the Lowest Intermediate Balance of any other recognized tracing method as required under new 9-315, secured creditor did not meet its burden of proving that its security interest extended to proceeds of accounts receivable.

### 19. § 325 (hanging paragraph)

In re Penrod, 611 F.3d 1158 (9th Cir. 2010)

1) A lender's payoff of the deficiency on the trade-in is not secured by the purchase money security interest in the new car, and is not thereby protected by the hanging paragraph.

2) "[T]he hanging paragraph protects that portion of the lender's debt allocable to the car purchased, and does not protect that portion of the debt that is allocable to negative equity."

In re Trejos**,** 374 B.R. 210, 215 (9th Cir. B.A.P. 2007)

Under the "hanging paragraph," chapter 13 debtor was required to pay the full contract price of his automobile. Trial court held that § 1322(b) remained applicable, and the debtor could alter the interest rate and monthly payments. The B.A.P. did not address this issue, since the creditor did not pursue it on appeal.

### 20. Ipso facto clauses–enforceability

In re Dumont, 383 B.R. 481, 489 (9th Cir. 2009)

"Ride through" option under pre-B.A.P.CPA law (*In re Parker,* 139 F.3d 668 (9th Cir. 1998)) was eliminated in 2005. *"At least where the debtor has not attempted to reaffirm,* our decision in *Parker* has been superceded by B.A.P.CPA." (Emphasis added)

**21. Misc**

Ta Chong Bank v. Hitachi High Technologies America, 610 F.3d 1063 (9th Cir. 2010)

Buyer of goods from debtor could not be sued by debtor's factor for having failed to comply with a notice pursuant to 9-406 of the UCC to pay factor rather than debtor, where factor's security interest had been found avoidable as a preference.

In re Choo, 273 B.R. 608 (9th Cir. B.A.P. 2002)

Failure to prove that secured party saved foreclosure costs from the trustee's sale of the property failed actual benefit test.

In re Prestige Ltd. Partnership - Concord, 164 F.3d 1214 (9th Cir. 1999)

The court held that under California law, a creditor waives its security interest in a debtor's ground lease by attaching a guarantor's unpledged assets in a separate state-court action.

In re Yepremian, 116 F.3d 1295 (9th Cir. 1997)

State deposition testimony of prior unrecorded joint venture agreement is insufficient to establish priority of equitable interest over subsequent recorded interest/

In re CFLC, Inc., 209 B.R. 508 (9th Cir. B.A.P. 1997), *aff'd*, 166 F.3d 1012 (9th Cir. 1999)

Creditor does not have security interest or lien in property of customer's bankruptcy estate despite evidence of customer's receipt and payment of invoices containing terms for general lien in goods.

In re Taffi, 96 F.3d 1190 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997)

Residence retained by debtor in bankruptcy proceeding valued at fair market value (*In re Mitchell* overruled).

In re McDonell, 204 B.R. 976 (9th Cir. B.A.P. 1996), *aff'd*, 164 F.3d 630 (9th Cir. 1998)

Recordation of certified copy of federal judgment created valid judgment lien.

In re Kim, 130 F.3d 863 (9th Cir. 1997)

Valuation of security interests in business equipment and lease based on worth of equipment not business as a whole.

In re Decker, 199 B.R. 684 (9th Cir. B.A.P. 1996)

Secured creditor's lien against debtor's property senior to IRS lien.

In re Leisure Time Sports, Inc., 194 B.R. 859 (9th Cir. B.A.P. 1996)

Secured party cannot transfer interest in loan collateral to third party separately from underlying debt - party who did not assign debt deemed to have done so.

In re Ehrle, 189 B.R. 771 (9th Cir. B.A.P. 1995)

Sale proceeds of real property are not covered by a deed of trust.

In re Auza, 181 B.R.63 (9th Cir. B.A.P. 1995)

"Dragnet clauses" in security instruments executed by debtors did.

In re Crosby, 176 B.R. 189 (9th Cir. B.A.P. 1994), *aff'd.* 85 F.3d 634 (9th Cir. 1996)

Secured party properly deemed not to have retained collateral in full satisfaction of debtor's obligation absent written notice, unreasonably delay, or manifested intention to accept collateral in satisfaction of debt. Also commercially reasonably sale.

In re Days California Riverside Limited Partnership, 27 F.3d 374 (9th Cir. 1994)

1. Room revenues are rents, not accounts

2. Food and drink revenues are accounts, not rents.

In re Stoumbos, 988 F. 2d 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 867 (1993)

1. Failure of security contract to make reference to after-acquired property is not a security interest in same. Security contract did not refer to "inventory" or "all inventory."

Lomas Mortgage USA v. Wiese, 980 F.2d 1279 (9th Cir. 1992), ***vacated,*** 508 U.S. 958, 113 S.Ct. 2925 (1993)

Hypothetical costs of sale not factored into amount of secured claim. *Balbus* followed.

In re Southland & Keystone, 132 B.R. 632 (9th Cir. B.A.P. 1991)

PACA claimants hold superior security to bank's blanket security over debtor's account receivable.

In re Robert B. Lee Enterprises, Inc., 980 F.2d 606 (9th Cir. 1992)

Assignee of secured creditor has sam priority as secured creditor as to future advances it makes.

In re Kirkland, 915 F. 2d 1236 (9th Cir. B.A.P. 1990)

Defaulting guarantor was "debtor" entitled to notice before creditor's sale of collateral under California Commercial Code. No waiver of notice found.

Crocker National Bank v. Emerald, 221 Cal. App. 3d 852 (1990)

Secured creditor barred from obtaining deficiency judgment unless collateral is sold in commercially reasonable manner.

In re Estreito, 111 B.R. 294 (9th Cir. B.A.P. 1990)

Lienholder's interest on advances limited by deeds of trust reference to rate allowed by law.

Newman v. First Security Bank of Bozeman, 887 F.2d 973 (9th Cir. 1989)

Secured creditor lien remains intact post bankruptcy.

In re Falk Farms, Inc., 88 B.R. 254 (9th Cir. B.A.P. 1988)

True lease v. Disguised security agreement.

In re Dettman, 84 B.R. 662 (9th Cir. B.A.P. 1988)

Creditor which had prepetition security in proceeds and general intangibles had valid security interest in crop diversion proceeds.

**SETOFF & RECOUPMENT**

In re Gould, 401 B.R. 415 (9th Cir. B.A.P. 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

In re Straightline Investments, Inc,. 525 F.3d 870 (9th Cir. 2008)

Postpetition transfer by debtor of accounts receivable to a factor without bankruptcy court approval were avoidable under § 549(a). This is true regardless of whether they diminished the estate, the court declining to extend the diminution of the estate doctrine of § § 547 and 548 to § 549. They were not sales in the ordinary course of business, since they failed to meet both the vertical and horizontal dimension tests of § 363(c).The earmarking doctrine did not apply, because the money received by the debtor was not designated for a specific creditor. Recoupment did not apply, because it is an equitable doctrine, and the factor engaged in inequitable conduct.

In re Wade Cook Financial Corp., 375 B.R. 580 (9th Cir. B.A.P. 2007)

Section 553 governs the IRS's right to setoff in bankruptcy, not the Internal Revenue Code. Whether the obligation to remit a refund was a prepetition debt, and whether there was a mutuality of debts, were genuine issues of material fact that required a remand.

In re Brown & Cole Stores, LLC, 375 B.R. 873 (9th Cir. B.A.P. 2007)

Secured creditors are entitled to the administrative expense priority allowed by § 503(b)(9). Because such claims arise prepetition, they may be subject to setoff under § 553(a) if all of the requirement of the statute are met.

In re Madigan, 270 B.R. 749 (9th Cir. B.A.P. 2001)

Insurer's overpayment of prepetition disability benefits and insured's right to postpetition benefits for separate disability were not logically related so as to entitle insurer to equitable recoupment.

In re TLC Hospitals, Inc., 224 F.3d 1008 (9th Cir. 2000)

HHS's overpayments for TLC's nursing services in one fiscal year arise from the same transaction as its underpayments to TLC in a later fiscal year, thus allowing them to recoup the overpayments.

In re United Marine Shipbuilding, Inc., 146 F.3d 739 (9th Cir. 1998), *amended and superseded on denial of reh'g*, 158 F.3d 997 (9th Cir. 1998)

Governments' setoff rights are not waived when I.R.S. mistakenly disburses bankruptcy debtor's tax refund to debtor's trustee

In re Luz Int'l, Ltd., 219 B.R. 837 (9th Cir. B.A.P. 1998)

Elements of a set-off under 553

1. Pre-petition debt owed to debtor
2. Debts are mutual and pre-petition and owing between same parties
3. Parties stand in same capacity.

In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243 (9th Cir. 1997)

Bank improved position under § 553(b), thus setoff.

Newbery Corp. v. Fireman's Fund Insur. Co., 95 F.3d 1392 (9th Cir. 1996)

Recoupment does not violate ratable distribution.

In re HAL, Inc., 196 B.R. 159 (9th Cir. B.A.P. 1996), *aff'd.* 122 F.3d 851 (9th Cir. 1997)

Federal government agencies constitute single entity for purposes of mutuality requirement of setoff except for agencies acting in distinct private capacity.

In re Harmon, 188 B.R. 421 (9th Cir. B.A.P. 1995)

Excess temporary workers' compensation payments may be deducted from debtor's permanent disability award under either recoupment or setoff.

In re Cascade Roads, Inc., 34 F.3d 756 (9th Cir. 1994)

U.S. government's right of setoff deemed due to its inequitable conduct, notwithstanding setoff right found in 31 U.S.C. 3728.

In re Newbery Corp., 145 B.R. 998 (9th Cir. B.A.P. 1992), *op withdrawn* 161 B.R. 999 (9th Cir. B.A.P. 1994)

Claim for prepetition damages for abandoning work on a project and a claim for rental of equipment postpetition arise out of the same transaction, this recoupment appropriate.

In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269 (9th Cir. 1992), *cert. denied*, 506 U.S. 918 (1992)

Setoff available even after plan confirmed - 553 takes precedence over 1141.

In re Buckenmaier, 127 B.R. 233 (9th Cir. B.A.P. 1991)

Error to prohibit creditor's setoff claim against discharged debtor.

In re Holford, 896 F.2d 176 (5th Cir. 1990)

Recoupment not barred by automatic stay.

In re Davidovich, 901 F.2d 1533 (10th Cir. 1990)

Setoff v. Recoupment.

Lewis Industries v. Barham Constr. Inc., 878 F.2d 1230 (9th Cir. 1989)

Failure to raise setoff at time of assumption by debtor of executory contract = estoppel

In re Pieri, 86 B.R. 208 (9th Cir. B.A.P. 1988)

Creditor may assert setoff in cross-complaint against a debtor's complaint seeking money which would be exempt.

**SEVERANCE PAY**

In re Selectors, Inc., 85 B.R. 843 (9th Cir. B.A.P. 1988)

**SOVEREIGN IMMUNITY--STATE AND FEDERAL**

In re Blixseth, __F.4th__ (9th Cir. 2024)

Sovereign immunity protects a state which is a petitioning creditor in an unsuccessful involuntary bankruptcy petition against section 303(i) remedies. Case contains interesting discussions regarding waiver of sovereign immunity and whether the State of Montana is entitled to immunity under Central Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

Hunsaker v. United States, 902 F.3d 963 (9th Cir. 2018)

Section 106(a) waives sovereign immunity for an award of emotional distress damages under § 362(k).

In re DBSI, 697 Fed.Appx. 493 (9th Cir. 2017)

Where the trustee proceeds against the IRS under § 544(b)(1), sovereign immunity is waived under § 106.

Central Virginia Community College v. Katz, 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006)

Preference action against state agencies is not barred by sovereign immunity, a finding that does not hinge on the validity of 11 U.S.C. § 106(a).

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004)

Exercise of in rem jurisdiction to discharge a student loan does not infringe sovereign immunity.

In re Balser, 327 F.3d 903 (9th Cir 2003), *cert. denied*, 124 S.Ct. 2159 (2004)

United States trustee is immune from suit if acting in his official capacity based on acts conducted within the course and scope of his employment.

In re Bliemeister, 296 F.3d 858 (9th Cir. 2002)

State waived sovereign immunity where it failed to raise it until after filing an answer and arguing a summary judgment motion.

In re Harleston, 331 F.3d 699 (9th Cir. 2003)

State waived sovereign immunity by filing proof of claim. Waiver extended to suits involving same transaction or occurrence, such as this one, which sought a declaration that a debt was discharged, even though proof of claim sought secured status.

In re Franceschi, 268 B.R. 219 (9th Cir. B.A.P. 2001), *aff'd*, 43 Fed.Appx. 87 (9th Cir. 2002)

Action for declaratory and injunctive relief properly dismissed on sovereign immunity grounds as to state bar, and on Younger abstention grounds as to the state bar's chief trial counsel.

In re Ellett, 254 F.3d 1135 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002)

1) "...[W]e hold that a bankruptcy court's discharge order is binding on a State, despite the State's election not to share in the recovery of the bankruptcy estate's assets by filing a proof of claim."

2) ...[A] discharge order can be enforced against a state tax official in an action for prospective injunctive and declaratory relief under the *Ex Parte Young* doctrine."

In re Lazar, 237 F.3d 967 (9th Cir. 2001), *cert. denied*, 534 U.S. 992 (2001)

1) "...[W]e hold today that when a state or an "arm of the state" files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim."
2) California Underground Storage Tank Cleanup Fund is an "arm of the state."

In re Jackson, 184 F.3d 1046 (9th Cir. 1999)

FTB waived sovereign immunity by filing proof of claims.

In re Black, 222 B.R. 896 (9th Cir. B.A.P. 1998)

Bankruptcy court erred in denying motion for default judgment and ordering prove-up hearing after appellate panel had determined that evidence was sufficient to prevail on dispositive issue.

In re Lapin, 226 B.R. 637 (9th Cir. B.A.P. 1998)

California Franchise Tax Board had sovereign immunity against bankruptcy court's sanction order arising from board's attempts to collect delinquent taxes from discharged debtor.

In re White, 139 F.3d 1268 (9th Cir. 1998)

Filing of claim waived Indian tribes sovereign immunity.

In re H.P.A. Assoc., 191 B.R. 167 (9th Cir. B.A.P. 1995)

Current case law from the circuit courts and the Supreme Court indicates that Congress acted within its plenary Article I powers to amend §106 of the Bankruptcy Code in order to abrogate the state's sovereign immunity as to specific Code sections. At least three of these sections were pled by the trustee in the complaint to recover a payment made to EDD from H.A.'s escrow account. Therefore, EDD's sovereign immunity defense was unavailable.

Doe v. U.S., 58 F.3d 494 (9th Cir. 1995)

As a matter of law, for purposes of waiver of sovereign immunity and setoff under 11 U.S.C. §106 all agencies of the United States, except those acting in some distinctive private capacity, are a single governmental unit.

In re Vanguard Mfg. Co., 145 B.R. 644 (9th Cir. B.A.P. 1992)

Accepting postpetition payments insufficient to constitute a waiver of sovereign immunity.

In re Town & Country Homes Nursing Services, Inc., 112 B.R. 329 (9th Cir. B.A.P. 1990), *aff'd*, 963 F.2d 1146 (9th Cir. 1991)

No sovereign immunity under 106(a) where government offset -- deemed to file informal proof of claim.

In re Pearson, 917 F.2d 1215 (9th Cir. 1990), *cert. denied*, 503 U.S. 918 (1992)

U.S. immune from money damages under 362.

In re Bulson, 117 B.R. 537 (9th Cir. B.A.P. 1990)*, aff'd*, 974 F.2d 1341 (9th Cir. 1992)

IRS not immune from damages for violating automatic stay.

Hoffman v. Conn. Dept of Income Maint., 492, U.S. 96, 109 S.Ct. 2818 (1989)

**STANDING, MOOTNESS AND RIPENESS**

Truck Insurance Exchange v. Kaider Gypsum Company, Inc., 602 U.S. __ (2024)

An insurer with financial responsibility for bankruptcy claims is a party in interest under Bankruptcy Code section 1109(b). The Supreme Court rejects the insurance neutrality doctrine.

In re Venegas, 623 B.R. 555 (9th Cir. B.A.P. 2020)

Good analysis of what constitutes "constitutional" standing. Here's debtor's insurer lacked standing to move to dismiss an involuntary bankruptcy against the debtor.

In re Sino Clean Energy, 901 F.3d 1139 (9th Cir. 2018)

Board members removed by a receiver do not have corporate authority to file a bankruptcy case for the corporation. State law determines who is authorized to file a voluntary bankruptcy petition on a debtor's behalf.

In re Castaic Partners II, LLC, 2016 WL 2957150 (9th Cir. 2016)

An appeal of an order lifting the automatic stay is moot when the bankruptcy case is dismissed.

In re Transwest Resort Properties Incorporated, 791 F.3d 1140 (9th Cir. 2015)

A substantially consummated plan does not render an appeal equitably moot.

In re Tower Park Properties LLC, 803 F.3d 450 (9th Cir. 2015)

A beneficiary of a trust does not possess party-in-standing status under § 1109(b), at least where his interests are adequately represented by a party-in-interest trustee.

n re Kronemyer, 405 B.R. 915 (9th Cir. B.A.P. 2009)

Surety had standing to bring motion for relief from the automatic stay, even though it only had a contingent claim for contribution or reimbursement under § 502(e)(1).

In re Coleman, 560 F.3d 1000 (9th Cir. 2009)

Student loan undue hardship determinations are ripe for decision substantially in advance of completion of a chapter 13 plan. Constitutional and prudential ripeness discussed as length.

In re Gould, 401 B.R. 415, 421 (9th Cir. B.A.P. 2009)

Appeal was not moot, where even if the debtor had spent a tax refund that the IRS should have been allowed to set off against, the court could still order the money returned.

In re PW LLC, 391 B.R. 25, 33-37 (9th Cir. B.A.P. 2008)

Sale involving lien stripping under § 363(f)(5) was not subject to constitutional, equitable or statutory mootness under § 363(m).

In re Nelson, 391 B.R. 437 (9th Cir. B.A.P. 2008)

Dismissal of repeat filers' third bankruptcy case did not moot appeal from earlier order dismissing an adversary proceeding to recover for a mortgagee's violation of the automatic stay.

Suter v. Goedert, 504 F.3d 982 (9th Cir. 2007)

Motion for stay pending appeal was not mooted by state supreme court's dismissal of an appeal in the underlying suit.

Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007)

Landowners' claims were ripe, because the government agency had made a final decision, and the owners also met the exhaustion requirement.

In re Sherman, 491 F.3d 948, 965 (9th Cir. 2007)

Entry of discharge in this chapter 7 case did not moot the appeal, because it did not terminate the debtor's bankruptcy, and the grant of the SEC's motion to dismiss under § 707(a) may have triggered a reconsideration of the discharge order.

In re Sobczak, 369 B.R. 512, 516 (9th Cir. B.A.P. 2007)

Chapter 13 debtor had standing to seek dismissal under § 1307(c), since he had a pecuniary interest and practical stake in whether his case was dismissed.

Estate of Spirtos v. San Bernardino County, 443 F.3d 1172, 1177 (9th Cir. 2006)

". . .[A]s a creditor, plaintiff lacks standing to raise RICO claims on behalf of Basil's bankruptcy estate because only the bankruptcy trustee has standing to sue on behalf of the estate."

In re Miles, 430 F.3d 1083 (9th Cir. 2005)

Bankruptcy court had "arising under" jurisdiction over state law tort suits removed from state court, since such actions were totally preempted by § 303(i). Furthermore, siblings of debtors had no standing to bring an action under § 303(i).

Smith v. Arthur Anderson LLP, 421 F.3d 989 (9th Cir. 2005)

Plan trustee had standing to sue former officers and directors, since the trustee was seeking to redress injuries to the debtor caused by the defendants' conduct, rather than injury to creditors. Here, the trustee asserted that the defendants concealed the debtor's financial condition, and if they hadn't, the debtor might have filed for bankruptcy sooner and additional assets might not have been expended on a failed business.

In re Burrell, 415 F.3d 994 (9th Cir. 2005)

Where two potentially preclusive lower court judgments were involved, after appeal became moot through no act of party seeking relief, vacatur was required as to both judgments of the district court or B.A.P. and the bankruptcy court.

In re Popp, 323 B.R. 260 (9th Cir. B.A.P. 2005)

Equitable mootness did not apply to a sale order that was improperly entered under § 363. Doctrine explained.

In re Gotcha International L.P., 311 B.R. 250 (9th Cir. B.A.P. 2004)

Appeal of confirmation order dismissed for equitable mootness, where debtor had obtained a refinance and distributed substantial payments to all but two classes.

In re La Sierra Financial Services, Inc., 290 B.R. 718 ( 9th Cir. B.A.P. 2002)

Nonparty purchasers of property sold by a bankruptcy estate have standing to appear and seek relief from orders which may affect their property interests.

In re Chiu, 266 B.R. 743 (9th Cir. B.A.P. 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002)

Debtors had both constitutional and prudential standing to seek lien avoidance after property was sold.

In re Stoll, 252 B.R. 492 (9th Cir. B.A.P. 2000)

Chapter 7 debtor with solvent estate lacked standing to sue professionals employed by trustee.

In re P.R.T.C., Inc., 177 F.3d 774 (9th Cir. 1999)

Creditor has standing to challenge trustee's transfer of avoiding actions.

In re Cross, 218 B.R. 76 (9th Cir. B.A.P. 1998)

Securities and Exchange Commission has standing as creditor to object to discharge of disgorgement judgment against debtor.

In re Abbott, 183 B.R. 198 (9th Cir. B.A.P. 1995)

Individual alleged to have received fraudulent transfer from bankruptcy debtor lacks standing to appeal bankruptcy court order denying her motion to set aside order reopening debtor's case.

"Standing represents a jurisdictional requirement which is open to review at all stages of the litigation." *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S.Ct. 798, 802

(1994). The test for standing is generally referred to as the "person aggrieved" test. Only entities who are directly and adversely affected pecuniarily by an order of the bankruptcy court have standing to appeal. *Matter of Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983). The entity must demonstrate that the order diminished its property, increased its burdens or detrimentally affected its rights.

In re Umpqua Shopping Center, Inc., 111 B.R. 303 (9th Cir. B.A.P. 1990)

Debtor lacked standing to appeal for third party.

In re Brooks, 871 F.2d 89 (9th Cir. 1989)

Trustee of ex-wife's bank had no standing as non-creditor to raise violation of automatic stay in husband's bankruptcy

In re Palmdale Hills Property LLC, 654 F.3d 868 (9th Cir. 2011).

Party moving for relief from the automatic stay to enforce note secured by deed of trust must have constitutional and prudential standing. Movant must be the real property in interest who is entitled to enforce the note under Article 3 of the Uniform Commercial Code. See also In re Veal, 450 B.R. 897 (B.A.P. 9th Cir. 2011).

In re Griffin, 719 F.3d 1126 (9th Cir. 2013)

Creditor filed a relief from stay motion, attaching a copy of the note and a declaration stating that it possessed the original note. Creditor had prudential standing to pursue r.s. motion. Given the limited nature of the relief sought by a r.s. motion, because final adjudication of parties' rights and liabilities has not occurred, a party seeking stay relief need only establish a colorable claim to the property. By providing a copy and a declaration stating possession of the original note, prudential standing established.

**STARE DECISIS**

In re Silverman, 616 F.3d 1005 (9th Cir. 2010)

". . .[A] bankruptcy court is not bound by a district court's decision from another district." Court reaffirms earlier decision that B.A.P. decisions are merely persuasive, not binding, authority as to bankruptcy courts. The court does not decide the issue of whether a bankruptcy court is bound by the decisions of a district judge within it's own district, but indicates that they probably are not binding.

In re Commercial Money Centers, Inc., 392 B.R. 814, 832 (9th Cir. B.A.P. 2008)

Under the law of the case doctrine, bankruptcy court was not barred from considering an issue that was not specifically raised by the parties.

Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910 (9th Cir. 2001)

Law of the case doctrine applies only if the issue was decided "explicitly or by necessary implication in the previous disposition."

In re Rainbow Magazine, 77 F.3d 278 (9th Cir. 1996)

1. The law of the case of doctrine.

Caldwell asserts that the award of sanctions against him for Rainbow's bad faith filing ignores the ruling of the B.A.P.. He argues that the sanctions violate the law of the case doctrine as well as the plain language of the mandate. We disagree.

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (quoting *Maag v. Wessler*, 993 F.2d 718, 720 n.2 (9th Cir. 1993). Although the observance of the doctrine is considered discretionary, this court has ruled that the prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration

appropriate, or (3) substantially different evidence was adduced at a subsequent trial *Hegler v. Borg,* 50 F.3d 1472, 1475 (9th Cir. 1995), *cert. denied*, 516 U.S. 1029 (1995).

In re Drysdale, 248 B.R. 386 (9th Cir. B.A.P. 2000), *aff'd*, 2 Fed. Appx. 776 (9th Cir. 2001)

Case law holding that student loan consolidation must be five years old to be eligible for discharge was applied retroactively.

In re Berg, 188 B.R. 615 (9th Cir. B.A.P. 1995), *aff'd*, 121 F.3d 535 (9th Cir. 1997)

A lower federal court should only deviate under compelling circumstances from the interpretation placed on a federal statute by the only circuit to have spoken.
*See also In re Taffi*, 68 F.3d 306 (9th Cir. 1995), *cert. denied*, 521 U.S. 1103 (1997)

**STATUTE OF FRAUDS**

American Int'l. Enterprises, Inc. v. F.D.I.C., 3 F.3d 1263 (9th Cir. 1993)

Neither quantum meruit nor estoppel can be used to sidestep statute of frauds as to real estate broker's contract.

## STATUTE OF LIMITATIONS

### State Law

In re Roberts Farms, Inc., 980 F.2d 1248 (9th Cir. 1992)

Legal bill accompanied by time sheets = open book account under CCP §337(a).

### §§ 546, 108, 549(d), etc.

In re Dobos, 603 B.R. 219 (9th Cir. B.A.P. 2019)

Existence of a valid claim is a precondition to any § 523 action. If underlying debt is stale or underlying judgment has not been renewed, motion to dismiss adversary proceeding is appropriate. Case also has an interesting analysis of how § 108 works.

Daff v. Good, 906 F.3d 1100 (9th Cir. 2018)

Duration of an ORAP lien under California law extended by Bankruptcy Code § 108(c), because creditor's enforcement of a judgment lien constitutes the continuation of the original action that resulted in the judgment.

In re Gilman, 603 B.R. 437 (9th Cir. B.A.P. 2019)

CCP § 685.080 two year deadline applies to attempt to recover attorney's fees in post state court judgment adversary proceedings and evidentiary hearings. Bankruptcy Code § 108© does not toll application of 685.080 to postpetition fees. See how case addresses Daff v. Good (In re Swintek), 906 F.3d 1000 (9th Cir. 2018).

In re Smith, 352 B.R. 702, 706 (9th Cir. B.A.P. 2006)

". . . § 108(c)(1) does not operate without regard to existing nonbankruptcy law to stop the running of any periods of limitation." The Arizona Supreme Court held that § 108 did not toll the running of the statute for renewal of judgments, so the original limitation date applied.

In re Spirtos, 221 F.3d 1079 (9th Cir. 2000)

Under § 108(c), the period of duration of a judgment lien under CCP § 683.020 will not expire until 30 days after all the assets in the debtor's estate have been finally distributed.

In re National Environmental Waste Corp., 200 F.3d 1266 (9th Cir. 2000)

Under § 108, state statute of limitations is extended "where recovery of the claim will substantially benefit the creditors of the estate, even though the claim was not explicitly specified in the plan of reorganization."

In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000)

Statutory deadline for filing of IRS proof of claim was not equitably tolled, even though there was an improper dismissal of the case resulting from clerical error.

In re DeLaurentiis Entertainment Group, Inc., 87 F.3d 1061 (9th Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996)

Liquidation estate's recovery action is time-barred when brought within two years of trustee's appointment but more than two years after start of bankruptcy case.

In re Hosseinpour-Esfahani, 198 B.R. 574 (9th Cir. B.A.P. 1996)

Trustee's fraudulent conveyance complaint filed more than 2 years after appointment time-barred.

In re IRFM, Inc., 65 F.3d 778 (9th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996)

546(a) - 2 year statute of limitations runs from date Chapter 11 is filed.

In re Olsen, 36 F.3d 71 (9th Cir. 1994)

Equitable tolling applies to § 549(d).

In re United Ins. Mgmt., Inc., 14 F.3d 1380 (9th Cir. 1994)

Under the equitable tolling doctrine, where a party "remains in ignorance of [a fraud] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773 (1991)

Applied to 546(a) but facts did not justify application here.

In re Conco Building Supplies, Inc., 102 B.R. 190 (9th Cir. B.A.P. 1989)

Two year period under § 546(a)(1) does not begin to run until permanent trustee appointed.

In re Hunters Run Ltd. Partnership, 875 F.2d 1425 (9th Cir. 1989)

108 applies generally to state law statute of limitations or duration.

In re Herzig, 96 B.R. 264 (9th Cir. B.A.P. 1989)

If two years under § 546(a)(1) has not run as of the date the case is closed, trustee may have remainder of the 2 year period in which to commence avoidance actions.

In re Petty, 93 B.R. 208 (9th Cir. B.A.P. 1988)

Trustee may reopen case and pursue preference because transfer not disclosed prior to case closing.

In re EPD Inv. Co., LLC , 523 B.R. 680 (9th Cir. B.A.P. 2015)

So long as the state law fraudulent transfer claim exists on the petition date (or the order for relief date), the state statute of limitations no longer applies, and the relevant statute of limitations becomes § 546(a).

**STATUTORY LIENS - §545**

In re Mainline Equipment, Inc., 865 F.3d 1179 (9th Cir. 2017)

Personal property tax liens recorded under applicable Ca law (Tax Code § 2191.4) avoidable under § 545.

In re Berg, 188 B.R. 615 (9th Cir. B.A.P. 1995), *aff'd,* 121 F.3d 535 (9th Cir. 1997)

"A trustee standing in the shoes of a BFP under Bankruptcy Code § 545(2) does not fall within the beneficial protection of IRC § 6323 for the avoidance of a perfected federal tax lien, because § 6323 requires a higher standard.

In re T.H. Richards Processing Co., 910 F.2d 639 (9th Cir. 1990)

A producer who agrees to deferred payment arrangements for purchase of the produce does not release the producer lien as a matter of California law.

In re Loretto Winery, Ltd., 107 B.R. 707 (9th Cir. B.A.P. 1989)

California statutory producer's lien not avoidable under 11 U.S.C. § 545(2).

In re Badger Mountain Irrigation Dist., 885 F.2d 606 (9th Cir. 1989)

§ 545(2) - lienholder's statutory lien not avoidable.

**STATUTORY CONSTRUCTION**

In re Mcharo, 611B.R. 657 (9th Cir. B.A.P. 2020)

Good discussion of how court should interpret a statute.

Blausey v. U.S. Trustee, 552 F.3d 1124, 1133 (9th Cir. 2009)

"The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." "Plain meaning" also discussed.

**SUBORDINATION OF CLAIMS-- § 510(b)**

In re Elieff, __B.R.__ (9th Cir. 2022)

Discusses standard for interpreting § 510(b), and issues that arise when a single, indivisible sale agreement does not allocate sales proceeds between equity purchase and other claims. Section 510(b) covers both secured and unsecured claims. While the subordinated creditor retains his secured claim, it is junior to the interests of unsecured creditors.

In re Khan, 846 F.3d 1058 (9th Cir. 2017)

Subordination applies to both individual and corporate cases. Here, claims were tort claims unrelated to the purchase or sale of securities, and thus did not "arise from the purchase or sale of a security" under § 510(b).

In re USA Commercial Mortg. Co., 377 B.R. 608 (9th Cir. B.A.P. 2007)

Shareholders who filed proof of interest and proof of claim for fraud and breach of contract from the sale of the stock should not have had their claims disallowed. Claims may have been subject to subordination under § 510(b), but not without an adversary proceeding being filed under Bankruptcy Rule 7001(8).

In re American Wagering, Inc., 493 F.3d 1067 (9th Cir. 2007)

Claim for money damages for failure to deliver stock promised as compensation, brought well in advance of debtors' filing for bankruptcy, was a debt not subject to subordination under 510(b).

In re Betacom of Phoenix, Inc., 240 F.3d 823 (9th Cir. 2001)

1) "Section 510(b)'s legislative history does not reveal an intent to tie mandatory subordination exclusively to securities fraud claims;" 2) Nothing in § 510(b) limits the application of the statute to those who are in actual possession of the security; 3) An actual purchase or sale of a security is not required to subordinate the claim."

In re Esperanza Properties, LLC, 782 F.3d 492 (9th Cir. 2015)

Ninth Circuit provides explanation of mandatory subordination under § 510(b) for a claim for damages arising from the purchase or sale of a security.

In re Del Biaggio, 834 F.3d 1003 (9th Cir. 2016)

Applies § 510(b) to securities of an "affiliate" of an individual debtor.

**SUBROGATION**

In re Darosa, 318 B.R. 871 (9th Cir. B.A.P. 2004)

Opinion describes the three kinds of subrogation (contractual, statutory and equitable), and finds that none of the three apply to debtors who each have statutory liens on their residences arising out of the same facts.

In re Bevan, 327 F.3d 994 (9th Cir. 2003)

Senior lienholder who bids in amount of deed of trust into foreclosure, takes possession of the property, then pays off amount of IRS lien is not equitably subrogated to the rights of the IRS in the debtor's chapter 13 case.

In re Flamingo 55, Inc., 646 F.3d 1253 (9th Cir. 2011)

Subrogation rights under § 509(a) not limited to cash payments, and payments can encompass a creditor's payments through a foreclosure sale.

**SUBSTANTIAL CONTRIBUTION**

In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)

". . .[C]reditors who receive compensation under 503(b)(4) should also be compensated for costs incurred in litigating a fee award, so long as the services meet the § 503(b)(4) requirements and the case "exemplifies a 'set of circumstances' where litigation was 'necessary'". . . ."

In re Cellular 101, Inc., 377 F.3d 1092 (9th Cir. 2004)

Creditors made substantial contribution by proposing only plan presented to the bankruptcy court, which paid 100% of claims and a portion of the equity. Court declines to decide whether creditor's motive is relevant, noting the split in the circuits.

**SUBSTANTIVE CONSOLIDATION**

In re Bonham, 229 F.3d 750 (9th Cir. 2000)

Ninth Circuit adopts Second Circuit Augie/Restivo test:

1. whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or

2. whether the affairs of the debtor are so entangled that consolidation will benefit all creditors. See also In re Clark, 548 B.R. 246 (BAP 9th cir. 2016)..

In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515 (2d Cir. 1988)

Substantive consolidation improper where creditors dealt separately with debtors.

In re Clark, 548 B.R. 246 (BAP 9th Cir. 2016)

Recent explanation and application of substantive consolidation test.

**SURETY**

In re Kronemyer, 405 B.R. 915 (9th Cir. B.A.P. 2009)

Surety had standing to bring motion for relief from the automatic stay, even though it only had a contingent claim for contribution or reimbursement under § 502(e)(1).

In re Ferrante, 51 F.3d 1473 (9th Cir. 1995)

Successor trustee is entitled to recover on previous trustee's bond, even if money in question would be paid to a secured creditor ultimately**.**

Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962)

**TAX**

1. **Cal. Rev. & Tax Code § 6051**
2. **Cal. Rev. & Tax Code § 18590**
3. **Cal. Rev & Tax Code § 6829**
4. **Ch 11**
5. **Ch 7**
6. **Ch 12**
7. **Ch 13**
8. **ERISA Pension**
9. **Excise Tax**
10. **§ 362(b)(4)**
11. **§ 362(h)**
12. **§ 503(10)(1)(B)(I)**
13. **§ 505**
14. **§ 506**
15. **§ 507(a)(7)**
16. **§ 523(a)(1)**
17. **§ 523(a)(7)**
18. **§ 724(a) and(b)**
19. **§ 4971(a) of the IRC**
20. **Trustee**
21. **Trust Fund**
22. **26 U.S.C. § 6321**
23. **26 U.S.C. § 7421(a)**
24. **26 U.S.C. § 6323(f)**
25. **26 U.S.C. § 6502**
26. **26 U.S.C.§ 6672(a)**
27. **Misc**

### 1. Cal. Rev. & Tax Code § 6051

In re Raiman, 172 B.R. 933 (9th Cir. B.A.P. 1994)

Tax claims against debtor not dischargeable when claims based on California code section taxing gross receipts of retailer even though some exclusions listed in code. Rev & Tax § 6051 is a (a)(7) tax.

### 2. Cal. Rev. & Tax Code § 6829

In re Leal, 366 B.R. 77 (9th Cir. B.A.P. 2007)

General partners are jointly and severally liable for nonpayment of sales taxes.

### 3. Cal. Rev. & Tax Code § 18590

In re Bracey, 77 F.3d 294 (9th Cir. 1996)

When taxes are assessed under Cal. Rev. & Tax Code § 18590 et seq.; how the 60-day time limit for protest must be read**.**

### 4. Ch 11

In re Artisan Woodworkers, 204 F.3d 888 (9th Cir. 2000)

Postpetition preconfirmation interest and penalties on nondischargeable tax were not discharged following payment in full of prepetition debt and postconfirmation interest pursuant to confirmed Ch 11 plan.

United States v. Energy Resources Co., Inc., 495 U.S. 545 (U.S.R.I. 1990)

Bankruptcy court may order IRS to treat Ch. 11 tax payments by debtor corporation as trust fund payments if necessary for reorganization plan.

In re Stanmock, Inc., 103 B.R. 228 (9th Cir. B.A.P. 1989)

Can't confirm Chapter 11 plan which allows debtor to designate how IRS will allocate payments.

In re Condel, Inc., 91 B.R. 79 (9th Cir. B.A.P. 1988)

1. IRS may not be enjoined from collecting taxes from officers or directors via Chapter 11 plan.
2. IRS may apply tax payments as they see fit, since payments are not deemed "voluntary."

**5. Ch 7**

In re Feiler, 218 F.3d 948 (9th Cir. 2000)

Chapter 7 trustee may recover tax refunds from United States after avoiding debtors' prepetition election to carry forward net operating loss.

**6. Ch 12**

U.S. v. Hall, 617 F.3d 1161 (9th Cir. 2010)

Because a chapter 12 estate cannot, under the Internal Revenue Code, incur a tax, it cannot take advantage of § 1222(a)(2)(A), which allows for less than full payment and discharge of unsecured, non-priority debts owed to governmental entities arising out of the sale of a farm. Had the sale occurred prepetition, that statute would apply, but here it occurred postpetition. Thus, the debtors are liable for the tax.

**7. Ch 13**

In re Jones, 420 B.R. 506 (9th Cir. B.A.P. 2009)

Because a California Franchise Tax Board debt did not fall within three-year lookback period of § 507(a)(8)(A)(ii), neither the unnumbered paragraph of § 507(a)(8) nor equitable tolling

apply**,** and thus the tax was discharged in the debtor's chapter 7 case. Furthermore, because all estate property vested in the debtor upon plan confirmation, the FTB could have pursued collection of the tax debt as a postpetition debt not subject to the automatic stay or the debtor's chapter 13 case.

In re Joye, 578 F.3d 1070 (9th Cir. 2009)

Tax debt owed to California Franchise Tax Board was discharged, where the debtor properly listed the FTB in his schedules as being owed $10,000, even though the actual amount owed was over $26,000. Section 1305(a)(1) was not applicable, since the debt was incurred prepetition. ". . . [W]e hold that taxes become "payable" for purposes of section 1305(a)(1) when they are capable of being paid." here, the taxes were capable of being paid prepetition.

In re Fowler, 394 F.3d 1208 (9th Cir. 2005)

"We hold that § 348(d) requires that postpetition employment tax debt, incurred as an administrative expense of a Chapter 11 bankruptcy estate, retains its first priority administrative expense status upon conversion to a Chapter 13 bankruptcy plan. Section 1305 is not in conflict with this holding because it does not govern the priority of the postpetition claims it allows into the bankruptcy."

In re Bisch, 159 B.R. 546 (9th Cir. B.A.P. 1993)

A federal tax lien which was not included as a part of the IRS proof of claim and not provided for in the Chapter 13 remains valid despite confirmation of the plan.

In re Tomlan, 907 F.2d 114 (9th Cir. 18990)

IRS must file a proof of claim to obtain priority status in Chapter 13.

**8. ERISA Pension**

In re Snyder, 343 F.3d 1171 (9th Cir. 2003)

Debtor's interest in a pension plan was not property of the estate, and thus it could not be used to secure the IRS's claim for delinquent taxes in his chapter 13 case. This is so, even though the IRS is not subject to ERISA's antialienation provisions.

In re McIntyre, 222 F.3d 655 (9th Cir. 2000)

The IRS may levy upon ERISA-regulated pension benefits to satisfy a husband's tax debt against the claim that the wife has a vested interest in half of those benefits under California community property laws**.**

In re Connor, 27 F.3d 365 (9th Cir. 1994)

Fed tax lien enforceable against a bankruptcy debtor's future pension payments where the debtor's unqualified right to receive the payments mature before he filed for bankruptcy.

In re Anderson, 149 B.R. 591 (9th Cir. B.A.P. 1992)

A debtor's interest in an ERISA pension plan is property or a right to property to which an IRS tax lien could attach pursuant to 26 U.S.C. § 6321.

**9. Excise Tax**

In re Lorber Industries of California, 564 F.3d 1098 (9th Cir. 2009)

Reimbursement amounts for workers' compensation claims owed to the California Self-Insurer's Security Fund are not in the nature of an excise tax.

In re George, 361 F.3d 1157 (9th Cir. 2004)

Claim by California Uninsured Employers Fund against employer who failed to purchase workers' compensation insurance was not "excise tax" for purposes of bankruptcy law.

**10. § 362(b)(4)**

In re Universal Life Church, Inc., 128 F.3d 1294 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)

IRS's revocation of tax exempt status was within 362(b)(4).

**11. § 362(h)**

In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992)

IRS subject to 362(h).

**12. § 503(10)(1)(B)(I)**

In re Pacific-Atlantic Trading Co., 64 F.3d 1292 (9th Cir. 1995)

When is a tax "incurred by the estate". When does § 503(10)(1)(B)(I) apply Application of § 507(a)(7)(A)(iii).

**13. § 505**

Central Valley AG Enterprises v. U.S., 532 F.3d 750, 764 (9th Cir. 2008)

Notwithstanding the finality provisions of the Tax Equity and Fiscal Responsibility Act of 1982, "Section 505 provides for bankruptcy jurisdiction to redetermine a debtor's tax liabilities notwithstanding the preclusive effects to which a tax judgment might otherwise be entitled."

American Principals Leasing Corp. v. U.S., 904 F.2d 477 (9th Cir. 1990)

Bankruptcy court does not have jurisdiction to determine nondebtors tax under § 505.

**14. § 506**

In re Pletz, 221 F.3d 1114 (9th Cir. 2000)

Under Oregon law, chapter 13 debtor's interest in property held by debtor and nondebtor spouse as tenants by the entirety had to be valued under § 506 to reflect concurrent interests of both spouses.

**15. § 507(a)(7) and (a)(8)**

In re Carpenter, 540 B.R. 691 ((9th Cir. B.A.P. 2015)

Where an individual debtor is personally liable for a corporate excise tax, the debt is a priority debt under § 507(a)(8)

In re Gurney, 192 B.R. 529 (9th Cir. B.A.P. 1996)

Equitable tolling extended § 507(a)(7) priority period for Arizona state taxes.

In re Carpenter, 540 B.R. 691 (9th Cir. B.A.P. 2015)

Where an individual debtor is personally liable for a corporate excise tax, the tax liability is a priority debt of the individual under § 507.

**16. § 523(a)(1)**

In re Berkovich, 619 B.R. 397 (9th Cir. B.A.P. 2020)/In re Sienega, 619 B.R. 405 (9th Cir. B.A.P. 2020)

Explains debtor's need to timely submit returns and reports to FTB and IRS under Bankruptcy Code section 523(a)(1) in order to discharge the tax debt.

In re Smith, 828 F.3d 1094 (9th Cir. 2016)

Ninth Circuit determines when a tax return is a "return" under § 523(a)(1) when return is filed years after due and after IRS assesses taxes. There is a circuit split.

In re Martin, 542 B.R.479 (9th Cir. B.A.P. 2015)

BAP provides standard for determining whether debtors' returns filed after the IRS filed their returns constitute "returns" under § 523(a)(1). Read this case in conjunction with *In re Smith*, 828 F.3d 1094 (9th Cir. 2016).

In re King, 122 B.R. 383 (9th Cir. B.A.P. 1991), *aff'd.* 961 F.2d 1423 (9th Cir. 1992)

Cal. Law: taxes are assessed for purposes of 523(a)(1) when they are final, i.e., 60 days after notice of proposed additional tax (when a notice of proposed deficiency assessment becomes final).

In re Hawkins, 769 F.3d 662 (9th Cir. 2014)

Specific intent is required to prove that a debtor willfully evaded the payment of taxes under § 523(a)(1)(C).

**17. § 523(a)(7)**

McKay v. U.S., 957 F.2d 689 (9th Cir. 1992)

Tax penalties incurred more than 3 years prior to filing of petition are discharged under 523(a)(7)

**18. § 724(b)**

In re Gill, 574 B.R. 709 (9th Cir. B.A.P. 2017)

Chapter 7 trustee may avoid, subordinate and preserve penalty portion of IRS lien when selling estate property. "Enforcement of penalties against a debtor's estate serves not to punish the delinquent taxpayers, but rather their entirely innocent creditors. Innocent creditors should not be punished for the actions of delinquent debtor taxpayers."

In re Markair, Inc. (I), 308 F.3d 1038 (9th Cir. 2002), *cert. denied*, Barstow v. I.R.S., 539 U.S. 926 (2003)

"[T]he term "tax lien" in § 724(b) means a statutory tax lien and ...does not embrace a judicial lien securing an underlying tax obligation."

In re Markair, Inc. (II), 308 F.3d 1057 (9th Cir. 2002)

"We hold that, under § 724(b), priority unsecured creditors have a right to obtain only that portion of the proceeds equaling the amount of the tax liens; any remaining proceeds go first to the junior lien claimants, then to the holders of the tax liens insofar as their claims were not already satisfied and, finally, to the estate."

**19. § 4971(a) of the IRC**

United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 116 S.Ct. 2106 (1996)

Exaction imposed by § 4971(a) of the IRC on the amount of an accumulated funding deficiency of a pension plan is "not entitled to seventh priority as an 'excise tax' under § 507(a)(7)(E), but instead, is, for bankruptcy purposes, a penalty to be dealt with as an ordinary, unsecured claim."

**20. Trustee**

Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 120 S.Ct. 1951 (2000)

When the substantive law creating a tax obligation puts the burden of proof on a taxpayer, the burden of proof on the tax claim in bankruptcy court remains where the substantive law put it (in this case, on the trustee in bankruptcy).

In re Bakersfield Westar, Inc., 226 B.R. 227 (9th Cir. B.A.P. 1998)

Small Business trustee may avoid shareholders' Subchapter S revocation as fraudulent transfer of property conferring benefit on shareholders at expense of company's creditors.

U.S. v. Hemmen, 51 F.3d 883 (9th Cir. 1995)

Trustee liable on tax levy, even though it was made before court actually fixed the amount of administrative expense payment to be paid to debtor's principal. 362 inapplicable.

Holywell Corp. v. Smith, 503 U.S. 47, 112 S.Ct. 1021 (1992)

Trustee must file taxes for debtors.

**21. Trust Fund**

In re Hamilton Taft & Co., 53 F.3d 285 (9th Cir. 1995), ***Vacated***, 68 F.3d 337 (9th Cir. 1995)

Trust Fund. Money transferred to third party not subject to statutory trust.

In re Deer Park, Inc., 136 B.R. 815 (9th Cir. B.A.P. 1992), *aff'd.* 10 F.3d 1478 (9th Cir. 1993)

Bankruptcy court had power to order IRS to allocate tax payments to offset trust fund tax liabilities.

In re GLK, Inc, 921 F.2d 967 (9th Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991)

In light of *U.S. v. Energy Resources Co.,*, 110 S.Ct 2139 (1990), bankruptcy courts could order debtors' IRS payments allocated to offset trust-fund tax liability but need not do so where such allocation is not necessary to reorganization.

In re Major Dynamics, Inc., 897 F.2d 433 (9th Cir. 1990)

Post-petition tax withholding funds subject to bankruptcy code's priorities and do not create IRS trust fund.

**22. 26 U.S.C. § 6321**

U.S. v. Barbier, 896 F.2d 377 (9th Cir. 1990)

26 U.S.C. § 6321 allows tax liens to attach to all property, even debtors' personal property, even debtors' personal property exempt from levy under 26 U.S.C. § 6334.

**23. 26 U.S.C. § 7421(a)**

In re American Bicycle Assn', 895 F.2d 1277 (9th Cir. 1990)

Because of the Anti-Injunction Act, 26 U.S.C. § 7421(a), a bankruptcy court cannot enjoin the IRS from collecting a 100% penalty against a responsible officer of a debtor corporation.

**24. 26 U.S.C. § 6323(f)**

In re Crystal Cascades Civil, LLC, 415 B.R. 403, 406 (9th Cir. B.A.P. 2009)

A reasonable inspection of the real property records for purposes § 6323(f) "is properly analyzed from the perspective of an ordinary reasonable person and will vary by locality. . . ." Bankruptcy court correctly found that a reasonable inspection of the records would be by an exact name search. IRS liens were recorded under "Crystal Cascades, LLC, a corporation" rather than "Crystal Cascades Civil, LLC." Thus the later-filed judicial liens on the property had priority.

**25. 26 U.S.C. § 6502**

Severo v. C.I.R., 586 F.3d 1213 (9th Cir. 2009)

IRS 10-year statute of limitations for collections was tolled from the time debtors filed their chapter 11 case until the time they received a discharge in chapter 7, plus six months. Thus, the IRS efforts to collect a 1990 tax liability that occurred prior to November 7, 2005 were not barred by the statute of limitations.

**26. 26 U.S.C.§ 6672(a)**

York v. U.S.A. __F.4th__ (9th Cir. 2023)

The criteria for imposing a penalty under **§** 6672(a) on an individual requires that 1) the individual qualifies as a "responsible person"; 2) the individual failed to collect or account for and

pay over such tax; and 3) the individual acted willfully in doing so. Once the penalty is assessed, the individual bears the burden of proving by a preponderance of the evidence that one or more of the above elements are not present.

### 27. Misc

In re Gould, 401 B.R. 415 (9th Cir. B.A.P. 2009)

IRS had a valid right of setoff under 11 U.S.C. § 553 and IRC § 6402(a) as to chapter 13 debtors' tax refunds, even though the debtor claimed them as exempt and no objection to the exemption was filed. Bankruptcy court should have granted the IRS relief from the automatic stay for cause to allow it to exercise its setoff rights.

In re KRSM Properties, LLC, 318 B.R. 712 (9th Cir. B.A.P. 2004)

Limited liability corporation's assets could not be used to pay LLC members' personal tax liability, where members elect to have the LLC disregarded as a separate entity.

In re Olshan, 356 F.3d 1078 (9th Cir. 2004)

Presumption of correctness of assessment applies to all items assessed, except where there is a pattern of arbitrariness or carelessness. Although taxpayer rebutted in part presumption of correctness as to unreported business income, IRS still had right to present evidence establishing existence of unreported income.

In re Bunyan, 354 F.3d 1149 (9th Cir. 2004)

Bankruptcy court lacks jurisdiction to consider tax assessments, where they became final upon dismissal of appeals in 1993.

In re Mantz, 343 F.3d 1207 (9th Cir. 2003)

Bankruptcy court had subject matter jurisdiction to determine debtor's tax liability where there was no final administrative determination of debtor's tax liability prior to commencement of bankruptcy case.

In re Montross, 209 B.R. 943 (9th Cir. B.A.P. 1997)

Partnership that had no knowledge debtor was using partnership account for money laundering was not "transferee" for purpose of avoiding transfers into account.

In re Jones, 208 B.R. 935 (9th Cir. B.A.P. 1997)

Guilty plea to "concealing ability to pay" offers no guidance on whether taxpayer "concealed assets" within meaning of regulation addressing government's ability to reopen case after acceptance of offer in compromise.

In re Belozer Farms, Inc., 199 B.R. 720 (9th Cir. B.A.P. 1996)

Unpaid assessments levied against chicken processor by Oregon Fryer Commission were not a "tax" subject to priority status.

In re Hovan, Inc., 96 F.3d 1254 (9th Cir. 1996)

State's claim for unpaid tax penalties not entitled to priority status.

In re Los Angeles International Airport Hotel Associates, 196 B.R. 134 (9th Cir. B.A.P. 1996), *aff'd*. 106 F.3d 1479 (9th Cir. 1997)

Hotel's complimentary beverages and breakfasts constitute sales subject to California sales tax.

In re Baker, 74 F.3d 906 (9th Cir. 1996), *cert. denied*, 517 U.S. 1192 (1996)

Bankruptcy court may not redetermine debtors' tax liability as established by stipulated Tax Court decision.

In re Caroline Triangle Ltd., Partnership, 166 B.R. 411 (9th Cir. B.A.P. 1994)

Taxes are not incurred where property abandoned. Further, they were a lien, not a priority.

In re Smith, 158 B.R. 813 (9th Cir.. B.A.P. 1993)

Order requiring Washington not to deduct IRS taxes from lottery checks violated anti-injunction provision. 26 U.S.C. 7421.

In re Kimura, 969 F.2d 806 (9th Cir. 1992)

Provision requiring trade creditors to be paid as a condition to transfer of a liquor license is invalid as to a federal tax lien.

In re Sluggo's Chicago Style, Inc., 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)

Under California law, a security deposit held by the state taxing authority was property of the estate.

In re Isom, 901 F.2d 744 (9th Cir. 1990)

IRS not required to release tax liens when underlying debt was discharged.

**TELEPHONE APPEARANCE**

In re MEI Diversified, Inc., 186 B.R. 455 (D. Minn. 1995)

**TORTS- CALIFORNIA LAW**

Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825 (9th Cir. 2001)

A defendant's refusal to deal with the plaintiff, even if retaliatory, "was not "wrongful" in the sense required to make out the California tort of intentional interference with prospective economic advantage."

In re Daisy Systems Corp., 97 F.3d 1171 (9th Cir. 1996)

Fiduciary relationship may exist between investment bank and client corp that retained bank for assistance in a takeover attempt.

In re Saylor, 178 B.R. 209 (9th Cir. B.A.P. 1995), *aff'd*. 108 F.3d 219 (9th Cir. 1997)

Definition of conversion.

Robi v. Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990)

Interference of contractual relations or prospective economic advantage.

**TRUSTEES**

In Re Ruiz, 541 B.R. 892 (9th Cir. B.A.P. 2015)

Extraordinary circumstances required to reduce trustee's fees below the statutory amount in § 326.

In re Harris, 590 F.3d 730 (9th Cir. 2009)

Bankruptcy court had "arising in" jurisdiction over an action against a chapter 7 trustee alleging breach of a postpetition settlement agreement, since the claim could not exist independently of a bankruptcy. Bankruptcy court erroneously dismissed this case under the *Barton* doctrine. The case was filed against the trustee without seeking permission of the appointing court, but was then removed to the appointing court. Thus, the Barton doctrine did not apply.

In re AFI Holding, Inc., 355 B.R. 139 (9th Cir. B.A.P. 2006), *aff'd and remanded,* 530 F.3d 832 (9th Cir. 2008)(for determination of removed trustee's right to fees).

Chapter 7 trustee had a material conflict of interest and thus was not disinterested as required by § 701(a)(1) where she previously represented insiders of the debtor. Totality of circumstances test applied. Failure to disclose all connections and appearance of impropriety also supported her removal from the case.

In re Crown Vantage, Inc., 421 F.3d 963, 970 (9th Cir. 2005)

Under the *Barton* doctrine, "a party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity."

In re American Eagle Mfg., Inc., 231 B.R. 320 (9th Cir. B.A.P. 1999)

Otherwise-valid Chapter 7 trustee election could not be set aside under procedural rule requiring motion for election certification no later than 10 days after creditor's meeting. Rule 2003(d) is invalid.

In re Giordano, 212 B.R. 617 (9th Cir. B.A.P. 1997), *aff'd in part, rev'd in part*, 202 F.3d 277 (9th Cir. 1999)

Bankruptcy trustee entitled to derived judicial immunity absent showing of dishonesty or bad faith.

In re Kashani, 190 B.R. 875 (9th Cir. B.A.P. 1995)

1. Leave of court must be obtained before trustee may be sued in any court other than appointing court

2. No abuse to require debtors to attach a proposed complaint to their motion for leave.

**TRUSTS**

In re Patow, 632 B.R. 195 (9th Cir. B.A.P. 2021), aff'd, 2022 U.S.App. LEXIS 17374 (9th Cir. 6/23/22)

Good analysis of when a person holding a beneficial interest in a Ca. trust "accepts" that interest or "disclaims" that interest.

Carmack v. Reynolds, 2 Cal.5th 844 (2017)

A Chapter 7 trustee, in his capacity as a hypothetical lienholder under §544, may seek turnover of all distributions of principal when they are due and owning under Probate Code § 15301(b), subject to beneficiary's need for principal for his/her education or support. As to payments from principal to be disbursed in the future, trustee may seek 25% of that distribution when made, subject to beneficiary's need for his/her education or support.

In re Cutter, 398 B.R. 6, 19-20 (9th Cir. B.A.P. 2008)

1. Property which the debtor transferred to a self-settled trust became property of the estate. "While California law recognizes the validity of spendthrift trusts, any spendthrift provisions are invalid when the settlor is a beneficiary."

2. "If. . .the trust agreement allows the debtor-beneficiary to exercise control over and reach trust property contributed by others, the estate is entitled to the maximum amount that the trust could pay or distribute to the debtor-beneficiary.

In re Commercial Money Centers, Inc., 392 B.R. 814, 830f (9th Cir. B.A.P. 2008)

Debtor did not hold equipment lease payments in a constructive trust.

In re Sale Guaranty Corporation, 220 B.R. 660 (9th Cir. B.A.P. 1998), *aff'd*, 199 F.3d 1375 (9th Cir. 2000)

Trustee of tax-deferred sale "accommodator" could not avoid resulting trust in favor of property owners who retained obvious ownership of property pending sale. Elements of express trust discussed.

In re Coupon Clearing Services, Inc., 113 F.3d 1091 (9th Cir. 1997)

Creditor's failure to establish agency or trust relationship with debtor supports summary judgment for another creditor with perfected security interest.

In re Ehrle, 189 B.R. 771 (9th Cir. 1995)

Kraus v. Willow Park Public Golf Course, 73 Cal. App.3d 354, 140 Cal. Rptr. 744(Cal. App. 1977)

In California, to impose a constructive trust, there must exist a res, the plaintiff must have rights to the res, and the defendant must have gained the res by "fraud, accident, mistake, undue influence, violation of the trust or other wrongful act."

In re Advent Mgmt. Corp., 178 B.R. 480 (9th Cir. B.A.P. 1995), *aff'd* 104 F.3d 293 (9th Cir. 1997)

Complete review of constructive trust law in California.

In re Markair, Inc., 172 B.R. 638 (9th Cir. B.A.P. 1994)

Unsecured creditor who fixed debtor's engine not entitled to receive insurance proceeds in connection with engine damage as constructive trust without showing entitlement ahead of other creditors.

Inchoate right to constructive trust is comparable to an unperfected security interest

Under normal principle of trust, if a trustee transfers trust property to a third party, the third party holds that property free of trust unless the trustee committed a BREACH of trust in conveying the property. Restatement (Second) of Trusts §283 (1959); IV Austin W. Scott & William F. Fratcher, The Law of Trusts §283 (4th ed. 1989). Thus, absent a BREACH of trust, when a trustee enters into a contract with a third party, any trust funds transferred to that third party in consideration of the contract are transferred free of trust unless the contract provides that the transferred funds shall be held in trust.

In re Goldberg, 168 B.R. 382 (9th Cir. B.A.P. 1994)

Constructive trust imposed on property (cash used to buy home) that mistakenly came into debtor's hands. Need only show wrongful acquisition and unjust enrichment, not fraud. Strict tracing of assets not required where no creditor will be harmed.

In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. B.A.P. 1994)

In re Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994)

California law provides for the imposition of a constructive trust in a situation involving simple negligence on the part of a debtor who wrongfully detains another's property. *See* Cal. Civ. Code §§2223, 2224; *Toys "R" Us, Inc., v. Esgro,Inc. (In re Esgro, Inc.),* 645 F.2d 794, 797 (9th Cir. 1981); *GHK Assoc.. v. Mayer Group, Inc.,* 224 Cal. App. 3d 856, 878, 274 Cal Rptr, 168, 182 (1990); 11 B.E. Witkin, *Summary of California Law: Trusts* §§305(2), 306(2) (9th Cir. ed. 1990).

CHoPP Computer Corp. v. U.S., 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, 513 U.S. 811 (1994)

Imposition of a constructive trust upon a wrongful taking does not automatically award equitable title to the party nor does it defeat a third party judgment lienholder's prior rights in the property.

In re Jordan, 914 F.2d 197 (9th Cir. 1990)

Reversing the Bankruptcy Appellate Panel judgment affirming the bankruptcy court, the court of appeals held that a trust containing restrictions against the reach of creditors created to compensate a debtor for the release of a personal injury claim, was not a spendthrift trust excludable from the bankrupt's estate.

In re Foam Systems, 92 B.R. 406 (9th Cir. B.A.P. 1988), *aff'd*, 893 F.2d 1338 (9th Cir. 1990)

*See also* In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. B.A.P. 1994) Definition statute of frauds express and resulting trusts under California law.

In re Teichman, 774 F.2d 1395, 1399 (9th Cir. 1985)

Under California law, the elements of trust include "a competent trustor, an intention on the part of the trustor to create a trust, a trustee, an estate conveyed to the trustee, and acceptance of the trust the by trustee, a beneficiary, a legal purpose and a legal term."

**TURNOVER**

In re Anchorage Nautical Tours, Inc., 145 B.R. 637 (9th Cir. B.A.P. 1992)

Proceeds from charter boat sold without court authorization were property of the estate and subject to turnover.

In re Salazar, 465 B.R. 875 (9th Cir. B.A.P. 2012)

A Chapter 7 Trustee cannot recover a pre-petition tax refund used for ordinary and necessary living expenses during a Chapter 13 case before case is converted to Chapter 7. Tax refund, when spent, is no longer in the debtor's possession or under debtor's control.

In re Henson, 2014 WL 68998 (9th Cir. 2014)

Under § 542(a), a debtor must turn over property of the estate, or the value of such property if the debtor possessed or controlled it at any time during the case, even if the debtor no longer has the property in question.

**USE SALE OR LEASE OF PROPERTY - § 363**

In re Spanish Peaks Holding II, LLC, 872 F.3d 892 (9th Cir. 2017)

Chapter 7 trustee/Chapter 11 debtor may sell free and clear of leases under 363(f) so long as there is a ground do to so under 363(f). Note unresolved issue of adequate protection under 363(e).

In re Gill, 574 B.R. 709 (9th Cir. B.A.P. 2017)

Chapter 7 trustee may avoid, subordinate and preserve penalty portion of IRS lien when selling estate property. "Enforcement of penalties against a debtor's estate serves not to punish the delinquent taxpayers, but rather their entirely innocent creditors. Innocent creditors should not be punished for the actions of delinquent debtor taxpayers."

In re Fitzgerald, 428 B.R. 872 (9th Cir. B.A.P. 2010)

1. Because there was no evidence of good faith in the record, the sale did not render an appeal moot under § 363(m); nor was the appeal equitably moot, since the appellees did not demonstrate that the appellants could not be afforded any relief.

2. Given the fact that the buyers of the estate's claims against the defendants were the defendants themselves, the price paid for the claims required closer scrutiny than would be required in an ordinary sale auction.

3. The sale involved here was both a sale and a compromise, requiring the court to examine whether it met the four-part test of *In re A &C Properties,* 784 F.2d 1377, 1381 (9th Cir. 1986 ).

In re PW LLC, 391 B.R. 25, 41 (9th Cir. B.A.P. 2008)

1) ". . . § 363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held be creditors who hold a lien or security interest in the property being sold."

2) The term "interest" in § 363(f)(5) must be read expansively, and includes liens.

3) The compelled "money satisfaction" referred to in § 363(f)(5) means that the interest holder could be compelled for less than full payment. Cramdown under § 1129(b)(2) is not a legal or equitable proceeding to which § 363(f)(5) refers.

In re Lanijani, 325 B.R. 282 (9th Cir. B.A.P. 2005)

". . .[W]hen a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B)."

In re Flynn, 418 F.3d 1005 (9th Cir. 2005)

Finding that attorneys fees incurred in a co-owner sale constituted "compensation of a trustee" under § 363(j), the court held that the non-debtor co-owner's share of the attorneys fees incurred in the sale were not chargeable to the co-owner.

In re Popp, 323 B.R. 260 (9th Cir. B.A.P. 2005)

Failure to make specific findings that the estate had an ownership interest in property being sold required reversal. Neither § 363(m) nor the general mootness doctrine nor equitable mootness applied.

In re Rodeo Canon Development Corp., 362 F.3d 603 (9th Cir. 2004), *remanded for further proceedings*, 126 Fed.Appx. 353 (9th Cir. 2005)

"A bankruptcy court may not allow the sale of property as "property of the estate " without first determining whether the debtor in fact owned the property....The Property would not be property of the estate if. . .it was partnership property. That Rodeo, as a partner, had at least a 50% interest in the Property does not alter that conclusion."

In re Flynn, 418 F.3d 1005 (9th Cir. 2005)

Attorney fees could not be deducted from sale of co-owned property until after the sale proceeds had been divided between the estate and co-owner. Trustee had to distribute co-owners share of the proceeds immediately after the sale.

In re Thomas, 287 B.R. 782 (9th Cir. B.A.P. 2002)

Purchaser's good faith under § 363(m) must initially be determined by bankruptcy court.

In re R.B.B., Inc., 211 F.3d 475 (9th Cir. 2000)

No assignment and sale of debtor's franchise to bona fide purchaser where order approving transactions was ambiguous as to specific entity that would take assignment and fund purchase.

In re Loloee, 241 B.R. 655 (9th Cir. B.A.P. 1999)

Sale order which purported to resolve lienholder priority dispute without notice to all lienholders was void.

In re Filtercorp, Inc., 163 F.3d 570 (9th Cir. 1998)

Failure to obtain stay of sale pending appeal mooted appeal.

In re Diego's, Inc., 88 F.3d 775 (9th Cir. 1996)

Trustee sale governed by state contract law.

In re Safeguard Self-Storage Trust, 2 F.3d 967 (9th Cir. 1993)

Revenues from leasing storage space constitute cash collateral. Contract was a lease of real property. Rents were subject to perfected deed of trust.

In re Anchorage Nautical Tours, Inc., 145 B.R. 637 (9th Cir. B.A.P. 1992)

Sale of boat was not in debtor's ordinary course of business

In re Southwest Products, Inc., 144 B.R. 100 (9th Cir. B.A.P. 1992)

Insufficient evidence of bad faith in sale by trustee to insider - thus appeal moot under 363(m).

In re Ewell, 958 F.2d 276 (9th Cir. 1992)

363(m) - "good faith". Failure to obtain stay of sale order moots appeal under § 363(m). Doubtful that FRCP 62(d) applies to sales. Even if sale occurred during 10 day period, doesn't make it void. Definition of good faith.

In re Intermagnetics America, Inc., 926 F.2d 912 (9th Cir. 1991)

Bankruptcy court order approving sale of estate property found to be fraudulent did not mandate dismissal of trustee's complaint on res judicata grounds.

In re Mann, 907 F.2d 923 (9th Cir. 1990)

Failure to obtain stay pending appeal of foreclosure determination renders appeal moot under §363(m). Cal. law re: redemption rights. To set aside foreclosure, must show gross inadequacy of sale price and slight unfairness.

In re Two S Corp., 875 F.2d 240 (9th Cir. 1989)

Value is conclusively determined by sales price - no need for evidentiary hearing.

In re Air Beds, Inc., 92 B.R. 419 (9th Cir. B.A.P. 1988)

Distribution of proceeds of sale should not take place until after a plan is confirmed.

In re Onouli-Kona Land Co., 846 F.2d 1170 (9th Cir. 1988)

Sale of property mooted appeal.

In re KVN Corporation, 514 B.R.1 (9th Cir. B.A.P. 2014)

"Carve-Out" agreements between Chapter 7 trustee and fully secured creditor not per se improper. To overcome the presumption against such sales, trustee must demonstrate that 1) trustee

has fulfilled his/her basic duties; the carveout will generate a meaningful dividend to unsecured creditors; and the terms of the carve-out have been fully disclosed to the bankruptcy court.

**USURY**

In re Alfahel, 651 B.R. 381 (9th Cir. B.A.P. 2023)

Usury is a waivable affirmative defense that can only be raised by the borrower or the representative of the borrower.

In re Moon, 2023 Bankr.LEXIS 133 (9th Cir. B.A.P. 1/18/2023)

Good discussion of usury law as it applies to California forbearance agreements and the usury exceptions that apply to forbearance agreements.

In re Dominguez, 995 F.2d 883 (9th Cir. 1993)

Extension agreement did not violate usury law because savings clause operates to limit the interest rate to the maximum non-usurious rate.

**VALUATION/LIENSTRIPS/LIEN MODIFICATION**

In re Sunnyslope Housing Limited Partnership, 859 F.3d 637 (9th Cir. 2017)

Value of a secured claim under § 506(b) is determined in light of the purpose of the valuation and of the proposed distribution or use of such property, not the cost the debtor would incur to obtain a like asset for the same proposed use.

In re Lynch, 363 B.R. 101 (9th Cir. B.A.P. 2007)

Confirmation of a chapter 13 plan does not implicitly value a debtor's house. Where the chapter 13 is converted to chapter 7, house is valued as of the filing of the chapter 13 petition.

CSX Transportation, Inc. v. Georgia State Board of Equalization, --U.S.– (Dec. 4, 2007).

Railroad was entitled to challenge the valuation methods of the state for ad valorem tax purposes. No one single valuation method is typically used in arriving at market value. Where there is little market for an asset, the more difficult the estimate.

In re Kim, 130 F.3d 863 (9th Cir. 1997)

Laundry equipment should have been valued based on its FMV on location and in use, even though debtors could not have sold business as a turnkey operation because the creditor had a security interest in the lease.

Associates Commercial Corp. v. Rash, 519 U.S. 1106 (1997)

Property that a debtor seeks to retain over the objection of an under secured creditor is valued for the purpose of establishing the secured portion of the claim at "replacement value" rather than at "foreclosure value". Section 506(a) requires valuing the claim at "the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller."

Taffi v. United States (In re Taffi), 68 F.3d 306 (9th Cir. 1995), *cert. denied*, 521 U.S. 1103 (1997)

Where Chapter 11 debtor proposes to retain his home in his Chapter 11 plan, and liens exceeded home's value, court must value the allowed amount of secured claim under §506(a):

(1) on basis of fair market value of collateral (willing buyer and willing seller), not forced-sale liquidation value; and

(2) without deducting hypothetical costs of sale.

*See Lomas Mortgage USA v. Weise (In re Weise)*, 980 F.2d 1279 (9th Cir. 1992), *vacated on other grounds*, 508 U.S. 958, 113 S.Ct. 2925 (1993).

In re Mitchell, 954 F.2d 557 (9th Cir. B.A.P. 1992), *cert. denied*, 506 U.S. 908 (1992)

Wholesale blue book value of automobile under 11 U.S.C. §506(a) proper.

In re Wolverton Assoc., 909 F.2d 1286 (9th Cir. 1990)

Standard of review.

In re Malody, 102 B.R. 745 (9th Cir. B.A.P. 1989)

Vehicles should be valued at wholesale in Ch. 13 cases.

In re Abdelgadis, _B.R._, 2011 WL4482656 (B.A.P. 9th Cir. 2011)

Status of property as debtor's principal residence under § 1123(b)(5) determined as of petition date.

In re Dheming, 2013 Bankr. LEXIS 1166 (N.D.Cal. 2013)

Date at or near confirmation is appropriate date for valuing property under a Chapter 11 plan.

In re Dwight, 2013 Bankr. LEXIS 4311 (Bankr. N.D.Cal. 2013)

Petition date is appropriate date for valuing property under a Chapter 13 plan.

**VENUE**

In re Donald, 328 B.R. 192 (9th Cir. B.A.P. 2005)

Debtor who worked in Los Angeles for 30 days and lived in Whittier with a friend during that period was not domiciled in the Central District of California for purposes of 28 U.S.C. § 1408. Case properly transferred to Georgia pursuant to § 1412.

In re Little Lake Industries, 158 B.R. 478 (9th Cir. B.A.P. 1993)

"Arising under title 11" = "in a case under Title 11...arising in or related to such case" for 1409 purposes.

In re Hall, Bayoutree Assoc., Ltd., 939 F.2d 802 (9th Cir. 1991)

Not improper to dismiss rather than transfer, where there was evidence of bad faith.

In re Reddington Investments Ltd. Partnership-VIII, 90 B.R. 429 (9th Cir. B.A.P. 1988)

B.R. 1004(b) - where first petition is filed governs which court decides venue.

**VEXATIOUS LITIGANT**

In re Cashion Family Trust/In re Western Steel, Inc., __B.R.__ (9th Cir. B.A.P. 2025)

Thorough discussion of vexatious litigant elements. Court may issue a vexatious litigant order after a plaintiff/debtor voluntarily dismisses a case. Court may also issue sanctions beyond damages under section 303(i) for an improper involuntary bankruptcy, including damages under Rule 9011.

In re Koshkalda, 622 B.R. 749 (9th Cir. B.A.P. 2020)

Thorough discussion of vexatious litigant elements.

DeLong v. Hennessey, 912 F.2d 1144 (9th Cir. 1990), *cert. denied*, 498 U.S. 1001 (1990)

Standard for enjoining filings by a vexatious litigant**.**

**WAIVER**

Waller v. Trust Ins. Exchange, Inc., 11 Cal. 4th 1

Elements of waiver under Cal law.

# A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

**Revised June 2022**

**Paul W. Bonapfel**
**U.S. Bankruptcy Judge, N.D. Ga.**

This June 2022 compilation of *A Guide to the Small Business Reorganization Act of 2019* merges the July 2021 compilation of the *Guide* with material in the May-June 2022 Supplement and incorporates revisions in a May 2022 compilation. The earlier compilations and this one update the original version published at 93 Amer. Bankr. L. J. 571 (2019).

The May-June 2022 Supplement is in two parts. The first part supplements the July 2021 compilation with revisions and new material as of May 2022. The second part adds additional revisions and materials as of June 2022. This June 2022 compilation includes all of the revisions in both supplements.

The reader who is not familiar with the July 2021 compilation may consult only this June 2022 compilation, because it includes all the material in both of the supplements.

The reader who is familiar with the July 2021 compilation may consult only the May-June 2022 Supplement to review new material added to the July 2021 compilation. The reader who is also familiar with the May 2022 Supplement may consult only the June part of the May-June 2022 Supplement to review new material.

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# Table of Contents

I. Introduction ..... 1
II. Overview of Subchapter V ..... 7
A. Changes in Confirmation Requirements ..... 8
B. Subchapter V Trustee and the Debtor in Possession ..... 9
C. Case Administration and Procedures ..... 9
D. Discharge and Property of the Estate ..... 10
1. Discharge – consensual plan ..... 10
2. Discharge – cramdown plan ..... 10
3. Property of the estate ..... 11
III. Debtor's Election of Subchapter V and Revised Definition of "Small Business Debtor" ..... 11
A. Debtor's Election of Subchapter V ..... 11
B. Eligibility for Subchapter V; Revised Definitions of "Small Business Debtor" and "Small Business Case" ..... 17
1. Statutory provisions governing application of subchapter V and the debt limit ..... 17
2. Overview of eligibility for subchapter V ..... 19
3. Revisions to the definition of "small business debtor" and requirements for eligibility for subchapter V in general ..... 21
C. Debtor Must Be "Engaged in Commercial or Business Activities" ..... 24
1. Whether debtor must be engaged in commercial or business activities on the petition date ..... 25
2. What activities are sufficient to establish that the debtor is "engaged in commercial or business activities" when the business is no longer operating ..... 28
D. What Debts Arise From Debtor's Commercial or Business Activities ..... 37
E. Whether Debts Must Arise From Current Commercial or Business Activities ..... 44
F. What Debts Are Included in Determination of Debt Limit ..... 46
G. Ineligibility of Corporation Subject to SEC Reporting Requirements and of Affiliate of Issuer ..... 49
IV. The Subchapter V Trustee ..... 51
A. Appointment of Subchapter V Trustee ..... 51
B. Role and Duties of the Subchapter V Trustee ..... 53
1. Trustee's duties to supervise and monitor the case and to facilitate confirmation of a consensual plan ..... 53
2. Other duties of the trustee ..... 57
3. Trustee's duties upon removal of debtor as debtor in possession ..... 58

C. Trustee's Disbursement of Payments to Creditors ..... 59
1. Disbursement of preconfirmation payments and funds received by the trustee ..... 59
2. Disbursement of plan payments by the trustee ..... 61
D. Termination of Service of the Trustee and Reappointment ..... 62
1. Termination of service of the trustee ..... 62
2. Reappointment of trustee ..... 63
E. Compensation of Subchapter V Trustee ..... 64
1. Compensation of standing subchapter V trustee ..... 64
2. Compensation of non-standing subchapter V trustee ..... 65
3. Deferral of non-standing subchapter V trustee's compensation ..... 70
F. Trustee's Employment of Attorneys and Other Professionals ..... 70
V. Debtor as Debtor in Possession and Duties of Debtor ..... 76
A. Debtor as Debtor in Possession ..... 76
B. Duties of Debtor in Possession ..... 77
C. Removal of Debtor in Possession ..... 81
VI. Administrative and Procedural Features of Subchapter V ..... 89
A. Elimination of Committee of Unsecured Creditors ..... 90
B. Elimination of Requirement of Disclosure Statement ..... 91
C. Required Status Conference and Debtor Report ..... 92
D. Time for Filing of Plan ..... 96
E. No U.S. Trustee Fees ..... 100
F. Modification of Disinterestedness Requirement for Debtor's Professionals ..... 100
G. Time For Secured Creditor to Make § 1111(b) Election ..... 101
H. Times For Voting on Plan, Determination of Record Date for Holders of Equity Securities, Hearing on Confirmation, Transmission of Plan, and Related Notices ..... 102
I. Filing of Proof of Claim; Bar Date ..... 103
J. Extension of deadlines for status conference and debtor report and for filing of plan ..... 105
K. Debtor's postpetition performance of obligations under lease of nonresidential real property--§ 365(d) ..... 111
VII. Contents of Subchapter V Plan ..... 113
A. Inapplicability of §§ 1123(a)(8) and 1123(c) ..... 113
B. Requirements of §1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage ..... 114
C. Payment of Administrative Expenses Under the Plan ..... 119
VIII. Confirmation of the Plan ..... 121

A. Consensual and Cramdown Confirmation in General ..... 121
1. Review of confirmation requirements in traditional chapter 11 cases and summary of changes for subchapter V confirmation ..... 121
2. Differences in requirements for and consequences of consensual and cramdown confirmation ..... 124
3. Benefits to debtor of consensual or cramdown confirmation ..... 128
4. Whether balloting on plan is necessary ..... 133
5. Final decree and closing of case ..... 135
B. Cramdown Confirmation Under §1191(b) ..... 137
1. Changes in the cramdown rules and the "fair and equitable" test ..... 137
2. Cramdown requirements for secured claims ..... 139
3. Components of the "fair and equitable" requirement in subchapter V cases; no absolute priority rule ..... 140
4. The projected disposable income (or "best efforts") test ..... 141
i. Determination of projected disposable income ..... 143
ii. Determination of period for commitment of projected disposable income for more than three years ..... 150
5. Requirements for feasibility and remedies for default ..... 156
6. Payment of administrative expenses under the plan ..... 161
C. Postconfirmation Modification of Plan ..... 161
1. Postconfirmation modification of consensual plan confirmed under §1191(a) ..... 161
2. Postconfirmation modification of cramdown plan confirmed under §1191(b) ..... 164
D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases ..... 165
1. Classification of claims; unfair discrimination ..... 165
2. Acceptance by all classes and effect of failure to vote ..... 167
3. Classification and voting issues relating to priority tax claims ..... 168
4. Timely assumption of lease of nonresidential real estate ..... 169
5. The "best interests" or "liquidation" test of § 1129(a)(7) ..... 170
6. Voting by holder of disputed claim ..... 170
7. Individual must be current on postpetition domestic support obligations ..... 171
8. Application of § 1129(a)(3) good faith requirement in context of consensual plan when creditor objects because debtor is not paying enough disposable income ..... 171
E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases ..... 176
1. The § 1111(b)(2) election ..... 177
2. Realization of the "indubitable equivalent" of a secured claim -- § 1129(b)(2)(A)(iii) 187

IX. Payments Under Confirmed Plan; Role of Trustee After Confirmation ..... 190
A. Debtor Makes Plan Payments and Trustee's Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under §1191(a) ..... 190
B. Trustee Makes Plan Payments and Continues to Serve After Confirmation of Plan Confirmed Under Cramdown Provisions of §1191(b) ..... 191
C. Unclaimed Funds ..... 195
X. Discharge ..... 197
A. Discharge Upon Confirmation of Consensual Plan Under §1191(a) ..... 197
B. Discharge Upon Confirmation of a Cramdown Plan Under § 1191(b) ..... 199
C. Exceptions to Discharge in Subchapter V Cases ..... 200
1 Exceptions to discharge after consensual confirmation ..... 201
2. Exceptions to discharge after cramdown confirmation ..... 202
3. Procedure for determination of exceptions to discharge under § 523(a)(2), (4), or (6) 203
D. Whether § 523(a) Exceptions Apply to Cramdown Discharge of Entity ..... 203
1. Statutory language and background ..... 203
2. Judicial debate over application of § 523(a) exceptions to cramdown discharge of an entity ..... 207
XI. Changes to Property of the Estate in Subchapter V Cases ..... 239
A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Traditional Chapter 11 Cases ..... 239
B. Postpetition Property and Earnings in Subchapter V Cases ..... 241
1. Property of the estate in subchapter V cases of an entity ..... 242
2. Property of the estate in subchapter V cases of an individual ..... 244
XII. Default and Remedies After Confirmation ..... 247
A. Remedies for Default in the Confirmed Plan ..... 247
B. Removal of Debtor in Possession for Default Under Confirmed Plan ..... 249
C. Postconfirmation Dismissal or Conversion to Chapter 7 ..... 251
1. Postconfirmation dismissal ..... 251
2. Postconfirmation conversion ..... 255
XIII. Effective Dates and Retroactive Application of Subchapter V ..... 257

APPENDIX A Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019 (as amended by the Coronavirus, Aid, Relief, and Economic Security Act)

APPENDIX B Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA

APPENDIX C Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13 (Prepared by Bankruptcy Judge Mary Jo Heston's Chambers)

APPENDIX D Key Events in the Timeline of Subchapter V Cases (Prepared by Bankruptcy Judge Benjamin A. Kahn and Law Clerk Samantha M. Ruben)

APPENDIX E Comparison of Subchapter V With Chapter 13 and Chapter 11

# A Guide to the Small Business Reorganization Act of 2019

Paul W. Bonapfel
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## I. Introduction

The Small Business Reorganization Act of 2019 (the "SBRA")[1] enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.[2] SBRA also revised the definitions of "small business case" and "small business debtor" in § 101(51C) and § 101(51D), respectively.[3] It took effect on February 19, 2020, 180 days after its enactment on August 23, 2019.

Subchapter V applies in cases in which a qualifying debtor elects its application. As originally enacted, SBRA provided that a "small business debtor," as defined in revised § 101(51D), could make the election. In the absence of the election, a small business debtor would be in a "small business case," which revised § 101(51C) defines as the case of a small business debtor that does not elect subchapter V. SBRA did not change the pre-SBRA

[1] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.).

[2] Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code.

Section 3 of SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise "reasonable due diligence in the circumstances of the case" and must take into account a party's "known or reasonably knowable" affirmative defenses under § 547(c). SBRA § 3(a).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than $ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was $ 13,650. As of April 1, 2022, the adjusted amount under § 104 is $ 27,750.

[3] SBRA § 4(1)(A)-(B).

provisions of chapter 11 that govern a small business case with one exception. SBRA amended § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in a small business case unless the court orders otherwise.[4]

A debtor is a small business debtor under § 101(51D) only if, among other things, its debts (with some exceptions) are within a specified debt limit. The debt limit at the time of SBRA's enactment was $ 2,725,625; on April 1, 2022, the debt limit was increased pursuant to § 104 to $ 3,024,725.

As Section III(B) discusses in detail, later legislation expanded the availability of subchapter V on a temporary basis to debtors whose debts do not exceed $ 7.5 million if they otherwise qualify as a small business debtor.[5] Under this legislation, § 1182(1) defines eligibility for subchapter V, with the same language that defines a "small business debtor" in § 101(51D), except for the debt limit. On June 21, 2024, the provisions expire, and § 101(51D) will again govern eligibility for subchapter V.

Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affected and summarizes the changes, as affected by the later legislation.

The purpose of SBRA is "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs."[6] A sponsor of the legislation stated that it

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[4] SBRA, § 4(a)(11), 133 Stat. 1079, 1086.

[5] Between March 27, 2022 and June 20, 2022, a debtor had to be a small business debtor as defined in § 101(51D), and the debt limit was, therefore, $3,024,725. The change on June 21, 2022, was retroactive. See Section 3(B)(1); Part XIII.

[6] H.R. REP. NO. 116-171, at 1 (2019), *available at* https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf.

For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 BANKRUPTCY LAW LETTER, no. 10, Oct. 2019, at 1-4.

Amendments to the Bankruptcy Code in 1994 permitted a qualifying small business debtor to elect small business treatment. As amended, § 1121(e) provided that, in a small business case, only the debtor could file a plan for 100 days after the order for relief and that all plans had to be filed within 160 days. In addition, amended § 1125(f) permitted parties to solicit acceptances or rejections of a plan based on a conditionally approved disclosure

allows small business debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business," which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."[7] Courts have taken the legislative purpose of SBRA into account in their application of the new law.[8]

SBRA has had a significant impact. A preliminary estimate was that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would have qualified as a subchapter V debtor and that about 25 percent of individuals in chapter 11 cases

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statement and permitted a final hearing on the disclosure statement to be combined with the hearing on confirmation.

The Bankruptcy Abuse Protection and Consumer Protection Act of 2005 ("BAPCPA") significantly changed the small business provisions. Importantly, it eliminated the debtor's option to choose small business treatment. As such, a business that qualifies as a small business debtor became subject to all of the provisions governing small business cases.

BAPCPA replaced both § 1121(e) and § 1125(f).

BAPCPA's § 1121(e)(1) extended the exclusive time for the debtor to file a plan to 180 days and imposed a new 300-day deadline for the filing of a plan. BAPCPA also added § 1129(c) to require confirmation of a plan in a small business case within 45 days of its filing, unless the court extended the time.

BAPCPA's § 1125(f) added a provision that permitted the court to determine that the plan provided adequate information such that a separate disclosure statement was not required.

BAPCPA also added § 1116 to prescribe additional filing, reporting, disclosure, and operating duties applicable only to small business debtors.

Although some of BAPCPA's small business provisions facilitated chapter 11 reorganization for a small business debtor, others appeared to reflect skepticism about the prospects for success of a small business debtor in a chapter 11 case and specific, more intensive supervision of the administration of their cases. In practice, reporting and confirmation requirements applicable to small business debtors remained burdensome or unworkable for many small businesses. *See, e.g., Amer. Bankr. Inst. Comm'n to Study the Reform of Chapter 11: 2012-14 Final Report & Recommendations*, 23 AMER. BANKR. INST. L. REV. 1, 324 (2015) (For many small or medium-sized businesses, "the common result of plan confirmation extinguishing pre-petition equity interests in their entirety [are] unsatisfactory or completely unworkable.").

Because SBRA did not repeal SBRA's provisions relating to a "small business debtor," a small business debtor that does not elect subchapter V is in a small business case and subject to the provisions that BAPCPA added.

[7] H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc.,* 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business Reorganization Act,* 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

[8] *E.g., In re* Ventura, 615 B.R. 1 , 6, 12-13 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re* Progressive Solutions, Inc, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020).

would qualify.[9] Subchapter V thus changes the chapter 11 environment for both debtors and creditors.[10] A study of 438 cases filed between subchapter V's effective date of February 19, 2020 and December 31, 2020 indicates that it is working as intended.[11]

Subchapter V resembles chapter 12[12] and chapter 13[13] in some respects. As in subchapter V cases, both chapters 12 and 13 provide for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee in all of the cases has

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[9] Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?,* CREDIT SLIPS (Sept. 14, 2019), http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html. Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so. The estimate does not take into account the increase in the debt limit that the CARES Act temporarily made.

[10] For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 251 (2020).

[11] Michelle M. Harner, Emily Lamasa, and Kinberly Goodwin-Maigetter, *Subchapter V Cases By the Numbers,* 40-Oct Am. Bankr. Inst. J. 12 (Oct. 2021). Of the 438 cases filed in the period, 117 (27 percent) were individual cases, of which 52 were jointly administered. As of June 30, 2021, confirmation had occurred in 221 cases, the debtor had filed a plan that had not yet been confirmed in 105 cases, and the court had dismissed 82 cases. *Id.* at 59. Thus, the debtor was able to confirm a plan in more than 62 percent of the cases not dismissed and in more than half of all of the cases in the study.

*Id.*

In 130 of the 221 cases with confirmed plans, confirmation was consensual under § 1191(a) in 130 of them (69 percent). In the 91 cases where cramdown confirmation occurred, 40 involved at least one class of creditors voting against the plan and 51 had impaired classes that did not vote. *Id.*

The average number of days between filing of the case and confirmation was 184 days, and the median was 168. *Id.*

The authors concluded, *id.* at 60:

> Overall, subchapter V appears to be working as intended. Small businesses are using the subchapter with some regularity. The businesses also are, for the most part, confirming reorganization plans at a relatively high rate in a relatively short period of time. Although more data is needed to fully understand the impact of invoking the subchapter on both the short- and longer-term prospects of financially distressed small businesses, the initial results are promising. Small businesses appear now to have a restructuring tool that is both affordable and effective for addressing their financial needs.

[12] As the court observed in *In re Trepetin,* 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):

> Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

[13] See *In re Louis,* 2022 WL 2055290 at * *14 (Bankr. C.D. Ill. 2022) (The court noted that chapter 11 cases impose fiduciary duties and administrative tasks such as preparing and filing operating reports and producing other financial information that typically do not arise in chapter 13 cases and that representation requires understanding of subchapter V provisions, including the advantages of consensual confirmation for an individual.).

oversight and monitoring duties and the right to be heard on certain matters. The subchapter V trustee in some cases may make disbursements to creditors in a similar manner to disbursements in chapter 12 and 13 cases.[14]

But subchapter V differs from chapters 12 and 13 in significant ways. For example, whereas confirmation standards requirements in chapter 12 (§ 1225) and chapter 13 (§ 1325) are similar and do not contemplate voting by creditors, subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a) and contemplate voting by classes of creditors.[15] Unlike chapter 13, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") had authority to make changes in the Official Forms to take effect on SBRA's effective date. Changes to the Bankruptcy Rules, however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee made changes to the Official Forms and promulgated interim rules (the "Interim Rules") that amend the Federal Rules of Bankruptcy Procedure.[16] The changes to the Official Forms became effective as of the effective

[14] Part IX discusses disbursements in subchapter V cases.

[15] Part VIII discusses confirmation requirements in subchapter V cases. For a discussion of debt limits in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 12:8 – 12:10.

[16] On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure ("Interim Rules") to address provisions of SBRA for adoption in each judicial district by local rule or general order and new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial

date of SBRA. The Rules Committee recommended that each judicial district adopt the Interim Rules as local rules or by general order. Enactment of later legislation expanding the debt limit required technical revisions in Interim Rule 1020 in and the Official Forms for voluntary petitions.[17] Appendix B summarizes the changes that the Interim Rules made.

If a small business debtor does not elect subchapter V, the provisions that govern small business cases apply.[18] The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee refers to "small business cases" and to "cases under subchapter V of chapter 11."

This terminology is technically accurate. Under the SBRA amendments, a "small business debtor" is not necessarily a debtor in a "small business case." Rather, a "small business case" is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case. Moreover, under the temporary extension of the debt limits under later legislation, a debtor can be a subchapter V debtor, but not a small business debtor, if its debts are less than $ 7.5 million but more than the limit for a small business debtor.

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Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules are located on the *Current Rules of Practice & Procedure* page of the U.S. Courts public website (USCOURTS.GOV). The new Official Forms are posted on the *Forms* page of the website, under the *Bankruptcy Forms* table.

[17] On April 6, 2020, the Advisory Committee on Bankruptcy Rules proposed one-year technical amendments to Interim Rule 1020 to take account of the revised definition of "debtor" under the CARES Act, which Section III(B) discusses. The Advisory Committee also proposed conforming technical changes to official forms, including Official Forms 101 and 202, which are the forms for the filing of a voluntary petition by an individual and a non-individual, respectively.

On April 20, 2020, the Committee on Rules of Practice and Procedure approved the amendments and recommended their local adoption. It also approved the one-year technical change to the Official Forms.

[18] For a summary of key features of a non-sub V small business case governed by the provisions for small business cases, see *supra* note 6.

The distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case,* § 362(n) will not apply in a later case of the subchapter V debtor.[19]

Three types of cases are now possible under chapter 11: (1) a non-small business case under traditional chapter 11 for a debtor who is not a small business debtor and either (a) has debts in excess of the sub V debt limit or (b) has debts below the limit and is eligible for subchapter V but does not elect it; (2) a small business case for a small business debtor that does not elect subchapter V; and (3) a subchapter V case for a qualifying debtor who elects it. This paper generally uses "traditional" to describe a chapter 11 case (including a small business case) that is not a subchapter V case.

## II. Overview of Subchapter V

For electing debtors who qualify, subchapter V: (1) modifies confirmation requirements; (2) provides for the participation of a trustee (the "sub V trustee") while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) changes several

[19] In *In re Abundant Life Worship Center of Hinesville, GA., Inc.,* 2020 WL 7635272 (Bankr. S.D. Ga. 2020), a debtor whose earlier small business case had been dismissed seven months earlier filed a new chapter 11 case and amended the petition to elect subchapter V. The debtor contended that § 362(n)(1) did not apply because, upon its subchapter V election, it ceased being a debtor in a "small business case." *Id.* at *8. The court ruled that the status of the debtor in the current case made no difference: "The statute plainly requires only that the prior case was a small business case, not the subsequent case." *Id.* at * 18.

The debtor also contended that the exception in paragraph (n)(2) of § 362 to the operation of paragraph (n)(1) applied. Section 362(n)(2)(B) provides that paragraph (n)(1) does not apply if the debtor establishes "that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time *the case then pending* was filed" (emphasis added) and that "it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable time."

The court rejected this argument, concluding that the language, "the case then pending" refers to a separate case pending at the time of the filing of the second case. Because the debtor's previous case was not a "case then pending," the court ruled, the exception did not apply. *Id.* at *11-12. The court thus followed *Palmer v. Bank of the West,* 438 B.R. 167 (E.D. Wis. 2010).

administrative and procedural rules; and (4) alters the rules for the debtor's discharge and the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)). Only the sub V debtor may file a plan or a modification of it.

This Part provides an overview of these provisions. Later Parts discuss these and other provisions in more detail. Appendix C is a chart that compares provisions of subchapter V with those that govern traditional chapter 11, chapter 12, and chapter 13 cases.

## A. Changes in Confirmation Requirements

The court may confirm a sub V plan even if all classes reject it. Moreover, the "fair and equitable" requirement for "cramdown" confirmation does not include the absolute priority rule. Instead, the plan must comply with a new projected disposable income requirement (applicable in cases of entities as well as those of individuals). The cramdown requirements for a secured claim are unchanged. (Part VIII).

A sub V plan may modify a claim secured only by a security interest in the debtor's principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor. Such modification is not permitted in traditional chapter 11 cases or in chapter12 or 13 cases. (Section VII(B)).

## B. Subchapter V Trustee and the Debtor in Possession

Subchapter V provides for the debtor to remain in possession of assets and operate the business with the rights and powers of a trustee unless the court removes the debtor as debtor in possession. (Part V).

The United States Trustee appoints the sub V trustee. The role of the sub V trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

## C. Case Administration and Procedures

Subchapter V modifies the usual procedures in chapter 11 cases in several respects. Appendix D summarizes the key events in a subchapter V case and the timeline for them.

*No committee of unsecured creditors.* A committee of unsecured creditors is not appointed unless the court orders otherwise. (SBRA also makes this the rule in a non-sub V small business case.) (Section VI(A)).

*Required status conference and report from debtor.* The court must hold a status conference within 60 days of the filing "to further the expeditious and economical resolution" of the case. Not later than 14 days before the status conference, the debtor must file a report that details the efforts the debtor has undertaken and will undertake to achieve a consensual plan of reorganization. (Section VI(C)).

*Time for filing of plan.* The debtor must file a plan within 90 days of the date of entry of the order for relief, unless the court extends the time based on circumstances for which the debtor should not justly be held accountable. The requirements in a non-sub V small business case that a plan be filed within 300 days of the filing date (§ 1121(e)) and that confirmation

occur within 45 days of the filing of the plan (§ 1129(e)) do not apply in a sub V case. (Section VI(D)).

*No disclosure statement.* Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan. (Sections VI(B), VII(B)).

*No U.S. Trustee fees.* A sub V debtor does not pay U.S. Trustee fees. (Section VI(E)).

## D. Discharge and Property of the Estate

### 1. Discharge – consensual plan

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a).[20] One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

### 2. Discharge – cramdown plan

When cramdown confirmation occurs in a sub V case, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, §1192 governs the discharge, which does not occur until the debtor completes plan payments for a period of at least three years or such longer time not to exceed five years as the court fixes. (Section X(B)).

[20] § 1141(d)(2).

Under §1192, the discharge in a cramdown case discharges the debtor from all debts specified in § 1141(d)(1)(A) and all other debts allowed under § 503 (administrative expenses), with the exception of: (1) debts on which the last payment is due after the first three years of the plan or such other time not exceeding five years as the court fixes; and (2) debts excepted under § 523(a). (Section X(C)(2)). Under § 362(c)(2), the automatic stay remains in effect after confirmation of a cramdown plan until the case is closed or dismissed, or the debtor receives a discharge.

**3. Property of the estate**

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case.[21] If the court confirms a plan under the cramdown provisions of §1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings.[22] See Section XI(B).

## III. Debtor's Election of Subchapter V and Revised Definition of "Small Business Debtor"

### A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which an eligible debtor elects them.[23] If an eligible debtor does not make the election, the traditional provisions of Chapter 11 apply. If

[21] § 1181(a).
[22] § 1186(a).
[23] One commentator has suggested that a creditor may want to attempt to limit the availability of subchapter V by including in the credit agreement a commitment from the debtor not to make the election or to waive it, noting that such a contractual provision may not be enforceable. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 251, 264 (2020). Professor Bradley suggests alternatively that a creditor could require a "springing" (sometimes referred to as a "bad boy") guarantee from a debtor's insider that would arise if the debtor elected subchapter V. *Id.* at 264-65.

the non-electing debtor is a small business debtor as defined in § 101(51D), the debtor is in a "small business case" under § 101(51C), and the special provisions governing such cases apply.

As Section III(B) discusses, § 1182(1) defines eligibility for subchapter V until June 20, 2024. Thereafter, a debtor must be a small business debtor under § 101(51D) to be eligible for subchapter V. Except for the debt limit ($ 3,024,725 under § 101(51D) and $ 7.5 million under § 1182(1)), eligibility for subchapter V is the same under both provisions.

An individual eligible for subchapter V will also be eligible for chapter 13 if the debtor has regular income and debts that do not exceed the chapter 13 debt limits.[24] Effective June 21, 2022, the debt limit in a chapter 13 case was temporarily increased to $ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA").[25] On June 20, 2024, the debt limits return to $ 465,275 for unsecured debts and $ 1,395,875 for secured debts.[26]

Appendix E compares subchapter V cases with chapter 13 cases, small business cases, and traditional chapter 11 cases.

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) requires a debtor to state in the petition whether it is a small business debtor.[27] In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order for relief. The case proceeds in accordance with the debtor's statement unless and until the court enters an order finding that the statement is incorrect.

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[24] § 109(e) governs chapter 13 eligibility.
[25] Bankruptcy Threshold Adjustments and Technical Corrections Act § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA"). The increased debt limits apply retroactively in any bankruptcy case commenced on or after March 27, 2020 that is pending on the date of BTATCA's enactment. *Id.* § 2(h)(2(A).
[26] BTATCA § 2(i)(1)(A). The court may convert a chapter 11 case to chapter 13 if the debtor requests it. § 1112(c).
[27] FED. R. BANK. P. 1020(a).

Interim Rule 1020(a) as originally promulgated added the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provided that the case proceed in accordance with the election unless the court determined that it is incorrect. In an involuntary case, the Interim Rule required the debtor to state whether it is a small business debtor and to make the election within 14 days after the order for relief.[28] In response to temporary legislation that changed the debt limit for subchapter V eligibility to $7.5 million and put the eligibility requirements in § 1182(1),[29] revised Interim Rule 1020 provides in both instances for the debtor to state whether the debtor is a small business debtor or a debtor as defined in § 1182(1) and, if the latter, whether the debtor elects application of subchapter V.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor or a § 1182(1) debtor and whether it does or does not make the election.[30] Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.[31]

Parties in interest may object to a debtor's statement of whether it is a small business debtor or is eligible for subchapter V. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement of its small business status within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Interim Rule 1020(b) makes the same

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[28] INTERIM RULE 1020.

[29] See Section III(B).

[30] OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

[31] OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) were renumbered as B309E1 and B309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

The new forms require inclusion of the trustee and the trustee's phone number and email address. The new notices state that the debtor will generally remain in possession of property and may continue to operate the business and advise that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made.

requirement applicable to the statement regarding the debtor's statement that it is an eligible subchapter V debtor.

Most courts have determined that the burden is on the debtor to establish eligibility for subchapter V if challenged.[32] A contrary view is that the objecting party as the moving party has the burden of proving that the debtor is not eligible.[33] The issue may be academic in most cases dealing with eligibility. For the most part, the outcomes do not appear to turn on the resolution of factual disputes but on the legal conclusions to be drawn from the facts.

It is not clear whether a bankruptcy court's order determining that a debtor is eligible is a final order for purposes of appeal under 28 U.S.C. § 158(a)(1).[34] A district court or bankruptcy

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[32] NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 2022 WL 1288608 at *8-9 (B.A.P. 9th Cir. 2022); *In re* Blue, 630 B.R. 179, 187 (Bankr. M.D.N.C. 2021); National Loan Invs., L.P. v. Rickerson (*In re* Rickerson*),* 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021); Lyons v. Family Friendly Contracting LLC (*In re* Family Friendly Contracting LLC)*,* 2021 WL 5540887 at * 2 (Bankr. D. Md. 2021); *In re* Vertical Mac Construction, LLC, 2021 WL 3668037 at *2 (Bankr. M.D. Fla. 2021); *In re* Port Arthur Steam Energy, L.P., 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021); *In re* Offer Space, LLC, 629 B.R. 299, 304 (Bankr. D. Utah 2021); *In re* Ikalowych, 629 B.R. 261, 275 (Bankr. D. Colo. 2021); *In re* Johnson, 2021 WL 825156 at *4 (Bankr. N.D. Tex. 2021); *In re* Thurman, 625 B.R. 417, 419 n.4 (Bankr. W.D. Mo. 2020).

[33] *E.g.,* Hall L.A. WTS, LLC v. Serendipity Labs, Inc. (*In re* Serendipity Labs, Inc.), 620 B.R. 679, 680 n.3 (Bankr. N.D. Ga. 2020); *In re* Body Transit, Inc., 613 B.R. 400, 409 n. 15 (Bankr. E.D. Pa. 2020) ("It is appropriate to place the burden of proof on [the objecting party], as it is the *de facto* moving party.").

[34] In *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC),* 2022 WL 1288608 (B.A.P. 9th Cir. 2022), the court reviewed the bankruptcy court's eligibility order in connection with an appeal of the order confirming the subchapter V plan. The court stated, "The interlocutory Subchapter V Order merged into the final Confirmation Order." *Id.* at *3 n. 3. The court cited *United States v. Real Prop. Located at 475 Martin Lane,* 545 F.3d 1134 , 1141 (9th Cir. 2008) (under merger rule, interlocutory orders entered prior to the judgment merge into the judgment and may be challenged on appeal).

In *Gregory Funding v. Ventura (In re Ventura),* 638 B.R. 499 (E.D. N.Y. 2022), however, the court in reversing an order of the bankruptcy court determining that the debtor was eligible for subchapter V, without discussing the finality issue, stated that district courts have appellate jurisdiction over final judgments, orders, and decrees. *Id.* at *3.

The district court's ruling in *Guan v. Ellingsworth Residential Community Association, Inc. (In re Ellingsworth Residential Community Association, Inc.)*, 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022), indicates that an eligibility determination is a final order. The creditor filed a notice of appeal after the bankruptcy court issued an order scheduling a hearing on confirmation of the debtor's subchapter V plan after a hearing at which it took the eligibility objection under advisement. The creditor appealed the scheduling order, and the bankruptcy court denied the creditor's motion for a stay pending appeal. In a later order, the bankruptcy court determined that the debtor was eligible. See *In re* Ellingsworth Residential Community Association, Inc.*,* 619 B.R. 519 (Bankr. M.D. Fla. 2019). The creditor did not seek leave to amend her notice of appeal to include the order denying a stay pending appeal or the eligibility order.

appellate panel has jurisdiction to hear an appeal from an interlocutory order, with leave of the court, under 28 U.S.C. § 158(a)(3) and § 158(b)(1), respectively.[35] Courts of appeals have discretionary jurisdiction to hear an appeal of an interlocutory order (as well as a final one) of the bankruptcy court under 28 U.S.C. § 158(d)(2) that a bankruptcy court, district court, or bankruptcy appellate panel certifies on various grounds.[36]

Bankruptcy Rule 1009(a) gives a debtor the right to amend a voluntary petition, list, schedule, or statement "as a matter of course at any time before the case is closed." A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes. Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed sub V election should be allowed and, if so, under what circumstances.[37]

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The district court held that the scheduling order was interlocutory and that the order denying the eligibility objections was not properly before the court. Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 3908525 at * 2 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022). The implication is that the eligibility order was a final order because it finally resolved the objection to eligibility. The district court nevertheless determined that, even if the creditor had properly raised the issue, the appeal would be denied on the merits. *Id.*

The Eleventh Circuit dismissed the appeal *sua sponte* for lack of jurisdiction because the district court's order affirming the bankruptcy court's interlocutory scheduling order was not a final order of the district court within its appellate jurisdiction under 28 U.S.C. § 158(d)(1). Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022).

[35] *In re* Parkinson, 2021 WL 1554068 at * 2 (D. Idaho 2021). ("[R]eviewing and resolving any questions concerning Subchapter V will not waste litigation resources, but will conserve them. In like manner, taking up Appellants' appeal at the current juncture will advance the ultimate termination of the underlying bankruptcy litigation.").

[36] The lower court must certify either: (1) that the order involves a question of law as to which no controlling circuit or Supreme Court authority exists or a matter of public importance; (2) that the order involves a question of law requiring resolution of conflicting decisions; or (3) that an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

[37] The Advisory Committee Note to Interim Rule 1020 states, "The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions."

Part XIII discusses whether a debtor who does not make the subchapter V election in the original petition may later amend the petition to elect application of Subchapter V. The issue arose in cases filed before enactment of SBRA in which the debtor sought to proceed under subchapter V when it became available. A similar issue may arise in a case filed by a debtor between March 27 and June 20, 2022, if the debtor was not eligible for subchapter V at the time of filing based on the amount of its debt but became eligible after enactment of the Bankruptcy Technical Adjustments and Technical Correction Act on the latter date that increased the debt limit, as Section III(B) discusses.

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference[38] and for filing a plan[39] run from the date of the order for relief. The Advisory Committee in its Report observed, "Should a court exercise authority to allow a delayed election, it is likely that one of the court's prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . ."[40] Section VI(J) and Part XIII discuss extension of the time limits and their effect on the ability of a debtor to amend the petition to make an election after their expiration.

[38] *See* Section VI(C).
[39] *See* Section VI(D).
[40] Advisory Committee on Bankruptcy Rules, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), at 3, available at https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

## B. Eligibility for Subchapter V; Revised Definitions of "Small Business Debtor" and "Small Business Case"

### 1. Statutory provisions governing application of subchapter V and the debt limit

The operative statutory provision for application of subchapter V is § 103(i), which SBRA added.[41] As amended by the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") [42] in March 2020, it provides:

> 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 title 11 shall apply.

As originally enacted by SBRA, § 1182(1) defined "debtor" as meaning a "small business debtor,"[43] a term defined in § 101(51D). As Section III(B)(2) discusses below, SBRA also revised the § 101(51D) definition of "small business debtor," but did not change the then-existing debt limit of $ 2,725,625 (now $ 3,024,725 as adjusted on April 1, 2022, under § 104).

The CARES Act increased the debt limit to $ 7.5 million through amendments to § 1182(a) and § 103(i). The CARES Act amended § 1182(1) so that its definition of "debtor" is the same as the definition of "small business debtor" in revised §101(51D), with a technical correction that it also made,[44] except that the debt limit in § 1182(1) is $ 7.5 million.[45] It did not change the debt limit in revised § 101(51D). The CARES Act changed § 103(i) to replace "small business debtor" with "debtor (as defined in section

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[41] SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (*l*). SBRA § 4(a)(2).

[42] Coronavirus Aid, Relief, and Economic Security Act § 1113(a)(2), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Before enactment of the CARES Act, § 103(*i*) provided:

> Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of title 11 shall apply.

[43] SBRA § 2(a).

[44] The technical correction involved the exclusion of public companies. Later legislation changed the provision. See Section III(G) and note 95 *infra*.

[45] CARES Act § 1113(a)(1).

1182)." As thus amended, § 103(i) provides that subchapter V applies in the case of a debtor as defined in § 1182 who elects is application.

The CARES Act provided for the increased debt limit to be effective for only one year after its enactment on March 27, 2020.[46] The Covid-19 Bankruptcy Relief Extension Act of 2021[47] amended the CARES Act to extend the amended provisions for an additional year. On March 27, 2022, §§ 1182(1) returned to its original language in the SBRA. At that time, § 1182(1) again defined "debtor" as "a small business debtor," and § 103(i) therefore limited application of subchapter V to a small business debtor who elected it.

The Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"),[48] enacted on June 21, 2022, temporarily reinstated for two years the expired provisions of § 1182(a), with some changes relating to affiliated debtors. BTATCA made the same changes in the definition of a small business debtor in § 101(51D).[49] The sunset provision of BTATCA provides that, on June 21, 2024, § 1182(1) will define debtor as a "small business debtor." At that time, § 103(i) will make subchapter V applicable only if the debtor is a small business debtor who elects it. The BTATCA changes to the definition of "small business debtor" do not expire.[50]

These temporary amendments in BTATCA became effective on the date of enactment.[51] They are retroactive to cases filed on or after March 27, 2020 that were pending on the date of its

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[46] CARES Act § 113(a)(5).
[47] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).
[48] Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").
[49] See Sections III(F), (G).

It is somewhat amusing that, in the course of one week, three different debt limits governed eligibility for subchapter V. On Sunday, March 27, 2022, the debt limit was $ 7.5 million. When that limit expired the next day, it was $ 2,725,625, the debt limit under § 101(51D). On Friday, April 1, 2022, adjustments under § 104 made the debt limit under § 101(51D) $ 3,024,725.
[50] BTATCA § 2(i)(1)(B).
[51] BTATCA § 2(h)(1).

enactment.[52] A debtor who filed a chapter 11 petition between March 27, 2022 and the effective date of BTATCA but was not eligible for subchapter V because its debts exceeded the debt limit, therefore, has the opportunity to seek to amend its petition to elect subchapter V.

Section XIII discusses the issues that arose when a debtor sought to amend its petition to elect subchapter V in a case filed before the effective date of SBRA. That caselaw may provide guidance in addressing retroactivity issues under the BTATCA amendments.

In summary, the effect of BTATCA is that until June 20, 2024, § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, a debtor must be a small business debtor under the revised definition in § 101(51D). The only difference in the language of the two statutes is the higher debt limit in the temporary version of § 1182(1). (Because none of this legislation changed the debt limit in the definition of "small business debtor," a debtor with debts in excess of the § 101(51D) limit but below $ 7.5 million that does not elect subchapter V cannot be a small business debtor.)

BTATCA provides for an inflationary adjustment to the debt limit in § 1182(1) under § 104.[53] Although this amendment does not expire, the next adjustment does not take place until April 1, 2025, by which time § 1182(1) will no longer state the debt limit.

**2. Overview of eligibility for subchapter V**

In general, a debtor is eligible to elect subchapter V if the debtor: (1) is a "person;" (2) is engaged in "commercial or business activities;" (3) does not have aggregate debts in excess of the debt limit; and (4) at least 50 percent of the debts arise from the debtor's commercial or business activities,[54] subject to certain exceptions. ("Person" under § 101(41) includes an

[52] BTATCA § 2(h)(2).
[53] BTATCA § 2(b).
[54] *See generally, e.g., In re* Blue*,* 630 B.R. 179, 191-93 (Bankr. M.D.N.C. 2021).

individual, corporation, or partnership but does not generally include a governmental unit. A limited liability company is a "person."[55])

A debtor is ineligible for sub V if: (1) its primary activity is the business of owning single asset real estate; (2) it is a member of a group of affiliated debtors that has aggregate debts in excess of the debt limit; (3) it is a corporation subject to reporting requirements under the Securities Exchange Act of 1934; or (4) it is an affiliate of a reporting corporation.

Although, as Section III(B)(1) explains, the statutory basis for determining a debtor's eligibility for subchapter V is § 1182(1) until June 20, 2024, the § 1182(1) definition contains the same language as the definition of a small business debtor in § 101(51D), with the exception of the amount of the debt limit ($ 7.5 million in § 1182(1), $ 3,024,725 in § 101(51D)). Because the eligibility requirements in § 1182(1) are the same as those in § 101(51D) (and will return to § 101(51D) under BTATCA's sunset provision), the next section discusses the definition of a small business debtor, as SBRA and later legislation revised it.

Later sections discuss in detail: the requirement that the debtor be "engaged in commercial or business activities" (Section III(C)); what debts "arose from" such activities (Section III(D)); whether the commercial or business debts must be connected to the debtor's current commercial or business activities (Section III(E)); what debts are included in determination of the debt limit (Section III(F)); and the exclusion of reporting companies and affiliates of an issuer (Section III(G)).

[55] *E.g., In re* QDN, LLC, 363 Fed. Appx. 873, 876 n. 4 (3d Cir. 2010); *In re* CWNevada, LLC, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re* 4 Whip, LLC, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re* ICLNDS Acquisition, LLC, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio (2001); *see In re* Asociación de Titulares de Condominio Castillo, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

### 3. Revisions to the definition of "small business debtor" and requirements for eligibility for subchapter V in general

Under pre-SBRA law, paragraph (A) of § 101(51D) defined a "small business debtor" as a person[56] (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts[57] as of the date of the filing of the petition or the date of the order for relief in an amount not more than $ 2,725,625 (adjusted on April 1, 2022 under § 104 to $ 3,024,725), (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor.

Paragraph (B) of former § 101(51D) excluded any member of a group of affiliated debtors that had aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

SBRA amended the § 101(51D) definition of "small business debtor" and provided that a small business debtor could elect application of subchapter V. As Section III(B)(1) explains, later legislation temporarily put the eligibility requirements for subchapter V in § 1182(1), increased the debt limit for subchapter V to $ 7.5 million, and made other revisions.

Except for the difference in the debt limits, the temporary language of § 1182(1) is identical to the language of § 101(51D). Specifically, paragraphs (A) and (B) of § 1182(1) are the same as paragraphs (A) and (B) of § 101(51D), as amended by both SBRA and later legislation.

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[56] A trust is not a "person" unless it is a business trust. *E.g., In re* Quadruple D Trust, 639 B.R. 204 (Bankr. D. Col. 2022). The court's opinion includes a comprehensive analysis of the standards for determining what is a business trust, concluding that the debtor was not a business trust and that it was not eligible to file for bankruptcy protection.

[57] § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.* See Section III(F).

SBRA did not change the provision that a "small business debtor" does not include a debtor that is "a member of a group of affiliated debtors" that has aggregate debts in excess of the debt limit. § 101(51D)(B)(i). The Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"),[58] enacted on June 21, 2022, made a technical correction to this language, which Section III(F) discusses. The same language is in § 1182(1).

SBRA also retained the requirement in § 101(51D) that the debtor be "engaged in commercial or business activities." SBRA revised paragraph (A), however, to add the requirement that 50 percent or more of the debtor's debt must arise from the debtor's commercial or business activities. The same requirements are temporarily in § 1182(1). Section III(C) discusses eligibility issues that have arisen as to whether the debtor is "engaged in commercial or business activities," and Section III(D) considers what constitutes a debt arising from commercial or business activity. Section III(E) addresses whether the debts arising from the debtor's commercial or business activities must arise from the debtor's current commercial or business activities.

SBRA made three other definitional changes in § 101(51D). Later legislation made a technical correction to one of them. As amended, § 101(51D) and § 1182(1) contain identical paragraphs (A) and (B).

First, amended paragraph (A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real

[58] Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a)(1), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").
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estate.[59] Pre-SBRA § 101(51D) excluded a debtor whose principal activity was the business of owning or operating real property.

Second, the requirement that no committee of unsecured creditors exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in a non-sub V small business case unless the court orders otherwise.)

Finally, SBRA added subparagraphs (B)(ii) and (B)(iii) to exclude two additional types of debtors to those that paragraph (B) excludes from being a small business debtor.

The first new exclusion, in (B)(ii), is for a corporation subject to reporting requirements under § 13 or § 15(d) of the Securities Exchange Act of 1934.[60] As amended by later legislation, the second new exclusion, in (B)(iii), is for a debtor that is an affiliate of a corporation subject to those reporting requirements.

Section III(G) discusses the exclusions for a public company and its affiliates.

An individual who does not have regular income may be a chapter 13 debtor in a joint case with the individual's spouse who does have regular income,[61] and an individual who is not a family farmer or fisherman may be a chapter 12 debtor in a joint case with the individual's spouse who is engaged in a farming operation or a commercial fishing operation.[62]

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[59] Section 101(51B) defines "single asset real estate" as "real property constituting a single property of 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." § 101(51B). For a discussion of case law relating to the definition of "single asset real estate" in the sub V context, see *In* re NKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021) (Debtor is qualified for subchapter V because the hotel that it owns and operates is not a "single asset real estate" project.). *See also In re* Caribbean Motel Corp., 2022 WL 50401 (Bankr. D. P.R. 2022) (motel renting rooms by the hour generating five to seven percent of income from providing food service on request and selling goods such as prophylactics and aspirin is not a single asset real estate debtor).

[60] § 101(51D)(B)(ii).

[61] 11 U.S.C. § 109(e).

[62] 11 U.S.C. § 109(f) (only a family farmer or family fisherman may be a chapter 12 debtor); 11 U.S.C. § 101(18)(A) (definition of family farmer includes spouse); 11 U.S.C. § 101(19A) (definition of family fisherman includes spouse).

Subchapter V has no such provision. Although an affiliate of an eligible subchapter V debtor may be a subchapter V debtor even if the affiliate is not otherwise eligible, a spouse is not an affiliate as defined in § 101(2).[63]

SBRA amended the definition of "small business case" in § 101(51C) to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a "small business case," even if the sub V debtor is a "small business debtor." And as a result of the amendments increasing the debt limit for subchapter V, a debtor may be eligible to be a sub V debtor under § 1182(1) (until its expiration), but not a "small business debtor."

## C. Debtor Must Be "Engaged in Commercial or Business Activities"

If a debtor is conducting active operations at the time of filing, it plainly meets the eligibility requirement that the debtor be "engaged in commercial or business activities." A profit motive is not necessary for a debtor to qualify as being "engaged in commercial or business activities." Thus, a nonprofit entity, such as a homeowner's association, meets the requirement.[64] Similarly, an entity formed for the sole purpose of acquiring and selling interests

[63] *In re* Johnson*,* 2021 WL 825156 (Bankr. N.D. Tex. 2021).
[64] *In re* Ellingsworth Residential Community Association, Inc.*,* 619 B.R. 519 (Bankr. M.D. Fla. 2019). The district court agreed with the bankruptcy court in an order affirming the issuance of a scheduling order. Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022).

in aircraft and providing depreciation tax benefits to its sole member is eligible for subchapter V even though it has no profit motive.[65]

An individual who is the principal of an entity such as a corporation or limited liability company may want to file a subchapter V case to deal with personal liabilities arising out of guarantees or other obligations when the entity fails and is no longer operating. The entity that is out of business may itself want to deal with its assets and debts under subchapter V.

Courts have dealt with two eligibility issues when the business is no longer operating. The first is whether eligibility depends on the debtor being engaged in commercial or business activities at the time of the filing of the petition. If so, the second question is what types of activities satisfy the requirement that the debtor be engaged in commercial or business activities.

**1. Whether debtor must be engaged in commercial or business activities on the petition date**

In *In re Wright,* 2020 WL 2193240 (Bankr. D. S.C. 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord, In re Bonert,* 619 B.R. 248, 255 (Bankr. C.D. Cal. 2020); *see In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La., 2020).

Other courts have concluded that a debtor must be currently engaged in business to be eligible for subchapter V. Thus, in *In re Thurmon,* 625 B.R. 417 (Bankr. W.D. Mo. 2020), The court reasoned, "The plain meaning of 'engaged in' means to be actively and currently involved. In § 1182(a)(1)(A) of the Bankruptcy Code, 'engaged in' is written not in the past or future but

[65] NetJets Aviation, Inc. v. RS Air, LLC (*In re* RS Air, LLC), 2022 WL 1288608 at *6-8 (B.A.P. 9th Cir. 2022). The court's holding on this point is broad: "[N]o 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." *Id.* at *8.

in the present tense."[66] *Accord, e.g., In re Blue,* 630 B.R. 179, 188-89 (Bankr. M.D.N.C. 2021) (collecting and discussing cases); *In re Offer Space, LLC,* 629 B.R. 299, 305-06 (Bankr. D. Utah 2021); *In re Ikalowych,* 629 B.R. 261, 280-83 (Bankr. D. Colo. 2021); *In re Johnson,* 2021 WL 825156 (N.D. Tex. 2021).

In *In re Johnson,* 2021 WL 825156 (N.D. Tex. 2021), the debtor and the debtor's spouse had filed a chapter 7 petition, before enactment of subchapter V, to deal with business debts arising from the debtor's ownership of several limited liability companies.

After the U.S. Trustee filed a complaint objecting to their discharge, and after subchapter V's effective date, the debtor and the spouse filed a motion to convert their case to chapter 11, conditioned on the court's authorization for the case to proceed under subchapter V.

The U.S. Trustee and a number of creditors objected, asserting that a debtor must be "actively carrying out" commercial or business activities at the time of the filing of the petition to be "engaged in" commercial or business activities for purposes of subchapter V eligibility.

The court rejected the "actively carrying out" test as too narrow because it would preclude subchapter V relief for debtors with businesses temporarily closed for unexpected non-financial reasons such as weather, natural disaster, regulatory requirements, or a pandemic. But the court concluded that the inquiry is "inherently contemporary in focus instead of retrospective,

[66] *In re* Thurmon*,* 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020), Although the U.S. Trustee timely raised the issue of eligibility by objecting to the sub V election, the U.S. Trustee did not request a hearing on it. Accordingly, the ruling on eligibility occurred in connection with the hearing on confirmation of the plan, which all impaired classes of creditors had accepted. *Id.* at 423-24.

The only party objecting to the plan was the U.S. Trustee, who contended that the court could not confirm the plan of a debtor ineligible for subchapter V because it was not accompanied by a disclosure statement. The court overruled the objection and confirmed the plan in the unusual circumstances of the case. The court reasoned that (1) the U.S. Trustee had in essence waived the right to request a disclosure statement by not requesting that the court require a disclosure statement while the eligibility objection was pending; and (2) the plan substantially complied with disclosure statement requirements by containing "adequate information." *Id.* at 424.

requiring the assessment of the debtor's current state of affairs as of the filing of the bankruptcy petition." *Johnson,* 2021 WL 825156 at *6.

Because nothing indicated that the debtor's companies were only temporarily out of business or that the debtor intended to cause any of them to resume operations, the court concluded that the debtor's prior ownership and management of them did not qualify the debtor for subchapter V. *Id.* at *7.

The *Johnson* court advanced three reasons for this conclusion.

First, applying the dictionary definition of "engaged" as "involved in activity: occupied, busy" to the statutory language, the court determined that a person "engaged in business or commercial activities" is a person "occupied with or busy in commercial or business activities – not a person who at some point in the past had such involvement." *Id.* at * 6.

Second, the *Johnson* court noted that the purpose of subchapter V is to facilitate expedience and minimize cost for the reorganization of a small business. Such benefits are essential to the successful the reorganization of a small business that is "currently occupied with/busy in commercial or business activities" but not to a small business no longer so occupied. *Id. at *6.*

Finally, the court relied on interpretations of "engaged in" in eligibility provisions applicable to railroads under subchapter IV of chapter 11 and to chapter 12 debtors that apply a contemporary analysis to eligibility. *Id.* at *7. Thus, a former railroad did not qualify for subchapter IV,[67] and a family farmer must be currently engaged in a farming operation or intend to continue to engage in a farming operation at the time of the filing of the petition. [68]

[67] Hileman v. Pittsburgh & Lake Erie Props., Inc. (*In re* Pittsburgh & Lake Erie Props., Inc.), 290 F.3d 516, 519 (3rd Cir. 2002).
[68] Watford v. Federal Land Bank of Columbia (*In re* Watford), 898 F.2d 1525, 1528 (11th Cir. 1990). *See also In re* McLawchlin, 511 B.R. 422, 427-28 (Bankr. S.D. Tex. 2014).

In *In re Two Wheels Properties, LLC,* 625 B.R. 869 (Bankr. S.D. Tex. 2020),[69] a corporation's charter had been forfeited under state law for tax reasons, state law did not permit its reinstatement in that circumstance, and state law permitted only the liquidation of its assets. The court ruled that, because the corporation could not be "engaged in commercial or business activities" under state law, it was ineligible to be a sub V debtor.

*National Loan Invs., L.P. v. Rickerson* (*In re Rickerson),* 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021) also ruled that eligibility requires that the debtor be engaged in commercial or business activities on the petition date.

The Bankruptcy Appellate Panel of the Ninth Circuit extensively reviewed the subchapter V case law on the issue in *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 (B.A.P. 9th Cir. 2022). The Ninth Circuit BAP adopted the majority view that "engaged in" is "inherently contemporary in focus and not retrospective." *Id.* at *5. The court ruled, *id.*:

> 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 [the eligibility requirement].

**2. What activities are sufficient to establish that the debtor is "engaged in commercial or business activities" when the business is no longer operating**

When an entity has gone out of business at the time of the filing of the bankruptcy case, courts concluding that sub V eligibility requires current commercial or business activities have considered whether the principal of the entity or the entity itself is nevertheless eligible based on current activities other than operating it, such as winding down its affairs or dealing with assets or creditors.

[69] *Cf. In re* BK Technologies, Inc., 2021 WL 1230123 (Bankr. N.D. W.Va. 2021) (Dismissing sub V case based on bad faith because, among other things, the debtor had liquidated its assets prior to filing the petition and, therefore, was not engaged in business).

In *In re Johnson,* 2021 WL 825156 (N.D. Tex. 2021), discussed in Section III(B)(1), the individual debtor and the debtor's spouse sought to proceed under subchapter V to deal with the debtor's personal liabilities arising out of his ownership and operation of defunct limited liability companies.

After the court concluded that that eligibility required that the debtor be engaged in commercial or business activities at the time of the filing of the petition, the court considered the debtor's argument that he was currently engaged in commercial or business activities because, as an employee, he managed the business of a limited liability company owned by the debtor's mother. The mother had acquired her interest by inheritance upon the death of her husband, who had originally organized and owned it. The debtor and spouse had no ownership interest in the mother's company.

The *Johnson* court rejected the debtor's argument. Applying dictionary definitions of "commerce" and "business" to the eligibility statute's language, the court concluded that a person engaged in "commercial or business activities" is "a person engaged in the exchange or buying and selling of economic goods or services for profit." *Id.* at *8.

Neither the debtor nor the spouse was engaged in the exchange or buying and selling of goods or services for their own profit. Because they had no ownership in the mother's company, the debtor's management of the company could not be for their indirect profit. Accordingly, the debtor's management of the mother's company as an employee and officer did not meet the requirement that the debtor be engaged in commercial or business activities. *Id.* at *8.

The court in *In re Ikalowych,* 629 B.R. 261 (Bankr. D. Colo. 2021), agreed with the rulings in *Thurmon* and *Johnson* that whether a debtor is engaged in commercial or business

activities must be determined as of the petition date. *Id.* at 280-83.[70] The *Ikalowych* court, however, held that an individual was eligible for subchapter V when the limited liability company that the debtor managed and in which the debtor held an indirect 30 percent ownership interest had surrendered its assets to the secured lender immediately before filing, but the individual was still engaged in wind down work relating to the company. *Id.* at 284-85.

Based on the text of the statute, dictionary definitions of "commercial", "business", and "activities", and phrases analogous to "commercial or business activities" in other federal statutes, *id.* at 275-79, the *Ikalowych* court reasoned that the phrase "commercial or business activities" is "exceptionally broad." *Id.* at 276.

Thus, the *Ikalowych* court interpreted "commercial or business activities" to mean, *id.* at 276:

> [A]ny private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).

In determining whether a debtor is engaged in "commercial or business activity," the court employed a "totality of the circumstances" test, which includes consideration of the circumstances immediately before and after the date of the sub V filing as well as the debtor's conduct and intent. *Id.* at 283.[71]

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[70] The *Ikalowych* court qualified its ruling, *id.* at 283:

> [F]ocusing only on the exact nanosecond the Petition was filed is a bit too narrow. For example, perhaps the Debtor did no work on the Petition Date itself. So, in considering whether the Debtor was engaged in "commercial or business activity" as of the Petition Date, the Court deems relevant the circumstances immediately preceding and subsequent to the Petition Date as well as the Debtor's conduct and intent.

[71] The court cited *Watford v. Fed. Lank Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990), which adopted a "totality of the circumstances" test to decide whether the debtor in a chapter 12 case was "engaged in a farming operation."

The *Ikalowych* court acknowledged that the facts in *Thurmon* and *Johnson* (both discussed in Section III(B)(1)) were similar to, but not the same as, the facts in the case before it. *Id.* at 285-86. The distinguishing factor was the wind down work, which included interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records. *Id.* at 285. The court reasoned, "Each category of Wind Down Work itself constitutes 'commercial or business activities' in the broad sense." *Id.* at 286.

The *Ikalowych* court also considered whether the debtor was "engaged in commercial or business activities" based on two other activities.

First, the debtor was the sole owner of a limited liability company that he formed and managed as a mechanism to obtain income through investments and the provision of services. This limited liability company owned 30 percent of the operating company just discussed and also received income from the debtor's services as a board member of a cemetery company and as a consultant for other companies. The court concluded, "Managing or directing the operations of a limited liability company is a 'commercial or business activity.'" *Id.* at 284.

Second, the court considered the debtor's employment by an insurance brokerage company (in which the debtor had no ownership interest) to sell its commercial insurance products, which had begun shortly before filing, qualified as "commercial or business activities." Under the broad scope of the definition, the court ruled, *id*. at 286 (citations to dictionary definitions omitted):

> [T]he Debtor's work as a wage earner with [the insurance company] constitutes "commercial or business activities." After all, his role is selling a product in the private

marketplace in order to make money for himself and his employer. That is what "commercial activity" and "business activity" means.

The *Ikalowych* court realized that its conclusion "suggests that virtually all private sector wage earners may be considered as 'engaged in commercial or business activities.' So be it." *Id.* at 286-87. But the court continued, this does not mean that every private sector wage earner is eligible for subchapter V because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at 287. Section III(E) discusses this aspect of the court's ruling.

*National Loan Invs., L.P. v. Rickerson (In re Rickerson),* 636 B.R. 416 (Bankr. W.D. Pa. 2021), rejected *Ikalowych's* conclusion that an employee is "engaged in commercial or business activities" for purposes of sub V eligibility. The court reasoned that the ordinary meaning of the phrase does not encompass "an employee who is in an employment relationship with an employer – at least where the employee has no ownership or other special interest with an employer." *Id.* at 426.

*Ikalowych's* broad reading, the court explained, "threatens to virtually drain it of any meaning." 636 B.R. at 426. The court continued, *id.* at 426:

> If any person who is an employee is thus engaging in commercial or business activities, and thus potentially eligible to proceed under Subchapter V, why limit it there? What about a debtor whose only source of income is Social Security – cannot such a person nonetheless be said to be engaging in commercial or business activity by purchasing food and gasoline on a regular basis, and therefore potentially be eligible to proceed under Subchapter V?

The court in *In re Offer Space, LLC,* 629 B.R. 299 (Bankr. D. Utah), concluded that a debtor no longer operating its business was nevertheless "engaged in commercial or business activities" in the circumstances of the case.

About three months before the subchapter V filing, after several months of difficulties due to legal claims and chargebacks, the debtor began informing its customers that it would be unable to continue to provide vendor marketing services, which included customer relations management, merchant account management, and marketing campaign management using proprietary software. One of its customers purchased the software in exchange for shares of its publicly traded stock. *Id.* at 302.

At the time of filing, the debtor was no longer conducting business, had no employees, and did not intend to reorganize. It had been marshaling its assets and taking steps to realize value from its assets and pay its creditors. Its assets consisted of a bank account, accounts receivable, counterclaims in a lawsuit, and the stock. *Id.* at 303

The U.S. Trustee objected to eligibility because the debtor was not an operational business on the petition date. *Id.* at 304.

Like the *Ikalowych* court, the *Offer Space* court looked to the dictionary definitions of relevant terms ("engaged," "commercial," "business," and "activity"), *Offer Space,* 629 B.R. at 305, and noted that Congress had chosen "very broad language." *Id.* at 306. The court observed that, in contrast to the definition of a family farmer in § 101(18A), which refers to a debtor engaged in a farming *operation,* the subchapter V definition uses the broader and more inclusive term, *activities. Id.* at 307.

Considering the "totality of the circumstances," the *Offer Space* court concluded that the debtor was "engaged in commercial or business activities" because it had active bank accounts,

had accounts receivable, was analyzing and exploring counterclaims in a lawsuit, was managing the publicly traded stock it acquired from the earlier sale of its main operational asset, and was winding down its business, including steps to pay creditors and realize value from its assets. *Offer Space,* 629 B.R. at 306.

The *Offer Space* court rejected the U.S. Trustee's contention that the legislative history of SBRA demonstrated that subchapter V is not available for a debtor seeking to liquidate its shutdown operations.

After concluding that the plain language of the statute made it unnecessary to consider legislative history, the court concluded that, although successful reorganizations might be the primary purpose of SBRA, noting indicated that it did not have other purposes, including "relief for small business debtors who intend to liquidate their businesses without the cumbersome structure that otherwise exists in Chapter 11." *Id.* at 307-08. Moreover, the court observed, chapter 11 permits confirmation of liquidation plans under § 1129(a)(11),[72] and Congress did not include this section in the list of those that it made inapplicable in subchapter V cases. *Id.* at 308.

The debtor in *In re Port Arthur Steam Energy, L.P.,* 629 B.R. 233 (Bankr. S.D. Tex. 2021), similarly had terminated its historical business operations before it filed its subchapter V case but was engaged in other activities that the court concluded were sufficient for it to be "engaged in commercial and business activities."

[72] Section 1129(a)(11) conditions confirmation of a plan on a determination that confirmation "is not likely to be followed by the liquidation . . . of the debtor or any successor to the debtor, unless such liquidation . . . is proposed in the plan."

The court in *In re Port Arthur Steam Energy, L.P.,* 629 B.R. 233, 237-38 (Bankr. S.D. Tex. 2021), also noted that a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. The court observed that § 1123(b)(4) permits a chapter 11 plan to provide for the sale of all or substantially all of its assets and that it is not one of the sections that is inapplicable in a subchapter V case.

Two principals of the debtor's limited partner and an independent contractor managed the debtor and maintained its facility and vehicles to preserve the value of the assets, including running technical parts of the facilities, maintaining utilities like power and water, making repairs after severe storms, and filing reports and tax returns that state and federal agencies required. The managers worked on a plan to sell assets and pay creditors in the chapter 11 case and sold one asset in the months preceding the bankruptcy filing. The debtor was also litigating a multi-million dollar lawsuit and pursuing collection remedies on an account receivable, both arising out of its prepetition transactions with a party who claimed to be a creditor in the case and objected to the subchapter V election. *Id.* at 236-37.

The court concluded that, because all of these activities were "commercial or business activities," the debtor was eligible for subchapter V relief. *Id.* at 237.

The *Port Arthur Steam Energy* court addressed the argument that eligibility for subchapter V required current operation of a business because SBRA's legislative history demonstrated that the Congressional purpose of subchapter V was to promote reorganizations. The court rejected the argument, concluding that, because the eligibility statute is not ambiguous, consideration of legislative history was not properly a part of the analysis. In any event, the court continued, a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. *Id.* at 237.

The court in *In re Blue,* 630 B.R. 179 (Bankr. M.D.N.C. 2021), held that a salaried employee who received a material contribution to her income from part-time consulting work as an independent contractor was "engaged in commercial or business activities." Agreeing with the *Offer Space* reasoning that "activities" is a much broader term than "operations," the court concluded, "[N]othing in the Bankruptcy Code or legislative history of subchapter V mandates

that commercial or business activities must be full-time to qualify, and Debtor's activities in this case are substantial and material." *Id.* at 190.

The *Blue* court also concluded that the debtor's rental of her former residence to tenants was within the broad scope of commercial or business activities. *Id.* at 194.

The *Blue* court ruled that more than 50 percent of the debtor's debts arose from commercial or business activities and that such debts did not have to arise from the debtor's current commercial or business activities for purposes of sub V eligibility. Sections III(D) and (III(E)), respectively, discuss these aspects of the court's decision.

In *In re Vertical Mac Construction, LLC,* 2021 WL 3668037 (Bankr. M.D. Fla. 2021), the debtor filed a subchapter V case to liquidate its assets and disburse the sale proceeds to creditors. Shortly after filing the petition, the debtor moved to sell its assets under § 363, and the court approved the sale.

The court denied the U.S. Trustee's objection to eligibility based on the fact that the debtor was no longer operating a business on the filing date. The court concluded that the debtor was engaged in commercial or business activities on the filing date "by maintaining bank accounts, working with insurance adjusters and insurance defense counsel to resolve [various claims] and preparing for the sale of its assets." *Id.* at * 4.

The Bankruptcy Appellate Panel of the Ninth Circuit in *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 2022 WL 1288608 at *5-6 (B.A.P. 9th Cir. 2022), adopted a broad approach to what activities qualify as "commercial or business activities" on the petition date, citing cases that earlier text discusses.

The bankruptcy court in *RS Air* had found that the debtor was engaged in commercial or business activities on the petition date by litigating with the objecting creditor, paying registry

fees for its aircraft, remaining in good standing as a limited liability company under state law, filing tax returns, and paying taxes. The bankruptcy court also found that the debtor intended to resume business operations once it was able to do so. The BAP concluded that these activities were "commercial or business activities" within the meaning of the eligibility statute. *Id.* at *6.

In a chapter 12 case, the court in *In re Mongeau,* 633 B.R. 387 (Bankr. D. Kansas 2021), ruled that debtors who had discontinued their own farming operations were nevertheless "engaged in farming" based on their involvement in the operation of farms of their extended family, their intent to continue farming operations in the future, and their ownership of some farm assets. The court relied in part on subchapter V cases concluding that winding down a business that had ceased operations on the filing date is sufficient to be "engaged" in business activities. *Id.* at 397.

## D. What Debts Arise From Debtor's Commercial or Business Activities

Eligibility for subchapter V requires that not less than 50 percent of the debtor's debts arise from the commercial or business activities of the debtor.[73] Chapter 12 similarly conditions eligibility on a specified percentage of debt arising from a farming or fishing operation.[74] The court in *In re Ikalowych,* 629 B.R. 261, 288 (Bankr. D. Colo. 2021), applying chapter 12 case

[73] The requirement is in paragraph (A) of § 1182(1), which governs subchapter V eligibility under the CARES Act, which increased the debt limit for subchapter V eligibility. When the increased debt limit sunsets on March 27, 2022, § 101(51D) will govern sub V eligibility. See Section III(B). Paragraph (A) is the same in both statutes. See Section III(B).

[74] For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor's income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

law, concluded that qualifying business debts "must be directly and substantially connected to the 'commercial or business activities' of the debtor."[75]

The *Ikalowych* court determined that the individual debtor's liability on guarantees of certain debts of a limited liability company that he managed and was winding down and of his wholly-owned operating company that provided his services and that owned 30 percent of the limited liability company met this standard.[76] Because these debts were 86 percent of his total debts, the court concluded he was eligible for subchapter V. *Ikalowych,* 629 B.R. at 288.

In *In re Blue,* 630 B.R. 179 (Bankr. M.D. N.C. 2021), the debtor had retained her former residence when she bought a new one and rented it until she evicted a tenant approximately three years before filing. Because the tenant had substantially damaged the property, the debtor owed $ 38,271.31 for partial repairs but had not been able to complete them and had not rented it in the meantime.

After determining that her rental of the property fell within the "broad scope of commercial or business activities," *id.* at 195, the court considered the question of whether the mortgage debt on the property and the repair debts arose from such activities.

The court concluded that the debtor had originally incurred mortgage debt when she purchased it for her residence and that she did not intend to lease it at that time. The court ruled, therefore, that the mortgage debt did not arise from commercial or business activities. *Id.* at 194.

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[75] The court quoted *In re Woods,* 743 F.3d 689, 698 (10th Cir. 2014), which in the chapter 12 context stated, "a debt 'for' a principal residence 'arises out of' a farming operation only if the debt is directly and substantially connected to the farming operation."

[76] Section (III)(C)(2) discusses the *Ikalowch* court's ruling that the debtor was "engaged in commercial or business activities." The court also determined that the debtor was engaged in commercial or business activities as a salaried employee, but the court concluded that those activities did not make the debtor eligible for subchapter V because none of the debts arose from that activity.

The court found that the debtor had continuously rented the property until the damage to the property occurred and that she had not rented it since then because of her inability to finance and complete necessary repairs. Because the damage occurred when she was actively renting the property, the court concluded, the debts arose from commercial or business activities. *Id.* at 195.

In *Lyons v. Family Friendly Contracting LLC (In re Family Friendly Contracting LLC),* 2021 WL 5540887 (Bankr. D. Md. 2021), the former owner of the business and an affiliate that owned the business premises had sold their interests to the current owners of the debtor and an affiliate. The sale had been financed with bank loans on which the debtor and its affiliate were jointly and severally liable. The bank loans comprised over 90 percent of the debt.

The former owner objected to the debtor's eligibility on the ground that most of the debtor's obligations to the bank were incurred primarily for the benefit of the debtor's owners and affiliate and, therefore, did not arise out of the debtor's commercial or business activities. The court concluded that the loans were part of a "fully integrated transaction" that provided benefits to the debtor. *Id.* at * 4.

In determining how much of the debtor's debt arose from its commercial or business activities, the court concluded that the eligibility statute "does not require the court to dissect the various benefits obtained by all the parties and, for purposes of § 1182(1)(A), include only debt that is linked to a direct benefit obtained by a debtor, while excluding debt that directly benefitted others." *Id.* at * 5. Accordingly, the court ruled that the debtor was eligible.

*National Loan Invs., L.P. v. Rickerson* (*In re Rickerson),* 636 B.R. 416 (Bankr. W.D. Pa. 2021), considered whether an individual's personal tax obligation qualified as a business debt. The court noted that courts had concluded that, for purposes of determining whether a debtor's

debts are "primarily consumer debts" for purposes of dismissal for abuse under § 707(b), a personal tax obligation is neither a consumer nor a business debt. *Id.* at 428.[77]

The *Rickerson* court declined to rule on that basis, however. Instead, the court concluded that taxes owed with regard to income the debtor earned from previous businesses did not arise from commercial or business activities. The obligation arose from the debtor's failure to address taxes she owned on her income, not her commercial and business activities. *Id.* at 429.

*In re Sullivan,* 626 B.R. 326 (Bankr. D. Colo. 2021), examined the question of how to determine whether debts "arose from the commercial or business activities of the debtor" in detail.[78]

The debt in question was the debtor's obligation imposed in a divorce proceeding to pay the former spouse an "equalization payment" for the former spouse's share of the value of the debtor's business that the debtor retained. Shortly after the filing of the case, the COVID-19 pandemic hit and resulted in the liquidation of the business.

Proper characterization of the equalization payment was critical because, if it were not a business debt, the debtor's business debts would be less than 50 percent of the total, and the debtor would be ineligible to be a sub V debtor. Because the court concluded that the equalization debt did not arise from a business or commercial purpose, the court ruled that the debtor was ineligible and denied confirmation of the sub V plan. *Sullivan,* 626 B.R. at 333.[79]

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[77] The court cited *In re Brashers,* 216 B.R. 59 (Bankr. D. Okla. 1998) and *In re Stovall,* 209 B.R. 849 (Bankr. E.D. Va. 1997).

[78] The definition in effect under the CARES Act is in § 1182(a)(1). See Section III(B). The *Sullivan* court discussed the definition in § 101(51D)(A), which has the same language, because the case was filed before enactment of the CARES Act, and the CARES Act applies only to cases filed after its enactment.

[79] The situation in *Sullivan* suggests two questions.

The first is whether the former spouse or any other party in interest timely objected to the debtor's sub V election as Interim Bankruptcy Rule 1020(b) requires. The court did not address whether a court may consider an out-of-time objection to the subchapter V election or whether the court may raise the issue *sua sponte* after the time for an objection has expired.

The *Sullivan* court began its analysis by noting that, although the Bankruptcy Code does not define when a debt arises from "commercial or business activities," it defines "consumer debts" in § 101(18) as "debts incurred by an individual primarily for a personal, family, or household purpose." In determining whether a debt is for a "personal, family, or household purpose," the court continued, courts have focused on the debtor's purpose in incurring the debt,[80] reasoning that a debt incurred with a "profit motive" or an "eye toward profit" is not a consumer debt. *Id.* at 330-31.[81] The court noted rulings that student loans,[82] alimony obligations,[83] and divorce-related debts are consumer debts.[84]

The debtor argued that the equalization debt arose from business or commercial activities because it represented a transfer of the value of the business, akin to one partner's buy-out of another's interest in a business. The court acknowledged, "[I]t is possible to characterize this debt as a business debt and it is possible to treat many otherwise personal or family debts as debts incurred with an eye toward profit," but noted that the profit motive inquiry raised difficulties: "Probably all courts would agree that the home mortgage debt is a consumer debt and yet the family home is the asset that most families view as their greatest investment – the one that they purchase with an eye toward appreciation in value." *Sullivan,* 626 B.R. at 331.

Because the legislative history of the definition of "consumer debt" in § 101(8) indicated that it was adapted from consumer protection laws and because the § 101(8) definition mirrors

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A second, more practical, question is what benefit the debtor expected to gain from a successful subchapter V case. Any debt arising from a separation agreement or divorce decree that is not a domestic support obligation is excepted from discharge under § 523(a)(15), and the sub V discharge of an individual is subject to all exceptions in § 523(a). See Part IX. A plan could not have eliminated the debtor's liability for the equalization payment.

[80] The court cited *In re* Garcia, 606 B.R. 9, 106 (Bankr. D. N.M. 2019).

[81] The court cited Stewart v. U.S. Trustee (*In re* Stewart), 175 F.3d 769, 806 (10th Cir. 1999) and *In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988).

[82] The court cited Stewart v. U.S. Trustee (*In re* Stewart*)*, 175 F.3d 769, 807 (10th Cir. 1999).

[83] The court cited Stewart v. U.S. Trustee (*In re* Stewart*)*, 175 F.3d 769, 807 (10th Cir. 1999).

[84] The court cited Kestell v. Kestell (*In re* Kestell), 99 F.3d 146, 149 (4th Cir. 1996); *In re* Garcia, 606 B.R. 98, 105 (Bankr. D. N. M. 2019), and *In re* Traub, 140 B.R. 286 (Bankr. D. N.M. 1992).

the definition of consumer debt in the Truth in Lending Act ("TILA"), the court sought further guidance from cases interpreting the TILA. *Id.* at 331-32.

Cases under the TILA, the court explained, focus on the purpose of the loan transaction. The *Sullivan* court quoted a five-factor test that another court employed in *Sundby v. Marquee Funding Group, Inc.,* 2020 WL 5535357 at * 8-9 (S.D. Ca. 2000) (internal quotations and citations omitted):

> 1. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be a business purpose.
>
> 2. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.
>
> 3. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.
>
> 4. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.
>
> 5. The borrower's statement of purpose for the loan.

The *Sullivan* court concluded that the first four of these factors favored characterization of the equalization debt as a business debt. But the court questioned whether it had a business purpose. "While the debtor characterizes the equalization payment as payment for the [debtor's business], the separation agreement does not describe it in that fashion. Rather, it states that it was a payment 'to equalize the division of marital property . . . .', and [the business] was only one asset of their marital property." *Sullivan,* 626 B.R. at 332.

The *Sullivan* court next looked to federal tax law as a source for distinguishing between "business" and "personal" payments in that it generally permits a deduction for "ordinary and necessary business expenses," but not for most personal expenses. *Id.* at 332-33.

The court analyzed the Supreme Court's decision in *United States v. Gilmore,* 372 U.S. 39 (1963), which held that a taxpayer could not deduct legal fees incurred in connection with the division of business interests in a divorce proceeding as a business expense. Rejecting the taxpayer's argument that the legal fees were a business expense because they were incurred to protect interests in various corporations, the Supreme Court held that the focus should be on "the original character of the claim with respect to which an expense was incurred, rather than its potential consequences on the fortunes of the taxpayer." 372 U.S. at 49. Because the spouse's claims stemmed entirely from the marital relationship, and not from income-producing activity, the Supreme Court concluded that the legal fees were not business expenses and denied the deduction. *Id.* at 52. The *Sullivan* court noted that the Supreme Court stated, "[T]he marriage relationship can hardly be deemed an income-producing activity." *Sullivan,* 626 B.R. at 333, *quoting Gilmore,* 372 U.S. at 52 n. 22.

After analyzing marriage dissolution under state law as an equitable proceeding including the division of marital property to each spouse of what equitably belongs to each spouse, the *Sullivan* court concluded, 626 B.R. at 333 (citations omitted):

> [T]he equalization payment debt is rooted and grounded in the equitable termination of their marriage. The equitable distribution of their marital property was not a business or commercial transaction – it did not stem from a profit motive. Instead, it was a method of ensuring that each spouse received their fair share of marital property. This is inherently a personal and family-related purpose. The fact that the parties' marital

property included a business does not alter the underlying purpose of the property division.

## E. Whether Debts Must Arise From Current Commercial or Business Activities

Eligibility for subchapter V requires that the debtor be "engaged in commercial or business activities" and that not less than 50 percent of the debtor's debts arise from "the commercial or business activities of the debtor." § 101(51D)(A); §1182(1)(A).

In *In re Ikalowych,* 629 B.R. 261 (Bankr. D. Colo. 2021), the court concluded that an individual working as a salaried employee was engaged in commercial or business activities. *Id.* at 286. The court observed that, although this ruling suggested "that virtually all private sector wage earners may be considered as 'engaged in commercial or business activities,'" *id.* at 286-87, this did not mean that every private sector wage earner is eligible for subchapter V relief because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at 287. Thus, the court concluded that debtor's employment did not make him eligible for subchapter V because none of the debts arose from that activity. *Id.* at 287.

The court's conclusion was not necessary for the decision; the court determined that most of the debtor's debts arose from other commercial or business activities. Nevertheless, the implication may be that eligibility requires that more than 50 percent of the debtor's debts must be connected to current commercial or business activities.

The court in *In re Blue,* 630 B.R. 179 (Bankr. M.D. N.C. 2021), addressed this issue and ruled that no connection is necessary. There, the debtor filed a subchapter V case to deal with debts arising from her ownership and operation of a corporation that had discontinued its operations about 21 months earlier, as well as other debts. At the time of filing, the debtor was a

salaried, full-time, W-2 employee. In addition to her income, the debtor worked part-time for two different companies as an independent contractor.

As section III(C)(2) discusses, the *Blue* court determined that the debtor's work as an independent contractor constituted "commercial or business activities." The Bankruptcy Administrator, however, argued that the debtor was not eligible for subchapter V because no nexus existed between the debtor's current activities as an independent contractor and the debts arising from her previous activities. *Id.* at 191.

The premise of the argument is based on the language of the eligibility requirement, which states that not less than 50 percent of the debtor's debt must arise from "*the* commercial or business activities of the debtor." § 101(51D)(A); § 1182(1)(A) (emphasis added). Use of the word "the" at the end of paragraph (A), the argument continues, implies a reference to the same "commercial or business activities" in which the debtor must be engaged under the language at the beginning of paragraph (A).

The *Blue* court rejected the argument, concluding, "Such an implication is not required by the language of the statute, and would be far too limiting for the remedial purposes of subchapter V." *Id.* at 191. The court reasoned that courts have interpreted and applied the eligibility statute broadly, citing cases noting that the purposes of SBRA include providing relief for debtors that intend to liquidate their businesses without the cumbersome structure that otherwise exists in chapter 11[85] and that debtors may proceed under subchapter V even though their debts stem from both currently operating and non-operating businesses.[86] *Id.* at 191.

The *Blue* court concluded, *id.* at 191:

[85] The court cited *In re Offer Space, LLC,* 629 B.R. 299, 303 (Bankr. D. Utah 2021).
[86] The court cited *In re Blanchard,* 2020 WL 4032411 at *2 (Bankr. E.D. La. 2020).

> [D]ebtor intends to use subchapter V to address both defunct and non-defunct commercial and business activities, and the more straightforward interpretation of § 1182(1)(A) does not require a connection of debts to current business activities. Nothing in the statute requires that there be a nexus between the qualifying debts and the Debtor's current business or commercial activities. Moreover, such an interpretation could, for example, disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations. The Court will not interpret subchapter V as narrowly as suggested by the BA.

## F. What Debts Are Included in Determination of Debt Limit

A debtor is not eligible for subchapter V if the "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" exceed the applicable debt limit. Debts owed to affiliates or insiders are excluded from the calculation. As Section III(B) explains, the Bankruptcy Threshold Adjustments and Technical Corrections Act ("BTATCA")[87] provides that § 1182(1) governs eligibility for subchapter V until June 20, 2024. Thereafter, a debtor must be a "small business debtor" as defined in § 101(51D) to be eligible for subchapter V.

Under both statutes, however, a debtor is ineligible if the debtor is a member of a group of affiliated debtors when the aggregate of all such debts of all of the affiliates exceeds the debt limit. § 101(51D)(B)(i); § 1182(1)(B)(i). Only the debts of affiliates who are debtors in a bankruptcy case are included.[88]

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[87] Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").

[88] As enacted by SBRA, both statutes excluded "any member of a group of affiliated debtors" with debts in excess of the debt limit. The Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"), effective June 21, 2022, added "under this title" after "affiliated debtor." BTATCA §§ 2(a)(1), 2(d). Thus, both § 101(51D)(i) and

The requirement that debts be "liquidated" and "noncontingent" for inclusion in the debt limit also appears in the eligibility requirements for relief under chapters 12[89] and 13.[90]

The court in *In re Parking Management, Inc.,* 620 B.R. 544 (Bankr. D. Md. 2020), considered subchapter V's eligibility debt limits, noting that courts had addressed similar language governing debt limitations in chapter 12 and 13 cases. The court observed that the standards in those cases provide useful guidance but that subchapter V cases involve more complex creditor relationships. *Id.* at *5.

The court concluded that claims for damages arising from the rejection of unexpired leases were contingent, *id.* at *5-7, and that the debtor's obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated, *id.* at 9-12. Because these debts were not included in the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

*In re 305 Petroleum, Inc.,* 622 B.R. 209 (Bankr. S.D. Miss. 2020), considered the exclusion of debts of debtors in an affiliated group. Four affiliated debtors filed chapter 11 cases. Each of them had elected subchapter V, but one was a single asset real estate debtor that was ineligible for subchapter V. In this opinion, the court considered whether the three debtors were also ineligible because the debt of all of the affiliates exceeded $ 7.5 million. Without including the SARE debtor, the debt of all of the affiliates was less than $ 7.5 million.

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§ 1182(1)(B)(i) now provide for the exclusion of "any member of a group of affiliated debtors under this title" with debts that exceed the debt limit. Under the amendment, therefore, debts of affiliates who are not in bankruptcy are disregarded. BTATCA resolved another issue discussed *infra* note 95.

The amendments apply in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[89] Chapter 12 is available only to a "family farmer" or "family fisherman" under § 109(f). Definitions of the terms include the debt limit requirement. §§ 101(18)(A); 101(19A)(A)(i).

[90] § 109(e). For a discussion of what debts are "liquidated" and "noncontingent" for purposes of the debt limitation in chapter 13 cases, *see generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 12:8, 12:9.

The court concluded that the debts of all filing affiliates were included in the debt limit and that, therefore, none of them were eligible because their collective debts exceeded $ 7.5 million.[91]

[91] The court analyzed the issue under the definition of small business debtor in § 101(51D) and reached the correct result under its provisions. Paragraph (B) of § 101(51D) excludes "any member of a group of affiliated *debtors*" (emphasis added) if the group's debts collectively exceed the limit. "Debtor" is defined in § 101(13) as a person "concerning which a case under [title 11] has been commenced." Because all of the entities had filed bankruptcy petitions and they were affiliates, each was a member of a group of affiliated debtors with aggregate debts in excess of the limit. Therefore, none of them were eligible.

But because the case arose after the CARES Act, the applicable statute was § 1182(1), as section III(B) discusses. Although § 1182(1) at the time used the same language as § 101(51D), the outcome was potentially different.

As amended by the CARES Act, § 1182(1)(A) defined "debtor" for purposes of subchapter V, and it was part of subchapter V. BTATCA enacted a revised § 1182(1)(A), discussed below.

Because § 1182(1)(A) defined "debtor" at the time of the *305 Petroleum* case, the definition of "debtor" in § 101(13) arguably did not apply. The definition of "debtor" in § 1182(1)(A) excluded an SARE debtor. Because the SARE was not a "debtor" under the § 1182(1)(A) definition, it arguably was not in the group of "affiliated debtors" for purposes of the exclusion in § 1182(1)(B)(i). Consequently, its debts would not be included in determining eligibility. In other words, "debtors" in § 1182(1)(B)(i) meant "debtors" under (1)(A), which did not include an SARE.

An argument in favor of this reading is that, if Congress had intended otherwise, it would have used "persons" in (B)(i), or more simply, "affiliates", so that § 1182(1)(B)(i) would read as follows:

(1) Debtor. -- The term "debtor"—

(B) does not include –

(i) any member of a group of [*affiliates* or *affiliated persons*] that has [debts greater than $7.5 million].

Under this analysis, the non-SARE debtors in *350 Petroleum* would be eligible for subchapter V because the SARE entity is excluded.

The argument against this interpretation is that Congress in the CARES Act amendments did not intend to change the eligibility requirements of § 101(51D) other than to increase the debt limit. Moreover, the contrary interpretation involves a circular definition of "debtor." It requires use of the § 1182(1) definition of "debtor" to determine the meaning of "debtors" in one part of the definition. This creates an ambiguity that leads to an interpretation that uses the general definition of debtor in § 101(13) as the proper definition of the term in (1)(B). The ineligibility of all of the debtors in *350 Petroleum* then follows even under the CARES Act version of § 1182(1).

BTATCA resolves the issue. It added language to paragraph (B)(1) of both § 101(51D) and § 1182(1) so that both provisions now exclude "any member of a group of affiliated debtors *under [title 11]*" (emphasized language added) whose debts exceed the debt limit. BTATCA §§ 2(a)(1), (d). Accordingly, the debts of affiliates who are not bankruptcy debtors are not included in the debt limits.

## G. Ineligibility of Corporation Subject to SEC Reporting Requirements and of Affiliate of Issuer

The SBRA added two exclusions from the definition of "small business debtor" that did not previously exist. Later legislation made a technical correction to the SBRA language.[92]

As amended by SBRA, the definition of "small business debtor" does not include a debtor that "is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)." § 101(51D)(B)(ii). Under § 1182(1), which governs sub V eligibility until June 20, 2024,[93] identical language makes such a debtor ineligible for subchapter V. § 1182(1)(B)(ii). In general, the provisions of the Securities Exchange Act require reporting by any public company.

As amended by the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA"),[94] paragraphs (B)(iii) of both § 101(51D) and § 1182(1) also exclude "an affiliate of a corporation described in clause (ii)" that, as just explained, is a public company. [95]

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[92] See Section III(B).

[93] See Section III(B).

[94] BTATCA §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA"). The amendment applies to cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[95] As originally enacted by SBRA, paragraph (B)(iii) provided that a small business debtor did not include "an affiliate of a debtor." SBRA § 4(a)(1). For a discussion of the issues relating to this provision, *see* Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 7.

The CARES Act made a technical correction to (B)(iii). CARES Act § 1113(a)(4)(A). The revised (B)(iii) excluded "any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c))." The temporary § 1182(1) that the CARES Act enacted contained the identical exclusions in (B)(iii). CARES Act § 1113(a)(1).

Section 3(8) of the Securities Exchange Act defines "issuer" as "any person who issues or proposes to issue any security." 15 U.S.C. § 78(c)(8). Section 3(10) broadly defines "security" as including, among other things, any "stock," "certificate of interest or participation in any profit-sharing agreement," or "investment contract." 15 U.S.C. § 78(c)(10).

Read broadly, the exclusion for the affiliate of an issuer under the CARES ACT version of (B)(iii) would render ineligible any debtor that is an affiliate of any corporation or other limited liability entity. By definition, stock in a corporation or an interest in a limited liability entity is a "security." Thus, for example, if an individual has a sufficient equity interest in two or more such entities to qualify as an "affiliate" under § 101(2), all of the affiliates would be disqualified. Similarly, if one entity is an affiliate of another, neither could be a small business or sub V debtor.

*In re Serendipity Labs, Inc.,* 620 B.R. 679 (Bankr. N.D. Ga. 2020), considered whether the corporate debtor was an affiliate of a publicly traded company. The public company owned more than 27 percent of the voting shares of the debtor but only 6.51 percent of the voting shares of the debtor entitled to vote on the debtor's bankruptcy filing. The debtor argued that, in determining whether the public company was an "affiliate" within the definition of § 101(2)(a), the court should count only the shares with power to vote on the matter before the court, *i.e.,* the bankruptcy filing.

Section 101(2)(a) defines "affiliate" to include "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." The *Serendipity Labs* court noted that the Bankruptcy Code does not define "voting securities" but that the Securities Exchange Commission in 17 C.F.R. § 230.405 defined "voting securities" as " securities the holders of which are presently entitled to vote for the election of directors." The court concluded that this unambiguous definition is the appropriate one to use for purposes of § 101(2)(a). 620 B.R. at 683. All of shares held by the public company met this requirement.

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The court in *In re Phenomenon Marketing & Entertainment, LLC,* 2022 WL 1262001 (Bankr. C.D. Cal. 2022), applied this reading of the statute to conclude that a limited liability company was not eligible to be a subchapter V debtor because affiliates of the debtor were "issuers." One of the affiliates was the sole member of the debtor, and another affiliate was the sole member of the debtor's member.

The court ruled that the affiliates were "issuers" under the Securities Exchange Act even though the securities were not publicly traded. *Id.* at *3-4. The court ruled that the plain meaning of the statute required the result and that it was not absurd. *Id.* at *5

Congress could not have intended this result. The appropriate interpretation of the CARES ACT version of (B)(iii) would limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii). *See* Mark T Power, Joseph Orbach, and Christine Joh, et al, *Not so Technical: A Flaw in the CARES Act's Correction to "Small Business Debtor,* 41-Feb Amer. Bankr. Inst. J 32, 33 (2022) ("It is evident that Congress intended to exclude from subchapter V eligibility public companies, including affiliates.").

BTATCA amended (B)(iii) in both § 101(51D) and § 1182(1) to resolve the issue. As the text states, (B)(iii) excludes an affiliate of a public company rather than an affiliate of an issuer. The amendment thus abrogates the ruling in *In re Phenomenon Marketing & Entertainment, LLC,* 2022 WL 1262001 (Bankr. C.D. Cal. 2022).

Analyzing a split of authority on the issue in other contexts, the *Serendipity Labs* court ruled that the language of § 101(2)(a) did not limit the meaning of "voting securities" to those entitled to vote on the matter before the court. The court reasoned that "power to vote" in § 101(2)(a) modifies only the holding of securities, not their ownership or control. Because the public company owned more than 20 percent of the debtor's voting securities, it was an affiliate. Accordingly, the debtor, as an affiliate of an issuer, was ineligible for subchapter V. 620 B.R. at 685.

## IV. The Subchapter V Trustee

### A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.[96] The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12 and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.[97]

The United States Trustee Program has selected a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.[98] The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated,

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[96] § 1183(a). SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

[97] § 1181(a). Section 1104, which governs the appointment of a trustee in a traditional chapter 11 case, does not apply in sub V cases. In a sub V case, the U.S. Trustee's appointment of the trustee is not subject to the court's approval as it is under § 1104(d).

[98] *See* Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP's Implementation of the HAVEN Act and the SBRA,* 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

"There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee."[99]

The trustee must be a "disinterested person. § 1183(a). Section 101(14) defines a disinterested person as a person that, among other things, "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." § 101(14)(C).

In *In re 218 Jackson LLC,* 631 B.R. 937 (Bankr. M.D. Fla. 2021), the court ruled that the sub V trustee was not a disinterested person because he was not impartial. The trustee represented a creditor in a chapter 11 bankruptcy case in which the principals of the debtor were the same as those in the case before it. The trustee's representation of the creditor included representation in a state court lawsuit against the principals.

Noting that a unique duty of a sub V trustee is the facilitation of a consensual plan (see Section IV(B)(1)), the court concluded that a sub V trustee must be independent and impartial. *Id.* at 948. The court observed that the trustee had been "openly and actively adverse" to the debtor and that time records showed "no time trying to bring the parties together or encouraging a consensual plan of reorganization." *Id.*

On the facts before it, the court determined that cause existed to remove the trustee under § 324 because the trustee was not independent and impartial and had an interest materially adverse to the debtor's principals. *Id.* at 949. Because, due to the conflict, the trustee's fees were not reasonable or necessary, the court denied the request for compensation.

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[99] *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), *available at* https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

## B. Role and Duties of the Subchapter V Trustee

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. But as later text discusses, a sub V trustee has the specific duty to "facilitate the development of a consensual plan of reorganization." §1183(b)(7). Sub V trustees may, therefore, confront issues that are quite different from those that trustees in other cases deal with.[100]

Section 1183 enumerates the trustee's duties. Section 1106, which specifies the duties of the trustee in a traditional chapter 11 case, does not apply in sub V cases.[101] §1183, however, makes many of its provisions applicable in some circumstances. As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under §1185(a), the trustee operates the business of the debtor.[102]

For a general discussion of a subchapter V trustee's role and duties, see *In re 218 Jackson LLC,* 631 B.R. 937, 946-48 (Bankr. M.D. Fla. 2021).

### 1. Trustee's duties to supervise and monitor the case and to facilitate confirmation of a consensual plan

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan.[103] Because the subchapter V trustee is a fair and

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[100] The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee's role in the case. U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK]. For a discussion of the sub V trustee's duties and role in the case, and strategic considerations for creditors, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 251, 260-62, 267-71 (2020).

[101] § 1181(a).

[102] § 1183(b)(5).

[103] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 1-1, provides an overview of the sub V trustee's duties:

> In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor's payments under the confirmed plan of reorganization. In certain

impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V advise the court of the trustee's positions and recommendations concerning issues affecting administration of the case.[104] The sub V trustee's role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

First, the sub V trustee has the duty to "facilitate the development of a consensual plan of reorganization."[105] No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan."[106] One practitioner has suggested that the sub V trustee should be a "financial wizard" who can work with all parties on cash flows, interest rates, payment requirements, and "all the numbers puzzles that comprise a plan," and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.[107] The United States Trustee Program expects sub V trustees to be proactive in the plan process.[108]

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> instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.

The Handbook notes, "The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case." *Id.* at 2-2. For a summary of the U.S. Trustee Program's views of the sub V trustee's duties, see *id.* at 1-5 to 1-7.

[104] *E.g., In re* Major Model Management, Inc., 2022 WL 2203143 at *16 (Bankr. S.D.N.Y. 2022) (Requesting sub V trustee's views concerning whether class proof of claim should be permitted and agreeing that claims allowance process was the better approach).

[105] § 1183(b)(7).

[106] § 1302(b)(4).

[107] Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers,* 38 AMER. BANKR. INST. J. 8 (Nov. 2019). *See also* Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 251, 261 (2020) ("Trustees seem likely to play the role of mediator.").

[108] The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-9, states:

> As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon

Second, the trustee must appear and be heard at the status conference that §1188(a) requires.[109] Although § 105(d) (which does not apply in a sub V case under §1181(a)) provides for a status conference in any case on the court's own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.[110] The trustee's duty to appear and be heard regarding confirmation gives the trustee standing to object to confirmation.[111]

The responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor's property, business, and financial condition.[112] Like a chapter 12 trustee, however, a sub V trustee does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a traditional chapter 11 case has a broad duty of investigation under § 1106(a)(3) unless the court orders otherwise.

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> the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

When the plan is filed, the Handbook advises the sub V trustee to "review the plan and communicate any concerns to the debtor about the plan prior to the confirmation hearing." *Id.*

[109] § 1183(b)(3). *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-8 ("The trustee should review the debtor's report carefully. . ." and "should be prepared to discuss the debtor's report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.").

[110] § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

[111] *In re* Topp's Mechanical, Inc., 2021 WL 5496560 at *1 n.1 (Bankr. D. Neb. 2021)

[112] *In re* Ozcelebi, 2022 WL 990283 at * 8 (Bankr. S.D. Tex. 2022) ("The responsibility of the subchapter V trustee to participate in the plan process and to be heard on the plan and other matters cloaks the subchapter V trustee with the statutory right to obtain information about the debtor's property, business, and financial condition.").

The court may impose the investigative duties that § 1106(a)(3) specifies for a chapter 11 trustee in a traditional case on the sub V trustee. Under §1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a).

The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)[113]); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).[114] The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

In *In re 218 Jackson LLC,* 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021), the court observed that, given (1) the trustee's duty to facilitate a consensual plan, (2) the fact that the debtor remains in possession of estate property, and (3) the absence of a requirement that the trustee investigate the financial affairs of the debtor unless the court orders otherwise, "It is not a stretch then to conclude that the subchapter V trustee's role was intentionally designed to be less adversarial."

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[113] Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors' committee, equity security holders' committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

[114] § 1183(b)(2). In *In re AJEM Hospitality, LLC*, 2020 WL 3125276 (M.D.N.C. 2020), the court on motion of the bankruptcy administrator, and with the consent of the debtor and sub V trustee, authorized the trustee to conduct an investigation limited to the investigation of potential intercompany claims. The court noted, "The language of [§ 1106(a)(3)] specifically allows the Court to limit the scope of an investigation 'to the extent that the court orders . . . .'" *Id*. at *2.

Nevertheless, the trustee's monitoring and supervisory responsibilities include oversight of the debtor's compliance with the Bankruptcy Code.[115] Thus, when circumstances in the case raise significant questions such as the debtor's true financial condition, what property is property of the estate, the debtor's management of the estate as debtor-in-possession, and the accuracy and completeness of the debtor's disclosures and reports, a court may expect parties who have identified potential issues – including creditors, the U.S. Trustee, or the subchapter V trustee – to request an order under § 1183(b)(2) requiring the trustee to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, as well as other matters relevant to the case or formulation of a plan.[116]

**2. Other duties of the trustee**

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),[117] a sub V trustee under §1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).[118] Under §1183(b)(4),

[115] *See In re* Major Model Management, Inc., 2022 WL 2203143 at *16 (Bankr. S.D.N.Y. 2022) (The subchapter V trustee "has a fiduciary duty to ensure compliance with the Bankruptcy Code.").
[116] *In re* Ozcelebi*,* 2022 WL 990283 at * 8 (Bankr. S.D. Tex. 2022).
[117] Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor's intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.
[118] § 1183(b)(1).

the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).[119]

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.[120] The U.S. Trustee Program has developed procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor their performance.[121]

**3. Trustee's duties upon removal of debtor as debtor in possession**

Under § 1185(a), the court may remove the debtor as debtor in possession. If the court does so, the sub V trustee under § 1183(b)(5) has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106.[122] In addition, § 1183(b)(5)(B) authorizes the trustee to operate the debtor's business when the debtor is removed from possession.[123] Similar provisions apply in chapter 12 cases.[124]

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[119] § 1183(b)(4).

[120] 28 U.S.C. § 586(a)(3). SBRA § 4(b)(1)(A) amended 28 U.S.C. § 586(a)(3) to include sub V cases within the types of cases that the U.S. Trustee supervises.

[121] SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, ch. 8. *See also* U.S. DEP'T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020) §§ 3-17.16, 3-17.16.1, 3.17.1.2, 3.17.16.3, 3.17.16.5, 3.17.16.6, https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra,* directs sub V trustees to consult with the U.S. Trustee before filing an objection to confirmation (*id.* at 3-9, 3-10, 3-12), objecting to a claim (*id.* at 3-15), or filing a motion to dismiss or convert (*id.* at 3-17).

[122] Section 1183(b)(5) also requires the sub V trustee to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

[123] As originally enacted by SBRA, § 1183(b)(5) required that, upon removal of the debtor in possession, the trustee "perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of [§ 1106(a)], including operating the business of the debtor."

The Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATAC"), effective June 21, 2022, amended § 1183(b)(5), dividing it into two subparagraphs. Subparagraph (A) retains the requirement that the trustee perform the duties specified in the enumerated sections of § 1106(a). Subparagraph (B) states that the trustee is "authorized to operate the business of the debtor," thus removing operation of the business as a mandatory requirement. BTATCA § 2(e). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[124] The court may remove a chapter 12 debtor from possession under § 1204. Under § 1202(b)(5), the chapter 12 trustee then has the duties of a trustee under § 1106(a)(1), (2), and (6). §§ 1106(a), 1202(b).

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).[125]

Paragraph (2) of § 1106(a) requires the trustee to file any list, schedule, or statement that § 521(a)(1) requires if the debtor has not done so. Paragraph (6) requires the trustee to file tax returns for any year for which the debtor has not filed a tax return.

The trustee's duties do not, however, include the filing of a plan, which only the debtor can do under §1189(a). Section V(C) discusses issues arising from the trustee's lack of authority to file a plan.

## C. Trustee's Disbursement of Payments to Creditors

### 1. Disbursement of preconfirmation payments and funds received by the trustee

Paragraphs (a) and (c) of §1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any

[125] § 1106(a)(1).

operative effect. Nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

Section 1194(a) states that the trustee shall retain any "payments and funds" received by the trustee until confirmation or denial of a plan.[126] Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, §1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases.[127]

Provisions for a trustee's disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the

[126] § 1194(a).

[127] §§ 1194(a), 1226(a), 1326(a)(2). The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee are allowable as an administrative expense and as such are within the scope of the deduction.

The chapter 13 provision, § 1326(b)(2), does not specifically provide for fees of the chapter 13 trustee. It does provide for the trustee to deduct adequate protection payments.

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2) (2018); *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5. Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee's fee that has already been paid. A non-standing chapter 13 trustee's fee is included in the deduction because it is an administrative expense.

chapter 13 case.[128] If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

No such provisions for preconfirmation payments exist in a sub V case. Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the court to require the debtor to make preconfirmation payments to the trustee.

Nevertheless, paragraph (c) of §1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim.[129] But a court can hardly require a sub V trustee to make adequate protection payments as §1194(c) contemplates if the trustee has no money to make them.

It is perhaps arguable that the §1194(a) and (c) provisions impliedly authorize the court to require a debtor to make preconfirmation payments to the trustee, particularly if the court orders the trustee to make adequate protection payments. But the concept of the sub V debtor remaining in possession of its assets and operating its business includes the debtor retaining control of its funds. It is more appropriate (and simpler) for a court to require the debtor, not the trustee, to make whatever adequate protection or other payments the court orders.

**2. Disbursement of plan payments by the trustee**

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under §1194(b), the trustee makes payments under a plan confirmed under the cramdown provisions of §1191(b), unless the plan or

[128] § 1326(a).
[129] § 1194(c).

confirmation order provides otherwise.[130] If a consensual plan is confirmed under §1191(a), however, the trustee's service terminates under §1183(c) upon "substantial consummation,"[131] and the debtor makes plan payments.[132] Part IX discusses payments under the plan.

## D. Termination of Service of the Trustee and Reappointment

### 1. Termination of service of the trustee

When termination of the trustee's service occurs depends on whether the court confirms a consensual plan under §1191(a) or confirms a plan that one or more impaired classes of creditors have not accepted under the cramdown provisions of §1191(b).

When the court confirms a consensual plan under §1191(a), the trustee's service terminates upon substantial consummation,[133] which ordinarily occurs when distribution commences.[134] Confirmation of a plan under the cramdown provisions of §1191(b) does not terminate the trustee's service. As just discussed, the trustee continues to serve and makes payments under the plan as §1194 requires.

Part IX further discusses these provisions.

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.[135]

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[130] §1194(b).
[131] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.
[132] § 1191(a).
[133] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.
[134] § 1183(c). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.
[135] Section 701(a) directs the U.S. Trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

Sections 1202 and 1302 provide for a standing trustee to serve in cases under those chapters, if one has been appointed, or for the U.S. Trustee to appoint a disinterested person to serve as trustee.

### 2. Reappointment of trustee

Section 1183(c)(1) provides for the reappointment of a trustee after termination of the trustee's service in two circumstances.

First, §1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under §1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.[136] The reason for this provision is unclear.

Cramdown confirmation does not terminate the service of the sub V trustee. Therefore, if a debtor seeks modification after cramdown confirmation, the trustee is in place, so reappointment is unnecessary. When confirmation of a consensual plan has occurred, the trustee's service terminates upon substantial consummation,[137] after which §1193(b) prohibits modification. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial consummation.

Second, §1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under §1185(a). §1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter."[138] Because §1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and the business. Section XII(B) further discusses the postconfirmation removal of the debtor in possession.

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[136] § 1183(c)(1).
[137] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.
[138] § 1185(a).

## E. Compensation of Subchapter V Trustee

If the trustee in a sub V case is a standing trustee, the trustee's fees are a percentage of payments the trustee makes to creditors under the same provisions that govern compensation of standing chapter 12 and chapter 13 trustees.

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As Section IV(E)(2) discusses, some observers expected that technical amendments would impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.[139] Some of them, however, have indicated that it is unlikely that this will occur in the foreseeable future.

### 1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.[140] As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e),[141] the U.S. Trustee Program establishes the compensation for a standing sub V trustee in the same manner it does for standing chapter 12 and 13 trustees.[142] Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12 and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing

[139] The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.
[140] SBRA § 4(a)(4).
[141] SBRA § 4(b)(1)(D).
[142] 28 U.S.C. § 586(e).

subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation[143] of a consensual plan under §1181(a) (as Section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court "shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."[144] The limits require reference to the standing trustee's maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

**2. Compensation of non-standing subchapter V trustee**

Questions have arisen concerning the provisions of the new statute for compensation of a subchapter V trustee who is not a standing trustee.

Section 330(a) permits the court to award compensation to trustees. Sections 326(a) and (b) impose limits on compensation of trustees. SBRA does not amend § 330(a), but it does amend §§ 326(a) and (b). Under a "plain meaning" interpretation of these provisions as amended, a non-standing sub V trustee is entitled to "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" under § 330(a), and §§ 326(a) and (b) do not impose any limits on compensation.

[143] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.
[144] 28 U.S.C. § 586(e)(5).

In *In re Tri-State Roofing,* 2020 WL 7345741 (Bankr. D. Idaho 2020), the court ruled that § 326(b) does not prevent an award of compensation to a sub V trustee under § 330(a)(1) and that it does not place a cap on such compensation.

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.[145] The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.[146]

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to "five percent upon all payments under the plan." Although it appears the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V trustee.[147] Observers close to the legislative process expected a technical amendment to resolve

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[145] See *supra* note 139.

[146] *See generally In re* Louis, 2022 WL 2055290 at * 11 n. 10 (Bankr. C.D. Ill. 2022) (Noting that the absence of a cap on compensation may have been a drafting error and but that the United States Trustee Program's position is that compensation may be awarded without regard to a cap, the court awarded compensation to the subchapter V trustee without applying a cap and without deciding the issue in the absence of any objections).

[147] A full understanding of the issue requires further elaboration.

Section 330(a) provides for the allowance of compensation to "trustees," subject to § 326 (and other sections). SBRA does not amend § 330(a).

SBRA did not change the provisions of subsections (a) and (b) of § 326(a) with regard to compensation of trustees other than sub V trustees. Thus, § 326(a) limits the compensation of a chapter 11 (and chapter 7) trustee to a percentage of moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor.

Section 326(b) deals with compensation of trustees in chapter 12 and 13 cases in two ways. First, it provides that a standing chapter 12 or 13 trustee is not entitled to compensation under § 330(a); instead, a standing chapter 12 or 13 trustee receives compensation, and collects percentage fees, under 28 U.S.C. § 586(e). Second, § 326(b) limits the compensation of a non-standing chapter 12 or 13 trustee to "five percent upon all payments under the plan." § 326(b). The exact language of § 326(b) is that the limitation applies to a "trustee appointed under section 1202(a) or 1302(a) of this title." *Id.*

Generally, then, pre-SBRA § 326(a) dealt with chapter 7 and 11 cases and § 326(b) dealt with chapter 12 and 13 trustees. Without an amendment, a sub V trustee would be a chapter 11 trustee, and § 326(a) would apply. Similarly, unamended §326(b) would not apply because it is for chapter 12 and 13 cases.

SBRA § 4(a)(4)(A) amended § 326(a) by excluding sub V trustees from its application. SBRA § 4(a)(4)(B) amended § 326(b) to prohibit a standing sub V trustee from receiving compensation under § 330. SBRA's amendments to 28 U.S.C. § 586(e) provide for compensation of a standing sub V trustee under its provisions, so the same provisions that govern compensation of standing chapter 12 and 13 trustees apply. SBRA § 4(b)(1).

this issue by making the five percent limitation also applicable to sub V trustees.[148] Technical corrections in the CARES Act, however, did not address this issue.[149] Some of the observers have indicated that it is unlikely that this will occur in the foreseeable future.

Although SBRA addresses compensation of a standing trustee upon conversion or dismissal of a sub V case prior to confirmation in its amendment of 28 U.S.C. § 586(e)(5), it does not address allowance or payment of compensation of a non-standing trustee in those circumstances.

If the case is converted, the sub V trustee may file an application for compensation, and the allowed amount will be entitled to administrative expense priority under § 503(b)(1), subject in priority to administrative expenses in the chapter 7 case. § 726(b).

Dismissal of the case raises the prospects that the sub V trustee may find the compensation disputed if the trustee seeks payment under applicable nonbankruptcy law and that the trustee will not be paid, given the debtor's distressed financial circumstances.

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What the SBRA amendments did not do was add "§ 1183" (the new subchapter V section that calls for the appointment of a sub V trustee) before "§ 1202(a) and 1302(a)" (the sections under which chapter 12 and 13 trustees are appointed) in the language quoted above. Without this insertion, amended § 326(b) does not limit the compensation of a non-standing sub V trustee. As the next footnote discusses, one reading of amended § 326(b) is that nothing authorizes compensation of a non-standing sub-V trustee.

[148] Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court "may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title," but it does not state that the court may allow compensation under § 330 of a trustee appointed under § 1183. § 326(b). Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, it may be arguable that a sub V trustee is not entitled to compensation. The position of the United States Trustee Program is, "Case-by-case trustees are compensated through § 330(a)(1) which allows for 'reasonable compensation for actual, necessary services rendered by the trustee . . . and by any paraprofessional person employed by such person.'" SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-21.

[149] The technical corrections in the CARES Act involved the exclusion of public companies from the definition of a small business debtor and unclaimed funds in subchapter V cases. CARES Act § 1113(a)(4).

A trustee may seek to avoid the former issue by filing an application for compensation in response to a motion to dismiss and requesting that the court rule on it, preferably before dismissal of the case.

Allowance of an administrative expense claim in a dismissed case, however, may still leave the sub V trustee without compensation. In allowing compensation to the sub V trustee after dismissal of the case, the court in *In re Tri-State Roofing,* 2020 WL 7345741 at *1, n. 1 (Bankr. D. Idaho 2020), observed, "[A]dministrative expense claims are not monetary judgments but rather entitle the claimant to receive a distribution from the bankruptcy estate. If there are no funds currently held by the Trustee, it is difficult to understand how this claim would be paid." (Citation omitted).

A potential solution to all of these problems is to request that the court condition dismissal on allowance and payment of the trustee's compensation.

*In re Slidebelts, Inc.,* 2020 WL 3816290 (Bankr. E.D. Cal. 2020), supports this proposition. There, the debtor in a traditional chapter 11 case sought its dismissal for the purpose of obtaining a loan under the Paycheck Protection Funding Program of the CARES Act of the case and then re-filing a case under subchapter V. Professionals employed by the committee of unsecured creditors requested that the court condition dismissal on allowance and payment of their fees.

The court observed that § 349(b)(3) ordinarily revests the property of the estate in the debtor, but that, as the Supreme Court recognized in *Czyzewski v. Jevic Holding Corp.,* 137 S.Ct. 973, 979 (2017), the court may order otherwise "for cause." The court reasoned that committee professionals had rendered services in reliance on provisions of the Bankruptcy Code for payment of their compensation in the case. This reliance, the court concluded, constituted

"cause" under § 349(b) for conditioning dismissal on allowance and payment of the committee professionals. *Id.* at * 3.

In *In re Hunts Point Enterprises, LLC,* 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss the case. Because the case revolved around a two-party dispute and the debtor's request for dismissal demonstrated that it no longer wanted to file a plan of reorganization, the court concluded that cause existed for dismissal of the case, conditioned on the debtor's payment of the sub V trustee's compensation.

In traditional chapter 11 cases, cash collateral or debtor in possession financing orders often provide for a so-called "carve-out" to provide money to pay professionals employed by the debtor and the committee of unsecured creditors. It seems appropriate to include the sub V trustee in any carve-out in a subchapter V case.

Even if the case does not involve cash collateral or debtor in possession financing – or if the cash collateral or financing order does not provide for a carve-out – it may be advisable for the sub V trustee, the debtor, or both to request that the court require the debtor to make regular payments to a fund dedicated to the payment of professional fees.

Judges in the Middle District of Florida have included a provision for interim trustee compensation in subchapter V cases in an "Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference."[150] The orders require the debtor to pay $ 1,000 as interim compensation to the sub V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment upon

[150] *E.g., In re Nostalgia Family Medicine P.A.,* Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Bankr. M.D. Fla. Mar. 26, 2021).

request of any interested party and to the court's approval of the trustee's compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

**3. Deferral of non-standing subchapter V trustee's compensation**

A standing sub V trustee receives compensation as a percentage of payments the trustee makes from funds paid by the debtor under a plan. The percentage fees of a standing trustee are necessarily deferred until payments are made.

A non-standing trustee's compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan.[151] This requirement applies in subchapter V cases to confirmation of a consensual plan under §1191(a).[152]

Section 1191(e) permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of §1191(b).[153] Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

As Section IV(E)(2) discusses, it is possible that a technical amendment to § 326(b) will impose a limitation on a non-standing trustee's compensation to five percent of payments under the plan. If this occurs, a non-standing trustee's compensation may arguably be limited to five percent of payments as they are made.

## F. Trustee's Employment of Attorneys and Other Professionals

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals "to represent or assist the trustee in carrying out the trustee's duties." SBRA does not modify

[151] § 1129(a)(9)(A).
[152] § 1191(a).
[153] § 1191(e).

this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.[154] In this regard, a person serving as a sub V trustee should have a sufficient understanding of applicable legal principles to perform the trustee's monitoring and supervisory duties, and appear and be heard on specified issues, without the necessity of separate legal advice.

A question exists whether a trustee who is not an attorney may appear and be heard in a bankruptcy case. Section 1654 of title 28 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.[155]

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[154] *See In re* Penland Heating and Air Conditioning, Inc., 2020 WL 3124585 (E.D.N.C. 2020). The court declined to approve the sub V trustee's application to approve the employment of the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA." *Id.* at *2. In a footnote, the court cautioned that "overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved." *Id.* at *2 n. 2.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-17 to 3-18, states:

> Although the trustee may employ professionals under section 327(a), SBRA is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. See 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether the employment of the professional is warranted under the specific circumstances of each case.

[155] 28 U.S.C. § 1654.

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel.[156]

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.[157] Because a bankruptcy trustee acts as the representative of the estate[158] and creditors have an interest in the estate, the same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court.

In *In re McConnell,* 2021 WL 203331 at *16-18 (Bankr. N.D. Ga. 2021), however, the court determined that 28 U.S.C. § 1654 did not apply to require a nonlawyer panel trustee in a chapter 7 case to retain a lawyer to file an application for the retention of a real estate broker.

The *McConnell* court reasoned, "The nature of proceedings in bankruptcy courts for the administration of estate assets in Chapter 7 cases suggests that the rule of 28 U.S.C. § 1654 applicable in a federal lawsuit between discrete parties should not be extended to apply to a chapter 7 trustee's filing of routine papers that the Bankruptcy Code and Bankruptcy Rules require in connection with the sale of property." *Id.* at *17. The court observed that, without discussing § 1654, bankruptcy courts have recognized that a trustee may file papers in a bankruptcy court without a lawyer in the course of performing the trustee's duties, such as the

[156] *E.g.*, Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.").
[157] *E.g.*, J. J. Rissell, Allentown, P.A. Trust v. Marchelos, 976 F. 3d 1233 (11th Cir. 2020) (trust); Guest v. Hansen, 603 F.3d 15 (2d Cir. 2010) (estate); Knoefler v. United Bank of Bismarck, 20 F.3d 347 (8th Cir. 1994) (trust); C.E. Pope Equity Trust v. United States, 818 F.2d 696 (9th Cir. 1987) (trust).
[158] § 323(a).

filing of applications to retain professionals[159] and routine objections to claims.[160] *Id.* at *18 & nn. 59-60.

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest that 28 U.S.C. § 1654 likewise should not apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18th and 19th century practice in federal courts[161] when the availability of bankruptcy relief was either nonexistent or short-lived.[162] The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In

[159] The court cited: *In re* Garcia, 335 B.R. 717, 726 (B.A.P. 9th Cir. 2005); *In re* Jay, 2018 WL 2176082 at *12 (Bankr. D. Utah 2018), *aff'd* 2019 WL 4645385 (D. Utah 2019) ("[I]n simple cases, trustees should prepare applications to employ realtors or accountants as they are seldom contested and routinely granted."); *In re* McLean Wine Co., Inc., 463 B.R. 838. 848-49 (Bankr. E.D. Mich. 2011) (application to employ other professionals is trustee work); *In re* Peterson, 566 B.R. 179, 195, 207-08 (Bankr. M.D. Tenn. 2017) (application for employment of professionals, including accountant and special counsel, is trustee duty). *Contra, e.g., In re* Yovtcheva, 590 B.R. 307 (Bankr. E.D. Pa. 2018); *In re* Hambrick, 2012 WL 10739279, at * 5 (Bankr. N.D. Ga. 2012); *In re* Holub, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991).

[160] The court cited: *In re* King, 546 B.R. 682, 699 (Bankr. S.D. Tex. 2016) (Routine objection to claim that is unopposed and does not require legal analysis or a brief falls within trustee's duty); *In re* Lexington Hearth Lamp and Leisure, LLC, 402 B.R. 135 (Bankr. M.D.N.C. 2009) (Although the court concluded that compensation is allowed for services that require a law license, *id.* at 142, the court ruled that the filing of objections to claims that require no legal analysis is a trustee duty. *Id.* at 144-45.) *In re* Perkins, 244 B.R. 835 (Bankr. D. Montana 2000); *In re* Holub, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991). *Contra, e.g., In re* Howard Love Pipeline Supply Co., 253 B.R. 790 (Bankr. E.D. Tex. 2000) ("[T]he express duty of the trustee to object to improper claims does not authorize a non-attorney trustee to engage in the unauthorized practice of law.").

[161] Section 35 of the Judiciary Act of 1789 is the statutory predecessor to 28 U.S.C. § 1654 (2018) and contained substantially the same language. *See* United States v. Dougherty, 473 F.2d 1113, 1123 n. 10 (D.C. Cir. 1972).

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), provided "that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

[162] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States,* 3 AMER. BANKR. INST. L. REV. 5, 12-23 (1995). *See also* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 1:2.

other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization,[163] and to appear and be heard on confirmation and other significant issues that relate to confirmation.[164] The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

A nonlawyer trustee does not need an attorney to work with the parties on business issues, to investigate and obtain information about the debtor and its business, to facilitate confirmation, and to report to the court. When the time comes to report to the court, the trustee should be permitted to perform the reporting function without a lawyer.

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court. In short, unless a sub V trustee needs to *litigate* something, the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a traditional chapter 11 case,[165] or an expert witness that a court appoints.[166] Such parties provide

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[163] § 1183(b)(7).
[164] § 1183(b)(3).
[165] § 1106(b). Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 NORTON BANKRUPTCY LAW AND PRACTICE § 99:29. *See also In re* W.R. Grace & Co., 285 B.R. 148, 156 (Bankr. D. Del. 2002) ("[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals." (citation omitted)).
[166] FED. R. EVID. 706.

information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.[167]

Finally, the trustee is an officer of the court. The court need not insist that its officer hire a lawyer to hear what the officer has to say.

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of subchapter V's primary objective.[168] Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

If a court determines that the rule prohibiting a nonlawyer trustee from appearing in federal court requires the trustee to retain counsel to be heard, economic considerations may lead the court to limit the services that will be compensated to those for which a lawyer is legally required. Non-compensable services might include, for example, work in connection with the investigation of the debtor and its business or negotiations or development of business information to facilitate a consensual plan. And because it is the trustee, not the lawyer, who is to be heard, any written report concerning confirmation and other matters would seem to be the responsibility of the trustee, not the lawyer.

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[167] In some jurisdictions, some chapter 7 panel trustees are not lawyers. The author's informal discussions with bankruptcy judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

[168] This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.

# V. Debtor as Debtor in Possession and Duties of Debtor

## A. Debtor as Debtor in Possession

The debtor, as debtor in possession, remains in possession of assets of the estate.[169] A sub V debtor in possession has the rights, powers, and duties of a trustee that a traditional chapter 11 debtor in possession has, including the operation of the debtor's business.[170] The court may remove the debtor as debtor in possession under §1185(a). The court may reinstate the debtor in possession.[171]

It is important to note that many of the requirements applicable in a traditional chapter 11 case govern a subchapter V case. The court must approve retention of the debtor's lawyers and other professionals[172] and their compensation.[173] The debtor cannot use cash collateral[174] or use, sell, or lease property outside the ordinary course of business[175] without court approval. The debtor must comply with guidelines of the U.S. Trustee, including the closing of prepetition bank accounts and the establishment of new debtor-in-possession accounts. The debtor must file

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[169] § 1186(b).

[170] § 1184. Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. § 1181(a). Section 1184 replaces § 1107(a) in sub V cases.

[171] § 1185(b).

[172] § 327(a).

[173] § 330(a). *See generally In re* Rockland Industries, Inc., 2022 WL 451542 (Bankr. D. S.C. 2022) (disallowing portion of requested fees of attorney for subchapter V debtor). The court commented on the review of applications for compensation under § 330 in a subchapter V case, *id.* at *6:

> As a threshold matter, the Court emphasizes that the more cost-effective and streamlined approach to Chapter 11 bankruptcy offered by Subchapter V should not revive "economy of the estate" considerations that previously existed under the Bankruptcy Act and which have long since been abandoned. To be clear, the UST does not espouse, or even seemingly favor, an economy-of-the-estate standard. However, any deviation from the § 330 compensation standard because this is a Subchapter V case is a step on, or toward, a slippery slope that must be avoided. Professional services rendered in bankruptcy cases are scrutinized for necessity and reasonableness, and following the testimony of counsel at the Hearing, the Court is satisfied that this case presents more complexity than originally acknowledged by the UST and that this complexity should not prevent the Debtor from availing itself of the advantages of the Subchapter V designation. While the streamlined nature of Subchapter V means that reduced fees is a likely natural consequence, it should not be a forced result.

[174] § 363(c)(2).

[175] § 363(b).

appropriate "first day motions" to deal with issues such as payment of prepetition wages or other employee benefits, payment of prepetition taxes, or payment of other prepetition obligations (such as customer deposits or warranty obligations).

A subchapter V case is subject to dismissal or conversion for cause under § 1112(b)(1) under the same standards that apply in a traditional chapter 11 case.[176] Thus, failure to take such actions may constitute cause for dismissal or conversion under § 1112(b)(1).[177]

## B. Duties of Debtor in Possession

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor in a non-sub V case under §§ 1116(1)(A) and (B).[178] In a sub V case, §1116 is inapplicable, but §1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.[179]

The timing of the election does not change the time for a debtor who qualifies as a small business debtor to file the required documents. In a voluntary case, it is the date of the filing of the petition. If a small business debtor makes the election in the petition (as Interim Rule 1020(a) requires), § 1187(a) requires the debtor to file the documents at that time. If the debtor does not make the election in the petition, § 1116(1) is applicable and requires the debtor to

[176] *See generally In re* Ozcelebi, 2022 WL 990283 (Bankr. S.D. Tex. 2022).
[177] *E.g., In re* MCM Natural Stone, Inc., 2022 WL 1074065 (Bankr. W.D. N.Y. 2022).
[178] New. § 1187(a).
[179] Section 1116 does not apply in a sub V case, § 1181(a), but § 1187 incorporates all its requirements. In view of this, it is unclear why SBRA made § 1116 inapplicable in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee. This statutory scheme is important in the case of a debtor who is not a small business debtor because its debts exceed $2,725,625 but qualifies for subchapter V because its debts are less than $ 7.5 million. Because § 1116 applies only in a small business case, it would not apply to such a debtor, but § 1187 requires such a debtor to comply with its requirements.

append the documents to the petition. In an involuntary case, the debtor must file the documents within seven days after the order for relief.[180]

The timing requirements operate differently in the case of a debtor who is not a small business debtor because its debts exceed $ 2,725,625. In this situation, § 1116 does not apply because the case is not a small business case. In a voluntary or involuntary case, §1187(a) requires the debtor to comply with § 1116 upon making the sub V election, which could occur after the filing of a voluntary petition or entry of an order for relief in an involuntary case.

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.[181]

SBRA also requires a sub V debtor to file periodic reports under § 308, which continues to apply in a non-sub V small business case.[182] Section 308(b) requires periodic reports that must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in

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[180] Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. Section 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

Unless and until the debtor makes the election, § 1116 applies. Accordingly, the debtor must comply with § 1116(1) and file the required documents within seven days after the order for relief, regardless of when the debtor makes the election.

[181] § 1116(1).

[182] § 1187(b). Although § 308 applies only in a small business case, § 1187(b) requires all sub V debtors to comply with it.

Bankruptcy Rule 2015 implements § 308. Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to perform the duties prescribed in (a)(6). *See In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 6 (Bankr. D. P.R. 2022).

compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.[183]

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).[184] Thus, the debtor's senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary and compelling circumstances[185]); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;[186] (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor's business premises, books, and records.[187]

A sub V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).[188]

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[183] § 308.
[184] § 1187(b).
[185] As in non-sub V small business cases, the debtor and counsel must attend the initial debtor interview scheduled by the U.S. Trustee and must attend the § 341 meeting of creditors, at which the U.S. Trustee presides. *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*
[186] That is not a typo. The statute specifies local rule of the district court.
[187] § 1118.
[188] § 1184.

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a).[189] These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

Other § 1106(a) duties applicable to the sub V debtor under §1184 are the duties under § 1106(a)(5) through (a)(8): to file a plan;[190] to file tax returns for any year for which the debtor has not filed a tax return; to file postconfirmation reports as are necessary or as the court orders; and to provide required notices with regard to any domestic support obligations. [191]

Subchapter V does not expressly impose on a sub V debtor the duties to communicate and cooperate with the sub V trustee and to negotiate with creditors in an effort to obtain consensual confirmation, but at least one court has noted the debtor's failure to do so, despite

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[189] § 1106(a)(1).

[190] The duty under § 1106(a)(5), applicable to the sub V debtor under § 1184, is to "as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case."

The § 1106(a)(5) language is somewhat problematical in a sub V case. First, § 1121 (dealing with who may file a plan) does not apply in a sub V case because only the debtor may file a plan. Second, the statutory deadline of 90 days for the debtor to file a plan, § 1189(b), is inconsistent with the "as soon as practicable" direction in § 1106(a)(5). § 1106(a)(5).

Nevertheless, the clear import of the statutory scheme is that the sub V debtor has a duty to file a plan.

[191] § 1106(a)(5-8).

encouragement from the court, in connection with dismissal of the case and denial of confirmation.[192]

## C. Removal of Debtor in Possession

Section 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.[193] "Cause" includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case." This language is identical to § 1104(a),[194] which governs appointment of a trustee in a traditional chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case. Although § 1185(a) does not list the debtor's bad faith as a ground for removal of the debtor from possession, the specified grounds are not exhaustive, and a court may consider it.[195] An incurable conflict of interest between the debtor's principal and the estate – such as the possibility of claims against the principal or affiliates – may also establish cause.[196]

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[192] *In re* U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile U.S.A. Limited Partnership, 2021 WL 1679062 at *2 n. 4, *5 (Bankr. N.D. W. Va. 2021). The court concluded its Memorandum Opinion dismissing the debtor's case, in which it also determined that the debtor's plan was not feasible, as follows, *id.* at * 5:

> The Debtor had ample opportunities as it meandered through this case to negotiate with interested parties and propose a confirmable plan of reorganization. Specifically, the court encouraged the Debtor to engage with the Subchapter V Trustee and negotiate with the Creditors. By all accounts, however, the Debtor lacked motivation in those regards while evading certain of its responsibilities to the bankruptcy estate. Cause undoubtedly exists to dismiss this case, and the Debtor has been in bankruptcy for over a year without putting forth a feasible, confirmable plan. The court will therefore enter a separate order dismissing the Debtor's case.

[193] § 1181(a). Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee's appointment, are inapplicable in a sub V case.

Section 1104 also permits appointment of a trustee if it is "in the interests of creditors, any equity security holders, and other interests of the estate." § 1185(a) does not include this reason as "cause" for removing a debtor in possession.

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner. As Section IV(B)(1) notes, the court may authorize a trustee to investigate for cause shown under § 1183(b)(2).

[194] Section 1104 does not apply in a sub V case. § 1181(a).

[195] *In re* Young, 2021 WL 1191621 at * 6-7 (Bankr. D. N.M. 2021).

[196] *In re* No Rust Rebar, Inc., 2022 WL 1639322 at * 8 (Bankr. S.D. Fla. 2022).

A court may, after notice and a hearing, remove a debtor from possession *sua sponte.*[197]

In *In re Neosho Concrete Products Co.,* 2021 WL 1821444 at * 8 (Bankr. W.D. Mo. 2021), the court found guidance for the standards a court should consider in determining whether to remove a sub V debtor from possession under § 1185(a) in case law construing the provisions of § 1104(a) for appointment of a trustee in a traditional chapter 11 case.[198]

Applying rulings in § 1104(a) cases, the court concluded that it had discretion to determine whether "cause" exists to remove a sub V debtor in possession. The court determined that the party seeking removal of the sub V debtor bears the burden of establishing cause by a preponderance of the evidence. The court noted, "Because removal of a debtor in possession is an "extraordinary remedy,' the movant's burden is high." *Id.* at *8.[199]

The court adopted a "flexible" approach to determining whether cause exists for removal of a sub V debtor from possession and identified the following factors that a court may consider, among others: (1) the materiality of any misconduct; (2) the debtor's evenhandedness or lack thereof in dealing with insiders and affiliated entities in relation to other creditors; (3) the existence of prepetition avoidable transfers; (4) whether any conflicts of interest on the part of

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In situations in which potential disputes between the estate and insiders exist, the debtor should consider ways to avoid losing possession through effective management of the conflict. This includes transparency and full and accurate disclosure of information relating to potential claims. If creditors, the subchapter V trustee, or the U.S. Trustee raise substantial issues about the potential claims, the debtor should consider asking the court, pursuant to § 1183(b)(5), to expand the subchapter V trustee's duties to include duties under § 1106(b)(3) and (4) to investigate the potential claims and to file a report of the investigation.

If a dispute over claims against insiders cannot be resolved consensually, a potential solution is to provide in the plan for the subchapter V trustee, or perhaps a creditor, to prosecute potential claims for the benefit of creditors. Although the provisions of subchapter V do not contemplate that the subchapter V trustee prosecute claims of the estate, such an approach seems possible under the procedure developed in traditional chapter 11 cases under which the court authorizes the committee of unsecured creditors or a creditor to pursue claims against insiders through "derivative standing."

[197] *In re* Pittner*,* 2022 WL 348188 (Bankr. E.D. Mass. 2022).

[198] *Accord, see In re* No Rust Rebar, Inc., 2022 WL 1639322 at * 8 n. 48 (Bankr. S.D. Fla. 2022).

[199] The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership),* 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

the debtor are interfering with its ability to fulfill its fiduciary duties; and (5) whether any self-dealing or squandering of estate assets had occurred. *Id.* at 8.[200]

The court concluded that cause did not exist to remove the debtor from possession because its principal had "competently managed the estate and adapted to challenges as it encountered them," had agreed to reimburse the estate for the value of preferential transfers he had received, had retained separate counsel, and had prioritized the interests of the debtor above his own. *Id.* at 9.[201]

Removal of a debtor from possession may be an alternative to dismissal or conversion of a subchapter V case for cause under § 1112(b)(1).[202] In *In re Pittner,* 2022 WL 348188 (Bankr. E.D. Mass. 2022), the debtor, who was in his fifth bankruptcy case and had been in bankruptcy for ten years, failed to comply with an order of the court that the debtor either file a motion to retain a real estate broker or a motion under § 363(b) to sell two parcels of real estate. After concluding that the violation of the order constituted cause to convert or dismiss under § 1112(a)(4)(E) and that the debtor had not invoked the exception in § 1112(b)(2) to the

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[200] The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership),* 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

[201] The court also denied a motion to convert the case to chapter 7.

[202] Section 1112(b)(1) requires dismissal or conversion to chapter 7 of a chapter 11 case for "cause," unless the court determines that the appointment of a trustee or an examiner under § 1104 is in the best interests of the estate.

Section 1112(b)(2) states an exception 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 another party in interests establishes a reasonable likelihood of confirmation of a plan and that (1) the grounds for converting or dismissing the case do not include substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (2) a reasonable justification exists for the act or omission; and (3) the act or omission will be cured within a reasonable period of time fixed by the court.

Because § 1104 does not apply in a subchapter V case, § 1181(a), some courts have stated that § 1112(b)(1) permits no alternative other than conversion or dismissal if cause exists, unless the exception in § 1112(b)(2) applies. *E.g., In re* Ozcelebi, 2022 WL 990283 at * 9 (Bankr. S.D. Tex. 2022); *In re* MCM Natural Stone, Inc., 2022 WL 1074065 at * 4 (Bankr. W.D. N.Y. 2022). These courts did not consider removal of the debtor from possession as an alternative.

requirement of conversion or dismissal for cause, the court considered whether dismissal or conversion was in the best interest of creditors and the estate. *Id.* at *3.[203]

The court reasoned that dismissal would likely provide no recovery for unsecured creditors and that dismissal would bring no resolution to the disputes between the debtor and secured creditors based on the "long, contentious history" between them. It would result, the court predicted, in the filing of a sixth case. *Id.* at *3. The court agreed with the subchapter V trustee that conversion would result in abandonment of the debtor's principal assets and "would likely end no differently than a dismissal." *Id.*

The court noted that § 1112(b)(1) requires conversion or dismissal for cause "unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Although § 1104(a) does not apply in a subchapter V case,[204] the court continued, subchapter V contains "its own parallel provision in § 1185(a)'s authorization for the court to remove a debtor in possession for cause, with a resulting increase under § 1183(b)(5) in the powers of the subchapter V trustee." *Id.* at *3.

The court reasoned, *id.* at *4:

> Removal of a debtor from possession is simply a lesser form of the conversion option. It is precisely that in every motion to convert or dismiss under § 1112(b)(1), where the Court is obligated to ask in every instance where cause is shown whether the appointment of a chapter 11 trustee might better serve the interests of creditors and the estate.

The court ruled that the debtor's deliberate refusal to obey the court's order was cause for removal of the debtor from possession under § 1185(a) and that removal, with the resulting

[203] Not surprisingly, the court rejected the debtor's contention that "moving forward on a purchase and sale agreement outside of the Court-established deadlines would be a better option" as an appropriate response to the failure to comply with the order. 2022 WL 348188 at *2.
[204] § 1181(a).

increase in the subchapter V trustee's powers and duties under § 1183(b)(5), was in the best interests of creditors and the estate and better served those interests than either conversion or dismissal. *Id.*

From a debtor's standpoint, the removal remedy may be more advantageous than conversion or dismissal. The debtor retains the exclusive right to file a plan and has the right to seek reinstatement of possession under § 1185(b). A debtor thus has at least the opportunity of "repenting" from the conduct that led to the debtor's ouster and cooperating with the subchapter V trustee and creditors to achieve a result that benefits everyone more than conversion, dismissal, or liquidation of assets in the subchapter V case.

Section 1185(a) also provides for removal of the debtor in possession "for failure to perform the obligations of the debtor" under a confirmed plan, as Sections V(C) and XII(B) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession in traditional chapter 11 cases and in chapter 12 cases.[205]

Section 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.[206] Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor's business.

Like §§ 1104(a) and 1204(a), §1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.[207] A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the

[205] § 1185(a).
[206] § 1185(b).
[207] § 1185(a).

debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

If the court removes the debtor in possession, the trustee is authorized to operate the business of the debtor[208] and has other duties that Section IV(B)(3) discusses.

The removal of a sub V debtor from possession has one significant legal difference from appointment of a trustee in a traditional chapter 11 case.

In a traditional case, § 1121(c)(1) provides that appointment of a trustee terminates the debtor's exclusivity period to file a plan under § 1121(b) and permits the trustee to file a plan. One of the duties of a trustee in a chapter 11 case under § 1106(a)(5) is to file a plan, to file a report of why the trustee will not file a plan, or to recommend conversion or dismissal of the case.

In a subchapter V case, however, § 1121 does not apply, §1181(a), and the debtor thus remains the only party who can file a plan under §1189(a). Moreover, the duties of a sub V trustee upon removal of the debtor in possession do not include the duty to file a plan or report or to recommend conversion or dismissal. §1183(b)(5)

When a sub V trustee after removal of the debtor's possession thinks that confirmation of a reorganization plan is possible, therefore, the trustee will have to convince the debtor to file a satisfactory plan or to amend the petition to eliminate the sub V election so that the case becomes a traditional chapter 11 case in which the trustee may file a plan.

Unless the debtor files a plan that the court confirms or amends the election, or unless the court reinstates the debtor's possession, the case must conclude through either dismissal or

[208] § 1183(b)(5).

conversion. One possibility is for the trustee to liquidate the debtor's assets and then seek their distribution through conversion to chapter 7 or a structured dismissal of the case.[209]

*In re Young*, 2021 WL 1191621 at *7 (Bankr. D. N.M. 2021), suggested such an alternative. There, the court removed the debtor from possession due to gross mismanagement, bad faith, and dishonesty instead of converting the case on those grounds. The court reasoned that, because the sub V trustee was familiar with the case and might be able to liquidate the estate's assets and make distributions to creditors for a lower fee than a chapter 7 trustee would charge, removal of the debtor in possession was a better option than conversion. *Id.* at 7. The court reserved for a later day the possibility that eventual conversion to chapter 7 might be necessary.

An eventual consequence of removal of the debtor from possession may be the court's revocation of the subchapter V election so that the case proceeds as a traditional chapter 11 case, with the appointment of a trustee to administer it. In *In re National Small Business Alliance,* 2022 WL 2347699 (Bankr. D.C. 2022), the court had spent over a year following its removal from possession trying to confirm a plan. After the court denied the debtor's fifth attempt, the court revoked the debtor's subchapter V election so that the case could proceed as a traditional

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[209] A so-called "structured dismissal" involves payment of allowed administrative expenses and distributions on allowed claims, followed by dismissal of the case. *See generally,* Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017). The Supreme Court observed in *Jevic Holding Corp., id. at* 979:

> [T]he [Bankruptcy] Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a
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> > "hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).
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> Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." Ibid., n. 973.

chapter 11 case and directed the appointment of a chapter 11 trustee. The court granted this relief based on its determination that neither conversion to chapter 7 nor dismissal of the case for inability to confirm a plan was in the best interest of creditors and the estate.

Although subchapter V does not expressly permit revocation of the election, the court concluded that "the ability to revoke a Subchapter V election is consistent with the Bankruptcy Code [and] the Congressional goals of ensuring that Subchapter V cases provide a quicker reorganization process" and that the revocation option "provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter 11." *Id.* at *3. The court noted that § 105(a) authorized the revocation because it was "consistent with the right of a debtor to convert the case to another chapter under § 1112(a)." *Id.*

The court concluded that revocation of the subchapter V election, although not expressly authorized, is permissible "in appropriate situations and based upon a totality of the circumstances." *Id.* at 3.

Revocation of the election is arguably inconsistent with the right of the debtor to control its own destiny under the provisions of subchapter V that permit only the debtor to make the subchapter V election and to file a plan. Nevertheless, the result from the debtor's standpoint is no different from conversion to chapter 7, in which the debtor also loses control over its assets and operation of its business.

When the debtor is removed from possession, a question arises whether the debtor's attorney (or any other professional employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee,* 540 U.S. 526, 124 S. Ct. 1023 (2004), ruled that an attorney for a former chapter 11 debtor in possession who provides services

after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan and may not be able to participate effectively in the case.

## VI. Administrative and Procedural Features of Subchapter V

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. This Part discusses: the elimination of the committee of unsecured creditors (Section VI(A)) and the § 1125(b) disclosure statement (Section VI(B)), unless the court orders otherwise; the mandatory status conference (Section VI(C)); the 90-day deadline for the debtor to file a plan (Section VI(D)), unless the court extends it (Section VI(J)); elimination of U.S. Trustee fees (Section VI(E)); and the modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a) (Section VI(F)).

This Part also discusses: procedures relating to a creditor's § 1111(b) election (Section VI(G)); voting on the plan and confirmation procedures (Section VI(H)); the filing of claims and the fixing of a bar date for the filing of proofs of claim (Section VI(I)); and the debtor's performance of postpetition obligations as lessee under an unexpired lease under § 365(d). (Section VI(K)).

## A. Elimination of Committee of Unsecured Creditors

SBRA amended § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise.[210] Prior to the amendment, § 1102(a)(3) provided for the U.S. Trustee to appoint a committee in a small business case unless the court, for cause, ordered that a committee not be appointed.

The same rule applies in a subchapter V case. The provisions of § 1102,[211] which require the appointment of a committee of unsecured creditors and permit the appointment of other committees, and of § 1103, which states the powers and duties of committees, do not apply in a sub V case unless the court orders otherwise. §1181(b).

Although SBRA eliminates the appointment of a committee of unsecured creditors in both sub V and non-sub V small business cases unless the court orders otherwise, the Interim Rules did not change the requirement of Bankruptcy Rule 1007(d) that a debtor in a voluntary chapter 11 case file a list of its 20 largest unsecured creditors, excluding insiders.

The requirement of the list serves two purposes. First, an objection to the debtor's designation of itself as a small business debtor or to its election of subchapter V[212] must be served on the creditors on the Rule 1007(d) list under Interim Rule 1020(c). Second, if the court directs the appointment of a committee, the list provides the information that the U.S. Trustee needs to identify the largest unsecured creditors for purposes of selecting committee members from the holders of the largest claims willing to serve under § 1102(b)(1).

[210] SBRA § 4(a)(11).
[211] The provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).
[212] See Section III(A).

## B. Elimination of Requirement of Disclosure Statement

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive "adequate information"[213] about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.[214] The court must hold a hearing on approval of the disclosure statement after at least 28 days' notice before solicitation of votes on the plan may occur.[215]

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,[216] so that solicitation may occur without prior notice and hearing on the disclosure statement.[217] The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.[218] In addition, the court in a small business case may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary,[219] and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.[220]

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.[221] Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) apply.

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[213] Section 1125(a)(1) defines "adequate information" as information that would enable "a hypothetical investor of the relevant class to make an informed judgment about the plan." § 1125(a)(1).
[214] § 1125(b).
[215] FED. R. BANKR. P. 3017(a).
[216] § 1125(f)(3)(A).
[217] § 1125(f)(3)(B).
[218] § 1125(f)(3)(C).
[219] § 1125(f)(1).
[220] § 1125(f)(2).
[221] § 1181(b).

A sub V debtor's plan must contain certain information that a disclosure statement typically contains, including: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization. §1181(a)(1).

Subchapter V does not require that the plan contain "adequate information," and it does not provide for prior judicial review of the required information before solicitation of acceptances of the plan. Nevertheless, confirmation of a sub V plan requires that a plan comply with the applicable provisions of § 1129(a),[222] among which are the requirements that a plan[223] and its proponent[224] comply with applicable provisions of chapter 11 and that the plan be proposed in good faith.[225] These provisions provide the basis for a court to consider whether a debtor's plan contains the information that § 1181(a) requires. Material or intentional errors or omissions could provide a basis for denial of confirmation.[226]

## C. Required Status Conference and Debtor Report

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest.[227] Section 105(d) does not apply in a sub V case.[228] Instead, §1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case.[229] The court may extend the time for holding the status conference if the need for an

[222] § 1191(a), (b). See Section VIII(A).
[223] § 1129(a)(1).
[224] § 1129(a)(2).
[225] § 1129(a)(3).
[226] *See generally* Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 10.
[227] § 105(d).
[228] § 1181(a).
[229] Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

extension is "attributable to circumstances for which the debtor should not justly be held accountable."[230] Section VI(J) discusses extension of the deadline. The statutory purpose of the status conference is "to further the expeditious and economical resolution" of the case.

Not later than 14 days prior to the status conference, the debtor must file, and serve on the trustee and all parties in interest, a report that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[231] The trustee has the duty to appear and be heard at the status conference.[232]

Subchapter V does not specify any consequences if the status conference does not timely occur or if the debtor fails to file a report. Courts have noted that the deadline for the status conference is a deadline for the court, not the debtor, and that a debtor is not in default until the status conference has been set and the debtor fails to file the report at least 14 days before that date.[233]

A debtor's unexcused failure to file the report timely or to attend the status conference could be cause for dismissal or conversion of the case under § 1112(b) or denial of confirmation. "Cause" for dismissal includes unexcused failure to satisfy timely any filing or reporting requirement under the Bankruptcy Code, § 1112(b)(4)(F), and the failure to comply with an order of the court, § 1112(b)(4)(E). Confirmation of a subchapter V plan requires compliance by the proponent with applicable provisions of the Bankruptcy Code. § 1129(a)(2). Section VI(D) considers these issues further in the context of a debtor's failure to file a plan within the 90-day deadline of §1189(a).

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[230] § 1188(b).
[231] § 1188(c).
[232] New§ 1183(b)(3).
[233] *In re* Tibbens, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re* Wetter, 620 B.R. 243, 252 (Bankr. W.D. Va. 2020).

Neither subchapter V nor the Interim Rules specify how the court schedules the status conference, the agenda for the status conference, or the contents of the debtor's report. The practitioner must consult local rules, orders, and procedures to determine how the bankruptcy judge will address these matters and the judge's expectations about the report and the status conference.[234]

Some courts include the time for the status conference in the Notice of Chapter 11 Bankruptcy Case that the clerk sends at the outset of the case. Others schedule it in a separate notice, or include it in a scheduling order, that the clerk or debtor's counsel mails to parties in interest.

§1188(a) states only that the purpose of the status conference is "to further the expeditious and economical resolution" of the subchapter V case, and §1188(c) requires only that the report detail "the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." While some courts are scheduling the status conference without further direction, others have provided more specific instructions.

For example, a scheduling order for the status conference may remind counsel that senior management must attend the conference, that the report will be covered, and that the debtor should be prepared to discuss any anticipated complications in the case (such as adversary proceedings, discovery, or valuation disputes), the timing of the confirmation hearing and related procedures and deadlines, and monthly operating reports.

A scheduling order may also outline specific items to be included in the report, which may include one or more of the following: (1) the efforts the debtor has undertaken or will

[234] For example, the New Jersey bankruptcy court has promulgated a mandatory form for the debtor's report, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms. Bankruptcy courts in the District of Maryland, https://www.mdb.uscourts.gov/content/local-bankruptcy-forms, and in the Central District of California, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms, have published suggested forms.

undertake to obtain a consensual plan of reorganization, as §1188(c) requires; (2) the goals of the reorganization plan; (3) any complications the debtor anticipates in promptly proposing and confirming a plan, including any need for discovery, valuation, motion practice, claim adjudication, or adversary proceeding litigation; (4) a description of the nature of the debtor's business or occupation, the primary place of business, the number of locations from which it operates, and the number of employees or independent contractors it utilizes in its normal business operations; and the goals of the reorganization plan; (5) any motions the debtor contemplates filing or expects to file before confirmation; (6) any objections to any claims or interests the debtor expects to file before confirmation and any potential need to estimate claims for voting purposes; (7) the estimated time by which the debtor expects to file its plan; (8) whether the debtor is current on all required tax returns; (9) other matters or issues that the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case.

Regardless of whether the court specifies its requirements with regard to the debtor's report or sets an agenda for the scheduling conference, counsel for the parties should anticipate that the court will be interested in any of these matters that the case involves and that debtor's counsel must ultimately address in connection with plan confirmation. Creditors may use the status conference as an opportunity to obtain information about the financial affairs of the debtor and to articulate their views and concerns about the debtor's operations, prospects for a feasible plan, and other matters.[235]

[235] *See* Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 251, 256, 272-72, 281 (2020).

## D. Time for Filing of Plan

Only the debtor may file a plan.[236] The debtor has a duty to do so.[237]

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.[238] The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable,[239] the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.[240] Section 1193(a) permits preconfirmation modification of a plan.[241] Section VI(J) discusses extension of the deadline.

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,[242] and § 1129(e) requires that confirmation occur within 45 days of the filing of the plan.[243] These requirements do not apply in a subchapter V case.[244] They continue to apply in the case of a small business debtor who does not elect subchapter V.

The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V small business case in two ways. First, a sub V debtor must file a plan much more promptly than a non-sub V debtor – 90 days instead of 300.[245] Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

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[236] § 1189(a).
[237] See *supra* note 190.
[238] § 1189(b). Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.
[239] *Id.*
[240] The court in *In re Trepetin,* 617 B.R. 841, 848-49 (Bankr. D. Md. 2020), found guidance for determining whether to extend the deadline in a chapter 12 case that addressed the issue under § 1221, *In re Gullicksrud,* 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016).
[241] § 1193(a).
[242] § 1121(e).
[243] § 1129(e).
[244] § 1181(a).
[245] Because of the short time to file a plan, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.

Subchapter V does not provide any consequences when a debtor does not timely file a plan. Under other provisions of chapter 11, however, a debtor's failure to comply with a plan deadline subjects the debtor to the risks of dismissal of the case, its conversion to chapter 7, or denial of confirmation of a plan.

As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal under § 1112(b)(4)(J). When cause exists, § 1112(b)(1) states that the court, on request of a party in interest, *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interests of creditors and the estate, unless the court determines that the appointment of a trustee or examiner *under § 1104* is in the best interests of the estate. Because § 1104 does not apply in a subchapter V case,[246] § 1112(b)(1) requires the court to convert or dismiss the case if the debtor does not timely file a plan upon request of the sub V trustee, a creditor, or other party in interest.[247]

Section 1112(b)(2), however, provides an exception to this requirement. It prohibits dismissal or conversion if: (1) the court "finds and specifically identifies unusual circumstances" establishing that conversion or dismissal is not in the best interests of creditors; and (2) the debtor (or other party in interest) satisfies two other requirements, unless the ground for conversion or dismissal is (1) substantial or (2) continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

The first requirement for application of the exception is a reasonable likelihood that a plan will be confirmed within a reasonable time. § 1112(b)(4)(A). The second is that a

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[246] § 1181(a).

[247] *E.g., In re* Online King LLC, 628 B.R. 340, 348 (Bankr. E.D.N.Y. 2021); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 343 (Bankr. S.D. Fla. 2020); *see In re* Majestic Gardens Condominium C Association, Inc., 2022 WL 789447 at * 2 (Bankr. S.D. Fla. 2022) (Failure to file plan within deadline generally requires dismissal, but court allows debtor's request to amend petition to remove subchapter V election instead of dismissing case).

reasonable justification for the act or omission constituting cause exist and that it be fixed within a reasonable time fixed by the court. § 1112(b)(4)(B).

Under these provisions, a debtor can overcome a motion for dismissal or conversion based on failure to timely file a plan by establishing (1) that conversion or dismissal is not in the best interest of creditors; (2) a reasonable justification for missing the deadline; (3) an ability to cure the omission (preferably by pointing to a plan already filed or a well-founded motion for an extension of the time to do so); and (4) the likelihood of confirmation of a plan within a reasonable time.[248]

Confirmation of a subchapter plan requires compliance with §§ 1129(a)(1) and (a)(2).[249] Paragraph (a)(1) requires that the plan comply with the applicable provisions of the Bankruptcy Code, and paragraph (a)(2) requires that the proponent of the plan comply with the applicable provisions of the Bankruptcy Code.

In *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020), the court concluded that the failure to comply with the § 1189(a) deadline for the filing of a plan would preclude confirmation of a plan under §§ 1129(a)(1) and (2). The debtor had elected application of subchapter V in a case filed before subchapter V's effective date, and the plan deadline had already expired. After the court refused to extend the deadline based on the determination that the election to proceed under subchapter V in these circumstances was within the debtor's control, the court dismissed the case because the debtor could not possibly confirm a plan in view of the default.[250]

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[248] Dismissal is not necessarily fatal for the debtor. Upon dismissal, the debtor can file another subchapter V case. The provisions of 11 U.S.C. § 362(n) that make the automatic stay inapplicable in a case pending within the previous two years apply only in a "small business case."

[249] § 1191(a) (confirmation of a consensual plan); § 1191(b) (cramdown confirmation). See Section VIII(A).

[250] Other courts have concluded that the court may extend the deadline for filing a plan (and for the status conference) in these circumstances. See Part XIII.

The court in *In re Tibbens,* 2021 WL 1087260 at *6 (Bankr. M.D.N.C. 2021), reached a contrary conclusion: "Although the failure to timely file a plan constitutes cause for dismissal under § 1112(b)(4)(J), nothing in the Bankruptcy Code suggests that this failure alone is fatal to confirmation."

The *Tibbens* court noted that the provisions of § 1112(b)(2) that prohibit dismissal or conversion under the circumstances just discussed apply, among other things, when the debtor can establish the likelihood of confirmation. Because Congress permitted a debtor to avoid conversion or dismissal by establishing an ability to confirm a plan, the court reasoned, a failure to comply with plan-filing deadlines does not prevent confirmation. *Tibbens,* 2021 WL 1087260 at *6. The court also concluded that legislative history and cases interpreting §§ 1129(a)(1) and (2) focused on contents of the plan and compliance with disclosure and solicitation requirements, not matters such as failure to comply with a deadline. *Id.* at 7.[251]

The *Tibbens* court permitted a debtor to convert a chapter 13 case, filed after enactment of subchapter V but before its effective date, to chapter 11 after the plan-filing deadline had expired but declined to extend the deadline because delays the debtor caused in the chapter 13 case and failures to comply with directives of the court were within the debtor's control and were circumstances for which the debtor justly should be held accountable. The issue of dismissal or conversion of the case was not before the court, and the court did not address it.

[251] The *Tibbens* court cited Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) (§ 1129(a)(1)); *In re* Multiut Corp., 449 B.R. 323 (Bankr. N.D. Ill. 2011) (§ 1129(a)(1)); *In re* Cypresswood Land Partners, I, 409 B.R. 396, 423-24 (Bankr. S.D. Tex. 2009) (§ 1129(a)(2)) ("Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125."); and 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (§ 1129(a)(1)) ("[T]he courts have recognized that the complexity of plan confirmation permits notions of 'harmless error,' so that technical noncompliance with a provision that does not significantly affect creditor rights will not block confirmation.").

## E. No U.S. Trustee Fees

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. SBRA amended this subparagraph to except cases under subchapter V from this requirement.[252]

## F. Modification of Disinterestedness Requirement for Debtor's Professionals

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a "disinterested person." A person who holds a claim against the debtor is not a disinterested person under the term's definition in § 101(14)(A).[253] A disinterested person cannot not have an interest "materially adverse to the interest of the estate."[254]

These provisions disqualify an attorney or other professional to whom the debtor owes money at the time of filing because the professional is a creditor. Moreover, because payment of amounts owed to the professional prior to filing would in most instances be a voidable preference under § 547 and result in the professional having a material adverse interest to the estate in a preference action, the debtor's professionals must either waive any unpaid fees or forego representation of the debtor.

New§ 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than $ 10,000.[255]

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[252] SBRA § 4(b)(3).
[253] § 327(a).
[254] § 101(14)(C).
[255] § 1195.

Depending on what the debtor's plan will propose to pay to unsecured creditors, the economic impact of the new provision may be limited. An important practical implication is that debtor's counsel will no longer have to explain to accountants and other professionals who are not familiar with bankruptcy practice that they must waive their fees to provide services to the debtor in the case – something that may be contrary to their standard practice of declining to provide services if the client fails to pay fees in a timely manner.

## G. Time For Secured Creditor to Make § 1111(b) Election

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.[256] If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.[257] Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.[258]

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.[259]

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[256] § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 25, 275-76 (2020). Section VIII(E) discusses the operation and effect of the § 1111(b) election and how courts have applied it in subchapter V cases.
[257] FED. R. BANKR. P. 3014.
[258] FED. R. BANKR. P. 3017.1.
[259] INTERIM RULE 3017.

Courts have taken varied approaches to scheduling the date for the § 1111(b) election. Many do not address it unless a party requests it. Others fix the date by reference to the date the plan is filed (such as 14 or 30 days after the plan's filing) in a scheduling or other order or notice. When the court on its own does not set a date and a party anticipates that a creditor will make the election, the party should request that the court establish a deadline.

If the court does not establish a deadline for making the § 1111(b) election, a creditor may nevertheless decide to make the election in response to the filing of the debtor's plan. In *In re VP Williams Trans, LLC,* 2020 WL 5806507 (Bankr. S.D.N.Y. 2020), the court overruled the debtor's objection to the § 1111(b) election in this situation.

The court rejected the debtor's argument that the creditor had to file the election before the filing of the plan, concluding that Bankruptcy Rule 3014 provides for the court to set the deadline. Because no one had asked the court to set a deadline, the court permitted the election, noting that the creditor had filed it before any actions to solicit votes or any steps in contemplation of confirmation had occurred. The court also rejected the debtor's arguments that the creditor had waived its right to make the election by filing a proof of claim that did not invoke § 1111(b). *Id.* at 6.

## H. Times For Voting on Plan, Determination of Record Date for Holders of Equity Securities, Hearing on Confirmation, Transmission of Plan, and Related Notices

Bankruptcy Rule 3017: (1) requires the court to fix the time for holders of claims or interests to vote to accept or reject a plan on or before approval of the disclosure statement; (2) provides that the record date for creditors and holders of equity securities is the date that the order approving the disclosure statement is entered or another date fixed by the court; (3) permits the court to set the date for the hearing on confirmation in connection with approval of the disclosure statement; and (4) requires that, upon approval of the disclosure statement, the court

must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.[260]

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.[261]

## I. Filing of Proof of Claim; Bar Date

Bankruptcy Rule 3003 governs the filing of proofs of claim or interest in a chapter 11 case. The Interim Rules made no change in its provisions.

Rule 3003 does not establish a deadline for filing a proof of claim in any chapter 11 case. Instead, Rule 3003(c) provides that the court "shall fix and may extend the time within which proofs of claim or interest may be filed."

Many courts have adopted procedures for fixing the bar date for the filing of proofs of claim at the outset of a sub V case. Some include the bar date in the Notice of Chapter 11 Bankruptcy Case that the clerk sends. Others establish the deadline in a separate document, such as a scheduling order or other notice. Lawyers representing creditors in subchapter V cases who are accustomed to the usual practice in chapter 11 cases – the issuance of a separate bar date order – must check local practice to make sure that they know the deadline.

Some courts have set the bar date as 70 days after the filing of the petition. This is the same time that Bankruptcy Rule 3002(c) establishes in chapter 12 and 13 cases. Others have set the date as 90 days after the § 341(a) meeting of creditors.

An advantage of fixing the bar date as 70 days after the filing date is that it expires before the deadline under §1189(b) for the debtor to file a plan, which is 90 days after the order for

[260] FED. R. BANKR. P. 3017.1.
[261] INTERIM RULE 3017.2.

relief. If a debtor must know with certainty what the claims in the case are before it can file its plan, the debtor will need to ask the court to extend the time until the bar date has expired. The debtor will have to establish that the need for the extension is "attributable to circumstances for which the debtor should not justly be held accountable" under §1189(b).

The court cannot shorten the time for a governmental unit to file a proof of claim, which is 180 days after the order for relief under § 502(b)(9). Although it would be helpful for tax claims to be filed before the debtor files a plan, this should rarely be an obstacle. Most taxes are self-assessed by the debtor upon filing a return. If the debtor does not know its tax liability, it is unlikely that the taxing authority does either. A debtor might not be able to accurately calculate the exact amount of interest and penalties, but it should know the principal amount.[262]

In *In re Wildwood Villages, LLC,* 2021 WL 1784408 (Bankr. M.D. Fla. 2021), plaintiffs in a state court class action sought to file a proof of claim on behalf of the class under Rule 7023 of the Federal Rules of Civil Procedure in the sub V case. The court explained that most courts conclude that class proofs of claim are permissible and that the determination of whether to allow and certify a class claim is within the court's discretion. *Id.* at *2 & n. 8 (collecting cases). The court rejected the debtor's argument that class claims should not be permitted in subchapter V cases because it would circumvent Congress' intent that creditors' committees should not exist in them. Instead, the court addressed the issue under the traditional analysis of the exercise of the court's discretion. *Id.* at *4.

[262] *But see In re* Baker, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020) (The court noted that the expiration of the time for governmental claims is important because the amount of the claims will affect the drafting of the plan and consideration of its feasibility; this supported granting the debtor an extension of time to file the plan until the bar date had passed.).

Under those principles, the court declined to allow a class claim. *Id.* at *4-7. The court directed the debtor to send a proof of claim form to all of the class members identified in the motion for allowance of a class claim, with notice of the bar date. *Id.* at *7.

The court in *In re Major Model Management, Inc.,* 2022 WL 2203143 (Bankr. S.D.N.Y. 2022), also declined to permit the filing of a class proof of claim based on its analysis of factors that apply in traditional chapter 11 cases.

## J. Extension of deadlines for status conference and debtor report and for filing of plan

Section 1188 requires a status conference within 60 days after entry of the order for relief and the filing by the debtor of a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization at least 14 days before the status conference. Section 1189(b) requires the debtor to file a plan within 90 days after the order for relief.

Both provisions state that the times run from the date of the order for relief *"under this chapter.*" Under this language, if a debtor in a chapter 7 or 13 case seeks to convert the case to chapter 11 and elect sub V status, it is arguable that the time periods begin on the date of conversion.

Section 348(a), however, provides that conversion of a case from one chapter to another "does not effect a change in the date of the . . . order for relief." Courts have therefore ruled that the deadlines are measured from the date of the order for relief in the original case.[263] Part XIII considers extensions of the deadlines in the context of the availability of subchapter V in cases pending before enactment of subchapter V.

[263] *In re* Tibbens, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re* Trepetin, 617 B.R. 841, 844 (Bankr. D. Md. 2020).

The court may extend the deadlines if the need for an extension is "attributable to circumstances for which the debtor should not justly be held accountable." §§ 1188(b), 1189(b). Courts have noted that the requirement for an extension is more stringent that the "for cause" standard of Bankruptcy Rule 9006(b), which governs extensions generally, and § 1121(d)(1), which permits extension of the exclusivity period for the debtor to file and obtain confirmation of a plan in a traditional chapter 11 case.[264]

Sections 1188(b) and 1189(b) use the same language to provide for extension of their deadlines as § 1221, which governs extension of the 90-day period for the debtor to file a plan in a chapter 12 case. Courts have, therefore, looked to chapter 12 cases applying § 1221 for guidance in interpreting the identical language in subchapter V.[265]

The court in *In re Trepetin,* 617 B.R. 841 (Bankr. D. Md. 2020), noted that courts and commentators had interpreted § 1221 to permit an extension if the debtor "clearly demonstrates that the debtor's inability to file a plan is due to circumstances beyond the debtor's control."[266] The court reasoned that it was appropriate to apply a similar standard to requests for extensions under §§ 1188(b) and 1189(b). *Id.* at 848-49. Other courts have done the same.[267]

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[264] *E.g., In re* Online King, LLC, 349 B.R. 340, 349 (Bankr. E.D.N.Y. 2021); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

[265] *E.g., In re* Tibbens, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re* Baker, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020); *In re* Trepetin, 617 B.R. 841, 847-48 (Bankr. D. Md. 2020).

[266] *In re* Trepetin*,* 617 B.R. 841, 848 (Bankr. D. Md. 2020) (quotations and punctuation omitted), *quoting In re* Gullicksrud*,* 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016) (quoting 7 COLLIER ON BANKRUPTCY ¶ 221.012[2]), *and also citing In re* Marek, 2012 WL 2153648, at *8 (Bankr. D. Idaho 2012), and *In re* Raylyn AG, Inc., 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987).

[267] *E.g., In re* Tibbens, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re* Baker, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

Courts have taken different approaches to the determination of whether circumstances are "beyond the debtor's control." The *Trepetin* court formulated the inquiry as whether the debtor is "fairly responsible" for the inability to comply with the deadline.[268] In *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333, 345 (Bankr. S.D. Fla. 2020), however, the court concluded that the language asks whether the need for an extension is due to *circumstances* beyond the debtor's control, not whether *the debtor* was responsible for the inability to meet the deadlines.

*Trepetin* and *Seven Stars* involved a debtor's request to proceed under subchapter V in a case pending prior to its enactment when the deadlines had already expired. The *Trepetin* court concluded that the deadlines could be extended because the debtor was not responsible for the inability to meet the deadlines that had not previously existed. The *Seven Stars* court concluded that the circumstances were entirely within the debtor's control and that no external factors beyond the debtor's control contributed to the inability to meet the deadlines.

In *In re Tibbens,* 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should justly be held accountable. *Id.* at *9.

*In re Keffer,* 2021 WL 1523167 (Bankr. S.D. W.Va. 2021), also considered a chapter 13 debtor's request to convert to chapter 11 and elect sub V after the deadlines for the status conference and the filing of a plan had expired. The need for chapter 11 relief arose, the court

[268] *Accord, In re* Wetter, 620 B.R. 243 (Bankr. W.D. Va. 2020).

explained, after the Internal Revenue Service filed a proof of claim for substantially more than the debtor anticipated, increasing his liabilities above the chapter 13 debt limit and making the debtor ineligible for chapter 13.[269]

The propriety of conversion, the court explained, turned on whether to extend the deadlines. Without an extension, the debtor's chapter 11 case would be subject to dismissal or conversion to chapter 7 for cause for failure to file a plan timely. *Id.* at *9.

The *Keffer* court concluded that *Trepetin* provided a superior approach to the extension issue and rejected the *Seven Stars* view. *Id.* at *9. Because the debtor had proceeded appropriately in the chapter 13 case, and because the debtor was not aware of the large amount of his tax liability until the IRS filed its proof of claim and therefore did not know that chapter 13 would be unavailable, the court ruled that the debtor was not justly accountable for the circumstances necessitating an extension of the deadlines. *Id.* at *9. The court directed that the deadlines run from the date of its order. *Id* at *10.

The court in *In re Baker,* 625 B.R. 27 (Bankr. S.D. Tex. 2020), identified four factors to consider in determining whether to extend the deadline for the filing of a plan: (1) whether the circumstances raised by the debtor were within the debtor's control; (2) whether the debtor had made progress in drafting a plan; (3) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances; and (4) whether any party-in-interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

[269] The court did not address whether chapter 13 eligibility should be determined as of the petition date based on the debtor's schedules, which showed that he was eligible. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 12:8.

Regardless of the standard for extending the deadlines, the debtor must describe the circumstances beyond its control and explain why they preclude the timely filing of a plan. For example, although circumstances such as the Covid-19 pandemic, inclement weather, and the Jewish holidays may constitute acceptable reasons for an extension, they do not warrant an extension when the debtor does not demonstrate how they affected the debtor's ability to meet the deadline.[270] Circumstances such as the amount of work required to negotiate and propose a plan and competing demands on the debtors – common to any bankruptcy case – are insufficient to justify an extension.[271] Similarly, an error in calendaring the deadline for filing a plan may not provide a basis for an extension.[272]

The need to resolve disputes concerning the debtor's interests in property before filing a plan may justify extending the deadline,[273] but not if the debtor has failed to show that the dispute could not have been resolved prior to the deadline, what progress the debtor has made proposing a plan, and that its resolution is essential to the plan, even in the absence of any objection to the extension.[274]

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[270] *In re* Online King, LLC, 629 B.R. 340, 351-52 (Bankr. E.D. Tex. 2021) (pandemic and Jewish holidays); *In re* Northwest Child Development Centers, Inc., 2020 WL 8813586 at *2 (Bankr. M.D. N.C. 2020) (pandemic and inclement weather preventing inspection of business premises for appraisal).

[271] *In re* Online King, LLC, 629 B.R. 340, 351 (Bankr. E.D. Tex. 2021).

[272] *In re* Majestic Gardens Condominium Association, Inc., 2022 WL 789447 (Bankr. S.D. Fla. 2022). The court declined to extend the deadline even though the debtor's lawyer filed the plan three days after expiration of the deadline. The court noted that the standard for extension of the plan filing deadline is more stringent than the "excusable neglect" standard of Bankruptcy Rule 9006(b)(1) for extending a deadline after its expiration.

The court allowed the debtor to amend the petition to remove the subchapter V election instead of dismissing the case. It is unclear what dismissal would accomplish in this situation: the debtor could simply re-file another case and promptly file the plan in the new one.

[273] *In re* HBL SNF, LLC, 635 B.R. 725 (Bankr. S.D.N.Y. 2022). The court granted an extension of 60 days rather than 90 as the debtor requested. The court reasoned that the 60-day extension would extend the deadline beyond the date of a scheduled hearing on a motion for summary judgment in an adversary proceeding regarding the debtor's lease of its facility and that the court at that time could assess the status of the case and rule on a further extension request, if necessary. The court observed that its "wait and see" approach is "sometimes used by bankruptcy courts when confronted with contested requests for an extension of a debtor's exclusivity period under Section 1121(d) in a traditional Chapter 11 case." *Id.* at 731.

[274] *In re* Excellence 2000, Inc., 2022 WL 163400 (Bankr. S.D. Tex. 2022).

The court may grant an extension even if the deadline has expired at the time the debtor requests it.[275] Nevertheless, the better practice is for the debtor to file a motion for an extension in time to permit the court to schedule a hearing on it before the deadline terminates because the failure to timely file a plan constitutes "cause" for dismissal or conversion of the case under § 1112(b)(4)(J).[276]

Because subchapter V does not contain a deadline for confirmation of a plan and §1193 permits preconfirmation modification of a plan at any time, a debtor may consider the timely filing of a "placeholder" plan with the expectation of a later modification instead of seeking an extension.[277]

The court in *In re Baker*, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020), criticized the strategy as "a waste of time and resources for all parties-in-interest" that "does not represent Congress's intent" in enacting subchapter V. . . . The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans."

Stating that "filing a placeholder plan merely to satisfy the statutory plan deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V, the *Baker* court announced, *id.* at 38*:*

[275] *E.g., In re* Excellence 2000, Inc.*,* 2022 WL 163400 (Bankr. S.D. Tex. 2022); *In re* Tibbens, 2021 WL 1087260 at * 8 (Bankr. M.D.N.C. 2021); *In re* Online King LLC*,* 629 B.R. 340, 350-351 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03.

[276] *In re* Online King LLC*,* 629 B.R. 340, 350-51 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03. See Section VI(D).

[277] In *In re Baker,* 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020), the court described a "placeholder plan" as "a skeletal document filed to satisfy a filing deadline, with the intent to file a completed, substantive document later."

> [T]his Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.

## K. Debtor's postpetition performance of obligations under lease of nonresidential real property – § 365(d)

Section 365(d)(3) requires the timely performance of all obligations of a debtor that is the lessee under an unexpired lease of nonresidential real property, unless the court for cause extends the time for performance. SBRA did not change § 365(d)(3), but the Consolidated Appropriations Act, 2021 (the "CAA") enacted a temporary amendment that permits the court to extend the time for performance in subchapter V cases that was effective until December 26, 2022.[278]

Pre-CAA § 365(d)(3), which remains in effect, redesignated as § 365(d)(3)(A),[279] permits the court to extend the time for performance of postpetition obligations arising within 60 days after the order for relief, but not beyond such 60-day period.

The CAA temporarily added subparagraph (B) to § 365(d)(3) to permit an extension of the time for performance in a subchapter V case if the debtor "is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic."[280] Subparagraph (B) permitted extension of the time for performance

[278] Consolidated Appropriations Act, 2021 (the "CAA"), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020). The CAA also temporarily amended § 365(d)(4). Pre-CAA § 365(d)(4) provided that, if assumption of a lease of nonresidential real property under which the debtor is the lessee did not occur by the earlier of confirmation of a plan or 120 days after the order for relief, the lease was deemed rejected and the trustee (or debtor in possession) must surrender the property to the lessor. The court for cause could extend the time by 90 days, for a maximum time of 210 days. The CAA extended the 120-day period to 210 days and permits extension to a maximum of 300 days. CAA § 1010(f)(1)(B). The extended period sunsets two years after enactment of CAA, or December 26, 2022. CAA § 1001(f)(2)(A)(ii).

[279] CAA § 1001(f)(1)(A)(i).

[280] CAA § 1001(f)(1)(A)(iii).

to the earlier of 60 days after the order for relief or the date of assumption or rejection of the lease.[281] In addition, subparagraph (B) permitted the court to extend the time for an additional 60 days if the debtor is continuing to experience a material financial hardship due to the COVID-19 pandemic.

CAA also temporarily added subparagraph (C) to § 365(d)(3). It provided that, if the court extended the time for performance of an obligation under subparagraph (B), the obligation would be treated "as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e)."[282] Section VII(C) considers this provision in its discussion of §1191(e), which permits deferral of administrative expenses under a cramdown plan.

The amended provisions expire on December 26, 2022.[283] They continue to apply, however, in any subchapter V case filed before the sunset date.[284]

It is unclear whether a sub V debtor who has not experienced financial hardship due to COVID-19 could seek relief under subparagraph (A). Although subparagraph (B) arguably states the rule for all sub V cases, its apparent purpose is to relax the rule in a subchapter V case for a debtor whose problems arise from the COVID-19 pandemic. A sub V debtor who cannot establish that it has experienced Covid-related financial distress, therefore, should be able to proceed under subparagraph (A).

[281] This provision in subparagraph (B) differs from subparagraph (A) (the pre-CAA rule in § 365(d)(3)). Subparagraph (A) permits extension of the time for performance for 60 days without regard to whether the lease is assumed or rejected. Subparagraph (B) does not permit extension of time beyond the date of assumption or rejection. Arguably, the purpose of subparagraph (B) is to relax the rules for postpetition performance in a subchapter V case so that a sub V debtor could still seek an extension of time for 60 days to perform postpetition obligations notwithstanding the earlier rejection of a lease.
[282] CAA § 101(f)(1)(A)((iii).
[283] CAA § 101(f)(2)(A)(i).
[284] CAA § 101(f)(2)(B).

## VII. Contents of Subchapter V Plan

The requirements for the contents of a sub V plan are contained in §§ 1122 and 1123[285] (with two exceptions) and in §1190. An important provision is that §1190(3) permits modification of a claim secured only by a security interest in real property that is the principal residence of the debtor if the loan arises from new value provided to the debtor's business.[286]

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c) – are not applicable in sub V cases.[287] A subchapter V plan must comply with the other requirements of §§ 1122 and 1123.

Official Form 425A, which is a permissible, but not required, form for a chapter 11 plan, has been modified and may be used in a subchapter V case. Courts may adopt local forms for subchapter V plans[288] or make the use of Official Form 425A mandatory and provide guidance on its preparation.[289]

### A. Inapplicability of §§ 1123(a)(8) and 1123(c)

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan.[290] Section 1123(c) prohibits a plan filed by an entity

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[285] A plan may include a provision for settlement of a dispute with a creditor over the avoidance of its lien. *E.g.,* Kopleman & Kopleman, LLP v O'Grady (*In re* O'Grady), 2022 WL 1058379 at *6 (D. N.J. 2022).
[286] § 1190(3).
[287] § 1181(a).
[288] E.g., *Debtor's Chapter 11, Subchapter V Plan* (D. Md.) (suggested), available at https://www.mdb.uscourts.gov/content/local-bankruptcy-forms; *Chapter 11 Subchapter V Small Business Debtor's Plan of Reorganization [or Liquidation]* (D. New Jersey) (mandatory), available at http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms; *Plan of Reorganization* (W.D. Wisconsin) (suggested), available at https://www.wiwb.uscourts.gov/forms.
[289] E.g., *SBRA Plan Instructions*, available at http://www.canb.uscourts.gov/forms/district. The full text of a somewhat elaborate subchapter V plan is attached to the confirmation order in *In re Abri Health Services, LLC,* 2021 WL 5095489 at * 11 (Bankr. N.D. Tex. 2021).
[290] § 1123(a)(8).

other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.[291]

SBRA replaced § 1123(a)(8) with a disposable income provision applicable to all debtors in §1190, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan.[292]

## B. Requirements of §1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage

Section 1190 contains three provisions governing the content of a sub V plan.

First, §1190(1)[293] requires information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

Second, §1190(2) requires the plan to provide for the submission of "all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

Because a plan ordinarily must provide for payment of creditors from the debtor's income, the requirement for the submission to the trustee of income as necessary for the execution of the plan states nothing more than a feasibility requirement.

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[291] § 1123(c).
[292] § 1189(a).
[293] No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

Section 1190(2) raises interpretive issues regarding the requirement that future income be submitted to the "supervision and control" of the trustee.

If a consensual plan is confirmed under §1191(a), §1194 does not contemplate that the trustee make the payments. Moreover, §1183(c)(1) provides for termination of the trustee's service upon substantial consummation of a consensual plan under §1191(a). Under § 1101(2)(C), "substantial consummation" occurs upon (among other things[294]) "commencement of distribution under the plan." An issue is whether a consensual plan must provide for submission of future income to the trustee's supervision and control when the trustee's service will terminate once the first plan payment is made.[295]

The third content provision in §1190(3) changes the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence.[296] The same antimodification rule applies in chapter 13 cases under § 1322(b)(2).[297]

Section 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to

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[294] Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A) (2018), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

[295] *See* Section IX(A).

[296] *E.g.,* Mechanics Bank v. Gewalt (*In re* Gewalt), 2022 WL 305271 (B.A.P. 9th Cir. 2022). The court held that a subchapter V liquidation plan providing for payment of the mortgage from the sale of the debtor's principal residence within two years, without a provision for current mortgage payments, violated § 1123(b)(5) because it impermissibly modified the mortgage lender's rights under the Supreme Court's interpretation of 11 U.S.C. § 1322(b)(2) in *Nobleman v. American Savings Bank.* 508 U.S. 324, 329, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). The court noted that it had reached the same result in a chapter 13 case. *Philadelphia Life Ins. Co. v. Proudfoot (In re Proudfoot),* 144 B.R. 876, 877-78 (B.A.P. 9th Cir. 1992). The exception in in § 1190(3) was not relevant in the case. *Gewalt at* *4 n. 7.

[297] For a discussion of the antimodification provision in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:39-5:42.

acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."[298] (Query whether an individual whose debts exceed the limits for qualification as a "small business debtor" under § 101(51D)(A) but who qualifies for subchapter V under the temporary $ 7.5 million debt limit under the CARES Act meets the requirement in (B) for use of loan proceeds for the debtor's "small business.")

Courts have considered whether the prohibition on modification of a residential mortgage applies when the property in which the debtor resides has nonresidential characteristics or uses, usually in chapter 13 cases.[299] For example, the property may be a multi-family dwelling that does or can generate rental income or a farm. The debtor may use it for business purposes, or it may include additional tracts or acreage beyond a residential lot.

The issue in such cases is whether the claim is secured by property other than the debtor's residence. Some courts have ruled that antimodification protection extends to a mortgage secured by any real property that the debtor uses, at least in part, as a residence. Other courts, however, have concluded that the debtor's use of real property as a residence does not alone mean that the debt is secured only by the debtor's principal residence, and that a mortgage on property the debtor uses as a residence is subject to modification if the property has sufficient nonresidential characteristics or uses.[300]

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[298] § 1190(3). For a discussion of strategies for lenders to consider to preclude application of the subchapter V exception to the anti-modification rule, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act,* 28 AMER. BANKR. INST. L. REV. 251, 282-83 (2020). Professor Bradley suggests lenders might require more than half of the loan proceeds to be used for personal expenses or that, in the case of a proposed loan secured by a second mortgage, the lender instead pay off the first mortgage and refinance that amount so that most of the loan is not for the business. *Id.*

[299] *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:42.

[300] *Id.*

The court in *In re Ventura*[301] concluded that application of §1190(3) requires a different analysis. There, an individual operated a bread and breakfast business in her residence through a limited liability company she owned. In her chapter 11 case filed prior to SBRA's enactment, the court had ruled that she could not modify the mortgage on the property, applying the cases holding that a debtor may not modify a mortgage on property in which she resides even if she uses it for other purposes.

After SBRA's effective date, the debtor amended her petition to elect application of subchapter V. In addition to permitting her to proceed under subchapter V,[302] the court addressed the lender's contention that she could not invoke § 1190(3) because the proceeds from the mortgage had been used to acquire the property.[303]

The *Ventura* court concluded that § 1190(3) specifically permits the modification of a residential mortgage if the conditions of subparagraphs (A) and (B) exist. The questions, therefore, were whether the mortgage proceeds were "not used primarily to acquire the real property" (§1190(3)(A)) and were "used primarily in connection with the small business of the debtor" (§11903(3)(B)).[304]

The court focused on two terms in subparagraph (A). "Primarily," the court said, means "for the most part," "of first importance," or "principally," rather than "substantial." The phrase "real property," the court continued, refers back to the real property that is the debtor's residence.[305]

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[301] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).
[302] *Id.* at 7-14. Part XIII discusses the court's ruling on the availability of subchapter V in the case.
[303] The lender also argued that § 1190(3) could not be applied to a transaction arising prior to its effective date. Part XIII discusses the court's ruling rejecting this contention.
[304] *In re* Ventura, 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).
[305] *Id.* at 24.

Based on these definitions, the court phrased the question of subparagraph (A)'s application in the case before it as "whether the Mortgage proceeds were used primarily to purchase the Debtor's Residence."[306] The inquiry thus differs from the issue under § 1123(b)(5) (and § 1322(b)(2) in chapter 13 cases) that, under the court's prior ruling, prohibited modification of the mortgage because the debtor resided in the property, regardless of its other uses. §1190(3), the court explained, "asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence."[307]

Subparagraph (B), the court stated, required it to determine "whether the mortgage proceeds were used primarily in connection with the debtor's business."

The *Ventura* court concluded that subparagraphs (A) and (B) directed it "to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor's business activities."[308]

The court proposed five factors to consider in this analysis: "(1) Were the mortgage proceeds used primarily to further the debtor's business interests; (2) Is the property an integral part of the debtor's business; (3) The degree to which the specific property is necessary to run the business; (4) Do customers need to enter the property to utilize the business; and (5) Does the business utilize employees and other businesses in the area to run its operations."[309]

The court found that the debtor bought the property to operate it as a bed and breakfast, that its primary purpose was the offering of rooms for nightly fees, that the debtor's LLC provided additional services to guests for additional fees, and that the mortgage proceeds were

[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.* at 25.

used to purchase the building that houses the business. The court ruled that the evidence was sufficient to hold a full evidentiary hearing to determine whether the debtor could use § 1190(3) to modify the mortgage.[310]

A business debtor may grant a security interest in a principal residence as additional collateral without receiving new value, perhaps in connection with a workout involving forbearance or restructuring of the debt. A potential issue is whether the §1190(3) exception to the antimodification rule applies in this situation when the debtor receives no additional loan proceeds.

## C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of §1191(b), §1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.[311] Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.[312]

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[310] *Id.*

[311] § 1191(e).

[312] The permission to pay these priority claims "through the plan" without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. *See* Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 15-16.

In *In re Seven Stars on the Hudson Corp.,* 618 B.R. 333, 347 n. 82 (Bankr. S.D. Fla. 2020), the court observed that a sub V plan cannot provide for the deferred payment of postpetition rent obligations under a lease of nonresidential real property.

The *Seven Stars* court agreed that § 1191(e) permits deferred payment of administrative expense claims allowed under § 503(b). It concluded, however, that § 365(d)(3), not § 503(b), governs postpetition rent obligations. The court ruled, "As such, even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent." *Id.* Even if the court permitted the debtor to proceed under subchapter V in its case that began prior to its enactment, the court ruled, it could not confirm a plan that did not provide for full payment of postpetition rent on the effective date of the plan in accordance with earlier orders of the court.

The Consolidated Appropriations Act, 2021 (the "CAA")[313] made temporary changes to § 365(d) dealing with the timely performance of the debtor's postpetition obligations as lessee under an unexpired lease of nonresidential real property. As Section VI(K) discusses, the temporary amendment added subparagraph (B) to § 365(d)(3) to permit the court to extend the time for the performance of such obligations for up to 120 days in a sub V case if it determined that the debtor "is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic."[314]

Importantly, CAA also added subparagraph (C) to § 365(d)(3) to provide that, if the court granted such an extension, the obligation "shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e)."[315]

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[313] Consolidated Appropriations Act, 2021 (the "CAA"), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020).
[314] § 365(d)(3)(B), as enacted by CAA § 1001(f)(1)(A)(iii).
[315] § 365(d)(3)(C), as enacted by CAA § 1001(f)(1)(A)(iii).

The provisions expire on December 26, 2022[316] but continue to apply in any subchapter V case filed before then.[317]

Because temporary § 365(d)(3)(C) requires treatment of a deferred postpetition lease obligation as an administrative expense for purposes of § 1191(e), it seems that, notwithstanding the *Seven Stars* analysis, a cramdown plan may provide for the deferral of payment of obligations that the court extends. The difficulty with the conclusion is that subparagraph (B) still requires that the court order performance of postpetition obligations within no more than 120 days after the order for relief.

Arguably, a debtor who has not complied with the mandatory requirement of § 365(d)(3)(B) has not satisfied the confirmation requirement of § 1129(a)(2) that the plan proponent comply with all applicable provisions of the Bankruptcy Code. Courts will have to determine whether temporary § 365(d)(3)(C) grants permission to defer payments that the debtor had the obligation to make within the time that § 365(d)(3)(B) requires.

# VIII. Confirmation of the Plan

## A. Consensual and Cramdown Confirmation in General

### 1. Review of confirmation requirements in traditional chapter 11 cases and summary of changes for subchapter V confirmation

In a traditional chapter 11 case, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met in a traditional case except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits

[316] CAA § 1001(f)(2)(A).
[317] CAA § 1001(f)(2)(B).

so-called "cramdown" confirmation "if the plan does not discriminate unfairly, and is fair and equitable," with regard to each impaired class that has not accepted it.[318] Section 1129(b)(2) states the rules for the "fair and equitable" requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).[319]

The effects of confirmation in a traditional case do not differ depending on whether cramdown confirmation under § 1129(b) occurs.

Section 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it.[320] Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.[321]

If all the applicable requirements in § 1129(a) are met in a sub V case except for the projected disposable income rule of paragraph (a)(15), §1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.[322] This paper refers to it as a "consensual plan."

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[318] § 1129(b)(1).
[319] § 1129(b)(2).
[320] § 1181(a). For cases applying the applicable § 1129(a) standards, see *In re* Hyde, 2022 WL 2015538 (Bankr. E.D. La. 2022); *In re* Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020); *In re* Pearl Resources, LLC, 622 B.R. 236 (Bankr. S.D. Tex. 2020). *See also In re* BCT Deals, Inc., 2022 WL 854473 (Bankr. C.D. Cal. 2022) (Court entered confirmation order on debtor's motion for confirmation in accordance with local rule without a hearing based on absence of opposition to motion after notice of opportunity to object).
[321] INTERIM RULE 1007(b).
[322] § 1191.

Section 1191(b) states the rules for cramdown confirmation in sub V cases. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.[323] In general, §1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)).

The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.[324]

Importantly, both consensual confirmation and cramdown confirmation require compliance with all requirements of § 1129(a) except those specifically mentioned above. Sections VIII(D) and (E) discuss confirmation issues that have arisen in subchapter V cases under provisions that SBRA did not change.

Cramdown confirmation under §1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as Section VIII(B) discusses.

For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected disposable income requirement, which a

[323] § 1181(a).
[324] § 1191(c)(1).

single creditor can do in a traditional case even if all impaired classes accept the plan.[325] Section VIII(D)(8) discusses application of the good faith requirement of § 1129(a)(3) in the context of confirmation of a consensual plan when an unsecured creditor objects because the debtor is not paying enough disposable income to creditors.

Official Form B315 contemplates a short confirmation order that identifies the plan and recites that all requirements for confirmation have been met. As in many traditional chapter 11 cases, however, courts in subchapter V cases have entered lengthy and detailed confirmation orders with extensive findings of fact and conclusions of law, even in the absence of objections to confirmation.[326]

**2. Differences in requirements for and consequences of consensual and cramdown confirmation**

In a subchapter V case, the effects of confirmation differ depending on whether confirmation occurs under §1191(a) (where all classes have accepted it) or under §1191(b) (where one or more – or even all – classes have not accepted it).[327]

Some effects of consensual confirmation are more advantageous to a debtor – particularly an individual – than the effects of cramdown confirmation. Some effects of cramdown confirmation, however, are more advantageous than consensual confirmation.

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[325] § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. *See In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes "sweat equity" (i.e., future income) as "new value" that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

[326] *E.g., In re* North Richland Hills Alamo, LLC, 2022 WL 2134976 (Bankr. N.D. Tex. 2022); *In re* Roundy, 2021 WL 5428891 (Bankr. D. Utah 2021). *In re* Abri Health Services, LLC, 2021 WL 5095489 (Bankr. N.D. Tex. 2021); *In re* Triple J Parking, 2021 Bankr. Lexis 2304 (Bankr. D. Utah 2021).

[327] Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); deferral of administrative expenses (Section VII(C)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

In addition, cramdown confirmation imposes different requirements that provide opportunities for creditors to object to confirmation. Resolution of the objections may require an evidentiary hearing that exposes the debtor to uncertainty and additional legal fees and other expenses required for the debtor to prepare for trial and to prevail.

Counsel for a subchapter V debtor must understand these differences in proposing a plan and engaging in negotiations about it with creditors and the sub V trustee, who must also understand them to fulfill the duty to facilitate a consensual plan.[328]

*Differences in requirements for confirmation*

Whether consensual or cramdown confirmation occurs, confirmation in a sub V case requires satisfaction of all the applicable confirmation requirements of § 1129(a) except for acceptance by all impaired classes (§ 1129(a)(8) and (a)(10)), and, in an individual case, compliance with the projected disposable income requirement of §1129(a)(15).

Consensual confirmation of a sub V plan under § 1191(a) requires acceptance by all impaired classes, as § 1129(a)(8) mandates. (This necessarily means that the plan complies with § 1129(a)(10), requiring acceptance by at least one class of claims.)

If one or more classes of impaired claims do not accept the plan, cramdown confirmation under § 1191(b) requires that the plan not discriminate unfairly and that it be "fair and equitable" under the provisions of § 1191(c), as Section VIII(B) discusses.

Section 1191(c)(1) requires treatment of a secured claim in compliance with § 1129(b)(2)(A), which applies in a traditional chapter 11 case.[329] Because the typical method for meeting this requirement is periodic payments with a value equal to the value of the

[328] *See In re* Louis, 2022 WL 2055290 (Bankr. C.D. Ill. 2022).
[329] See Section VIII(B)(2).

encumbered property, compliance with this requirement may require an evidentiary hearing with regard to the property's value and the proposed rate of interest.

Section 1191(c)(2) requires compliance with the projected disposable income requirement, which Section VIII(B)(4) discusses. Determination of the issues may require an evidentiary hearing with regard to the amount of the projected disposable income and the period over which the debtor must pay it.

Finally, § 1191(c)(3) requires the court to find either that the debtor will be able to make payments under the plan or that it is reasonably likely that the debtor will do so. If the court determines that it is reasonably likely that the debtor will make plan payments, the plan must also include "appropriate remedies. Section VIII(B)(5) explains these provisions. Resolution of an objection based on the debtor's ability to make plan payments may, like other cramdown issues, require an evidentiary hearing.

*Different consequences of consensual and cramdown confirmation*

In a subchapter V case, the effects of confirmation differ depending on whether consensual or cramdown confirmation occurs. Section VIII(A)(3) discusses the advantages and disadvantages for the debtor of consensual or cramdown confirmation based on these differences.

*Discharge.* Discharge occurs immediately upon confirmation of a consensual plan. Discharge does not occur after cramdown confirmation until the debtor completes payments under the plan. A cramdown discharge does not discharge debts on which the last payment is due after the three to five year term of the plan. In the case of any entity, courts disagree about whether a debt excepted from discharge under § 523(a) is excepted from a cramdown discharge,

as they are in an individual case regardless of the type of discharge. Part X discusses these issues.

*Property of the estate.* Unless the confirmation order or plan provides otherwise, confirmation of a consensual plan vests property of the estate in the debtor, whereas cramdown confirmation results in the retention of property of the estate in the debtor. Moreover, after cramdown confirmation, property of the estate includes property that the debtor acquires after the filing of the petition and postpetition earnings. See Part XI.

*Payments under the plan.* When cramdown confirmation occurs, the sub V trustee makes payments under the plan, unless the confirmation order or plan provides otherwise. Under a consensual plan, the debtor makes payments. See Part IX.

*Termination of services of subchapter V trustee.* If the court confirms a consensual plan, the services of the trustee terminate upon the plan's substantial confirmation. In the cramdown situation, the subchapter V continues to serve as trustee. See Part IX.

*Deferral of payment of administrative expenses.* The debtor may pay administrative expenses, such as compensation for the subchapter V trustee and the debtor's attorneys and other professionals, if the court confirms a plan under the cramdown provisions. A consensual plan cannot defer administrative expenses without the agreement of the administrative expense claimant. See Section VII(C).

*Postconfirmation modification of the plan.* After substantial consummation of a consensual plan, the debtor may not modify it. The debtor may modify the plan after confirmation under the cramdown provisions within three to five years after confirmation, as the court determines. See Section VIII(C).

The type of confirmation also affects the remedies available to creditors upon postconfirmation default, as Part XII discusses.

### 3. Benefits to debtor of consensual or cramdown confirmation

Two features of subchapter V reflect a policy of encouragement of consensual plans. One is the unique duty of a subchapter V trustee in § 1183(b)(7) to "facilitate the development of a consensual plan of reorganization."[330] The other is the requirement in § 1188(c) that the debtor file a report prior to the mandatory status conference that "details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."

A strategic question is whether the debtor wants consensual confirmation.[331] Cramdown confirmation is advantageous to the debtor in one important way: a debtor may seek postconfirmation modification of a confirmed cramdown plan even if it has been substantially consummated, but a debtor cannot modify a confirmed consensual plan after substantial consummation.[332]

A debtor who faces default after cramdown confirmation because of unanticipated postconfirmation business conditions (for example, a material decrease in income or unexpected expenses) may thus seek postconfirmation modification to deal with the issue, but a debtor operating under a confirmed consensual plan cannot. Moreover, a debtor may need to modify a plan for other reasons necessary for or helpful to its business or financial condition.[333]

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[330] See Section IV(B)(1).

[331] For a discussion of the advantages of consensual confirmation in an individual case, see *In re* Louis, 2022 WL 2055290 at * 14-16 & nn. 11, 12 (Bankr. C.D. Ill. 2022).

[332] See Section VIII(C). Section VIII(C)(1) discusses substantial consummation.

[333] The debtor in *In re National Tractor Parts, Inc.,* 2022 WL 2070923 (Bankr. N.D. Ill. 2022), sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVD-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA's claim as a general unsecured claim, payable in quarterly payments.

Because postconfirmation modification may be necessary for or helpful to the debtor's postconfirmation success, a debtor may want to preserve the flexibility of postconfirmation modification through cramdown, rather than consensual, confirmation.

Another potential advantage of cramdown confirmation is that postconfirmation payment of administrative expenses, usually compensation of the subchapter V trustee and the debtor's attorney and other professionals, is permissible in a cramdown plan under § 1191(3).[334] As a practical matter, however, it is likely that the same result can occur under a consensual plan.

If the debtor has proposed a feasible plan that all impaired classes have accepted but does not have the ability to pay administrative expenses in full on its effective date, the subchapter V trustee and debtor professionals will be hard-pressed to thwart confirmation of a consensual plan by insisting on immediate payment in full. The facts that deferral can happen anyway through cramdown confirmation and that the trustee and the debtor are charged with achieving consensual confirmation should lead to their agreement to deferred payment so that the plan complies with § 1129(a)(9)(A).

Several consequences of consensual confirmation are more beneficial to a debtor than cramdown confirmation. Some of these advantages may be achievable through a cramdown plan

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The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made *de minimis* payments totaling $ 1,428.20 to creditors in two classes but had not yet made a $ 50,000 payment to a creditor in another class or begun quarterly payments to generally unsecured creditors.

The court held that commencement of payments occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

[334] See Section VIII(B)(6).

or may be relatively unimportant. Two of them that a cramdown plan cannot deal with, however, are important – one for individual debtors and one for entity debtors.

In an individual case, an important consequence of cramdown confirmation is that property of the estate under § 1186(a) includes property that the debtor acquires after the filing of the petition and postpetition earnings. This means that, if conversion to chapter 7 occurs after confirmation, the chapter 7 estate includes postpetition property and earnings.[335] The result is the same in a traditional chapter 11 case.[336] Section 1186(a), however, does not apply if consensual confirmation occurs, so an individual debtor retains postpetition property and earnings upon conversion of a case after consensual confirmation.[337]

This difference is not important in the case of an entity because the distinction between postpetition and prepetition assets and earnings is immaterial.[338]

In the case of an entity, the critical advantage of consensual confirmation is that it is clear that the exceptions to discharge in § 523(a) do not apply. Upon confirmation of a consensual plan, an entity receives a discharge under § 1141(d)(1), and the exceptions to discharge under § 523(a) apply only to an individual under § 1141(d)(2).[339]

Cramdown confirmation, however, results in a discharge under § 1192. Section 1192 does not discharge debts "of the kind" specified in § 523(a), which states that a § 1192 discharge does not discharge an "individual debtor" from any of the specified debts. Courts disagree about whether the § 523(a) exceptions apply to the discharge of an entity under § 1192.[340]

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[335] See Section XI(B)(2).
[336] See Section XI(A).
[337] See Section XI(B)(2).
[338] See Section XI(B)(1).
[339] See Section X(A).
[340] See Section X(D).

Note that an entity can achieve this advantage of consensual confirmation only if the claim of the creditor asserting an exception to discharge (1) is not in a separate class; and (2) is not so large that the creditor controls acceptance of the class in which it is placed. Rejection by a creditor in a separate class prevents consensual confirmation. If the creditor is in a class with other creditors, such as the class of general unsecured claims, its rejection of the plan can prevent confirmation if the amount of its claim is more than one-third of the amount of all the claims in the class that vote.

Although provisions in a plan or confirmation order cannot provide these advantages in a cramdown situation, they can provide other advantages that automatically accompany consensual confirmation.

Confirmation of a consensual plan results in termination of the sub V trustee's services upon "substantial consummation" and distributions to creditors by the debtor.[341] The sub V trustee continues to serve after cramdown confirmation and makes payments under the plan, unless the plan or confirmation order provides otherwise.[342] The postconfirmation role of the sub V trustee and the trustee's disbursement of funds requires compensation of the trustee, which increases expenses in the case.

This may not matter to the debtor. A carefully drafted plan will provide for the trustee's compensation to be paid from the debtor's plan payments. If so, creditors effectively bear the burden of the trustee's compensation, not the debtor.

For this reason, creditors may support or even encourage payment by the debtor rather than the trustee. Moreover, the sub V trustee may prefer to avoid the ministerial duty of making

[341] See Section IX(A).
[342] See Section IX(B).

disbursements. In short, parties opposed to confirmation of a cramdown plan may nevertheless have no objection to provisions of a plan or confirmation order for the debtor to make disbursements.

Two differences in the consequences of confirmation relating to the discharge may be somewhat less important to the debtor. One difference is that discharge occurs upon confirmation of a consensual plan under § 1141(d)(1)[343] but not until completion of payments after three to five years, as fixed by the court, upon cramdown confirmation under § 1192.[344] The other is that debts on which the last payment is due after the three-to-five year period are not discharged under the cramdown discharge under § 1192(1). These differences may be of more concern to an individual debtor than to an entity.[345]

A significant advantage of consensual confirmation is that the projected disposable income and feasibility components of the fair and equitable rule do not apply. The debtor therefore does not face litigation over those and other potential issues that may arise in cramdown confirmation, such as valuation of a secured creditor's collateral and the appropriate interest rate. Consensual confirmation thus eliminates uncertainty about confirmation and the expense of litigating cramdown issues.

These benefits are potentially achievable in the cramdown context.

A plan under § 1190(1)(C) must in any event include projections with regard to the debtor's ability to make payments as proposed. In many cases it is likely that creditors or the subchapter V trustee will expect commitment of the equivalent of projected disposable income as

[343] See Section IX(A).
[344] See Section IX(B).
[345] See *In re* Louis, 2022 WL 2055290 at *14 nn. 11, 12 (Bankr. C.D. Ill. 2022) (Noting that discharge occurs immediately upon confirmation in consensual plan and that long-term mortgage debts to be paid by owners of property rather than debtor may not be included in cramdown discharge.).

a condition for support of a consensual plan. If the debtor has addressed the amount of payments to be made to creditors satisfactorily to the sub V trustee and creditors active in the case, projected disposable income, as well as feasibility, may not be significant issues at confirmation.

Similarly, negotiations with secured creditors may result in settlement of valuation and interest rate issues.

Thus, it is possible that careful drafting of the plan, negotiations with objecting parties, and the resolution of objections to confirmation through modification of the plan to address them can result in cramdown confirmation without objection – what might be called "consensual nonconsensual confirmation." If objections cannot be resolved such that the debtor must litigate them, it is unlikely that consensual confirmation would be possible anyway.

In summary, the primary advantage of cramdown confirmation is the availability of postconfirmation modification. For an individual, the primary disadvantage of cramdown confirmation is the inclusion of postpetition property and earnings as property of the estate if the case later converts to chapter 7.

### 4. Whether balloting on plan is necessary

Balloting on the plan is obviously necessary if the debtor wants to achieve consensual confirmation under § 1191(a) because all classes of impaired creditors must accept the plan to meet the confirmation requirement of § 1129(a)(8).

When the debtor expects that at least one class of claims – typically a major secured lender in its separate class – will not accept any plan that the debtor can realistically propose, or when the debtor wants cramdown rather than consensual confirmation based on its evaluation of the consequences just discussed, the question is whether balloting is required.

As Section VIII(A)(3) discusses, subchapter V contemplates efforts to achieve a consensual plan by imposing a duty on the sub V trustee to facilitate development of a consensual plan and by requiring the debtor to report at the status conference on the efforts that it has undertaken and will undertake to attain a consensual plan. Courts have been critical of sub V trustees and attorneys for debtors who have not attempted to achieve confirmation of a consensual plan.[346]

Subchapter V's emphasis on consensual confirmation supports a conclusion that balloting should ordinarily be required and that the debtor should at least try to obtain consensual confirmation. Nevertheless, circumstances may exist where doing so would be a fruitless exercise that does not justify the time and expense of doing so.

One such circumstance arises when a creditor with the ability to prevent consensual confirmation of a plan clearly intends to do so. Because even acceptance by all other impaired classes will not result in consensual confirmation, no legal reason exists for asking them to vote.

A debtor who expects acceptances from other classes, however, may find it advantageous to go through the balloting exercise.

As an initial matter, balloting even in the face of expected rejection eliminates the need for the debtor to explain why balloting should not be required and the efforts it has undertaken to negotiate with the creditor. It shows that the debtor is trying and lets the court see the effort.

In addition, it is always possible that, once the plan is filed, and maybe even after the creditor has rejected it, the creditor may re-evaluate its position and be amenable to further

[346] *See, e.g., In re* Louis*,* 2022 WL 2055290 (Bankr. C.D. Ill. 2022); *In re* 218 Jackson LLC*,* 631 B.R. 937 (Bankr. M.D. Fla. 2021). In *Louis,* the court observed that the subchapter V trustee had an "absolute duty" to work with the debtor, the debtor's attorney, and creditors to try to achieve consensual confirmation of a plan. *Louis,* 2022 WL 2055290 at * 18.

negotiations that will resolve its issues. If all other class have accepted the plan, the creditor's acceptance may permit consensual confirmation.

Moreover, acceptance by other creditors may as a practical matter be helpful in convincing the court to confirm a cramdown plan. If cramdown confirmation issues are close calls, a court may be sympathetic to resolving them in favor of confirmation when other creditors have accepted the plan.

The issue is more difficult when the debtor does not want consensual confirmation. It is arguable that the good faith requirement precludes cramdown confirmation when the debtor has not attempted confirmation of a consensual plan.[347] It would seem, however, that a debtor's good faith efforts to propose a plan that meets cramdown requirements and that resolves objections of the subchapter V trustee and creditors should satisfy the good faith requirement and permit cramdown confirmation, if that is the type of confirmation that the debtor has determined is in the debtor's best interests. Cramdown confirmation of a plan without balloting that draws no objections or that is modified to resolve them by agreement – a "consensual nonconsensual plan" – is consistent with subchapter V's objectives.

### 5. Final decree and closing of case

The type of confirmation affects the timing of the entry of a final decree and the closing of the subchapter V case. Section 350(a) provides for the closing of a case "after an estate has been fully administered and the court has discharged the trustee." Bankruptcy Rule 3022 implements § 350 in a chapter 11 case by providing, "After an estate is fully administered in a

[347] *See In re* Louis, 2022 WL 2055290 at *16 (Bankr. C.D. Ill. 2022) ("This Court interprets the provisions of Chapter 11 Subchapter V to require at least some attempt at consensual confirmation for a plan to be put forth in good faith.").

chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

Full administration of a case necessarily includes entry of the discharge and discharge of the trustee.

If the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation,[348] and the subchapter V trustee's services are terminated upon substantial consummation[349] of the plan.[350] Full administration of a subchapter V case, therefore, may ordinarily occur shortly after confirmation of a consensual plan.

In the cramdown context, in contrast, discharge does not occur until completion of payments under the plan,[351] and the trustee continues to serve until that time.[352] Full administration cannot occur until three to five years after confirmation, depending on the period during which the debtor must make payments.[353]

Accordingly, whereas the court may enter a final decree and close a subchapter V case shortly after confirmation of a consensual plan, entry of a final decree and closing of the case after cramdown confirmation must await the completion of plan payments.[354]

The fact that the subchapter V case after cramdown confirmation must remain open pending completion of plan payments may prompt a debtor to request "administrative closing" of the case to reduce the costs of administration after confirmation and before closing of the case.

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[348] See § X(A).
[349] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.
[350] See § IV(D)(1).
[351] See § X(B).
[352] See § IV(D)(1).
[353] See § VIII(D)(4)(ii).
[354] *See In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at *3-5 (Bankr. D. P.R. 2022).

The court denied the debtor's request to administratively close a subchapter V case in *In re Gui-Mer-Fe, Inc.,* 2022 WL 1216270 (Bankr. D. P.R. 2022). The court concluded that a case can be closed only when it is fully administered and that the debtor's concerns about administrative costs were unfounded because the debtor was exempt from paying US. Trustee fees[355] and because its duty to file reports under § 308[356] and Bankruptcy Rule 2015 terminated upon confirmation. *Id.* at *8.[357] *See also id.* at * 6.

## B. Cramdown Confirmation Under §1191(b)

### 1. Changes in the cramdown rules and the "fair and equitable" test

Discussion of the revised cramdown rules in a sub V case begins with a summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.[358] Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.[359]

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(10) that

[355] The court discussed cases dealing with administrative closing of traditional chapter 11 cases of individuals (in which discharge is deferred until completion of payments under the plan) in view of the burden on an individual debtor of paying U.S. Trustee fees for a lengthy time after confirmation if the case remained open. *In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at *5-8 (Bankr. D. P.R. 2022).
[356] Although § 308 applies only in a small business case, § 1187(b) requires a subchapter V debtor to comply with it.
[357] Interim Bankruptcy Rule 2015(a)(6) provides that the duty to file periodic reports in a chapter 11 small business case terminates on the effective date of the plan. Interim Bankruptcy Rule 2015(b) requires a subchapter V debtor to perform the duties prescribed in (a)(6).
[358] § 1129(a)(8).
[359] § 1129(a)(10).

at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).[360] In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.[361]

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.[362] Instead, §1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.[363] Section 1191(c) states a new "rule of construction" for the requirement that a plan be "fair and equitable."[364] It replaces the "fair and equitable" requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke §1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, §1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.[365]

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[360] § 1129(b)(2)(B).
[361] *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d]. For competing views of whether the absolute priority rule should apply in a traditional case of an individual, *see* Brett Weiss, *Absolute-Priority Rule Should Not Apply in Individual Cases*, 40-May AMER. BANKR. INST. J. 20 (2021), and Emily C. Eggmann and Robert E. Eggmann, *Absolute-Priority Rule Should Apply in Individual Chapter 11 Cases,* 40-May AMER. BANKR. INST. J. 21 (2021).
[362] § 1181(a).
[363] § 1191(b).
[364] § 1191(c).
[365] § 1191(d).

Under the cramdown rules in §1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern cramdown confirmation under § 1129(b).

It does not appear that subchapter V effects any change in the unfair discrimination requirement.[366] Section 1191(c) does, however, provide a new "rule of construction" in subchapter V cases for the condition that a plan be "fair and equitable," to replace the detailed definition of that term that § 1129(b) contains.

The following text explains the requirements of the "fair and equitable" test in sub V cases.

**2. Cramdown requirements for secured claims**

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is "fair and equitable" under § 1191(c)(1) if it complies with the standards for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. In a traditional chapter 11 case, an undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a traditional case because of the absence of an accepting impaired class of claims,

[366] See Section VIII(D)(1).

which § 1129(a)(10) requires.[367] This requirement is inapplicable for cramdown confirmation in a sub V case under §1191(b).

In addition, the creditor in a sub V case cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

Section 1129(b) states different requirements for cramdown confirmation for secured and unsecured claims. Compliance with the absolute priority rule, for example, is not a requirement for confirmation of a plan over a secured creditor's objection if the unsecured class accepts the plan. The absolute priority rule arises from cramdown requirements relating to unsecured claims in § 1129(b)(2)(B), but it is not in the requirements for cramdown of a secured claim in § 1129(b)(2)(A).

In a sub V case, paragraph (1) of § 1191(c) makes the § 1129(b)(2)(A) cramdown requirements applicable to secured claims, and paragraphs (2) and (3) impose additional requirements, the commitment of disposable income and a finding of feasibility.

It is unclear whether the additional requirements apply when only the secured creditor rejects the plan. Without discussing the issue, the court in *In re Pearl Resources, LLC,* 622 B.R. 236, 267-70 (Bankr. S.D. Tex. 2020), concluded that the plan, accepted by unsecured creditors, complied with the additional requirements in confirming the plan over the objections of secured creditors.

### 3. Components of the "fair and equitable" requirement in subchapter V cases; no absolute priority rule

Section 1191(c) does not state a "fair and equitable" rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the

[367] § 1129(a)(10).

"best efforts" test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.[368]

Section 1191(c) states that the "fair and equitable" requirement *includes* the factors just mentioned. A plan may also not meet the requirement if it proposes to pay a secured creditor more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.[369]

**4. The projected disposable income (or "best efforts") test**

The projected disposable income (or "best efforts") requirement is in §1191(c)(2).[370] Section 1191(c)(2) states two alternatives for satisfying the test. The same payments that satisfy the projected disposable income test may also satisfy the "liquidation" or "best interest of creditors" test of § 1129(a)(7).[371]

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[368] The court in *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 325.

[369] *In re* Topp's Mechanical, Inc. 2021 WL 5496560 (Bankr. D. Neb. 2021). The secured creditor in the case had a claim for about $ 3,765,000 secured by collateral worth about $ 2,125,000, resulting in an unsecured deficiency claim of about $ 1,640,000. The creditor elected treatment under § 1111(b)(2). As Section VIII(E)(1) discusses, the requirement for cramdown confirmation of an undersecured claim when the creditor elects § 1111(b)(2) requires payments that (1) have a value equal to the value of the collateral and (2) total the full amount of the claim.

The plan proposed to pay the creditor the full amount of the secured portion of the claim with interest, about $ 2,625,000. In addition, the plan provided for payment of the unsecured claim, for total payments of about $ 4,265,000.

The trustee contended that payments of interest on the secured portion of the claim should be taken into account in satisfying the requirement that the creditor receive payments that totaled the full amount of its claim. Under this method, the creditor was entitled to receive only approximately $ 1,140,000 on its unsecured claim, about $ 500,000 less than the $ 1,190,000 the plan proposed to pay. Because the proposed payments to the secured creditor resulted in $500,000 less being paid to unsecured creditors, the trustee contended, the plan discriminated unfairly against the unsecured class and was not fair and equitable.

The court concluded that the trustee's interpretation of the cramdown requirements was correct and that, therefore, the plan discriminated unfairly against the unsecured creditors and was not fair and equitable.

[370] § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

[371] *See* Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 (B.A.P. 9th Cir. 2022); *In re* Hyde, 2022 WL 2015538 (Bankr. E.D. La.. 2022).. The courts did not discuss the issue, but the point is implicit in their rulings. *See also* Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:2 (In a chapter 13 case, "[t]he plan must meet each of the best interest and projected disposable income tests, but the same payments may satisfy both of them. Thus, the debtor must pay the greater of the amount that the best interest test or the projected disposable income test requires.").

The first is in subparagraph (A). Section 1191(c)(2)(A) requires that the plan provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.[372]

The second alternative in subparagraph (B) is that the plan provide that the value of property to be distributed under the plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.[373] Courts have confirmed plans under the § 1191(c)(2)(B) alternative that provide for pro rata distributions to unsecured creditors from cash derived from a capital contribution from the debtor's equity owner[374] or the postpetition liquidation of an asset[375] in an amount not less than the value of the debtor's disposable income.

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[372] § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

This was the chapter 13 rule until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the "means test" standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

[373] The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

[374] *In re* The Lost Cajun Enterprises, LLC, 2021 WL 6340185 (Bankr. D. Col. 2021). The court confirmed a plan, over the objection of a creditor, that provided for pro rata cash payments to unsecured creditors on the plan's effective date, funded by a capital contribution from the debtor's sole member, equal to the debtor's projected disposable income for three years. The court did not consider whether the time should be longer.

[375] Legal Service Bureau, Inc. v. Orange County Bail Bonds (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 (B.A.P. 9th Cir. 2022). The plan provided for the pro rata distribution to creditors of proceeds realized from the postpetition sale of real property obtained through foreclosure of a deed of trust it held to secure a bail bond. The proceeds exceeded the value of the debtor's disposable income for three years. The court ruled that a three-year period applied because the bankruptcy court had not fixed a longer time. Section VIII(B)(4)(ii) further discusses the case.

The court in *In re Young,* 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021), ruled that individuals who claimed that they had no disposable income could not obtain confirmation of their sub V plan.[376]

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.[377] Like the chapter 12 requirement (and unlike the requirement in traditional chapter 11 cases), it applies to entities as well as individuals.

Key confirmation issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years; and (3) If so, how does the court determine how much longer the period must be?

**i. Determination of projected disposable income**

The Bankruptcy Code does not define "projected disposable income," but it defines "disposable income" in chapters 12[378] and 13.[379] In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.[380]

Section 1191(d) defines disposable income as income that is received by the debtor and that is not "reasonably necessary to be expended" for these specified purposes:

— the maintenance or support of the debtor or a dependent of the debtor;[381] or

[376] The *Young* court reasoned, "Debtors who elect not to make plan payments should not get the benefit of subchapter V. If making reasonable plan payments while working is unpalatable to the Debtors, they should have filed a chapter 7 case." *In re Young,* 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021).
[377] See § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. *See* Brubaker, Ralph Brubaker, *The Small Business Reorganization Act of 2019,* 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.
[378] § 1225(b)(2).
[379] § 1325(b)(2).
[380] § 1129(a)(15).
[381] § 1191(d)(1)(A).

— a domestic support obligation that first becomes payable after the date of the filing of the petition;[382] or

— payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.[383]

The definition of disposable income in §1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) defines the income component as "current monthly income" (defined in § 101(10A)) and permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.[384]

The definition of "current monthly income" in § 101(10A) specifically excludes Social Security benefits, § 101(10A)(B)(ii)(I), but the subchapter V definition of disposable income does not base the income component on "current monthly income." One commentator has concluded that Social Security benefits are not taken into account in determining projected disposable income in a subchapter V case.[385]

Although the definitions of disposable income in all cases are similar, the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the "maintenance or support" of the debtor and the debtor's dependents.

[382] § 1191(d)(1)(B).
[383] § 1191(d)(2).
[384] § 1129(a)(15).
[385] Alyssa Nelson, *Are Social Security Benefits "Disposable Income" for the Purposes of Subchapter V?,* 40-Sept Amer. Bankr. Inst. J. 30 (2021).

In chapter 13 cases, the so-called "means test" standards govern the deductions that an "above-median"[386] debtor may take in calculating disposable income.[387] The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.[388]

Section 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are "reasonably necessary to be expended" for "maintenance or support" in §1191(d)(1) in sub V cases is the same as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13 cases prior to the introduction of the means test standards in BAPCPA.[389] The case law on disposable income in such cases should provide guidance in making such determinations.[390]

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[386] Generally, an "above-median" debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a "below-median" debtor is one whose income is below the median. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12. The rules for determining the debtor's status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the "means test" rules for determination of disposable income; and § 1325(b)(4), which defines "applicable commitment period" for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an "above-median" debtor must use the means test rules and pay projected disposable income for five years. A "below-median" debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor's plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See id.* §§ 4:9, 8:12.

[387] § 1325(b)(3).

[388] In chapter 11 cases, § 1129(a)(15) states that projected disposable income is "as defined in [§ 1325(b)(2)]." §1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of "amounts reasonably necessary to be expended" under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

[389] Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor's dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that § 1191(d)(1) states. For a discussion of application of the "reasonably necessary" standard for expenditures for maintenance and support in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:28.

[390] *E.g., In re* Hyde, 2022 WL 2015538 at * 9 (Bankr. E.D. La. 2022).

With regard to expenditures for the business, income is not "disposable income" under §1191(d)(2) if it is "reasonably necessary to be expended" for expenditures "necessary for the continuation, preservation, or operation" of the business.[391] The rule contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.,* the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.,* increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.[392] As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or for expenditures to grow the business. The court in *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021), permitted an operating reserve based on testimony of the debtor's principal that the reserve was necessary to protect against shortfalls in cash due to the cyclical nature of the debtor's income.

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[391] § 1191(d)(2).

[392] *See, e.g.*, Hammrich v. Lovald (*In re* Hammrich), 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re* Schmidt*,* 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re* Kuhlman*,* 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re* Janssen Charolais Ranch, Inc., 73 B.R. 125 (Bankr. D. Mont. 1987) (dicta) (reserve is allowable). *But* see Broken Bow Ranch, Inc. v. Farmers Home Admin. (*In re* Broken Bow Ranch, Inc.), 33 F.3d 1005 (8th Cir. 1994).

Another question arises if a debtor is a "pass-through" entity for income tax purposes (*e.g.*, a subchapter S corporation or an entity taxed as a partnership, including a limited liability company). Such a business does not pay tax on its income. Rather, its income is "passed through" to its owners, who must pay tax on it regardless of whether the income is distributed to them. Payment of profits to owners of a business does not easily fit within the concept of an expenditure reasonably necessary for its continuation, preservation, or operation.

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income[393] but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is "reasonably necessary for the continuation, preservation, or operation of the business" when the debtor is not obligated to pay the tax.

The projected disposable income test has its genesis in chapter 13, which contemplates periodic, usually monthly, payments to the trustee for disbursement to creditors in accordance with the plan. In some cases, the amount of the monthly payment may increase by a specified

[393] Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

amount at one or more specified times.[394] In any event, chapter 13 plans typically provide for the debtor to pay a regular fixed amount.

While fixed payment plans are the standard in individual cases where material variations in income are not expected, debtors in business cases may be concerned that unpredictable changes in the economy may depress earnings or increase expenses and make it difficult or impossible to pay a fixed amount. Creditors, on the other hand, may expect that, if conditions improve, the debtor should pay more.

Thus, a debtor might propose, or creditors might insist on, the payment of *actual* disposable income over the required period rather than a fixed monthly amount. Variations could include minimum or maximum requirements or some percentage of disposable income in excess of specified amounts.

Such provisions are clearly permissible in a consensual plan that arises from negotiations between the debtors and creditors. The statutory requirements seem flexible enough that a debtor's plan that included them would satisfy the PDI test. Whether a court could impose such provisions is a more difficult question, in part because of difficulties in defining how to calculate projected disposable income when the payment is not fixed and in specifying how the debtor accounts for and reports it.

A debtor must also pay careful attention to the drafting of such a provision. *In re Patel,* 621 B.R. 245 (Bankr. E.D. Cal. 2020), illustrates the issues that arise when a plan provides for payment other than fixed amounts.

[394] Such plans are commonly referred to as "step" plans. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:23.

In *Patel*, the chapter 11 plan of the individual debtors, confirmed in 2011, provided for payment to creditors of all of the debtor's "disposable income as defined in § 1129(a)(15)(B)" in quarterly payments over seven years. The plan required reports every 120 days, but the debtor stopped making them after 24 months.

The debtor never made any payments, and an unsecured creditor filed a motion to convert the case to chapter 7 based on the default. The debtor contended that no default existed because there had been no disposable income.

Construing the plan as a contract and applying state contract law, the court concluded that disposable income included income from all sources, not just income from the business, as the debtor argued, and that the debtor had fiduciary or contractual duties under the plan to account for disposable income. Accordingly, although state law ordinarily places the burden on the creditor to show a default, the court concluded that the debtor must show the completion of payments to receive a discharge.

The court concluded that the debtor had not shown that he had not had any disposable income and converted the case to chapter 7.

The determination of objections to confirmation based on the PDI requirement requires the court to receive evidence about their accuracy and reliability, which may include testimony from an accountant or financial advisor as well as the debtor's principal.[395]

[395] *In re* The Lost Cajun Enterprises LLC, 2021 WL 6340185 (Bankr. D. Col. 2021).

### ii. Determination of period for commitment of projected disposable income for more than three years

A projected disposable income test applies in cases under chapter 12[396] and 13[397] and in traditional chapter 11 cases of individuals.[398] Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the "commitment period," but only chapter 13 specifically uses the term by defining the "applicable commitment period" – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for "below-median" debtors and five years for "above-median" debtors.[399]

For sub V cases, §1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.[400] The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.[401]

Section 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide guidance.

In chapters 12 and 13 and in traditional chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a

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[396] § 1225(b).
[397] § 1325(b).
[398] § 1129(a)(15). The requirement applies only if an unsecured creditor invokes it.
[399] § 1125(b)(4).
[400] § 1191(c)(2).
[401] The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor wants.[402] Case law dealing with the length of a plan under the other tests does not deal with the issue that §1191(c)(2) presents.[403]

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[402] In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the "applicable commitment period" as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(15) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

[403] The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a traditional chapter 11 case of an individual, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000) (current version at 11 U.S.C. § 1325(b)(4) (2018)).

The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* CHAPTER 13 PRACTICE AND PROCEDURE § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under §1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor's proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

Courts will have to determine what facts and circumstances justify a longer commitment period and, if so, how much longer the period should be.

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.[404]

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.[405] The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court's authority to fix the commitment period implies that the court may raise the issue *sua sponte.*

Several courts have addressed the issue of the period over which the debtor must pay disposable income to creditors.

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[404] *See* 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

[405] Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee's "objection" may initiate a dispute that requires legal representation, whereas a trustee's report bringing potential issues to the attention of the court may not. *See* Section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

*In re Walker,* 628 B.R. 9 (Bankr. E.D. Pa. 2021), which Section VIII(D)(8) discusses in detail, involved a plan that all impaired classes had accepted, so the PDI requirement did not apply. The court rejected the objecting creditor's contention that the debtor's failure to propose payments for more than three years established a lack of good faith.

*In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), considered arguments by the U.S. Trustee and creditors that the court should require the debtor to make payments for five years instead of the three years that the plan proposed for the plan to be fair and equitable. The court concluded that a three-year term was appropriate.

The legislative history of subchapter V, the court said, indicated that Congress had recognized that small businesses typically have shorter life-spans than large businesses and that it had enacted subchapter V to permit small businesses to obtain bankruptcy relief in a timely, cost-effective manner and remain in business, thereby benefitting not only the owners, but also employees, suppliers, customers, and others who rely on the business.

Congress's recognition that small businesses typically have shorter life-spans, the court reasoned, "suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances." *Id.* at *10. The court added that Congress's concern for employees, customers, and others, as well as for the small business itself, "reflects an intent to balance the shorter life-span planning of small businesses and timely cost-effective benefits to debtors, against the benefits to creditors." *Id.*

The *Urgent Care Physicians* court concluded that a three-year term achieved the proper balance. The court noted that the debtor provided outpatient health care for urgent needs, had deferred payments to insiders and some healthcare equipment payments, and had committed to paying at least its projected disposable income. Extending the term for two more years, the court

continued, would further defer salary restoration to key staff, and further deferring full repayment of equipment charges could jeopardize availability of the equipment. *Id.* at *11.

The court concluded, *id.* at *11 (citation omitted):

> While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors' desire for greater recovery. The three-year term here is fair and equitable, as it properly balances the risks and rewards for both the debtor and its creditors. In these circumstances, the Court declines to fix a longer plan period. A longer plan term would disproportionately harm the debtor in forcing it to accrue additional unpaid expenses and potentially emerge from its reorganization saddled with more debt.

In *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), the Bankruptcy Appellate Panel of the Ninth Circuit described the three-year period as a "baseline requirement." *Id.* at *5. The court explained, *id.*:

> As part of the streamlined, flexible process under subchapter V, the Bankruptcy Code sets a baseline requirement that a debtor commit three years of disposable income, while it also affords the bankruptcy court discretion to require more as a condition of finding a plan fair and equitable.

The court observed that the court's role in setting a period longer than three years is "unique to subchapter V, noting that the period for payment of disposable income in chapter 13 cases is set by statute and in chapter 12 cases by the debtor, *id.* at *5, as earlier text discusses. Because the bankruptcy court had not set a commitment period longer than three years, the court

ruled, the plan satisfied the minimum confirmation requirement if it provided for payment of disposable income based on a three-year period.

The *Orange County Bail Bonds* court affirmed confirmation of the plan because it met the alternative requirement of subparagraph (B) of § 1191(c)(2) that the plan provide for payments having a present value of not less than the debtor's disposable income for three years. Specifically, the plan provided for about $ 433,000 that the debtor realized from the postpetition liquidation of an estate asset to make payments under the plan, which exceeded its projected disposable income for three years of about $ 287,000. *Id*. at *6.[406]

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[406] The opinion in *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 2022 WL 1284683 (B.A.P. 9th Cir. 2022), states that the liquidation proceeds were about $ 433,000, *id.* at *3, that the plan proposed to pay the objecting creditor, Legal Service Bureau, Inc., d/b/a Global Fugitive Recovery ("Global"), which the plan separately classified, $100,000 of those proceeds, *id.*, and that the bankruptcy court's confirmation order required payment to Global of $127,794.35. *Id.* at *4. The opinion further states that the plan proposed to pay Global from its actual disposable income for the five years after confirmation, but the debtor stated that because it would pay only actual disposable income, it was possible that Global could receive nothing from future earnings or that it might not be paid in full. *Id.* at *3. The debtor projected total disposable income of about $287,000 over the three-year period after confirmation and about $493,000 over five years. *Id.*

The BAP opinion further states that, in response to an objection to confirmation that § 1191(c)(2) requires a debtor to commit at least three years of projected disposable income to the plan, the debtor amended the plan to provide that it would not receive a discharge unless it paid all actual disposable income over a five-year period and it paid the largest creditor, separately classified, a minimum of $181,000 from actual disposable income. *Id.* at *3.

The BAP opinion does not recite what happened to the liquidation proceeds that Global did not receive or the treatment of unsecured claims in the other class.

A review of the plan and confirmation order in the bankruptcy court clarifies the provisions of the plan. *In re* Orange County Bail Bonds, Inc., Bankruptcy Case No. 8:19-bk-12411-ES (the "Bankruptcy Case").

Although the confirmed plan separately classified Global and general unsecured creditors, it provided for the classes to share pro rata in the liquidation proceeds remaining after payment of priority and administrative claims and in the debtor's actual disposable income. Plan of Reorganization for Small Business Debtor, Bankruptcy Case ECF No. 285 (Mar. 2, 2021), at 1 (¶ C), 3 (¶ 4.01, Class 2 and Class 3 treatment). The provisions for treatment of the two classes are identical except that the provision for Global states that the debtor is pursuing an appeal from the prepetition judgment it obtained. The debtor in the plan valued the distributions that creditors would receive at "approximately" 100 cents on the dollar, *id.* at 2 (Article 1), and the plan provided for payment of interest on the claims in both classes at the federal judgment rate. *Id*. at 3 (¶ 4.01, Class 2 and Class 3 treatment). The plan stated that, after payment of administrative expenses and apriority claims from the liquidation proceeds, Global would receive $100,000 on its claim and general unsecured creditors would receive pro rata distributions totaling $3,608.31. *Id.* at 1 (¶ C).

The confirmation order amended the discharge provision of the plan to provide that, unless all claims were paid in full, the debtor would not receive a discharge unless the debtor paid all actual disposable income to creditors for five years and the debtor paid a minimum of $181,000. Confirmation Order, Bankruptcy Case ECF No. 310 (Apr. 13, 2021), at 6-7 (¶ I). It did not provide for $181,000 to be paid to Global.

The confirmation order also ) included specific directions for disbursement of the liquidation proceeds of $432,972.95. It provided for payment of allowed fees of the debtor's attorney's and professionals, the allowed fee

### 5. Requirements for feasibility and remedies for default

SBRA added a feasibility requirement in § 1191(c)(3) as part of the "fair and equitable" test. The Bankruptcy Threshold Adjustments and Technical Corrections Act ("BTATCA")[407] amended it to clarify its operation. [408]

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of the subchapter V trustee, unpaid postpetition compensation due to the debtor's principal, and priority claims in the total amount of $ 300,567.37, leaving a balance of $132,405.58 for distribution to unsecured creditors. Global received $127,794.35, and the only two other unsecured creditors received a total of $4,611.23.

The bankruptcy court confirmed the amended plan, concluding that it met the requirements of subparagraph (A) of § 1191(c)(2). Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (*In re* Orange County Bail Bonds, Inc.), 2022 WL 1284683 at *9 (B.A.P. 9th Cir. 2022).

The Bankruptcy Appellate Panel ruled that the plan did not meet the requirements of subparagraph A because it did not provide for payment of the debtor's projected disposable income. "Instead," the court explained, "it provides for an effective date payment of $427,972.95 and possible payment of an unknown amount from Debtor's actual disposable income." *Id.* at *5.

The BAP rejected the debtor's argument that the plan complied with subparagraph B because the effective date payment of the liquidation proceeds plus the minimum payment of $181,000 was greater than projected disposable income over five years.

The court advanced two reasons. First, the plan made discharge contingent on the minimum payments, but it did not require the payment of any specific amount. Second, the effective-date value of the payments could not be determined because the plan did not specify the timing or actual amount of any future payment. *Id.* at *5.

Nevertheless, the BAP concluded that the plan satisfied § 1191(c)(2)(B) because the effective date payment of the liquidation proceeds (about $433,000) exceeded the debtor's projected disposable income (about $287,000) for the minimum three-year period. *Id.* at *6. Therefore, the BAP ruled that the bankruptcy court "did not clearly err in finding that the Plan is fair and equitable to [the objecting creditor]. Although the confirmation order referenced § 1191(c)(2)(A), any such error was harmless. And we may affirm on any ground fairly supported by the record." *Id.* (citations omitted).

[407] Bankruptcy Threshold Adjustment and Technical Corrections Act, § 2(f), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA"). The amendment applies in cases commenced on or after March 27, 2020, that were pending on the effective date. BTATCA § 2(h)(2).

[408] Prior to BTATCA, § 1191(c)(3) had three parts.

Subparagraph (3)(A) contained two of them, stated in the alternative. Clause (3)(A)(i) required that the debtor *will* be able to make all payments under the plan, while clause (3)(A)(ii) required only a *reasonable likelihood* that the debtor will be able to make the plan payments. The two alternative provisions made no sense because the first necessarily incorporates the second. (If the debtor will be able to make all payments it must be true that there is a reasonable likelihood that it will.) The first provision is superfluous as a practical matter because the court never has to make a distinction and decide that a debtor will be able to make payments; finding a reasonable likelihood is always sufficient.

The third part of paragraph (3) was subparagraph (B), which required that the plan contain appropriate remedies. It made sense as an independent directive. Moreover, it is connected to subparagraph (A) with "and"; such a connection between two requirements normally means that both must be satisfied.

The puzzling language in subparagraph (A), however, provided the basis for an argument that a drafting error occurred. Thus, it was arguable that former § 1191(c)(3) did not require that the plan provide appropriate remedies if the court concluded that the debtor will be able to make all plan payments.

The three parts made more sense if the remedies requirement applied only when the court concluded there is a reasonable likelihood that the debtor will make payments, not that it will be able to. Under such an interpretation, the alternative requirements are: (1) a finding that the debtor will be able to make payments; or (2) a

As amended by BTATCA, § 1191(c)(3) states two alternative standards.

The first alternative, § 1191(c)(3)(A), requires a finding that the debtor *"will"* be able to make all payments under the plan.

The second alternative requires only a *"reasonable likelihood"* that the debtor will be able to make plan payments, § 1191(c)(3)(B)(i). In this situation, however, § 1183(c)(3)(B)(ii) requires that the plan provide "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." Section XII(B) discusses remedies for default in the plan.

A debtor may obtain cramdown confirmation of a plan that does not include "appropriate remedies" upon default, but doing so subjects the plan to the more stringent feasibility requirement. It seems risky to let confirmation depend on a bankruptcy judge's willingness to make a fine distinction between the two feasibility standards and, more critically, a determination that the debtor satisfies the higher one.

Each of the alternative feasibility standards is higher than the requirement in § 1129(a)(11) that confirmation is "not likely to be followed by liquidation, or the need for further reorganization" of the debtor, unless the plan contemplates it. Although the § 1129(a)(11) requirement remains applicable to subchapter V confirmation as one of the provisions of § 1129(a) that must be satisfied for consensual or cramdown confirmation, a finding that the debtor will make, or is reasonably likely to make, plan payments necessarily means that liquidation or further reorganization will not likely follow.

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finding that there is a reasonable likelihood that the debtor will make payments *and* the plan provides appropriate remedies. This reading gives meaning to both parts of subparagraph (A).

BTATCA changed § 1191(c)(3) to resolve the issue by requiring appropriate remedies if there is a "reasonable likelihood" that the debtor will make plan payments but not if the court finds that it will, as the text explains.

The court in *In re Moore & Moore Trucking, LLC,* 2022 WL 120189 (Bankr. E.D. La. 2022), held that a provision in a plan that permitted the objecting secured creditor to foreclose in the event of default was an appropriate remedy that met the requirement of § 1191(c)(3)(B).[409] In *In re Hyde,* 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), the court concluded that a provision for the debtor and the debtor's non-filing spouse to grant a second mortgage on their home to the trustee for the benefit of creditors in the event of default in payments of projected disposable was an appropriate remedy.

Courts in sub V cases have addressed objections based on feasibility (under the statute prior to the BTATCA amendment) in the context of the facts in the case.

In *In re Ellingsworth Residential Community Association, Inc.,* 2020 WL 6122645 (Bankr. M.D. Fla. 2020),[410] the bankruptcy court confirmed the plan of a homeowner's association over the objection of a creditor that it was not feasible because its funding depended on a proposed assessment of owners that the owners had not yet been approved.

Based on testimony from the president of the association that the plan was feasible and that the homeowners would approve the assessment, the court found that the assessment would be approved and that the debtor would therefore be able to make payments as proposed. As part of its ruling, the court imposed a requirement that the homeowners approve the assessment within four months, in default of which the court would find the debtor in breach of the plan.

[409] The case arose prior to BTATCA's amendment of the statute. The revised section is § 1191(c)(3)(B)(ii). See *supra* note 408.

[410] In an earlier order, the bankruptcy court had determined that the debtor was eligible for subchapter V even though as a nonprofit homeowner's association it had no profit motive. *In re* Ellingsworth Residential Community Association, Inc.*,* 619 B.R. 519 (Bankr. M.D. Fla. 2019). The district court agreed with the bankruptcy court in an order affirming the issuance of a scheduling order. Guan v. Ellingsworth Residential Community Association, Inc. (*In re* Ellingsworth Residential Community Association, Inc.), 2021 WL 3908525 (M.D. Fla. 2021), *appeal dismissed,* 2021 WL 6808445 (11th Cir. 2021) (unpublished), *cert. denied,* 2022 WL 1131391 (2022).

In *In re Pearl Resources, LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020), the court confirmed the plan of the jointly administered debtors over the objections of several creditors that the plan was not feasible because its projections with regard to disposable income were speculative and subject to market conditions.

The court observed, *id.* at 269 (footnotes omitted):

> The new requirement [of § 1191(C)(3)(A)[411]] fortifies the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposed it. . . . The feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan. Though a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.

The court found that expert testimony regarding the plan's feasibility was credible and confirmed the plan. In addition, the court found that the plan's provision for the liquidation of assets in the event of default satisfied the requirement of § 1191(c)(3)(B) that the plan contain appropriate remedies.

Other courts have similarly relied on testimony from an accountant[412] or credible testimony from the debtor's principal[413] in determining whether a plan meets the feasibility requirement of § 1191(c)(3)(B)(ii).

In *In re Gabbidon Builders, LLC,* 2021 WL 1964544 (Bankr. W.D. N.C. 2021), the court denied confirmation of the debtor's plan and converted the case to chapter 7. The debtor planned

[411] The case was decided before BTATCA's amendment of the statute. See *supra* note 408.
[412] *In re* Moore & Moore Trucking, LLC, 2022 WL 120189 (Bankr. E.D. La. 2022).
[413] *In re* Urgent Care Physicians, 2021 WL 6090985 (Bankr. E.D. Wisc. 2021).

to sell a parcel of real property, to use the proceeds to make some payments to creditors and to purchase a new lot, to construct a house on the new lot and sell it, and to use those proceeds to pay creditors. The plan also proposed monthly payments to creditors from operating income.

The court found that the principal's testimony in support of confirmation was unreliable and conflicting. The court concluded that the evidence did not establish that sale of the property was imminent, that the proposed construction of a new house could occur as proposed, or what the debtor would receive upon its sale. *Id.* at *2-3. Similarly, the court concluded that no evidence supported the debtor's predictions of future income. *Id.* at *4.

Testimony from a debtor's principal was likewise insufficient to establish feasibility in *In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership,* 2021 WL 1679062 (Bankr. N.D. W. Va. 2021). The court questioned the debtor's revenue projections, noting the absence of testimony as to how it would achieve a 50 percent increase over declining historical results. *Id.* at *4.[414]

The court in *In re Lupton Consulting LLC,* 2021 WL 3890593 (Bankr. E.D. Wisc. 2021), concluded that the plan was not feasible because the debtor's financial projections submitted by its principal were not reliable in view of historical data and discrepancies with operating reports.

In an individual case, the court in *In re Hyde,* 2022 WL 2015538 at *10 (Bankr. E.D. La. 2022), concluded that testimony from the debtor and the debtor's non-filing spouse about the debtor's income from Social Security benefits and part-time work, the non-filing spouse's income and commitment to assist in the funding of the plan, and annual household expenses

[414] The court addressed the feasibility issue after it had decided to dismiss the case for cause, including the failure to explain ambiguities in monthly reports, postpetition payment of unsecured creditors without court approval, failure to file postpetition sales tax returns and pay the taxes, and receipt of a postpetition loan from a company owned by the principal's spouse without court approval. 2021 WL 1679062 at *3.

established that the debtor could realistically carry out the plan providing for payment of projected disposable income for five years.

#### 6. Payment of administrative expenses under the plan

Section 1191(e) permits confirmation of a plan under §1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VII(C) discusses this provision.

## C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in §1193 differ depending on whether the court has confirmed a consensual plan under §1191(a) or a cramdown plan under §1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.[415]

#### 1. Postconfirmation modification of consensual plan confirmed under §1191(a)

If the court has confirmed a consensual plan under §1191(a), §1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under §1191(a).[416] The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.[417] These are the same rules that govern postconfirmation modification in traditional chapter 11 cases under § 1127(b).

Section 1101(2), defines "substantial consummation." It requires that three events occur. The first is the "transfer of all or substantially all of the property proposed by the plan to be

[415] § 1181(a).
[416] § 1193(b).
[417] § 1193(d).

transferred." § 1101(2)(A). The second is the "assumption by the debtor or 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." § 1101(2)(B). The third is the "commencement of distribution under the plan." § 1101(2)(C).

Typically, the determining factor for substantial consummation is the commencement of distribution.

*In re National Tractor Parts, Inc.*, 2022 WL 2070923 (Bankr. N.D. Ill. 2022), considered when distributions commence. There, the debtor sought to modify its consensual plan confirmed under §1191(a) to modify the treatment of the claim of the Small Business Administration based on a loan under the COVD-19 EIDL program. The debtor wanted to obtain an increase in the amount of the loan on favorable terms but was not eligible under the terms of the plan that treated SBA's claim as a general unsecured claim, payable in quarterly payments.

The proposed modification provided for separate classification of the SBA's claim and payment of it in accordance with contractual terms if the SBA provided additional funding or treatment as a general unsecured claim under the original plan provisions if it did not.

The United States Trustee objected to modification on the ground that "commencement of distribution under the plan" had occurred such that the plan had been substantially consummated under the definition in § 1101(2) and that, therefore, the consensual plan could not be modified under § 1193(b).

The debtor had made de minimis payments totaling $ 1,428.20 to creditors in two classes but had not yet made a $ 50,000 payment to a creditor in another class or begun quarterly payments to general unsecured creditors.

The *National Tractor Parts* court held that "commencement of distribution" occurs at the time any payment to any creditor is made. Accordingly, the court ruled, the plan had been substantially consummated and the debtor could not modify it.

The *National Tractor Parts* court concluded that § 1101(2)(C) is plain and unambiguous. The court explained, *id.* at * 4:

> The plain language of [§ 1101(2)(C)] does not require commencement of distribution to every creditor, or every class, or even substantially all creditors or classes. It means, simply, that the process contemplated in the confirmed plan is underway.

The court observed, further, that the language in § 1101(2)(A) and (B) refers to "all or substantially all" of property to be transferred or dealt with by the plan, whereas such language is "conspicuous in its absence from § 1101(2)(C). *Id* at *4.

*National Tractor Parts* is consistent with other cases dealing with other cases addressing the issue in traditional chapter 11 cases.[418]

[418] *E.g., In re* Centrix Fin. LLC, 394 F. App'x 485, 489 (10th Cir. 2010) ("[The] construction of § 1102(A) as requiring completion of substantially all payments to creditors would render meaningless § 1102(C), which requires only that distributions under the plan be commenced.") (Unpublished). *In re* Wade, 991 F.2d 402, 406 n. 2 (7th Cir. 1993) ("Section 1101(2) states that substantial consummation is reached when, *inter alia*, distribution has *commenced* but not necessarily been completed." (Emphasis in original); *In re* JCP Properties, Ltd., 540 B.R. 596, 607 (Bankr. S. D. Tex. 2015) ("To require a substantiality of distribution payments rather than a mere existence of distribution payments, where the very same definition expressly includes a substantiality component for transferred property, would render § 1102's 'all or substantially all' a mere surplusage within § 1101(2)."); *In re* Western Capital Partners, LLC, 2015 WL 400536 (Bankr. D. Colo. 2015).

Some courts, however, have concluded that commencement of distribution does not occur merely because the debtor has made some payments under the plan.[419] As one court explained:[420]

> Applying the plain meaning approach of statutory interpretation, it seems that commencement should mean not just the beginning of payments to a single creditor, but the commencement of distribution to all or substantially all creditors.

**2. Postconfirmation modification of cramdown plan confirmed under §1191(b)**

If the plan has been confirmed under §1191(b), §1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.[421] The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of §1191(b).[422]

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan; the modified plan must meet confirmation requirements.[423] Unlike the provisions

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[419] *E.g., In re* Dean Hardwoods, Inc., 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010); *In re* Litton, 222 B.R. 788 (Bankr. W.D. Va. 1998) (holding plan not substantially consummated because one distribution made to one creditor), aff'd on other grounds, 232 B.R. 666 (W.D Va. 1999); *In re* Heatron, Inc., 34 B.R. 526, 529 (Bankr. W.D. Mo. 1983)(holding plan not substantially consummated 29 months after confirmation when 53% of payments under the confirmed plan had been made). *See also In re* McDonnell Horticulture, Inc. 2015 WL 1344254 at *3 (Bankr. E.D.N.C. 2015) (Noting that "courts in this District have held that distribution of payments under a plan needs to have commenced with respect to 'all or substantially all' creditors," the court concluded that payments had commenced.); *In re* Archway Homes, Inc., 2013 WL 5835714 at * 4 (Bankr. E.D.N.C. 2013) (citing *Dean Hardwoods, supra,* with approval but concluding distributions had commenced.).

The *National Tractors* court characterized this approach as the minority view. *In re National Parts, Inc.,* 2022 WL. 2070923 at *5 (Bankr. N.D. Ill. 2022).

[420] *In re* Dean Hardwoods, Inc., 431 B.R. 387, 392 (Bankr. E.D. N.C. 2010).

[421] § 1193(c).

[422] The provisions of § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.

[423] §§ 1229, 1329.

in the other chapters, §1193(c) does not permit modification at the request of creditors or the trustee.[424]

## D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases

As Sections VIII(A) and (B) explain, both consensual and cramdown confirmation require that the plan meet all the requirements of § 1129(a) except those noted. This Section discusses confirmation issues under § 1129(a) that do not involve subchapter V provisions but that have arisen in subchapter V cases.[425] Section VIII(E) discusses confirmation and related issues involving secured claims that have arisen in subchapter V cases.

### 1. Classification of claims; unfair discrimination

A plan must designate classes of claims, with some exceptions such as priority tax claims, and interests, § 1123(a), and specify any class that is not impaired, § 1123(b). Classification is particularly critical if the debtor wants consensual confirmation because consensual confirmation requires that all classes of claims and interests accept the plan or not be impaired. § 1129(a)(8).[426] The classification rule in § 1122(a) is that the claims or interests in a class must be "substantially similar." An issue related to classification is that cramdown confirmation of a subchapter V plan requires, among other things, that the plan not "discriminate unfairly." §1191(b).

Two cases have considered the classification of secured claims in subchapter V plans.

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[424] § 1193(c).

[425] For a review and application of requirements for confirmation in a subchapter V case, see *In re Pearl Resources, LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020). *See also In re* Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020).

[426] It is also important in the cramdown context because cramdown confirmation still requires that the plan comply with the provisions of the Bankruptcy Code. § 1329(a)(1). But a court in the cramdown situation might overlook the issue if the treatment of all members of the class complies with the cramdown requirements anyway.

In *In re New Hope Hardware, LLC,* 2020 WL 6588615 (Bankr. N.D. Ga. 2020), the debtor sought confirmation of a consensual plan that put two creditors, each secured by a separate vehicle, in the same class. Only one of them accepted the plan. The court concluded that, because each creditor had rights in different collateral, the claims were not substantially similar, and the classification therefore violated § 1122(a). *Id.* at * 3.

In *In re Olson,* 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), however, the court confirmed a plan that provided for a class of "miscellaneous secured claims."

*In re Fall Line Tree Service, Inc.,* 2020 WL 7082416 (Bankr. E.D. Cal. 2020), involved cramdown confirmation of a sub V plan that provided different treatment for two classes of unsecured claims. One class consisted of disputed unsecured claims of a group of creditors that totaled approximately $ 360,000; the other class included all other unsecured claims of approximately $ 50,000.

The plan provided for creditors in each class to receive payments of 59 percent of their claims from disposable income over five years, but the method of payments differed. The undisputed creditors were to receive equal monthly payments. The payments for the disputed creditors, however, were adjusted to reflect the seasonal nature of the debtor's business, which was the sale of retail outdoor sporting goods in South Lake Tahoe, California.[427] Further, the plan provided for the payments on the disputed claims to be made into a reserve account pending determination of the objections to the claims. *Id.* at 6.

[427] Payments for the months of April through June and September through November were twice as much as payments for the months off January through March and July, August, and December.

The *Fall Line Tree Service* court concluded that the differences in treatment were "rationally related to the rights of the parties and to seasonal cash flow realities of the Lake Tahoe recreation market" and ruled that the plan did not discriminate unfairly. *Id.* at 6.

Unfair discrimination may also occur when a plan proposes to pay an undersecured creditor who exercises the § 1111(b)(2) election[428] more than it is entitled to receive, thereby reducing the money available to pay unsecured claims.[429]

**2. Acceptance by all classes and effect of failure to vote**

Consensual confirmation requires acceptance by all impaired classes of claims and interests. § 1129(a)(8). This includes holders of equity interests if the plan impairs them. *In re New Hope Hardware, LLC,* 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020).

If a creditor does not vote on the plan, the question is whether the creditor is deemed to have accepted the plan.

In *In re Olson,* 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), the court concluded that holders of impaired claims that did not vote were bound by the classes that accepted the plan and confirmed it in the absence of any accepting vote in one class. The court relied on *In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263, 1267-68 (10th Cir. 1988). Other bankruptcy courts in the Tenth Circuit have reached the same result.[430]

The court in *In re New Hope Hardware, LLC,* 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), reached the opposite conclusion. The court reasoned that, in the absence of acceptance by

[428] Section VIII(E)(1) discusses the § 1111(b)(2) election.
[429] *In re* Topp's Mechanical, Inc. 2021 WL 5496560 (Bankr. D. Neb. 2021). Section VIII(B)(3) discusses the case in the context of the "fair and equitable" requirement of § 1191(c).
[430] *In re* The Lost Cajun Enterprises, LLC, 2021 WL 6340185 at * 7 (Bankr. D. Col. 2021); *In re* Roundy, 2021 WL 5428891 at * 2 (Bankr. D. Utah 2021); *In re* Robinson, 632 B.R. 208, 218 (Bankr. D. Kansas 2021).

the impaired class of equity interests, the plan did not comply with the mandate of § 1129(a)(8) that the class either accept the plan or not be impaired.[431]

**3. Classification and voting issues relating to priority tax claims**

A debtor often owes taxes to the Internal Revenue Service as well as to state and local tax authorities that are entitled to priority under § 507(a)(8). Section 1129(a)(9)(C) requires that a plan pay the claims over a period ending not later than five years after the entry of the order for relief in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than "convenience class" creditors paid in cash as § 1122(b) permits). A priority tax claim must be paid with interest at the rate that applicable nonbankruptcy law requires. § 511.

Holders of priority tax claims often do not vote on chapter 11 plans that comply with § 1129(a)(9)(C). It does not appear that acceptance by a priority tax claimant is an additional requirement for confirmation under § 1129(a). Section 1123(a)(1) expressly excludes priority tax claims from its requirement that the plan designate classes of claims, thus recognizing that voting by such creditors is not required. The court in In *re New Hope Hardware, LLC,* 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), confirmed a plan that provided for treatment of a priority tax claim in compliance with § 1129(a)(9)(C) even though the tax claimant did not accept the plan.[432]

Although § 1123(a)(1) does not require classification of a priority tax claim, chapter 11 plans often provide for them in a class. Better practice is to place each taxing authority in its own class or to state the treatment for each one separately.

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[431] The court nevertheless confirmed the plan based on acceptances by all of the holders of equity interests that occurred at the confirmation hearing.

[432] *Accord, In re* Louis, 2022 WL 2055290 at * 17 (Bankr. C.D. Ill. 2022).

### 4. Timely assumption of lease of nonresidential real estate

Section 365(d)(4)(A) provides for the automatic rejection of a lease of nonresidential real property unless it is assumed within the time it specifies. The court may, prior to the expiration of the deadline, extend it for 90 days, for cause. § 365(d)(4)(B). If the lease is rejected, the debtor must immediately surrender the leased property to the lessor. § 365(d)(4)(A).

The Consolidated Appropriations Act, 2021 (the "CAA") temporarily amended § 365(d) to change the deadline for assumption from 120 days to 210 days after the order for relief and to permit an extension of the time for an additional 90 days.[433] On December 28, 2022, the deadline reverted to 120 days, which may be extended for up to 90 days.[434]

In *In re Motif Designs, Inc.,* 2020 WL 7212713 (Bankr. S.D. Mich., 2020), the sub V debtor obtained an extension of time to file its plan but had not sought to assume the lease. The plan, however, provided for the debtor to continue to occupy the property for about four months after the confirmation hearing. Because the plan provided for occupancy of the property in violation of § 365(d)(4), the court denied confirmation because the plan did not meet the requirement of § 1129(a)(1) that the plan comply with the applicable provisions of the Bankruptcy Code.

[433] Consolidated Appropriations Act, 2021 (the "CAA"), Pub. L. No. 116-260, Title X, § 1001(f)(1)(B), 134 Stat.1182, 3219 (December 27, 2020).
[434] *Id.* § 1001(f)(2)(A).

**5. The "best interests" or "liquidation" test of § 1129(a)(7)**

Section 1129(a)(7)(A)(ii) requires that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.

*In re Young,* 2021 WL 1191621 (Bankr. D. N.M. 2021), determined that a plan did not comply with this requirement based on its finding that the fees of a chapter 7 trustee would be less than the anticipated costs of liquidating property under a plan.

*In re Fall Line Tree Service, Inc.,* 2020 WL 7082416 (Bankr. E.D. Cal. 2020), discusses evidentiary issues in connection relating to the liquidation analysis.

The *Fall Line Tree Service* court rejected an objecting creditor's argument that purchased goodwill, arising from the debtor's earlier acquisition of its business from the creditor, should be included in the liquidation analysis under Generally Accepted Accounting Principles. The court concluded, "[P]urchased goodwill in the original sale of the going concern that has since devolved into this chapter 11 case is not an asset for purposes of hypothetical chapter 7 liquidation analysis." *Id.* at 4.

The court also rejected the creditor's assertion that the debtor's monthly operating reports showed that the value of its inventory was understated, ruling that such reports are not probative of inventory value. The admissible evidence, the court continued, showed that the debtor had used book value at actual wholesale cost in its liquidation analysis, which the court thought was actually more than a chapter 7 liquidation would produce. *Id.* at *4.

**6. Voting by holder of disputed claim**

*In re Fall Line Tree Service, Inc.,* 2020 WL 7082416 at *2 (Bankr. E.D. Cal. 2020), serves as a reminder that only the holder of an *allowed* claim is entitled to vote on a chapter 11

plan under § 1126(a).[435] Bankruptcy Rule 3018(a) permits the court, after notice and a hearing, to allow a claim temporarily in an amount that the court deems proper for the purpose of accepting or rejecting a plan, but the creditor had not sought that relief.[436]

**7. Individual must be current on postpetition domestic support obligations**

The confirmation requirement of § 1129(a)(14) is that an individual debtor have paid all amounts payable on a domestic support obligation ("DSO") "that first became payable" after the petition date. It makes no exception when a debtor's inability to pay a postpetition DSO is due to circumstances beyond the debtor's control. *In re Sullivan*, 626 B.R. 326, 334 (Bankr. D. Colo, 2021).[437]

**8. Application of § 1129(a)(3) good faith requirement in context of consensual plan when creditor objects because debtor is not paying enough disposable income**

In a traditional chapter 11 case of an individual, § 1129(a)(15) requires a plan to provide for the debtor to pay projected disposable income, or its value, for the longer of five years or for the term of the plan, if an unsecured creditor objects. The requirement applies even if the class of unsecured creditors has accepted the plan.

This rule does not apply in a sub V case. Section 1129(a)(15) is inapplicable, §1181(a), and neither consensual confirmation under §1191(a) nor cramdown confirmation under §1191(b) requires that the plan comply with § 1129(a)(15).

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[435] Section 1126(a) states, "The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan."

[436] The creditor in *Fall Line Tree Service* was the only creditor in the class, rejected the plan, and objected to its confirmation. The fact that the court disregarded its claim for voting purposes, therefore, did not affect the result in the case.

[437] The problem for the debtor in *Sullivan* was that his monthly obligations for alimony and child support were $ 16,835 and his gross monthly income was $ 7,600. The debtor was seeking to modify those obligations in the divorce case and proposed to modify his plan at a later time to accommodate a future ruling by the divorce court. In the meantime, he proposed to pay what he hoped the modified amounts would be. *Sullivan*, 626 B.R. 326, 334. In addition to ruling that § 1129(a)(14) prevented confirmation, the court noted, "Nor was the chapter 11 process meant to create a long-term shelter for debtors while they await the outcome of contested divorce litigation." *Id.* at 6.

Consensual confirmation under §1191(a) requires compliance only with the applicable provisions of § 1129(a). Accordingly, consensual confirmation requirements do not include a projected disposable income test.

Cramdown confirmation in a sub V case similarly does not require compliance with § 1129(a)(15), but §1191(c)(2) does require payment of projected disposable income for a minimum of three, and a maximum of five, years, as the court determines.[438]

The issue is how the good faith requirement of § 1129(a)(3) applies to an objection to confirmation of a consensual plan when the debtor could pay more than the plan provides. A similar issue arises in chapter 13 cases when the debtor could pay more than the projected disposable income test of § 1325(b) requires.

Objections based on good faith arise in chapter 13 cases, for example, when the debtor proposes to retain an expensive home, car, or other luxury item (and use income to pay the debts they secure instead of paying unsecured creditors) or if the debtor receives social security benefits.[439] The chapter 13 projected disposable income rules permit a deduction for payments on secured claims[440] and exclude social security benefits. The argument is that good faith requires a debtor to surrender expensive luxury items rather than pay for them or that the debtor's social security benefits permit the debtor to pay more, even though the proposed payments comply with the projected disposable income test.[441] The same "good faith" objection exists in the context of a consensual plan in a sub V case, when the projected income test similarly does not apply.

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[438] See Section VIII(B)(4).
[439] *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:34, 8:59.
[440] *See id.* §§ 8:29, 8:56, 8:59.
[441] *See id.* § 4:34.

Courts have taken various approaches in chapter 13 cases.[442] Appellate courts have rejected a "best efforts" approach to good faith (under which good faith requires that a debtor use "best efforts" to pay creditors).[443] Instead, courts use a "totality of the circumstances" test in which ability to pay is one of many factors.[444]

*In re Walker,* 628 B.R. 9 (Bankr. E.D. Pa. 2021), examined the issue in a subchapter V case. There, the debtor's plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan,[445] but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate.

The debtor, with estimated pre-tax annual income over the three-year period ranging from $ 360,000 to $ 525,000, projected monthly expenses of $ 16,000, including $ 9,000 to pay the mortgage on his residence (in which he alone would reside), and related taxes, maintenance, and utilities. The plan provided for payments of $ 488,061.82 over three years, of which $ 159,500 would be available for distribution to unsecured creditors after payment of administrative expenses, priority tax claims, a priority domestic support obligation claim, and prepetition mortgage arrearages.

The creditor asserted that good faith in an individual chapter 11 case required the debtor's "best effort" to repay creditors. In view of the debtor's luxurious lifestyle, the creditor argued that the debtor should be required to add two years of payments from income for the benefit of

[442] *See id.* § 8:26.
[443] *See id.* § 4:31.
[444] *See id.* § 4:32.
[445] Six creditors, holding claims totaling $ 1,871,481.51 (84.6%), accepted the plan. Two creditors, holding claims totaling $ 340,035.15 (15.4%) rejected it.

unsecured creditors, which would add $ 144,000 to the amount unsecured creditors would receive.

The court noted that courts analyze the good faith requirement of § 1129(a)(3) based on the "totality of the circumstances." In addition, the court observed, the good faith requirement "should be construed narrowly, particularly when raised by a dissenting creditor whose class has voted to accept the plan." *Walker,* 628 B.R. 9, 16.

The court expressed its concerns that "a robust application of the good faith doctrine creates a risk that the court's analysis will lapse into an inquiry that 'may clothe subjective moral judgments with the force of law"[446] and that "a broad application of the good faith requirement also would 'create an undue risk of judicial usurpation of the legislative power to determine the scope of and eligibility for [bankruptcy] relief."[447]

The *Walker* court thus rejected the suggestion that good faith under § 1129(a)(3) inflexibly requires a debtor's "best effort" to make every possible resource available to repay creditors. The court reasoned that the rejection of such a rule in a sub V case involving consensual confirmation under §1191(a) is especially relevant because § 1129(a)(15) is not applicable. The court stated, 629 B.R. at 17-18 (citation omitted):

> The omission of § 1129(a)(15) from the confirmation requirements under § 1191(a) sends a clear legislative message that decision whether a plan's funding justifies confirmation should be resolved by the creditor voting process and chapter 11's fundamental policy of "creditor democracy." When the affected creditors support confirmation of a plan, the

[446] *In re* Walker*,* 628 B.R. 9, 17 (Bankr. E.D. Pa. 2021), *quoting In re* Glunk, 342 B.R. 717, 731 (Bankr. E.D. Pa. 2006) (*quoting* Sarasota, Inc. v. Weaver, 2004 WL 2514290, at *3 (E.D. Pa. Nov. 5, 2004) (*quoting In re* Woodman, 287 B.R. 589, 592 (Bankr. D. Me. 2003), *aff'd* 2003 WL 23709465 (D. Me. Sept. 19, 2003), *aff'd* 379 F.3d 1 (1st Cir. 2004)).
[447] *Id.* at 17, *quoting In re* Glunk, 342 B.R. 717, 732 (Bankr. E.D. Pa. 2006).

> court generally should be circumspect about overriding the expressed will of the voting creditors based on the good faith requirement of 11 U.S.C. § 1129(a)(3). This narrow application of 11 U.S.C. § 1129(a)(3) is especially apt in a case under subchapter V.

The court agreed that the debtor could pay more to creditors and noted, "Any court should have serious concerns about approving an individual's reorganization plan in which the debtor proposed to live alone in a large residence, while paying arguably unnecessary carrying costs – roughly $ 9,000 per month – thereby reducing the available distribution to creditors." *Walker,* 628 B.R. 9, 18.

If it were a creditor, the court continued, it might reject the plan "absent more evidence that the Debtor is making some tangible sacrifices in order to repay his debts." *Id.* at 18. But the court emphasized, "[T]he subjective reaction of a bankruptcy judge to a debtor's proposed plan is not the test by which good faith is measured under 11 U.S.C. § 1129(a)(3)." *Id.* at 18.

Instead, the court explained, "[T]he good faith determination requires objective consideration of the totality of the circumstances. In the end, the critical issue is whether a plan adheres sufficiently to Bankruptcy Code policy and is sufficiently fair to warrant a finding that it was proposed in good faith." *Id.* at 18.

The court found it "extremely significant" that the unsecured class of creditors had voted overwhelmingly in support of the plan. The court reasoned, "Presumably, these creditors made a business judgment that any misgivings they may have regarding the Debtor's lifestyle and the likely accompanying reduction in their potential distribution under the Plan were outweighed by the benefits conferred by the Plan." *Id.* at 18.

The *Walker* court also took into account the fact that the debtor had voluntarily put additional money into the plan that the projected disposable income test applicable to cramdown

confirmation would not necessarily require. The additional funding arose from the fact that the debtor's payments included the commitment of preconfirmation earnings and that disposable income as predicted did not account for the full postpetition income tax liability on anticipated future earnings. 629 B.R. at 15.

In effect, these two adjustments resulted in $ 170,000 more in projected disposable income than the amount than the statute required. Accordingly, the debtor argued, the plan provided for more money to be paid to unsecured creditors than they would receive if the debtor paid adjusted disposable income for five years.

The court agreed that reference to the amount that a debtor would have to pay under the projected disposable income test of § 1191(c)(2) in the cramdown situation was helpful in evaluating good faith in connection with confirmation of a consensual plan, even though the test does not apply. *Id.* at 15. The court concluded that the debtor's voluntary commitment of additional money, which the strict statutory requirements would not require, supported a finding of good faith. *Id.* at 18.

The court overruled the good faith objection, *id.* at 19:

> [W]hile it may be true that the Debtor could provide a greater distribution to creditors . . . the plan is neither so unfair or offensive to basic notions of justice nor so inconsistent with bankruptcy policy as to warrant court intervention to overrule the will of voting creditors.

## E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

Although the cramdown requirements in § 1129(b) do not apply in subchapter V cases, § 1181(a), the provisions of § 1129(b)(2)(A) govern determination of what is "fair and equitable" with regard to secured claims for purposes of cramdown confirmation under § 1191(c)(1). This

Section discusses issues relating to cramdown treatment of secured claims in subchapter V cases that involve the cramdown standards in § 1129(b)(2)(A) that apply to secured claims in subchapter V cases and other sections of the Bankruptcy Code that SBRA did not affect.

**1. The § 1111(b)(2) election**

The § 1111(b)(2) election comes into play when a secured creditor is undersecured in that its claim exceeds the value of the property in which it has a lien. Before discussing its operation and effects, it is useful to review the general rule for allowance of secured claims in a bankruptcy case under § 506(a).

Section 506(a) provides that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is secured "to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Simply put, § 506(a) gives the secured creditor a secured claim equal to the value of the encumbered property and an unsecured claim for the deficiency. Bankruptcy professionals colloquially refer to this result as the "bifurcation" of the claim into a secured claim and an unsecured claim.[448] If the secured obligation is "nonrecourse" – *i.e.,* the debtor is not personally liable, and the creditor can collect its debt only from the encumbered property – the creditor does not have an unsecured claim in the case.

Assume, for example,[449] that a secured creditor has a claim of $ 100,000 secured by property worth $ 30,000. Under § 506(a), bifurcation results in the creditor having two claims: a

[448] *See generally see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:5.
[449] The example is taken from the excellent explanation of § 1111(b) in *In re Body Transit, Inc.,* 619 B.R. 816, 831-33 (Bankr. E.D. Pa. 2020).

secured one for $ 30,000 and an unsecured one for $ 70,000. If the claim is non-recourse, the creditor has no unsecured claim.

Section 1111(b) modifies the treatment of secured claims in chapter 11 cases in two ways.

First, § 1111(b)(1) provides that a secured claim will be allowed or disallowed under § 506(a) regardless of whether the creditor has recourse against the debtor. The effect is that a nonrecourse secured creditor has an allowed unsecured claim against the debtor.

Second, § 1111(b)(2) permits a secured creditor to elect to have its entire claim treated as a secured claim, with two exceptions discussed later. In the example, therefore, the electing secured creditor has a secured claim of $ 100,000 and no unsecured claim.

Whether the undersecured creditor makes the election may make a significant difference in how much it must receive for the plan to comply with cramdown requirements.

Section 1129(b)(2)(A) states three alternative ways to satisfy the "fair and equitable" requirement for cramdown confirmation with regard to a secured claim. They apply in a sub V case under § 1191(c)(1).[450]

The most common alternative, in clause (i) of § 1129(b)(2)(A), is for the secured creditor to retain its liens and receive deferred cash payments. Alternatively, a plan is "fair and equitable" if it provides for sale of the encumbered property and attachment of liens to the proceeds, § 1129(b)(2)(A)(ii), or for the realization by the creditor of the "indubitable equivalent" of the claim, § 1129(b)(2)(A)(iii).

The specific statutory language with regard to permissible cramdown treatment of a secured claim through deferred cash payments is: the creditor must receive "deferred cash

[450] See Section VIII(B)(2).

payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of [the creditor's] interest in the estate's interest in such property." § 1129(b)(2)(A)(i)(II).

The somewhat complicated language effectively states two requirements. First, the deferred cash payments must total at least the amount of the allowed secured claim. Second, the *value* of the stream of payments must be equal of the value of the encumbered property. The second requirement requires application of an appropriate present value interest or discount rate. For purposes of the example, we assume it is six percent.

If the creditor in the example does not make the § 1111(b)(2) election, application of the cramdown rules is straightforward: the plan must propose to pay the entire amount of the secured claim, $ 30,000, with interest at six percent. Payment of the claim in full satisfies the first part of the test, and the provision for interest satisfies the second one. Thus, a plan could amortize $ 30,000 over, say, five years at six percent interest, in monthly payments of $ 580, a total of $ 34,800. The plan must treat the deficiency claim of $ 70,000 as an unsecured claim, usually included in the class of general unsecured claims.

Such a provision would not, however, satisfy the first cramdown requirement if the creditor elected § 1111(b)(2). The total of payments is only $ 34,800, $ 65,200 short of the amount of the allowed secured claim, $ 100,000.[451]

[451] This assumes that the interest payments of $ 4,800 count in satisfying the total of payments requirements. It is not clear that they do. *See In re* Body Transit, Inc*.,* 619 B.R. 816, 833, n. 25 (Bankr. E.D. Pa. 2020), *citing* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[5][b].

The court in *In re Topp's Mechanical, Inc.* 2021 WL 5496560 (Bankr. D. Neb. 2021), after explaining the competing views, adopted the majority view, concluding that "the interest component of a debtor's stream of payments may serve a dual purpose of satisfying the allowed claim of the creditor and providing present value to the creditor." *Id.* at *6. Because the debtor's plan proposed to pay the secured creditor more than it was entitled to receive as a result of the § 1111(b)(2) election, the debtor had less money to pay to unsecured creditors, who had not accepted the plan. The court therefore ruled that the plan discriminated unfairly and was not fair and equitable. Section VIII(B)(3) discusses the case in the context of the "fair and equitable" requirement of § 1191(c).

Payment of the claim over five years would require an additional $ 1,087 per month, a total monthly payment of $ 1,667.

A longer amortization period would lower the monthly payment because there is more time to pay the claim and because more interest is paid. The following chart shows payment schedules that would satisfy both § 1129(b)(2)(A)(II) requirements (amounts rounded except monthly payment on last line). Whether a court would conclude that the longer lengths of time are "fair and equitable" is, of course, another question.

**Payment Schedules Providing for Payments Totaling $ 100,000 With a Value of $ 30,000**

| Amortization Period (a) | Payment On $30,000 (b) | Interest Paid at 6% (c) | Total of Payments ($ 30,000 + Interest payments) (d) | Remaining Balance ($ 100,000 – (d)) (e) | Monthly Payment on Remaining Balance ((e)/months) (f) | Total Monthly Payment (b) + (f) (g) |
|---|---|---|---|---|---|---|
| 5 years | $ 580 | $ 4,800 | $ 34,800 | $ 65,200 | $ 1,067 | $ 1,667 |
| 10 years | $ 333 | $ 9,968 | $ 39,968 | $ 60,032 | $ 500 | $ 883 |
| 15 years | $ 253 | $ 15,568 | $ 45,568 | $ 54,432 | $ 302 | $ 555 |
| 20 years | $ 215 | $ 21,583 | $ 51,583 | $ 48,417 | $ 202 | $ 417 |
| 25 years | $ 193 | $ 27,987 | $ 57,987 | $ 42,013 | $ 140 | $ 333 |
| 30 years | $ 180 | $ 34,751 | $ 64,751 | $ 35,249 | $ 98 | $ 278 |
| 53 yrs, 4 mos | $ 156.43 | $ 70,113 | $ 100,113 | $ 0.00 | $ 0.00 | $ 156.43 |

Section 1111(b)(1)(B) states two exceptions to the availability of the § 1111(b)(2) election.

One of the exceptions applies when the encumbered property is sold under § 363 or is to be sold under the plan. If the creditor has recourse against the debtor, the § 1111(b)(2) election is not available when the property is being sold. § 1111(b)(1)(B)(ii).

The other exception applies when the undersecured creditor's interest in the encumbered property is of "inconsequential value." § 1111(b)(1)(B)(ii).

In a traditional chapter 11 case, a secured creditor for strategic purposes may want to retain a large unsecured deficiency claim so that it controls the vote of the unsecured class. This may give the secured creditor a "blocking position" to prevent confirmation because, unless other classes exist, a debtor cannot meet the requirement of § 1129(a)(10) that at least one impaired class of claims accept the plan.

Because subchapter V permits confirmation even if no class accepts, a secured creditor does not have a blocking position regardless of whether it makes the § 1111(b) election. Especially if a nominal distribution to unsecured creditors is likely, a secured creditor in a sub V case may conclude that making the § 1111(b) election will enhance its recovery and negotiating position.

Three courts have considered a creditor's right to make the § 1111(b) election in a subchapter V case. The issue was whether the creditor could not invoke the election because its interest was "inconsequential." The cases are required reading for judges and practitioners dealing with § 1111(b) elections in subchapter V cases.[452]

*In re VP Williams Trans, LLC,* 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), involved a taxi business that owned a single taxi medallion in which its only creditor held a security interest to secure a debt of $ 576,927. The debtor contended that the value of the medallion was $ 90,000; the creditor claimed it was worth $ 200,000.

The court noted that courts have taken different approaches to determining whether property is of inconsequential value, but concluded that, under any approach, it was impossible

[452] *See generally* Thomas C. Scherer and Whitney L. Mosby, *The Applicability of the § 1111(b) Election in a Small Business Case,* 40 AMER. BANKR. INST. J. 12 (May 2021).

to conclude that the medallion's value was inconsequential, whether it was worth $ 90,000 or $ 200,000. *Id.* at * 3. The court then reviewed the different approaches.

The "most obvious approach," the court said, it to determine and apply the plain meaning of the word "inconsequential." Nothing that various dictionaries defined the word as "irrelevant," "of no significance," "unimportant", and "able to be ignored," the court concluded as "an abstract matter" that neither value was inconsequential. 2020 WL 5806507 at *3.

The court acknowledged that "some context is required," and that "[a]n item of a certain value might be relatively 'inconsequential' to a multi-billion dollar company." 2020 WL 5806507 at *3. But the court could not conclude that the value of the medallion was "irrelevant," "of no significance," or something that is "able to be ignored" when it was the debtor's most important and valuable asset, essential to its reorganization, regardless of its value. *Id.*

The court noted that, if the debtor owned the medallion outright and proposed to abandon it under § 554 (which permits abandonment of an asset that is "of inconsequential value or benefit to the estate"), it could not conceivably be treated as having inconsequential value. The court found no justification for giving the term a different meaning in § 1111(b) than it has in § 554. 2020 WL 5806507 at *3.

The *VP Williams Trans* court then considered the view that the value of the asserted security interest should be compared to the value of the collateralized asset. Under this approach, a junior security interest that is "almost completely out-of-the-money" has inconsequential value. 2020 WL 5806507 at *4.[453] The court saw no difference between this view and valuation in the abstract but concluded that it did not matter in the current case because

[453] The court cited McGarey v. MidFirst Bank (*In re* McGarey), 529 B.R. 777 (D. Ariz. 2015).

the creditor held the only security interest in the collateral and, therefore, the value of its lien equaled the value of the collateral.

Next, the *VP Williams Trans* court discussed the view that the court should compare the value of the security interest to the amount of the debt.[454] Under this approach, the court explained, a secured claim might have inconsequential value if the collateral is worth only a small fraction of the total claim. The court questioned application of this view when the value of the collateral is not small by itself but is significantly less than the debt. 2020 WL 5806507 at *4.

To illustrate, the court assumed that only one secured creditor with a $ 200,000 debt holds a security interest in collateral worth $ 100,000, which would not be "inconsequential." The result should not be different, the court reasoned, when the claim is $ 2,000,000 because the value of the collateral, and therefore the value of the secured claim, is the same. The court observed that denying the § 1111(b)(2) election to the $ 2 million claimant would result in a debtor having greater rights to retain and use collateral "against the secured creditor's will" when the debtor's economic interests are actually far more out-of-the-money. 2020 WL 5806507 at *4.

Under yet another approach, the *VP Williams Trans* court continued, a secured claim may be deemed inconsequential if the § 1111(b)(2) election would give rise to a claim that could not as a practical matter be amortized fully under the cramdown confirmation standards in § 1129(b)(2)(A)(i), discussed above.[455] The court reasoned that this view conditioned a creditor's right to the § 1111(b)(2) election on the debtor having a feasible way to deal with it.

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[454] The court cited *In re* Wandler, 77 B.R. 728, 733 (Bankr. N.D. 1987).
[455] The court cited *In re* Wandler, 77 B.R. 728, 733 (Bankr. N.D. 1987) (Holding that collateral worth $ 15,000 was "inconsequential" in context of claim of $ 390,000 and reasoning that payments having a nominal amount of $ 390,000 but an actual current value $ 15,000 would not be realistic).

The court found nothing in the statute to suggest that "'feasibility' from the debtor's perspective was intended to be a limit on a creditor's right to invoke section 1111(b)." 2020 WL 5806507 at *4.

Finally, the *VP Williams Trans* court considered and rejected the analysis of the *Body Transit* court, discussed below, that took policy considerations into account in making the "inconsequential value" determination. Later text discusses the court's reasoning, following discussion of *Body Transit.*

After its discussion of the various approaches to the determination of "inconsequential value," the *VP Williams Trans* court concluded that the case before it was not difficult because the creditor's interest was not inconsequential under any of them. 2020 WL 5806507 at *6.

In *In re Body Transit, Inc.,* 619 B.R.816, 835 (Bankr. E.D. Pa. 2020), the court ruled that the correct methodology is to compare the value of the lien position to the total amount of the claim.

The court reasoned that the statutory text of § 1111(b)(1)(B)(ii) "explains how to value [the creditor's interest in the collateral] and then directs the court to determine whether the value is inconsequential. The statutory text does not state how to make that second determination of 'inconsequentiality.'" 619 B.R. at 835. To make the second determination, the court continued, the court must "compare the value of the collateral to something else, and the statutory text offers no guidance there." *Id.*

The court concluded that the proper comparison is between the value of the collateral to the total amount of the claim. The court stated, *id.* at 835, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[3][a] (footnotes omitted):

> Section 1111(b) is intended to preserve creditors' nonbankruptcy rights, not enhance them.... Since "inconsequential" is not synonymous with "zero," plain meaning would suggest that "inconsequential value" has to include something more than zero value. This leads to the view that a creditor whose lien is almost, but not quite, out-of-the-money should be treated as if [it] were wholly unsecured, which is for practical purposes the status the creditor would likely ascribe to itself outside of bankruptcy with collateral of little or inconsequential value. Put another way, it [sic] if the collateral's value is inconsequential when compared to the total debt owed to the creditor, the creditor should be treated as unsecured, not secured [for purposes of § 1111(b)(1)(B)].

The court then turned to consideration of whether the creditor's interest was of "inconsequential value" when the value of the collateral was $ 80,000, 8.2 percent of the amount of the secured debt, $ 970,233. The court stated, 619 B.R. at 836:

> [T]he "inconsequential value" determination is not a bean counting exercise; the determination cannot be based solely on a mechanical, numerical calculation. Some consideration must be given to the policies underlying both the right to make the § 1111(b) election and the exception to that statutory right. In other words, while "the numbers" provide an important starting point in deciding how much value is "inconsequential," the court also must consider other relevant circumstances presented in the case and make a holistic determination that takes into account the purpose and policy of the statutory provisions that govern the reorganization case.

Under this analysis, the court concluded that the value of the creditor's interest was inconsequential and that it could not make the § 1111(b)(2) election.

In the *Body Transit* court's view, the purpose of the § 1111(b)(2) election is to protect the creditor from determination of its secured claim at a time when the value of its collateral is temporarily depressed, which could permit the debtor to realize a considerable gain upon its sale when the market rebounds. 619 B.R. at 833. The court reasoned that the case before it involving a fitness club and exercise equipment as collateral "does not resemble the classic fact pattern that Congress designed § 1111(b) to prevent. [The creditor] is not a secured creditor being cashed out during a temporary decline in the value of its collateral, with the Debtor seeking to retain such collateral and obtain the windfall benefit of a market correction in the foreseeable appreciation that restores value to the collateral." 619 B.R. at 836.

Rather, the court found, any increase in the value of the debtor's enterprise would most likely be "attributable to some combination of market forces, the entrepreneurial efforts and acumen of the Debtor's principal and, perhaps, the investment of additional capital." *Id.* at 836.

These circumstances, the *Body Transit* court reasoned, supported the conclusion that the collateral was of "inconsequential value" within the meaning of § 1111(b)(1)(B)(i). The court also found support for its conclusion in the purposes and policies underlying subchapter V. *Id.* at 837.

*In re VP Williams Trans, LLC,* 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), discussed earlier, rejected consideration of the policies that *Body Transit* invokes.

With regard to the intended purpose of the § 1111(b)(2) election, the court reasoned, "Section 1111(b) is not conditioned on a temporary decline in collateral value; it is available to secured creditors who are not happy with a value that a debtor has proposed, and who are not happy with the prospect of having to live with a judge's decision as to what the value of the collateral is." *Id.* at 5.

The *VP Williams Trans* court reasoned that the desire of Congress to foster small business reorganization had no bearing on the interpretation of § 1111(b). "Congress also desire to foster other forms of chapter 11 reorganizations," the court said, "but section 1111(b) applies in all chapter 11 cases, including subchapter V. If Section 1111(b) was supposed to give way in a subchapter V case, or to have a different application in such a case, that was for Congress to say, and Congress did not do so." 2020 WL 5806507 at *6.

The third case is *In re Caribbean Motel Corp.,* 2022 WL 50401 (D. P.R. 2022). The creditor held a claim of about $ 3.1 million secured by collateral worth $ 550,000, about 15% of its claim. Without determining which approach to use, the court concluded that the value of the collateral was not inconsequential. *Id.* at *5-6.

**2. Realization of the "indubitable equivalent" of a secured claim -- § 1129(b)(2)(A)(iii)**

One of the ways for a plan to meet the "fair and equitable" requirement for cramdown treatment of a secured claim under § 1129(b)(2)(A) (applicable in subchapter V under § 1191(c)(1)) is to provide for the creditor to realize the "indubitable equivalent" of its claim. The court in *In re Pearl Resources, LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020), examined and applied this provision in confirming a subchapter V plan of jointly administered debtors over the objection of creditors holding statutory mineral property liens under Texas law.

The total of the creditors' claims was $ 1,151,287 million. Their statutory liens extended to all of the debtors' gas and oil properties, valued at approximately $ 35 million. The plan provided that the creditors: (1) would retain their liens on one property, valued at $ 7,440,000; (2) would release their liens on all other properties; and (3) would receive pro rata payments from disposable income on a quarterly basis for two years. The plan further provided that, if the claims were not paid in full, with interest, in two years, the debtors would sell portions of the

retained collateral to pay the claims in full. In addition, the plan provided that, if the debtors did not pay the claims in full within 34 months, the creditors would receive a lien in the debtor's interest at that time in another property. *Id.* at 248-49.

The creditors rejected the plan and objected to its confirmation. Among other things, they argued that the plan was not fair and equitable because it did not provide for them to retain their existing liens and did not provide the indubitable equivalent of their claims. 622 B.R. at 266-67.[456] The court overruled their objections and confirmed the plan.

The court explained that the indubitable equivalent requirement is tied to a "claim," not to the property securing the claim. Thus, the court rejected the argument that the plan could not modify their lien rights in any fashion and still meet the indubitable equivalent standard 622 B.R. at 270.

The court then addressed the creditors' argument that the plan did not meet the indubitable equivalent requirement because it reduced their 29 to 1 value-to-debt equity cushion to a 6 to 1 cushion. The court provided the following review of case law, 622 B.R. at 271-72 (original footnotes omitted):[457]

> The Fifth Circuit has expressly recognized that one accepted method of providing indubitable equivalence is the exchange of collateral. Whether the indubitable equivalent offered is equivalent is a matter left to the discretion of the bankruptcy court in its careful

[456] The creditors also objected on the grounds that the plan did not meet the disposable income requirement of § 1191(c)(2) and the feasibility requirements of § 1191(c)(3). 262 B.R at 266. The court concluded that the plan met these requirements and that it provided adequate remedies for default. *Id.* at 267-70.

[457] In footnotes to the first paragraph of the quoted text, the court cited: *In re* Sun Country Dev, Inc., 764 F.2d 406, 408 (5th Cir. 1985); *In re* Walat Farms, Inc., 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) ("a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor"); *In re* Swiftco, Inc., 1988 WL 143714 (Bankr. S.D. Tex. 1988); and *In re* Philadelphia Newspapers, LLC, 418 B.R. 548, 568 (E.D. Pa. 2009), *aff'd* 599 F.3d 298 (3d Cir. 2009).

*In re Philadelphia Newspapers* ruled that a plan providing for the sale of the creditor's collateral without permitting the creditor to credit bid satisfied the indubitable equivalent requirement. The Supreme Court later ruled to the contrary in *Radlax Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 132 S.Ct. 2065 (2012). The Supreme Court concluded that the specific requirement for credit bidding in § 1129(b)(2)(A)(ii), which permits cramdown when a plan provides for the sale of collateral, precluded an interpretation of the indubitable equivalent standard that permitted sale without credit bidding.

> reliance upon sufficient facts. Courts should not accept offers of indubitable equivalence lightly and should insist on a high degree of certainty. Moreover, indubitable equivalence is a flexible standard. The indubitable equivalent standard requires a showing that the objecting secured creditor will receive the payments to which it is entitled, and that the changes forced upon the objecting creditor are completely compensatory, meaning that the objecting creditor is fully compensated for the rights it is giving up. For example, the Fifth Circuit has stated that the "[a]bandonment of the collateral to the class would satisfy indubitable equivalent, as would a replacement lien on similar collateral."
>
> In *Investment Company of The Southwest*, [341 B.R. 298, 325 (B.A.P. 10th Cir. 2006),] the court recognized that a debtor may be permitted to use some portion of the equity cushion in collateral to help implement a plan without violating the indubitable equivalent standard, as long as the secured creditor remains over-secured beyond a reasonable doubt and has sufficient protection. Courts have approved plans that did not pay a secured lienholder all of its collateral sale proceeds, as long as the court is satisfied that there will always be more value in the remaining collateral than the lender's lien amount.[458] Courts also have routinely held that a partial surrender of collateral to an over-secured creditor provides such creditor with the indubitable equivalent of its claim.[459] A sister Court approved a plan over the objection of a secured creditor finding the debtor had provided the indubitable equivalent because the secured creditor remained over-secured beyond a reasonable doubt and had sufficient payment protection over the life of the plan.[460] In essence, in the bankruptcy context, the indubitable equivalent means that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also insure the integrity of the creditor's collateral position.[461]

Applying these standards, the court concluded that the plan provided "virtual certainty" that the claims would be paid in full and that the 6 to 1 value-to-debt ratio provided an equity cushion that was sufficient adequate protection. 622 B.R. at 272.

The court rejected the creditors' arguments that a plan could not modify a Texas statutory mineral lien under any circumstances and that lien-stripping may not be accomplished under any

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[458] The court cited: *In re* Pine Mountain, Ltd., 80 B.R. 171 (B.A.P. 9th Cir. 1987) (Concluding that it was unlikely that creditor's claim would ever become even partially unsecured and that plan provided secured creditor with variety of safeguards and fair interest rates); and Affiliated Nat'l Bank-Englewood v. TMA Assocs., Ltd. (*In re* TMA Associates, Ltd.), 160 B.R. 172, 174 (D. Colo. 1993).

[459] The court cited *In re* May, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).

[460] The court cited *In re* SCC Kyle Partners, Ltd., 2013 WL 2903453 (Bankr. W.D. Tex.2013).

[461] The court cited 4 COLLIER ON BANKRUPTCY ¶ 506.03.

circumstances, concluding that § 1123(a)(5)(E) permits a plan to modify any lien as long as it complies with § 1129(b)(2)(A).[462]

## IX. Payments Under Confirmed Plan; Role of Trustee After Confirmation

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan or a cramdown plan.

### A. Debtor Makes Plan Payments and Trustee's Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under §1191(a)

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),[463] the court must confirm the plan.[464] Confirmation of a consensual plan under §1191(a) leads to the termination of the trustee's service under §1183(c)(1) when the plan has been "substantially consummated."[465] The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.[466]

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[462] The court cited *In re* Bates Land & Timber, LLC, 877 F.3d 188 (4th Cir. 2017), which permitted cramdown confirmation of a plan providing for a secured creditor to receive property valued at $ 13.7 million and cash of $ 1 million on its $ 14.6 million claim in exchange for the release of prepetition collateral.

The *Pearl Resources* court distinguished two cases on which the creditors relied, *In re CRB Partners, LLC*, 2013 WL 796566 (Bankr. W.D. Tex. 2013), and *In re Swiftco, Inc*., 1988 WL 143714 (Bankr. S.D. Tex. 1988). The court noted that these cases ruled that the plans did not provide the indubitable equivalent of the creditors' claims because of an insufficient equity cushion or reasonable doubt as to payment but recognized that liens could be modified.

[463] Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. *See* Section VIII(B)(4).

[464] § 1191(a).

[465] § 1183(c)(1).

[466] § 1183(c)(2).

Under § 1101(2), "substantial consummation" generally occurs upon "commencement of distribution under the plan."[467] Unless the plan implicates other requirements for substantial consummation, the sub V trustee's service terminates under §1183(c)(1) when the first payment under the plan occurs.

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and cannot make payments thereafter.

## B. Trustee Makes Plan Payments and Continues to Serve After Confirmation of Plan Confirmed Under Cramdown Provisions of §1191(b)

When the court confirms a cramdown plan, §1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.[468] Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.[469]

Because the sub V trustee must make payments under a cramdown plan, the trustee's service does not terminate upon its substantial consummation.[470] The trustee's service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee's service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge,

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[467] § 1101(2)(C). "Substantial consummation" under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or 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. § 1101(2)(B). Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

[468] § 1194(b). Curiously, paragraph (b) of § 1194 is titled "Other Plans," even though it applies exclusively to plans confirmed under the cramdown provisions of § 1191(b) and no other provisions of § 1194 deal specifically with payments under a consensual plan confirmed under § 1191(a).

[469] § 1226(c), 1326(c).

[470] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.[471]

Section 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.[472] The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because §1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.[473] Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated

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[471] *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 100, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee." ).

[472] § 1194.

[473] W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:10.

and postpetition payments due on leases or executory contracts that are being assumed. In such instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.[474]

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.[475] In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses.

The court in *In re Spindler,* 623 B.R. 543 (Bankr. W.D. Wis. 2020), permitted a chapter 12 debtor to make direct payments to a mortgage lender under a plan that provided for the re-amortization of the debt in monthly payments over 30 years.

The court reviewed three approaches to direct payments that courts have taken in chapter 12 cases. One view is that the Bankruptcy Code prohibits direct payments on impaired or modified claims,[476] while a second allows debtors to pay secured creditors directly, regardless of their impaired status.[477] *Id.* at 546-47.

Most courts adopt a third approach that permits direct payments depending on the circumstances of the case.[478] *Id.* at 547. In deciding whether to permit direct payments, the

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[474] *Id.*
[475] *Id.*
[476] The court cited *Fulkrod v. Savage (In re Fulkrod),* 973 F.2d 801 (9th Cir. 1992) and *In re Marriott,* 161 B.R. 816 (Bankr. S.D. Ill. 1993).
[477] The court cited *Wagner v. Armstrong (In re Wagner),* 36 F.3d 723 (8th Cir. 1994) and *In re Crum,* 85 B.R. 878 (Bankr. N.D. Fla. 1988).
[478] The court cited *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Speir*, 2018 WL 3814276 (Bankr. N.D. Miss. Aug. 8, 2018); *Westpfahl v. Clark (In re Westpfahl),* 168 B.R. 337 (Bankr. C.D. Ill. 1994); *In re Golden*, 131 B.R. 201 (Bankr. N.D. Fla. 1991); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); and *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988).

*Spindler* court explained, these courts consider some or all of the factors that *In re Pianowski,* 92 B.R. 225 (Bankr. W.D. Mich. 1988) identified: (1) the past history of the debtor; (2) the business acumen of the debtor; (3) the debtor's post-filing compliance with statutory and court-imposed duties; (4) the good faith of the debtor; (5) the ability of the debtor to achieve meaningful reorganization absent direct payments; (6) the plan treatment of each creditor to which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the legal sophistication, incentive and ability of the affected creditor to monitor compliance; (9) the ability of the trustee and the court to monitor future direct payments; (10) the potential burden on the chapter 12 trustee; (11) the possible effect on the trustee's salary or funding of the U.S. Trustee system; (12) the potential for abuse of the bankruptcy system; and (13) the existence of other unique or special circumstances.

The *Spindler* court noted that *In re Aberegg,* 961 F.2d 1307 (7th Cir. 1992), concluded that chapter 13 debtors could make direct payments in some cases and that *Aberegg* took a pragmatic approach to direct payment of mortgages that extend beyond the term of the plan, finding that it would be counterproductive to require debtors to make payments through the trustee until completion of plan payments and then to arrange for direct payments thereafter. *Spindler,* 623 B.R. at 547.

The *Spindler* court adopted the majority approach and, based on the circumstances of the case, permitted the direct mortgage payments.[479] Among other things, the court noted that the debtor had negotiated payment terms with the lender and that it did not make sense to require the payment method to change at the end of the plan. *Id.* at 548-49.

[479] The court also permitted, without objection, direct payment of a student loan.

When the subchapter V trustee makes payments under the plan, the trustee will be entitled to compensation for that service. To avoid this expense, a debtor may propose that the debtor, rather than the subchapter V trustee, make all payments under the plan. Creditors may support such a procedure because, at least in theory, they can receive the benefits of the reduced cost. A subchapter V trustee may prefer that the debtor make payments because it relieves the trustee of a potentially tedious administrative burden and reduces the risk of nonpayment for such additional services.

Although chapter 13 caselaw, as earlier text discusses, generally does not permit the debtor to make all payments under a plan, subchapter V does not expressly prohibit it. Moreover, the chapter 13 situation is distinguishable because the chapter 13 trustee receives compensation based on a commission on disbursements the trustee makes, whereas the subchapter V trustee generally bills on an hourly basis.

Anecdotal evidence and a few cases (that do not discuss the issue)[480] indicate that at least some courts are permitting the debtor to make all payments under the plan in the absence of any objection.

The fact that the subchapter V trustee does not make payments under the plan does not, however, terminate the subchapter V trustee's services.[481]

**C. Unclaimed Funds**

When a disbursement to a creditor occurs in a bankruptcy case but the creditor does not timely claim it, § 347 governs the disposition of the unclaimed property.[482] Unclaimed property typically arises when a check is mailed to the creditor at its address shown on its proof of claim

[480] *See, e.g., In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 2 (Bankr. D. P.R. 2022).
[481] *E.g., In re* Gui-Mer-Fe, Inc., 2022 WL 1216270 at * 8 (Bankr. D. P.R. 2022).
[482] SBRA amended § 347 to provide for disposition of unclaimed funds in subchapter V cases, SBRA § 4(a)(5), and the CARES ACT made a technical amendment to it. CARES Act §1113 (a)(4)(B).

or the debtor's records, but the creditor has changed its address or the creditor simply does not negotiate the check.

Disposition of unclaimed funds in a subchapter V case depends on who makes the distribution.

For distributions that the subchapter V trustee makes, § 347(a) requires that, 90 days after the final distribution, the trustee stop payment on any check remaining unpaid and pay the money into the court for disposition under chapter 129 of title 28. The applicable provisions of chapter 129 direct the Court to disburse unclaimed funds to the "rightful owners," 28 U.S.C. § 2041, upon "full proof of the right thereto." 28 U.S.C. § 2042. Accordingly, a creditor may later seek to recover the unclaimed funds. This is the same rule that applies to a trustee's disbursements in cases under chapters 7, 12, and 13.

For payments that the debtor makes, § 347(b) provides that any funds that remain unclaimed at the expiration of the time allowed to claim the funds become property of the debtor or of the entity acquiring the asses of the debtor under the plan. This rule also applies in chapter 9 and traditional chapter 11 cases and to distributions that a debtor or party other than the trustee makes in chapter 12 cases.

Section 347(b) does not prescribe the method by which the time to claim the funds is determined. A well-drafted plan, therefore, should establish the deadline, or the debtor or other party may request that the court fix one. Plans in traditional chapter 11 cases that do not provide for full payment of unsecured creditors often provide that no further distributions will be made to

creditors who do not timely claim their distribution and for the pro rata distribution of unclaimed funds to creditors who have claimed their distributions.[483]

## X. Discharge

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual or cramdown confirmation occurs.

### A. Discharge Upon Confirmation of Consensual Plan Under §1191(a)

Section 1141(d) governs discharge in a traditional chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.[484]

Section 1141(d)(5) does not apply in a sub V case.[485] The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.[486]

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[483] If funds in the final distribution are unclaimed, the provision might result in an administrative burden if the amount of unclaimed funds is insufficient to make a meaningful distribution to other creditors. A plan could resolve this problem by providing that, if the unclaimed funds in the final distribution are below a specified threshold, the funds will become property of the debtor instead of being distributed to creditors.

[484] § 1181(c).

[485] § 1181(a).

[486] Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12). Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of $ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B)

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.[487]

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.[488]

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under §1191(a).[489] Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

A plan may provide for so-called "lien-stripping" of a junior lien on the debtor's property. "Strip-off" of a junior lien may occur if the property's value is less than the amount of senior liens; "strip-down" reduces the amount of the lien to the value of the property in excess of the amount of the senior liens. In a chapter 13 case, lien-stripping does not occur until the end of the case, when the debtor receives a discharge.[490] In a subchapter V case, however, consensual confirmation of a plan may result in immediate stripping of the lien.[491]

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in

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denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

[487] § 1141(d)(5)(A).

[488] § 1141(d)(5)(B).

[489] *In re* Vega Cruz, 2022 WL 2309798 (Bankr. D. P.R. 2022). The individual debtor also does not have to deal with the § 522(q) issues discussed *supra* note 486 although they rarely arise.

[490] § 1325(a)(5)(B)(i)(I). *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:11. *See also id.* § 21:23 (discussing whether "strip-off" or "strip-down" may occur when a chapter 13 debtor completes payments under a plan but is not entitled to a discharge).

[491] *In re* Vega Cruz, 2022 WL 2309798 (Bankr. D. P.R. 2022).

§ 502(g) (claims from the rejection of an executory contract or unexpired lease lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.[492]

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.[493] Only an individual is entitled to a discharge in a chapter 7 case.[494] An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.[495]

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order.

Section X(C)(1) discusses exceptions to the § 1141(d)(1)(A) discharge.

## B. Discharge Upon Confirmation of a Cramdown Plan Under § 1191(b)

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in §1192.[496] Instead, the debtor receives a discharge under §1192.

Section 1192 provides for discharge to occur "as soon as practicable" after the debtor completes all payments due within the first three years of the plan, "or such longer period not to

[492] § 1141(d)(1)(A).
[493] § 1141(d)(3).
[494] § 727(a)(1).
[495] § 727(a).
[496] § 1181(c).

exceed five years as the court may fix."[497] Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under §1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under §1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions that Section X(C)(2) discusses, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The §1192 discharge also applies to "all other debts allowed under [§ 503] and provided for in the plan."[498] Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;[499] compensation of the trustee and professionals employed by the trustee and the debtor;[500] and claims for goods the debtor received within 20 days of the filing.[501] The discharge provision recognizes that a plan confirmed under §1191(b) may provide for the payment of administrative expenses through the plan.[502]

## C. Exceptions to Discharge in Subchapter V Cases

Exceptions to a subchapter V discharge differ depending on whether the court confirms a consensual plan under § 1191(a) or cramdown confirmation occurs under § 1191(b).

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[497] § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. § 1192 contains no provision for an earlier discharge.

[498] § 1192.

[499] § 503(b)(1).

[500] § 503(b)(2).

[501] § 503(b)(9).

[502] § 1191(e). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under § 1191(b). *See* Section VI(C).

Section 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for "involuntary gap claims" allowed under § 502(f).

### 1. Exceptions to discharge after consensual confirmation

As Section X(A) explains, § 1141(d) applies in a subchapter V case after confirmation of a consensual plan, except for the provisions of § 1141(d)(5) that govern the discharge of an individual in a traditional case.

The discharge that § 1141(d)(1)(A) grants upon confirmation has two exceptions.

First, in the case of an individual, § 1141(d)(2) provides that the discharge does not discharge any debt of the kind specified in § 523(a). No such exceptions apply to the discharge of an entity in a traditional or subchapter V case.

Second, § 1141(d)(6) provides that the discharge does not discharge an entity[503] from any debt: (1) of the kind specified in § 523(a)(2)(A) or (B)[504] that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts in § 523(a) that § 1141(d)(2) excepts from an individual discharge, and the definition of excepted debts in § 1141(d)(6)(B) is identical to the definition of tax debts excepted under § 523(a)(1)(C).

Section X(C)(3) discusses procedural requirements for determination of whether a debt is excepted under § 523(a)(2), (4), or (6).

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[503] Section 1141(d)(6) uses the term "corporation." Section 101(9) broadly defines "corporation" to include most business entities.

[504] § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition or (B) use of a written statement respecting the debtor's or an insider's financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

### 2. Exceptions to discharge after cramdown confirmation

As Section X(A) discusses, § 1141(d) does not apply when cramdown confirmation occurs under § 1191(b). Instead, § 1192 governs the discharge in that circumstance.

Section 1192 provides for two exceptions to discharge.

First, §1192(1) states that the discharge does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.[505] Any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation.[506]

Accordingly, the § 1192(1) exception provides that the discharge does not apply to debts on which the final payment is due after completion of payments under the plan, which is when the debtor receives a cramdown discharge. Chapters 12 and 13 similarly except such debts because they likewise provide for discharge at the end of the plan term.[507] Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

Second, §1192(2) excepts any debt "of the kind specified in [§ 523(a)]."[508] The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual, but not an entity, under § 1141(d)(2) when the court confirms a consensual plan. Section X(D) discusses the issue of whether the § 523(a) exceptions apply to the discharge of an entity upon cramdown confirmation.

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[505] § 1192(1).
[506] See Section VIII(B)(4)(ii).
[507] See *infra* note 552.
[508] § 1192(2).

Section X(C)(3) discusses procedural requirements for determination of whether a debt is excepted under § 523(a)(2)(, (4), or (6).

### 3. Procedure for determination of exceptions to discharge under § 523(a)(2), (4), or (6)

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable. Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting. If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had actual notice of the deadlines in time to do so.[509] The clerk's office must give at least 30 days' notice of the deadline.[510]

## D. Whether § 523(a) Exceptions Apply to Cramdown Discharge of Entity

### 1. Statutory language and background

Section 1192(2) excepts debts from the cramdown discharge "of the kind specified in § 523(a)." Unlike § 1141(d)(2), which makes the § 523(a) exceptions applicable after consensual confirmation only to an individual, § 1192(2) does not limit the applicability of the § 523(a) exceptions after cramdown confirmation to individuals. This language indicates that the exceptions also apply in entity cases.

[509] § 523(a)(3).
[510] The Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.

The language of § 523(a), however, leads to a different conclusion. As amended by SBRA, the preamble to § 523(a) is:

> 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 paragraphs (1) through (19) of § 523(a)].

SBRA added the italicized "1192" to the list of other sections, which are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.

As amended, therefore, § 523(a) states, "A discharge under section . . . 1192 . . . does not discharge an individual debtor from any debt" that § 523(a) lists. The implication of this language is that § 1192(2)'s reference to debts "of a kind specified" in § 523(a) includes only debts that § 523(a) excepts, which are only debts of individuals. In other words, although §1192(2) states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of an entity has no operative effect because § 523(a), as amended, applies only to individuals.

SBRA's amendment to include § 1192 in § 523(a) seems superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), §1192(2) alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a §1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the §1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and "any debt

that is otherwise nondischargeable."[511] The use of the words "otherwise nondischargeable" logically refers to § 523(a), which applies only to individuals.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law, as Section X(D)(2) discusses – one would expect the House Judiciary Committee Report to point that out. It does not.[512] To the contrary, the Report's explanation that the exceptions are for "any debt that is otherwise nondischargeable" demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Two bankruptcy cases decided under chapter 12, however, support the conclusion that the § 523(a) exceptions may apply to a §1192 discharge of an entity.[513] The chapter 12 discharge provisions have the same language as §1192, and the prefatory language of § 523(a) as amended refers to them and §1192 in the same way. [514]

In the two chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only excepts debts of an individual. Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

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[511] H.R. REP. NO. 116-171, at 8.

[512] Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small's explanation of the § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), *available at* https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

[513] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re* JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).

[514] The chapter 12 discharge provision applicable when a debtor completes plan payments, § 1228(a), excepts from discharge any debt "of a kind specified" in § 523(a). § 1228(a)(2), A debtor may receive a so-called "hardship" discharge under certain conditions even if the debtor does not complete plan payments under § 1228(b). Section 1228(c)(2) uses the same language to except such debts from a hardship discharge.

In *In re JRB Consolidated, Inc.*,[515] the court reasoned that the operative language in § 1228(a)(2) ("debts of the kind" specified in § 523(a)) "does not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in § 523(a)."[516] Instead, the court concluded, "debts of the kind" is limited to the types of debts that the subparagraphs of § 523(a) identify.[517] Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.[518]

The court in *In re Breezy Ridge Farms, Inc.*,[519] adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)[520] apply to debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)" that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.[521] The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

> Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.[522]

[515] *In re JRB Consol.*, 188 B.R. at 373.
[516] *Id.* at 374.
[517] *Id.*
[518] *Id.*
[519] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.
[520] Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. *See* Section X(A).
[521] *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.
[522] *Id*.

Commentators[523] and courts have disagreed about whether the § 523(a) exceptions are applicable to the cramdown discharge of an entity. The next section examines the competing rulings.

### 2. Judicial debate over application of § 523(a) exceptions to cramdown discharge of an entity

Four bankruptcy judges – two in the same district – have ruled that the exceptions to discharge in § 523(a) apply only in an individual case and, therefore, that no § 523(a) exceptions to a § 1192 cramdown discharge of a corporation (or other entity[524]) exist.[525] Reversing one of the decisions, the Fourth Circuit in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC),* 36 F.4th 509 (4th Cir. 2022), concluded that § 1192(2) excepts debts that are listed in § 523(a) from the cramdown discharge of both individual and corporate debtors. The debate involves analysis of legislative history and the context of the statutes in support of the competing textual analyses.

***Rulings of the bankruptcy courts that § 523(a) exceptions are inapplicable to entity discharge***

The bankruptcy court in *Cleary Packaging*[526] adopted and expanded the rationale of *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc.*

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[523] *Compare, e.g.,* 5 NORTON BANKRUPTCY LAW AND PRACTICE § 107:19; James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, NORTON BANKR. L. ADVISER, Oct. 2019, Part IX (exceptions are applicable to discharge of sub V entity) *with* Richard P. Cook, *Discharges in Subchapter V: What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?,* 41-Jun Am. Bankr. Inst. J. 24 (June 2022) (exceptions should not be applicable to discharge of sub V entity). .

[524] "Corporation" is a defined term in the Bankruptcy Code, § 101(9) and includes, among other things, a limited liability company. *E.g.,* Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 36 F.4th 509, 512 n. 1 (4th Cir. 2022). The text uses "corporate" or "corporation" interchangeably with "entity").

[525] Jennings v. Lapeer Aviation, Inc. (*In re* LaPeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021); Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 871 (Bankr. D. Md. 2021).

[526] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).

*Crabcake Factory USA),* 626 B.R. 871 (Bankr. D. Md. 2021), the first case to address the issue. Two later bankruptcy court opinions follow the approach of these cases.[527]

The bankruptcy courts focused on the text of § 523(a) and invoked two principles of statutory construction to support the conclusion that the discharge exceptions apply only to an individual. The first is the familiar rule that the plain meaning of the text governs interpretation of the bankruptcy statutes unless such an interpretation produces an absurd result.[528] The second is that "every word must be given meaning so that no word in a statute is rendered superfluous."[529]

For the bankruptcy courts, the critical text is in the preamble of § 523(a), which states that a discharge *under § 1192* discharges *an individual debtor* from all debts except the 21 types of listed debts. This clear and unambiguous language makes the exceptions applicable only to the § 1192 discharge of the debtor.

A contrary interpretation, the bankruptcy courts continue, would render SBRA's amendment of § 523(a) to insert § 1192 superfluous. Section 1192(2) states that a § 1192 discharge does not discharge a debt "of the kind specified in § 523(a)." For the exceptions in § 523(a) to apply to discharges of individuals and entities under § 1192(2), it is not necessary to add § 1192 to § 523(a).

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[527] Jennings v. Lapeer Aviation, Inc. (*In re* LaPeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559 (Bankr. D. Idaho 2021);
[528] Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 871, 875-76 (Bankr. D. Md. 2021), *citing* Lamie v. United States Trustee, 540 U.S. 526, 534 (2004).
[529] *Id.* at 876. The court cited: Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) (A court should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); and Star Athletica, L.L.C. v. Varsity Brands, Inc., —— U.S. ——, 137 S.Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'" (quoting Walters v. Metro. Ed. Enter., Inc., 519 U.S. 202, 207, (1997))).

The reference to § 1192 in § 523(a) must mean something, and "the only reasonable meaning is that Congress intended to limit application of the § 523(a) exceptions in a Subchapter V case to individuals."[530] In other words, the only function of the addition of "§ 1192" to the qualifying language of § 523(a) "is to limit application of § 523(a) to individual debtors in Subchapter V cases."[531] "This is not simply the logical reading of the statute but also it is the result mandated by common principles of statutory construction."[532]

Under this textual analysis, the *Cleary Packaging* bankruptcy court concluded, "When giving effect to every word of the statute, the plan language of Section 523(a) is unequivocal and confirms that the exceptions to a debtor's discharge, including a discharge under Section 1192, apply only to an individual."[533] The bankruptcy court in *Satellite Restaurants* put it this way: "[T]he Code, read holistically and in accordance with common principles of statutory interpretation, limits the application of section 523 in Subchapter V cases to individual debtors."[534]

***The Fourth Circuit ruling: § 523(a) exceptions apply to entity discharge***

The Fourth Circuit's contrary analysis in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC,* 36 F.4th 509 (4th Cir. 2022), focuses on the text of § 1192(2) "as the provision that specifically governs discharges" in a subchapter V case. *Id.* at 515.[535] The

[530] Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 876 (Bankr. D. Md. 2021).
[531] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).
[532] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).
[533] Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 871, 876 (Bankr. D. Md. 2021).
[534] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 472 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 871 (Bankr. D. Md. 2021).
[535] More accurately, § 1192(2) governs only one set of exceptions to discharge when the court confirms a cramdown plan under § 1191(a). It has no application when the court confirms a consensual plan under § 1191(a).

critical language of § 1192(2) is that it excepts "*any debt . . .of the kind*" specified in § 523(a). The Fourth Circuit concluded that use of the word "debt" was decisive because "it does not lend itself to encompass the 'kind' of *debtors* discussed in the language of § 523(a)." *Id.* (original emphasis).

The Fourth Circuit explained, "the combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a). 36 F.4th at 515 (original emphasis). This interpretation of "of the kind," the court continued, is in line with the ordinary dictionary meanings of "kind" as "category" or "sort."

The court summarized its ruling, 36 F.4th at 515 (original emphasis):

> [W]hile § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) – i.e., both individual and corporate debtors – remain subject to the 21 *kinds of debt* listed in § 523(a).

To the extent that tension existed between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors, the court added, the more specific language of § 1192(2) dealing only with subchapter V discharges should govern over the more general provisions of § 523(a) that reference other discharges under the Bankruptcy Code. 36 F.4th at 515.

The bankruptcy courts support their interpretation with analysis of legislative history, the underlying objectives of subchapter V, and the historical structure and objectives of the Bankruptcy Code. The Fourth Circuit finds support for its conclusion in the context of § 1192(2)

within the Bankruptcy Code, in the structure of the Bankruptcy Code, and in considerations of "fairness and equity."

***Reasoning of the bankruptcy courts to support their interpretation***

The bankruptcy courts, reviewing the legislative history of subchapter V that earlier text discusses, found nothing that indicated that Congress intended to expand the exceptions to discharge in § 523(a) to a corporation.[536]

In addition, the bankruptcy courts noted the well-settled law that the pre-SBRA version of § 523(a) did not apply to a chapter 11 discharge of a corporation.[537] Indeed, in enacting the Bankruptcy Code in 1978, Congress expressly considered and rejected the approach of one of the former reorganization chapters under the Bankruptcy Act, Chapter XI, that provided for objections to the discharge of a corporation.[538]

The bankruptcy court in *Cleary Packaging*[539] pointed out that, according to one bankruptcy scholar, the exceptions in chapter XI cases to a corporation's discharge for fraud and other debts "posed a substantial impediment to the ability of certain debtors to reorganize" under chapter XI, and the corporate discharge provisions in chapter 11 (the single reorganization chapter that replaced former Chapters X, XI, and XII) reflected "the considered judgment that

[536] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 473 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 871, 878 (Bankr. D. Md. 2021).
[537] Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (*In re* Satellite Restaurants, Inc. Crabcake Factory USA), 626 B.R. 871, 876-77 (Bankr. D. Md. 2021) (collecting and discussing cases).
[538] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 473-74 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).
[539] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 474 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).

*any* corporate discharge exception 'would leave an undesirable uncertainty surrounding reorganizations that is unacceptable.'"[540]

The court noted that the only exception to the discharge of a corporation in a traditional chapter 11 case is in § 1141(d)(6).[541] Section 1141(d)(6) provides a limited exception for debts of a kind specified in §523(a)(2) owed to (1) a domestic governmental unit or to a person resulting from an action under the False Claims Act or similar state statute and (2) taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat.[542] It took eight years for that provision to be enacted.[543]

From this, the bankruptcy court in *Cleary Packaging* concluded, "[T]he 1978 Code represented an intentional and decisive change by Congress with respect to the scope of a corporate debtor's discharge." 630 B.R. 474. Accordingly, the court reasoned, "[T]he suggestion that Congress incorporated [21] new exceptions to discharge for small corporations in a bill [the SBRA] that was introduced in April 2019, and signed into law by the President in August 2019, seems not only improbable but also contradicts years of bankruptcy law and policy. 'Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.'" 630 B.R. at 475.[544]

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[540] *Id.* at 474, *quoting* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005) (internal notes and citations omitted). See also *Cleary Packaging,* 630 B.R. at 475, n. 12.

[541] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 475 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).

[542] *See generally* Roger S. Goldman, et al., *Discharging False Claims Liability in Bankruptcy, Section 1141(d)(6)(A) of the Bankruptcy Code: An Incentive to Settle FCA Cases?,* 23 No. 1 Health Law 40 (American Bar Association 2010).

[543] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 475 & n. 17 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022).

[544] The court quoted *Whitman v. Am. Trucking Associations,* 531 U.S. 457, 468 (2001).

Simply put, the bankruptcy courts conclude that Congress did not intend that § 1192(2) change established law regarding exceptions to an entity's chapter 11 discharge.

The *Cleary Packaging* bankruptcy court also concluded that the scope of the chapter 11 discharge should be the same in all chapter 11 cases. The court explained, 630 B.R. at 475:

> Although the entities at issue in a Subchapter V case are smaller than those in most traditional chapter 11 cases, the state law structure of these entities and their need for a balance sheet restructuring are akin to larger chapter 11 cases. These entities act in the same general manner and should be subject to the same potential liabilities through the chapter 11 process. In fact, history has shown that individuals running very large corporations are capable of using the entity for improper purposes, yet the entity receives a discharge in chapter 11 if its plan is confirmed. It seems incongruent that Congress would penalize a smaller entity for similar individual conduct.

The *Cleary Packaging* bankruptcy court also noted that the § 523(a) exceptions do not apply to a discharge granted upon confirmation of a consensual plan under § 1191(a) – an outcome determined by class voting, not the actions of individual creditors. Thus, if enough creditors in a class including a creditor who claims a nondischargeable debt accept it (and all other impaired classes accept it), consensual confirmation under § 1191(a) discharges the allegedly nondischargeable claim. 630 B.R. at 476.

The court concluded, "[A]ny such result is arbitrary and undermines the equality principles of creditor treatment under the Code." 630 B.R. at 476.

The *Cleary Packaging* bankruptcy court summarized its ruling as follows, *id.* at 476:

> The nature and purpose of the discharge are different for corporate debtors, and those differences must, in this Court's opinion, be respected in Subchapter V.
>
> The Court is persuaded by Congress' rejection of prior exceptions to discharge for corporate debtors and, more importantly, the plain language that Congress used in section 523(a) to confine those exceptions to individual debtors. Absent clear and unambiguous direction from Congress to deviate from that approach, the Court finds that an entity's discharge under section 1192 of the Code is unimpeded by section 523(a) of the Code.

***The Fourth Circuit's reasoning in support of its interpretation***

The Fourth Circuit in *Cleary Packaging* did not address the bankruptcy court's analysis of legislative history, the history of exceptions to discharge in chapter 11 cases, or the need for consistency in the scope of the discharge of an entity in subchapter V and chapter 11 cases. Instead, the court made four points about "the context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure" that supported its interpretation. 36 F.4th at 515.

***Fourth Circuit's analysis of distinctions in discharge provisions***

The Fourth Circuit's first point is that "Congress conscientiously defined and distinguished the kinds of debtors" covered by the discharge provisions in chapters 7, 11, and 13. 36 F.4th at 516. Entities cannot get a discharge in chapter 7 and 13 cases; in traditional chapter 11 cases, Congress "explicitly distinguished" individual and corporate discharges by excluding different debts from each. In contrast, the court concluded, "Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings." *Id.*

As an initial matter, the discharge provisions of chapters 7 and 13 are irrelevant to the issue. Chapter 7 is a liquidation proceeding, so a corporation effectively no longer exists after the filing of a chapter 7 case. The reason for denying a discharge to an entity in a liquidation case is to avoid trafficking in corporate shells and bankrupt partnerships.[545] Section 727(a)(1) clearly and simply distinguishes individuals and entities by providing that such entities do not

[545] 5 Norton Bankruptcy Law and Practice § 86:2 ("Beyond removing what was often a meaningless extension of the discharge provisions, the purpose of Code § 727(a)(1) is to avoid the trafficking in corporate shells and in bankrupt partnerships. Consistent with this purpose, the discharge provisions of Chapter 11 similarly deny discharge to debtors who are not individuals if the confirmed Chapter 11 plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under Code § 727(a) if the case were a Chapter 7 case.") (Citing H.R. Rep. No. 95-595 (1977); S. Rep. No. 95-989 (1978)).

receive a discharge. The same prohibition exists in a chapter 11 case when a corporation liquidates assets and does not remain in business. § 1141(d)(3).

An entity cannot receive a chapter 13 discharge because an entity cannot be a chapter 13 debtor under § 109(e).[546] Chapter 13 distinguishes between entities and individuals by making only individuals eligible for chapter 13, not through a discharge provision.

The distinctions in the operation of the discharge provisions of chapter 7 and 13 between individuals and entities, therefore, shed no light on the interpretation of chapter 11 and subchapter V provisions that deal with exceptions to discharge.

A review of the structure of the discharge provisions of § 1141(d) and § 1192(2) helps to understand the Fourth Circuit's point about distinctions between exceptions to discharge for individuals and debtors in chapter 11 and subchapter V cases.

Section 1141(d) provides for a discharge in a traditional case (and after consensual confirmation in a sub V case) upon confirmation in one paragraph applicable to all debtors (§ 1141(d)(1)(A)) and excepts debts specified in § 523(a) from an individuals' discharge in another. (§ 1141(d)(2)). In a subchapter V case, § 1192(2) excepts debts in § 523(a) without limiting its application to individuals. The Fourth Circuit's conclusion is that Congress must have intended that the § 523(a) exceptions apply to all debtors because § 1192(2) did not limit the exceptions to individuals as § 1141(d)(2) does.

The structures of § 1141(d) and § 1192(2) support the Fourth Circuit's interpretation but they do not compel it. The legislative history of subchapter V and the history of the enactment of Chapter 11 without any exceptions to a corporation's discharge that the bankruptcy courts

[546] *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:6.

examined demonstrate that Congress did not intend that § 1192 apply to all debtors in a way that is materially different from the way that the discharge provisions of § 1141(d) apply to all debtors, as later text discusses in more detail.

***Fourth Circuit's concern about reconciliation with § 1141(d)(6)***

The Fourth Circuit's second point is that the bankruptcy court's interpretation would "create difficulty in reconciling § 523(a) with § 1141(d)(6)." 36 F.4th at 516. The Fourth Circuit did not elaborate on its concern.

Section 1141(d)(6) provides that the discharge does not discharge an entity[547] from any debt: (A) of the kind specified in § 523(a)(2)(A) or (B)[548] that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (B) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid (§ 1141(d)(6)(B)). Although § 1141(d)(6) does not apply to an individual, the debts it excepts in § 1141(d)(6)(A) are debts that are nondischargeable in an individual case under § 523(a)(2), and the debts in § 1141(d)(6)(B) are identical to debts excepted under § 523(a)(1)(C).

Two possible concerns involving § 1141(d)(6) arise from the bankruptcy court's interpretation.

First, if § 1192(2) does not except debts of an entity after cramdown discharge, the discharge will discharge debts that § 1141(d)(6) excepts, because § 1141(d) does not apply in the

[547] Section 1141(d)(6) uses the term "corporation." Section 101(9) broadly defines "corporation" to include most business entities.

[548] § 523(a)(2) applies to debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by: (A) false pretenses, false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition or (B) use of a written statement respecting the debtor's or an insider's financial condition that is materially false, on which the creditor relied, and that the debtor made or published with intent to deceive.

case of cramdown confirmation under § 1181(c). If consensual confirmation occurs, however, such debts are excepted because § 1141(d) governs the discharge.

The fact that an entity could escape nondischargeability of a § 1141(d)(6) debt through cramdown confirmation but not through consensual confirmation supports the conclusion that the § 523(a) exceptions must apply after cramdown confirmation because the § 523(a) exceptions encompass debts described in § 1141(d)(6). In this situation, under the bankruptcy court's interpretation, an entity has an incentive to seek cramdown confirmation rather than consensual confirmation so that it receives a broader discharge.

This anomalous result with regard to limited types of debts does not provide a persuasive basis for concluding that Congress intended to except *all* types of § 523(a) debts from discharge in order to preserve exceptions for a few. While § 1141(d)(6) debts rarely arisen in reported chapter 11 cases, the problem of exceptions to discharge in entity cases is widespread. The fact that the bankruptcy court's interpretation gives an entity a broader discharge in cramdown cases with regard to types of debts that rarely arise does not indicate that Congress intended to depart from the intentional and deliberate elimination of exceptions to discharge in entity cases, as later text explains.

The second issue involves the specific language of § 1141(d)(6)(A). That subparagraph provides that it does not discharge debts owed to certain creditors "of the kind specified" in § 523(a)(2)(A) or (B).

Again, a review of the statutes helps to clarify the issue.

Section 523(a) states that a discharge under § 1141 and § 1192 (and others) does not discharge an individual debtor from the listed debts. Section 1192(2) excludes debts "of the kind

specified" in § 523(a). Under the bankruptcy court's interpretation, the inclusion of § 1192 in § 523(a)(2) means that §1192(2) does not except debts of an entity.

Application of the bankruptcy court's interpretation to § 1141(d)(6)(A) would mean that § 1141(d)(6) likewise does not except debts of an entity from a discharge in a traditional chapter 11 case under the following syllogism:

1. Both § 1192(2) and § 1141(d)(6)(A) except debts "of the kind specified" in § 523(a).

2. Section 523(a) states that discharges under the listed sections, including § 1141 and § 1192, do not discharge "an individual debtor" from the debts it lists.

3. The bankruptcy court's conclusion that the exception to a § 1192 discharge for debts "of the kind specified" in § 523(a) does not apply to an entity because § 523(a) applies only to the discharge of an individual also applies to a § 1141 discharge.

A determination that § 1141(d)(6) does not except debts of an entity contradicts its express language that it excepts the listed debts from the discharge of a corporation. Accordingly, the conclusion from this exercise is that the bankruptcy court's interpretation of § 523(a) as limiting exceptions to discharge in § 1192(2) to individuals cannot be correct because the same interpretation makes no sense when applied to § 1141(d)(6)(A).

The bankruptcy courts do not discuss the point, but their interpretation does not necessarily require the result that the foregoing discussion posits. Section 1141(d)(6) expressly states that it provides exceptions to the debts of corporations and was enacted as a stand-alone amendment to § 1141(d). The bankruptcy court's interpretation cannot override the express provisions of § 1141(d)(6)(A) to except the debts it describes by reference to § 523(a) from a corporate discharge.

Further, the bankruptcy courts' interpretation can be reconciled with § 1141(d)(6)(A) based on differences in the context of § 1141(d)(6)(A) and in the circumstances of its enactment and the enactment of amendments to § 523(a) in 1986 and 2019 that added, respectively, the discharge provisions of chapter 12 and subchapter V. Context of the statutes and the circumstances of their enactment make it appropriate to interpret the same words differently in § 1141(d)(6)(A) than in § 1192(2).

As originally enacted in 1978, § 523(a) referenced only a chapter 7 discharge, a chapter 11 discharge, and the so-called "hardship" discharge in a chapter 13 case under § 1328(b).[549] The limitation of the exceptions to debts of an individual at that time had no effect on the discharge of an entity. An entity could not be a chapter 13 debtor, and it could not get a chapter 7 discharge. Section 1141(d)(2) specifically excepted debts in § 523(a) only from the chapter 11 discharge of an individual. Chapter 12 did not exist.

In 1986, Congress enacted chapter 12 as a temporary provision[550] and amended § 523(a) to include the chapter 12 discharge provisions.[551] Chapter 12 was modelled on chapter 13,[552]

[549] In a chapter 13 case, a debtor receives a discharge under § 1328(a) upon completion of plan payments. As originally enacted, § 1328(a) excepted only one type of debt listed in § 523(a) from discharge, obligations for alimony and other support in § 523(a)(5). It was, therefore, called a "superdischarge" because only one exception to discharge applied. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.*

[550] Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 255, Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986). After several extensions, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made it a permanent part of the Bankruptcy Code.

[551] Bankruptcy Judges, United States Trustees, and Family Farmer Act of 1986 § 257(n), Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986).

[552] Chapter 12 closely resembles chapter 13. In both chapters 12 and 13, creditors do not vote. The confirmation standards are similar, but different from those in chapter 11. Limits on the term of the plan exist in both chapters. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due. § 1322(b)(5) (chapter 13); § 1222(b)(5) and (9). Although a chapter 11 plan may provide for the cure of a default, it does not contain specific provisions for payments on long-term debt beyond the term of the plan. In fact, chapter 11 contains no limit on the term of the plan.

and its provisions for the exception of debts from discharge tracked the two exceptions to a chapter 13 discharge.[553]

One exception is for certain long-term debts on which the final payment is due after the final payment under the plan.[554] Because the debtor has a continuing obligation to make payments on such debts after completion of plan payments and discharge, such debts are excepted from discharge.

The second exception is for debts "of a kind specified" in § 523(a).

Under the chapter 12 discharge provisions standing alone, the § 523(a) exceptions to discharge in chapter 12 cases are not limited to discharges of individuals. But Congress also enacted, in the same legislation, an amendment to § 523(a) to add the chapter 12 discharge

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Sections 1222(b)(5) and 1322(b)(5) are the same. Both permit a plan to provide for the cure of defaults and maintenance of postpetition installment payments for a long-term debt (typically a real estate mortgage) on which the last payment is due after the final payment under the plan is due.

In chapter 12 cases, § 1222(b)(9) permits payment of allowed secured claims "consistent with" § 1225(a), but over a period of time longer than the term of the plan. Section 1225(a) is the chapter 12 analog of § 1325(a)(5) in chapter 13 cases. Both permit payment of an allowed secured claim with payments having a value of the allowed amount of the secured claim. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 5:10, 5:14. In a chapter 13 case, however, payments under this type of treatment must be completed within the plan term. *Id.* § 5:13.

[553] More precisely, the exceptions in the chapter 12 discharge provisions are the same as the exceptions to the "hardship discharge" in chapter 13, with one exception based on a different provision in chapter 12 that permits payment of allowed secured claims beyond the term of the plan.

In a chapter 13 case at the time of temporary enactment of chapter 12, a debtor received a so-called "superdischarge" upon completion of plan payments in a chapter 13 case under § 1328(a), subject to only one exception in § 523(a)(5) for alimony and support obligations. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:13. Later legislation excepted additional debts from the § 1328(a) discharge. *Id.* §§ 21:13, 21:16, 21:17.

A chapter 13 debtor who did not complete all plan payments could receive a so-called "hardship" discharge under § 1328(b) under certain conditions. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure §§ 21:8. Under § 1328(c), the hardship discharge of § 1328(b) is subject to exceptions for all of the debts in § 523(a). See *id.* § 21:18.

Like chapter 13, chapter 12 provides for both "completion" and "hardship" discharges. § 1228(a) (completion discharge); § 1228(b) (hardship discharge). Unlike chapter 13, however, both chapter 12 discharges are subject to all exceptions in § 523(a). § 1228(a)(2) (completion discharge); § 1228(c)(2) (hardship discharge).

The chapter 12 discharge provision differs from the chapter 13 hardship discharge provision in that it also excepts debts "provided for" in the plan under § 1222(b)(9), discussed *supra* note 552. These provisions recognize that, if a debtor will make payments on a debt beyond the term of the plan and after discharge, the debtor must remain liable on such a debt.

[554] § 1228(a)(1) (completion discharge); § 1228(c)(1) (hardship discharge). See *supra* note 552.

sections to the list of discharges. As amended, therefore, § 523(a) stated that a chapter 12 discharge "does not discharge an individual debtor from any debt" that it lists.

In enacting subchapter V, Congress did the same thing with respect to the cramdown discharge in § 1192. First, it modelled the exceptions to the cramdown discharge on the exceptions in chapter 12. Specifically, § 1192(1) excepts debts on which the last payment is due after the plan's term (which is when entry of discharge occurs after cramdown confirmation), and § 1192(2) excepts debts "of the kind specified" in § 523(a). Second, it added § 1192 to the list in § 523(a).

The bankruptcy courts' interpretation in the subchapter V context is that the addition of § 523(a) must mean something, and what it means is that only debts of an individual are excepted from discharge. The same analysis means that the 1986 chapter 12 legislation also resulted in application of the exceptions in § 523(a) only to individuals (contrary to the rulings of two bankruptcy courts in chapter 12 cases discussed above).

The bankruptcy courts' interpretation is subject to debate for other reasons, but its interpretation is not irreconcilable with § 1141(d)(6)(A).

The Fourth Circuit's correct premise is that this reading of "of the kind specified" in § 1192 makes no sense when applying § 1141(d)(6)(A). But this does not mean that the same words must have the same effect in § 1141(d)(6)(A), or even that the meaning of the words that makes sense in § 1141(d)(6)(A) requires that they be interpreted the same way in § 1192 (or in the chapter 12 discharge provisions).

The reason is that § 1141(d)(6)(A) was enacted in 2019 as a stand-alone provision that makes a specific exception to the chapter 11 discharge of a corporation. It clearly states an exception that is applicable to a corporation regardless of how it describes the debts that are

excepted. It addressed a specific problem involving a specific category of debts to be excepted from a corporate discharge.

In contrast, § 1192(2) was enacted in connection with an amendment to § 523(a) in the same way that § 523(a) had been amended in 1986 upon enactment of chapter 12. Although enactment of § 1192(2) and the accompanying amendment to § 523(a) occurred after enactment of § 1141(d)(6)(A), its purpose and effect are the same as those in the chapter 12 legislation enacted in 1986. Determination of the meaning of the subchapter V legislation, therefore, properly involves consideration of the meaning of chapter 12 legislation that preceded § 1141(d)(6)(A), without regard to how the same language applies in § 1141(d)(6)(A).

The chapter 12 discharge provisions in § 1228 and corresponding amendment to § 523(a) were part of comprehensive legislation to deal with the reorganization of family farmers that, unlike chapter 13, permitted entities to file such cases. The similar subchapter V provisions were a part of comprehensive legislation to facilitate the reorganization of small businesses that modified important aspects of chapter 11. How congress used the same words in another specific context does not properly inform their interpretation in the context of comprehensive legislation. Conversely, the meaning of the words in the comprehensive legislation does not require the same meaning in a statute with limited effect where a different meaning is clear.

In other words, the bankruptcy courts' reading of the effect of the limitation of exceptions in § 523(a) to individuals with regard to the general effect of discharges that it lists does not mean that the same reading is applicable when a specific statute – § 1141(d)(6)(A) – references specific subparagraphs of § 523(a)(2) to describe debts that are clearly intended to be excepted from a corporate discharge.

***Fourth Circuit's discussion of exceptions in chapter 12 cases***

The third structural point the Fourth Circuit advances, which it describes as "more telling," is "Congress's importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings." 36 F.4th at 516. Citing the chapter 12 cases that earlier text discusses,[555] the Fourth Circuit observed that, under the language of the chapter 12 discharge provisions materially identical to § 1192, those courts had determined that the § 523(a) exceptions applied to an entity's chapter 12 discharge.

The proposition that subchapter V is "conceptually similar" to chapter 12 is imprecise. Although subchapter V resembles chapter 12 in some ways, it is significantly different in others.[556] Critically, subchapter V is part of chapter 11, and its requirements for confirmation incorporate most of the requirements of § 1129(a). Thus, more accurately, subchapter V uses chapter 11 as its base and then incorporates some of chapter 12's structure.[557]

Nevertheless, because the language of the discharge exceptions in chapter 12 and § 1192(2) is identical, the holdings in the chapter 12 cases support the Fourth Circuit's ruling. In fact, the Fourth's Circuit's textual analysis is similar to the textual analysis those courts used. Otherwise, the cases add little enlightenment about the proper interpretation of the statutes in question. All they do is reach the same result as the Fourth Circuit for the same reasons.

The bankruptcy court in *Cleary Packaging* addressed the chapter 12 cases and distinguished them based on two important differences between chapter 12 and subchapter V.

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[555] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re* JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).

[556] See Part I.

[557] As the court observed in *In re Trepetin,* 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):
Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

630 B.R. at 472 & n. 9.[558] First, subchapter V is an alternative for a business entity and applies to a much broader array of entities than those eligible for chapter 12 as family farmers and fishers. Second, subchapter V incorporates the discharge provisions of § 1141(d) in the context of a consensual plan. Unlike the chapter 12 discharge provision, § 1141(d) distinguishes between individual and corporate discharges.

The *Cleary Packaging* bankruptcy court concluded, "The lack of such distinction within Chapter 12 considered in conjunction with the narrowly circumscribed type of entity that may be a Chapter 12 debtor renders analogy between the two discharge provisions unpersuasive." 630 B.R. at 472, n. 9, *quoting United States ex rel. Minge v. Hawker Beechcraft, Inc. (In re Hawker Beechraft, Inc.),* 515 B.R. 416, 430 (S.D.N.Y. 2014).

Further, the bankruptcy court in *Cleary Packaging* noted that the plain language of the chapter 12 provision "could support a result different that that reached by the courts" in the chapter 12 cases. 630 B.R. at 472.

In short, although the chapter 12 cases support the Fourth Circuit's decision in the sense that they are consistent with it, they provide no additional basis for it. They support the Fourth Circuit's ruling only if their textual analysis is correct – the question before the Fourth Circuit – and if their reasoning and holdings appropriately apply in the subchapter V context. The much wider availability of subchapter V than chapter 12 requires a fresh examination of the statutory language in the subchapter V context.

***Fourth Circuit's consideration of purposes of subchapter V***

[558] The court in *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA),* 626 B.R. 871, 877 (Bankr. D. Md. 2021) similarly distinguished the chapter 12 cases.

The fourth point in the Fourth Circuit's review of context and structure is the consideration of subchapter V's "juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter." 36 F.4th at 517. The court observed that a primary goal of subchapter V is to simplify chapter 11 for small businesses and to reduce administrative costs for them. To do so, the court said, "Congress deliberately altered the general provisions of traditional Chapter 11 proceedings by, among other things, eliminating the absolute priority rule and limiting the applicability of § 1141(d) to Subchapter V proceedings." *Id.*

The Fourth Circuit followed this statement with three sentences dealing with discharge provisions. The sentences, with commentary, are:

1. "Section 1141(d), in particular, sets forth debts that are eligible for discharge in a traditional Chapter 11 proceeding, making distinctions between individual debtors and corporate debtors." 36 F.4th at 517.

Specifically, § 1141(d)(1)(A) describes the debts that are discharged, and § 1141(d)(2) states that the discharge does not discharge an individual debtor from any debt excepted from discharge under § 523.[559] The distinction reflects the simple proposition that an individual should not be able to use chapter 11 to obtain benefits that are not available in other chapters.

[559] Section1141(d)(5) makes three other distinctions between the discharge of individual and entity debts. Section 11141(d)(5), which does not apply in subchapter V, § 1181(1), deals only with individual debtors and provides for (1) deferral of discharge until completion of plan payments; (2) the grant of a so-called "hardship discharge" under certain conditions for a debtor who has not completed plan payments; and (3) the court to grant the discharge if it finds no reasonable cause to believe that § 522(q)(1) is applicable and that no proceeding is pending in which the debtor may be found guilty of a felony as described in § 522(q)(1)(A) or liable for a debt as described in § 522(q)(1)(B). Similar provisions with regard to § 522(q) apply to the grant of a discharges under chapters 7 (§ 727(a)(12)), 12 (§ 1228(f)), and 13 (§ 1328(h). For a discussion of the chapter 13 provision, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 21:5.

Section 522(q)(1) limits the value of the exemption an individual debtor utilizing the nonbankruptcy exemptions under § 522(b)(3)(A) may take in a residence, homestead, of burial plot if the debtor has committed a felony that, under the circumstances, demonstrates that the filing of the case is an abuse of the Bankruptcy Code or

2. "In contrast, § 1192 provides benefits to small business debtors, regardless of whether they are individuals or corporations." *Id.*

This correctly states the operation of § 1192 as the court interpreted it. But whether the benefits are or should be the *same* is the issue before the court. Logic does not permit a premise that is the result of the reasoning.

3. "Thus, an important purpose for Subchapter V would be frustrated were we to adopt [the bankruptcy court's] interpretation of §§ 1192(2) and 523(a), which would treat individuals and corporations differently." *Id.*

This conclusion raises two questions. What is the "important purpose" for subchapter V that concerns the court? How is it frustrated by different provisions for the discharge of debts?

The Fourth Circuit's opinion states earlier that Congress enacted subchapter V "with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses." 36 F.4th at 517. This is the universally recognized objective of subchapter V.

But if that is the "important purpose," it is clear that making an entity's discharge subject to exceptions frustrates, rather than furthers, that purpose. As later text explains, the reasons that led Congress to eliminate exceptions to discharge of an entity when it enacted chapter 11 in 1978 require the same result in a subchapter V case.

The implication of the Fourth Circuit's reasoning, however, is that the court considers the "important purpose" to be that the same discharge exceptions in § 1192(2) apply to individuals

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if the debtor owes a debt arising from a violation of state or federal securities laws, from any civil remedy under 18 U.S.C. § 1964, or from any criminal act, intentional tort, or willful misconduct that caused serious physical injury or death to another individual, in the preceding five years.

and entities alike. If so, a ruling that different exceptions apply to entities obviously frustrates that purpose.

Again, however, whether § 1192(2) makes a distinction is the issue before the court. The court is deciding that the same treatment is an important purpose, but the fact that its ruling *has* that result does not provide a reason *why* that should be the result or why the same treatment is important. In other words, logic requires that a conclusion that an important purpose of § 1192 is identical treatment of individuals and entities rest on something more than the determination that § 1192 has that result.

***Fourth Circuit's consideration of "equity and fairness" and elimination of the absolute priority rule***

The Fourth Circuit also supported application of the § 523(a) exceptions to discharge to a corporation based on considerations of "equity and fairness" arising from elimination of the absolute priority rule. 36 F.4th at 517. After noting that elimination of the absolute priority rule allows an entity's owners in a subchapter V case to retain their ownership interests "at the expense of and over the objection of creditors," the court stated, *id.* (original emphasis):

> Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor. To this end, *all subchapter V debtors* are textually subject to the discharge limitations described in § 523(a), not just individual Subchapter V debtors.

The Fourth Circuit then concluded, *id.*

> To make a distinction between individuals and corporations for how Subchapter V is applied would not only undermine that balance, but would also make no sense and indeed would create perverse incentives.

The Fourth Circuit thus connected the cramdown discharge provision with elimination of the absolute priority rule and concluded that making a distinction with regard to exceptions to

discharge would (1) undermine the balancing of its elimination by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives.

Discussion of the Fourth Circuit's analysis of subchapter V's juxtaposition with traditional chapter 11 provisions and its related consideration of fairness and equity requires a review of related economic and legal issues that the business reorganization of an entity presents, including the operation and effect of the absolute priority rule and its elimination in subchapter V cases and the discharge of an entity.

***Review of reorganization, absolute priority rule, and exception to discharge principles***

A reorganization case under any chapter involves two basic economic issues that inform analysis of confirmation and discharge matters. The first is how much money can the debtor generate to pay creditors. The second is how that money is allocated among them. Bankruptcy principles require allocation to pay the value of secured claims, to pay administrative and priority claims in full, and to pay unsecured creditors what is left. A fundamental principle is equal treatment of similarly situated creditors.

Theoretically, the amount that an entity can pay is unlimited: it can just keep making payments until everyone is paid in full. In the meantime, however, the entity has a financial structure that makes no sense because it remains insolvent, and equity has no prospect of any return for the time it takes to pay its debts in full.

Reorganization solves an *entity's* financial structure by restructuring the balance sheet to reduce debt to a manageable amount. If the proposed restructuring is unacceptable to a class of unsecured creditors, the theory of the absolute priority rule is that the reorganized entity's value is then allocated among its stakeholders – creditors and owners – in accordance with their

priorities.[560] Because creditors have priority over owners, creditors under the absolute priority rule receive the ownership interests to the exclusion of existing owners, except in the rare instance where the reorganized entity is worth more than the amount of the debt.

Reorganization under these principles does not work if the reorganized entity remains liable for a nondischargeable debt. Professor Brubaker summarized the problem of exceptions to the discharge of a corporation in reorganization cases under chapter XI (one of the predecessors of chapter 11):[561]

> A corporate debtor could be denied a chapter XI discharge [under the prior Bankruptcy Act] altogether if the debtor had "been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of an individual] bankrupt." Moreover, chapter XI provided that confirmation of a plan of arrangement discharged a corporate debtor "from all ... unsecured debts and liabilities provided for by the arrangement," but expressly excluded from this discharge "such debts as ... are not dischargeable" in an individual debtor's ordinary bankruptcy case.
>
> The corporate discharge exceptions in chapter XI – particularly the discharge exception for fraud debts – posed a substantial impediment to the ability of certain debtors to reorganize under that chapter. Of course, cases precipitated by massive fraud (where the debtor's fraud liability could easily exceed the going concern value of the debtor's business) could not be successfully prosecuted under chapter XI, as the non-dischargeability of fraud debt would preclude any attempt to even address the source of the business's financial distress. Even more significantly, though, the presence of the discharge exceptions supplied, to any creditor who could assert colorable allegations of fraud, a credible threat to "opt out" of the chapter XI restructuring, in an attempt to receive a greater recovery than other creditors. Consequently, the chapter XI discharge exceptions invited holdout creditor problems of the sort that plague non-bankruptcy workouts and that are the very impetus for a federal bankruptcy reorganization process (that can fully bind dissenters to a restructuring plan).

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[560] The priority discussion here involves only the priority of unsecured creditors over equity interests. Although a secured creditor has a "priority" over unsecured creditors in that it has collateral to secure its debt, and unsecured creditors in a liquidation case cannot generally be paid from that liquidation of a creditor's collateral until the secured creditor receives full payment, that type of "priority" is irrelevant to the absolute priority rule. Priority claims under § 507 are likewise irrelevant to the issue because they must be paid in full. § 1129(a)(9). For simplicity, the discussion does not include consideration of issues that arise when one class of unsecured creditors is subordinated to the claims of another unsecured class.

[561] Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 764 (2005) (internal notes and citations omitted).

As previous text discusses, and as the bankruptcy court in *Cleary Packaging* recognized, Congress enacted chapter 11 in 1978 with no exceptions to the discharge of a corporation's debts because *any* corporate discharge exception "would leave an undesirable uncertainty surrounding reorganizations that is unacceptable."[562]

The existence of nondischargeable debts of an entity, therefore, is related to the basic economic questions of how much a debtor can pay and how it is allocated. If the nondischargeable debt is large enough that the debtor cannot generate enough money to pay it within a reasonable time, reorganization is not possible. If reorganization is possible, the need to pay the nondischargeable debt in full affects the allocation of the money available to pay debts.

The absolute priority rule is only tangentially related to the question of what the debtor can pay. It does not apply if what the debtor can pay is enough to be acceptable to the class of unsecured creditors so that their acceptance makes it inapplicable. It is not related at all to the allocation of available money among creditors. The absolute priority rule, rather, involves allocation of the debtor's value between creditors and owners.

What the absolute priority rule affects is the ability of a debtor, especially a small business, to reorganize.

In one sense, ownership interests in an insolvent entity have no value because the entity's assets exceed its value. If a reorganization plan obligates the debtor to pay creditors an amount for *pro rata* distribution equal to the net liquidation value of the company (*i.e.,* the value of the debtor as a going concern less the amount of secured and priority debt), the reorganized debtor

[562] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 630 B.R. 466, 474 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022), *quoting* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 764-66 (2005).

has a net worth of zero. Creditors arguably lose nothing if existing owners retain the ownership interests that have no value.

Absolute priority rule principles, however, prescribe value to ownership interests in an insolvent entity and require that, in the absence of payment in full, the creditors become the owners of the reorganized debtor even in the circumstances just described unless – as a class – they accept a plan that provides otherwise.

Creditor ownership of a publicly-traded corporation is one thing. Creditor ownership of a private small business is another. It is unlikely that a market for the equity interests in a privately held business will exist. Creditors typically are not interested in holding a minority interest in a private company that they cannot readily turn into cash.

Moreover, the owners of a small business are usually its managers. In many instances, the value of a small business is dependent on the services that they provide. If reorganization means that they will lose their ownership interests, they may elect not to pursue reorganization in the first place. And if they do but are unable to restructure without retaining ownership, they may well abandon the effort or let the creditors as the new owners manage the business.

These real-life considerations are the bases for elimination of the absolute priority rule in entity cases under subchapter V. Simply put, its elimination permits the reorganization of small businesses that would otherwise not be possible or even attempted.

In accordance with the underlying premises of the absolute priority rule that equity in an insolvent entity has value and that creditors are its equitable owners, subchapter V substitutes the projected disposable income requirement for it. At bottom, the value of a corporation is its earning capacity. Instead of giving creditors the right to own the entity if they reject the plan, subchapter V gives them its earnings for a three to five year period, as the court determines. As

such, it turns the ownership interest that unsecured creditors could otherwise claim under the absolute priority rule into cash in a way that could not be accomplished under the absolute priority rule in a small business context.

***Analysis of the Fourth Circuit's "fairness and equity" rationale***

These principles guide analysis of the Fourth Circuit's conclusion that considerations of fairness and equity require exceptions to an entity's discharge in view of elimination of the absolute priority rule.

The Fourth Circuit's consideration of equity and fairness and its connection of exceptions to discharge with elimination of the absolute priority rule begins with the premise that elimination of the absolute priority rule allows an entity's owners to retain their ownership interests "at the expense of and over the objection of creditors." 36 F.4th at 517.

The court's premise is partially correct in that it is true that elimination of the absolute priority rule means that a *class* of creditors in a subchapter V case no longer has the ability to insist on full payment as a condition of the owners' retention of their interests. But a *single* creditor never had the right to invoke the absolute priority rule unless its claim was large enough to control the class vote.

Elimination of the absolute priority rule in subchapter V cases does not necessarily mean that owners retain their interests "at the expense" of creditors. In a subchapter V case, as earlier text discusses, ownership interests in the debtor are likely to have no realizable value. Reorganization usually depends on continued management by existing owners and therefore requires their retention of ownership. The liquidation value of assets often is less than the amount of debt that the assets secure. Retention of ownership interests that have no realizable value hardly comes at the expense of creditors.

In its consideration of fairness and equity, the Fourth Circuit connected elimination of the absolute priority rule to exceptions to an entity's discharge and concluded that treating an entity's discharge differently from an individual's would (1) undermine the balance of elimination of the absolute priority rule by adding an additional layer of fairness and equity; (2) make no sense; and (3) create perverse incentives. 36 F.4th at 517.

The connection of discharge exceptions to elimination of the absolute priority rule is not an appropriate one.

Recall that the absolute priority rule is a requirement in traditional cases that unsecured creditors may invoke collectively if their class rejects that plan. A creditor cannot invoke it on its own behalf if its class of creditors accepts the plan. It protects classes of creditors, not individual one creditor.

In contrast, nondischargeable debt involves only the creditor who holds it. Nondischargeability of a creditor's debt may improve *that* creditor's position, but it provides no benefits to *other* creditors.

Limitations on dischargeability of debts that favor some creditors does not balance the elimination of the absolute priority rule that affects all creditors.

Moreover, elimination of distinctions between individuals and entities for the exception of debts from discharge cannot possibly add an "additional layer of fairness and equity" for any creditors except those with nondischargeable debts. Nondischargeability of a particular debt does not affect determination of the debtor's PDI – the key determinant of how much the debtor must pay unsecured creditors. All it does is leave the debtor with an obligation to pay the nondischargeable debt because it cannot restructure it.

Indeed, the existence of a nondischargeable debt in a reorganization case is in most circumstances adverse to the interests of unsecured creditors generally.

First, it results in competition for available funds between unsecured creditors with dischargeable debts and those with nondischargeable debts. In general, any chapter 11 plan (including all subchapter V plans, whether consensual or cramdown) must treat similarly situated creditors the same. The fact that a debt is nondischargeable presumably will not increase its share of projected disposable income in a subchapter V case.[563] At best, the plan may be able to deal with the nondischargeable debt by payment of the remaining balance after application of its pro rata share of PDI in payments that begin when the period for payment of PDI ends.

This situation creates an incentive for a debtor to minimize payments to creditors with dischargeable debts. Every dollar not paid to creditors generally is a dollar that is available to pay the nondischargeable debt. Conversely, every dollar paid on the nondischargeable debt in excess of a *pro rata* share of disposable income is a dollar that is not paid to unsecured creditors generally.

Second, the existence of nondischargeable debt increases the probability of liquidation. When a feasible plan is otherwise possible, liquidation generally results in a lower recovery for unsecured creditors than payments under a plan.

To the extent that application of exceptions to discharge in subchapter V affects any balance, it tips the scale in favor of the creditor whose debt is excepted from discharge and against creditors whose debts are not dischargeable.

[563] The general rule in chapter 13 cases is that a plan must treat a nondischargeable claim in the same manner as other unsecured claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure § 7:10 – 7:14.

The Fourth Circuit did not elaborate on its observation that the discharge of an entity's debts with no exceptions "would make no sense and indeed would create adverse incentives." As earlier text explains, discharge without exceptions furthers the prospects for a successful reorganization and results in equality of treatment for creditors in a traditional case. For these reasons, Congress eliminated exceptions to the discharge of an entity when it enacted chapter 11 in 1978.

A subchapter V case is no different. Depending on the amount of a nondischargeable debt, its existence is likely to doom reorganization of a small business and result in its liquidation.

A subchapter V debtor may be able to manage nondischargeable debts if, collectively, they are relatively immaterial in relation to its total debts. For example, assume a debtor with $300,000 of unsecured debt that will pay $ 75,000 in projected disposable income over three years to unsecured creditors – a 25 percent distribution.

This debtor could probably pay a nondischargeable debt of, say, $ 50,000. The debtor could pay the unpaid balance of $ 37,500 by continuing PDI payments at the same level for an additional year and a half. Owners may elect to pursue reorganization in this situation, reasoning that retention of ownership rather than liquidation is worth the additional cost.

On the other hand, it is arguable that this debtor should be required to pay projected disposable income to creditors for five years rather than three, thereby increasing what they receive. The additional money that unsecured creditors receive is money that would otherwise be paid on the nondischargeable debt, so it increases the cost of the reorganization from the owners' standpoint. At some point, owners will decide that it is better for them to start over in other employment or a new venture than to devote the fruits of their efforts to payment of debt.

In contrast, assume that a debtor has $ 5 million in unsecured debt, including a nondischargeable judgment of $4.7 million, and projected disposable income over five years of $280,000. Creditors receive a distribution of about 5.6 percent, and the nondischargeable debt is reduced to about $4,436,800. It would take this debtor over 16 years to pay the rest of the nondischargeable debt based on its currently projected income. It is not realistic to expect that owners will sign on for this type of work. Liquidation is inevitable.

For creditors with the objective of putting the debtor out of business, that is a welcome result. It is a disaster for owners who have invested their time and money in the business, and it adversely affects employees who lose their jobs, customers who rely on the business, and creditors who will be paid less (and often nothing) when liquidation occurs.

The same result can occur with regard to relatively small nondischargeable debts if there are enough of them. Further, once a creditor's strategy of asserting a nondischargeable debt succeeds, the predictable result is that more creditors will assert such claims. Indeed, creditors will have a significant incentive to do so. A debtor must defend even non-meritorious claims, increasing administrative expenses and, necessarily, what creditors receive.

The Fourth Circuit's conclusion that discharge of a subchapter V entity without exceptions would "make no sense" and "create perverse incentives" is, therefore, suspect.

The availability of exceptions to an entity's discharge threatens the ability of a debtor to reorganize. It encourages the assertion and prosecution of exceptions to discharge, resulting in litigation that requires time that could otherwise be devoted to reorganization efforts and money for attorney's fees and expenses that would otherwise be available for creditors.

Moreover, if the result of a nondischargeable judgment is liquidation, the nondischargeable debt receives only its pro rata share of any net proceeds of liquidation.

Anecdotal experience teaches that the liquidation of a small business most often results in pennies on the dollar for unsecured creditors and, in many cases, nothing at all.[564] The entire nondischargeability dispute becomes meaningless.

***The bankruptcy courts' interpretation is the better one***

The interpretations of the statute by the bankruptcy courts and the Fourth Circuit are both plausible, as the Fourth Circuit acknowledged in describing the question as a "close one."[565] Based on the legislative history of subchapter V and the historical background of the treatment of exceptions to the discharge of a corporation in traditional chapter 11 cases, the interpretation of the bankruptcy courts is the better one because it accurately reflects Congressional intent.

Exceptions to an entity's discharge in a subchapter V case create the same problems as exception of debts from a traditional chapter 11 discharge, whether the plan is consensual or not, that Congress addressed in 1978 by eliminating exceptions to an entity's discharge in a chapter 11 reorganization.

Perhaps Congress in 2019 had a different view of exceptions to an entity's discharge in the case of cramdown confirmation in a subchapter V case than the Congress in 1978. But it is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of small businesses by, among other things, eliminating the absolute priority rule in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier.

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[564] This consideration may have been of no concern to the creditor in *Cleary Packaging*. An employee of the creditor, apparently related to some of the creditor's former owners, left to organize the debtor and compete with it, resulting in litigation and a judgment against the debtor and the former employee for over $4.7 million. The creditor's objective in the subchapter V case could have been to put a competitor out of business through liquidation.
[565] Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging LLC), 36 F.4th 509, 512 (4th Cir. 2022).

Rather, in view of the facts that nothing in the legislative history of subchapter V mentions such a drastic change and parts of it indicate, to the contrary, that the existing structure would be continued, the better conclusion is that Congress did not intend that the exceptions to discharge in § 523(a) apply to the discharge of an entity under § 1192.

Two final observations about the effect of a subchapter V cramdown discharge without exceptions are appropriate.

First, a concern underlying the issue is the legitimate notion that a debtor should not be able to escape the consequences of fraud or other misconduct through the subchapter V process. After all, the classic formulation of the "fresh start" policy of the bankruptcy laws recognizes that bankruptcy relief is for the "honest but unfortunate debtor."[566] The same question exists in traditional chapter 11 cases, but Congress nevertheless provided for the elimination of nondischargeable debts when it enacted chapter 11, with one later exception in § 1141(d)(6).

The response is that an entity's discharge in a reorganization case serves a different function than the "fresh start" discharge that an individual receives. In short, discharge of an entity without exceptions rests on the need for finality of a confirmed plan. Discharge without exceptions is essential for the reorganization of the entity, rather than its liquidation, in accordance with chapter 11's creditor equality principles that require equal treatment of similarly situated creditors.[567]

Second, as earlier text discusses, a conclusion that an entity's debt is excepted from an entity's discharge does not mean that it will be paid in full. If reorganization fails for reasons discussed above and liquidation occurs, the creditor will receive only its *pro* rata share of the

[566] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
[567] *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions,* 13 Am. Bankr. Inst. L. Rev. 757, 761 (2005) Professor Brubaker discusses this point in detail. *Id.* at 761-62.

proceeds from liquidation after satisfaction of secured claims, administrative claims, and priority claims.

# XI. Changes to Property of the Estate in Subchapter V Cases

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.[568] Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, §1186 provides that, if the court confirms a plan under the cramdown provisions of §1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.[569] Section 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under pre-SBRA law.

## A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Traditional Chapter 11 Cases

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).[570]

[568] § 1181(a).
[569] § 1186.
[570] § 541.

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,[571] unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).[572] Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.[573] In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.[574]

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA.") Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings from postpetition services were not property of the estate (with limited exceptions as noted above).

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[571] Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.
[572] § 541(a)(6).
[573] *Id.*
[574] §§ 1207(a), 1306(a).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,[575] and earnings from postpetition services,[576] both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

## B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.[577] Section 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).[578] Section 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of

[575] § 1115(a)(1).
[576] § 1115(a)(2).
[577] § 1181(a).
[578] § 1186(a)

creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

### 1. Property of the estate in subchapter V cases of an entity

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

Section 1186 deals with property of the estate when cramdown confirmation occurs under §1191(b). It provides that property of the estate consists of property of the estate under § 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of §1186 when it applies begins with an explanation of what happens when it does not, *i.e.,* when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.[579]

The vesting of property of the estate in the debtor means that the automatic stay regarding acts against property terminates. Section 362(c)(1) provides, "[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate."[580] Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.[581]

[579] §§ 1227(b), 1327(b).
[580] § 362(c)(1).
[581] § 1141(b).

In the cramdown situation, §1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor's property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings remain property of the estate.

Section 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. Section 1186, however, keeps the property in the estate when cramdown confirmation occurs.

The purpose seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation[582] and makes payments under the plan,[583] and discharge does not occur until the debtor has completed payments for the specified period.[584]

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.[585] Section 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these

[582] *See* Section IV(D)(1).
[583] *See* Section IX(B).
[584] *See* Section X(B).
[585] "[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statues should prevail over older or more general ones." United States v. Lara, 181 F.3d 183, 198 (1st Cir. 1999) (*citing* HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) and Morton v. Mancari, 417 U.S. 535, 550-51 (1974)); *accord, e.g., In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); Tug Allie-B, Inc., v. United States, 273 F.3d 936, 941, 948 (11th Cir. 2001); Southern Natural Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re* Southern Scrap Material Co., LLC, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *see* 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

concepts, the provisions of §1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

**2. Property of the estate in subchapter V cases of an individual**

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.[586] The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings

[586] *E.g.*, *In re* Copeland, 609 B.R. 834 (D. Ariz. 2019); *In re* Meier, 550 B.R. 384 (N.D. Ill. 2016); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re* Hoyle, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re* Tolkin, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* Pagano v. Pergament, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g., In re* Lincoln, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re* Gorniak, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re* Vilaro Colón, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g., In re* Markosian, 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re* Evans, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

*In re Robinson,* 628 B.R. 168 (Bankr. D. Kan. 2021), answered this question affirmatively. There, the U.S. Trustee sought dismissal of the individual's sub V case because the debtor lost $ 4,000 playing slot machines during the first month after he filed the case. At the time of the hearing, the debtor had filed a plan that all classes of creditors had accepted. The debtor testified that he would no longer be gambling while he was in bankruptcy because, once his plan payments began, he would have no disposable income to do so.

The court concluded that the postpetition gambling did not constitute gross mismanagement of the estate that would provide cause for dismissal under § 1112(b)(4)(B) because the debtor had disclosed it in his monthly report and because nothing showed that the loss was material or had an adverse impact on the estate or its creditors. *Id.* at *7-8.

The court then observed that the gambling loss could not be gross management of the estate because, in a subchapter V case, the debtor's postpetition earnings were not property of the estate. *Id.*

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?[587]

[587] Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate. May the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, §1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.[588]

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such property may not be property of the estate because neither § 1115(a) nor §1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of §1186: Property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that §1186 requires it to have.

[588] § 1186.

# XII. Default and Remedies After Confirmation

If a debtor defaults after confirmation of a plan, creditors must decide what remedies are available and how to invoke them. If the court confirmed the plan under the cramdown provisions of §1191(b), the sub V trustee must also decide what to do if a default occurs.

## A. Remedies for Default in the Confirmed Plan

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in §1191(c)(3)(B)(ii) may provide the source of remedies for default. When the court concludes only that there is a "reasonable likelihood" that the debtor will be able to make plan payments, cramdown confirmation under § 1191(c)(3)(B)(ii) requires that the plan provide "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."[589] The only specific remedy in § 1191(c)(3)(B)(ii) is "the liquidation of nonexempt assets." The requirement for appropriate remedies does not apply if the court finds that the debtor *will* be able to make

[589] See Section III(B)(5).

plan payments, but debtors who seek cramdown confirmation of a plan that does not contain them subject themselves to the higher feasibility standard.[590]

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of § 1191(c)(3)(B)(ii), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor's default. Secured creditors and lessors will want provisions in the plan that recognize their rights to proceed against the debtor's property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

An unsecured creditor can subject the debtor's assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text in Section XII(C) discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

[590] See Section III(B)(5).

## B. Removal of Debtor in Possession for Default Under Confirmed Plan

Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or "for failure to perform the obligations of the debtor under a plan confirmed under this subchapter."[591] If removal of the debtor in possession occurs after the trustee's service has been terminated upon substantial consummation[592] of a consensual plan confirmed under §1191(a), §1183(c)(1) provides for reappointment of the trustee.

Section 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. Section 1183(c)(5)(B) authorizes the trustee to operate the business of the debtor, but the trustee's duties do not include liquidation of the debtor's assets. Nothing in subchapter V appears to authorize the trustee to do so.

The trustee's operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor's defaults. Even if the trustee can operate the business, its future is unclear. Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee may be able to do nothing more than observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor's default occurs after confirmation of a consensual plan under §1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan

[591] § 1185(a). Section V(C) discusses removal for cause.
[592] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

or confirmation order provides otherwise.[593] If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no "debtor in possession" to be removed.

Under this view, §1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the estate remains property of the estate under §1186[594]) or because the plan or confirmation order so provides.

It is arguable that Congress did not intend to limit the operation of §1185(a) based on how property vests at confirmation. One possible interpretation of §1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly revests the debtor's assets into the estate.

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.[595] Moreover, if the plan was a consensual one confirmed under §1191(a), postconfirmation modification under §1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan).[596] Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

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[593] *See* Section XI(B).
[594] *See* Section XI(B).
[595] § 1193(b).
[596] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.[597]

## C. Postconfirmation Dismissal or Conversion to Chapter 7

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." "Cause" includes "material default by the debtor with respect to a confirmed plan."[598] Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.[599]

### 1. Postconfirmation dismissal

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

[597] § 721.
[598] § 1112(b)(4)(N).
[599] § 702(d).

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under §1191(a).[600] Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.[601]

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.[602] Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.[603] Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

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[600] *See* Section X(A).

[601] *E.g.,* National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt."); *In re* T&A Holdings, LLC, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) ("[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan."); *In re* Potts, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).

[602] § 1192.

[603] Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a "hardship" discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. *See* First National Bank of Oneida, N.A. v. Brandt, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). *But see* Weise v. Community Bank of Central Wisconsin (*In re* Weise), 552 F.3d 584 (7th Cir. 2009).

The district court in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (M.D. Fla. 2018) addressed the binding effect of a confirmed plan upon dismissal of an individual's chapter 11 case on remand from the Eleventh Circuit. First National Bank of Oneida, N.A. v. Brandt, 887 F.3d 1255 (11th Cir. 2018). The Eleventh Circuit noted that case law in chapter 13 cases dealing with dismissal without a discharge "could perhaps become relevant to a determination of whether and how the dismissal of Brandt's Chapter 11 case without a discharge affects the enforceability of his confirmed Chapter 11 plan." *Id.* at 1261. The district court determined that it was, 597 B.R. at 669, and ruled that the confirmed plan was not binding upon dismissal prior to confirmation based on that case law, the provisions of § 349(b), and public policy. *Id.* at 671.

In *Weise v. Community Bank of Central Wisconsin (In re Weise*), 552 F.3d 584 (7th Cir. 2009), the bankruptcy court, on the debtors' motion, dismissed their chapter 12 case after confirmation of their plan that incorporated a settlement between debtors and bank that, among other things, released lender liability claims against the bank. In connection with dismissal, the bankruptcy court determined that, under U.S.C. § 349(b), cause existed for the plan's terms with regard to the settlement to remain binding on the parties. The Seventh Circuit ruled that the bankruptcy court did not abuse its discretion and that cause existed under § 349(b) to keep some terms of the plan binding on the parties. The Seventh Circuit stated that § 349(b) "explicitly contemplates that the court can choose to keep some terms binding on the parties where there is cause." *Weise, supra,* 552 F3d at 591. The court observed, "[N]egotiation alone would not be an acceptable standard for 'cause,' since every confirmed plan that required the consent of the creditor would involve some degree of negotiation." *Id.* at 589.

The district court in *Brandt, supra*, 597 B.R. 663, distinguished *Weise* because the bankruptcy court in dismissing Brandt's chapter 11 case made no mention of binding the parties to plan provisions and "chose not to keep specified plan terms binding." *Id*. at 670.

The court in *In re Akamai Physics, Inc.,* 2022 WL 1195631 (Bankr. D. N.M. 2022), addressed the effect of dismissal or conversion after confirmation of a consensual plan under § 1191(a) that deferred discharge until completion of plan payments.[604] The plan provided for pro rata payments to unsecured creditors from the greater of $10,000 per month or the debtor's "Disposable Income as defined in 11 U.S.C. § 1191(d)." *Id.* at *2.

Consensual confirmation occurred after the debtor resolved the objection of the U.S. Trustee that the plan was not feasible by including a provision in the confirmation order for the court to entertain a postconfirmation motion to dismiss or convert if the debtor did not generate any operating income within 120 days after confirmation. *Id.* at *2.

Although the debtor had timely made plan payments (through sales of assets or loans from its principal), it did not generate any operating income within 120 days. After concluding that the U.S. Trustee had not established cause for dismissal or conversion under § 1112(b)(4), *id.* at *3-5, the court considered the effect that the confirmed plan could have on the rights of the parties if it granted the motion, reasoning that the effect of dismissal or conversion is an issue to consider in determining a motion to dismiss or convert. *Id.* at *5.

The court determined that, in a traditional chapter 11 case, confirmation binds the reorganized debtor and creditor to the terms of the plan, revests property of the estate in the reorganized debtor, and discharges preconfirmation claims. The chapter 7 estate after conversion, therefore, has no assets because the plan vested all estate property in the debtor, the court explained, so conversion does not help creditors. Dismissal, the court continued, has no materially greater benefit because it does not "undo" the plan, which remains binding. *Id.* at *5.

[604] When the court confirms a consensual subchapter V plan under § 1191(a), § 1141(d) governs the discharge. See Section X(A). Section 1141(d)(1)(A) provides that confirmation discharges the debtor unless the plan or confirmation order provides otherwise.

The court concluded, *id.* at *6:

> In most standard chapter 11 cases with confirmed plans of reorganization, 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.

The *Akamai Physics* court then noted that a different rule applies to confirmed plans under chapters 12 and 13 and in individual cases under chapter 11, in which dismissal or conversion "negates the confirmation order and the plan, restoring parties to the *status quo ante.* *Id.* at 6. The court advanced two policy reasons for the distinction.

First, substituting disposable income for the absolute priority rule and other creditor protections in chapter 11 is a major benefit to creditors. If the debtor fails to make payments as the plan requires, the plan should not be binding. *Id.*

Second, discharge does not occur upon dismissal or conversion of such cases unless the debtor has completed plan payments. *Id.*

The court reasoned that a subchapter V cramdown plan is similar to plans in chapters 11, 12, and 13 that require payment of projected disposable income and deferral of discharge until completion of plan payments. The court suggested, therefore, that dismissal or conversion of a subchapter V case after cramdown confirmation might negate the plan. *Id.* at *6.

The court concluded that no reason existed "to think that 'consensual' subchapter V plans would be treated differently than typical chapter 11 plans." *Id.* at *7. In the case before it, however, the plan deferred discharge until completion of all plan payments, a key provision that also exists in disposable income plans under other chapters. Later dismissal or conversion, the court stated, might require it to determine whether such a "hybrid" plan would survive or be negated. *Id.*

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause: (1) § 349(b)(1) 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 (2) § 349(c) revests property of the estate in the entity in which such property was before the filing of the case.[605]

**2. Postconfirmation conversion**

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under §1191(a), but not when cramdown confirmation occurs under §1191(b) because §1186 keeps property in the estate.[606]

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not revest property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.[607] Other courts have ruled that property of the estate

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[605] § 349.

[606] *See* Section XI(B).

[607] *E.g.,* Bell v. Bell (*In re* Bell), 225 F.3d 203, 216 (2d Cir. 2000); National City Bank v. Troutman Enterprises, Inc. (*In re* Troutman Enterprises, Inc.), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which revested in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); Lacy v. Stinky Love, Inc. (*In re* Lacy), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re* Freeman, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re* L & T Machining, Inc., 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re* Sundale, Ltd., 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re* Canal Street Limited Partnership, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re* K

upon conversion consists of property owned by the debtor at the time of commencement of the case,[608] on the confirmation date,[609] or on the date of conversion.[610]

Under these principles, property 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.

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 in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in §1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that §1185(a) requires the revesting of property of the estate upon removal of the debtor in possession after

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& M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz 1997); Carter v. Peoples Bank and Trust Co. (*In re* BNW, Inc.), 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.,* 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. "[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor's pre-confirmation estate. . . ."); *In re* TSP Indus., Inc., 117 B.R. 375 (Bankr. N.D. Ill. 1990). *See also* Pioneer Liquidating Corp. v. United States Trustee (*In re* Consol. Pioneer Mortgage Entities), 264 F.3d 803 (9th Cir. 2001) (holding that "language and purpose" of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 NORTON BANKRUPTCY LAW AND PRACTICE § 114:13 (discussing different approaches to revesting of assets upon conversion after confirmation).

Property of the estate that vests in a chapter 11 debtor at confirmation may not include avoidance actions. *See* Still v. Rossville Bank (*In re* Wholesale Antiques, Inc.), 930 F.2d 458 (6th Cir. 1991) (Trustee in case converted to chapter 7 may recover unauthorized postpetition transfers under § 549 that occurred prior to confirmation.); *In re* Sundale, Ltd., 471 B.R. 300, 307 n. 15 (Bankr. S.D. Fla. 2012); *In re T. S. Note Co.,* 140 B.R. 812, 813 (Bankr. D. Kan. 1992).

[608] Smith v. Lee (*In re* Smith), 201 B.R. 267 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998).

[609] Carey v. Flintridge Lumber Sales, Incl (*In re* RJW Lumber Co.), 262 B.R. 91 (Bankr. N.D. Ca. 2001).

[610] *In re* Midway, Inc., 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

In *In re Akamai Physics, Inc.,* 2022 WL 1195631 (Bankr. D. N.M. 2022), discussed in detail in Section XII(C)(1), the court suggested that property of the estate that vests in the debtor under a consensual plan in a subchapter V case confirmed under § 1191(a) is not property of the chapter 7 estate upon postconfirmation conversion. With regard to conversion after cramdown confirmation under § 1191(b), however, the court suggested that conversion negates the binding effect of the plan because discharge does not occur until the completion of plan payments. *Id.* at *6.

To 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.

## XIII. Effective Dates and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

> This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply "with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act."[611]

[611] Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).

Debtors in pending chapter 11 cases at the time of SBRA's enactment sought to amend their petitions after SBRA's effective date to elect application of subchapter V. They argued that Bankruptcy Rule 1009(a) permitted amendment of a petition "as a matter of course at any time before the case is closed" and that SBRA did not restrict application of subchapter V to cases filed after its enactment.

As later text discusses, courts upon enactment of SBRA had to decide whether SBRA applied retroactively and, if so, whether a debtor could amend its petition to elect subchapter V when mandatory deadlines for the status conference[612] and the filing of a plan[613] had expired.

The provisions in the Bankruptcy Threshold Adjustment and Technical Correction Act ("BTATCA")[614] for retroactive application of the $7.5 million debt limit for subchapter V eligibility present a similar issue when mandatory deadlines have passed in a pending case where a debtor ineligible for subchapter V becomes eligible under BTATCA. As Section III(B) explains, the temporary increase in the debt limit to $7.5 million under the CARES Act, as amended, expired on March 27, 2022. BTATCA, effective June 21, 2024, reinstated the $7.5 million. BTATCA provided for application of the $7.5 million limit (and other technical amendments to the eligibility requirements) in any case commenced on or after March 27, 2020 that was pending on the date of enactment.[615] A debtor otherwise eligible for subchapter V with debts in excess of the debt limit of $ 3,024,725 applicable on that date but not in excess of $ 7.5 million who filed a case between March 27 and June 20, 2022 could not elect subchapter V but became an eligible subchapter V debtor on June 21, 2022. The issue is whether the debtor may

[612] See Section VI(C).
[613] See Section VI(D).
[614] Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA").
[615] BTATCA § 2(h)(2).

amend the petition to elect subchapter V in cases filed during this time if a mandatory deadline has passed.

A number of cases have addressed retroactive application of SBRA. This caselaw may provide guidance in the determination of retroactive application of the BTATCA amendments.

One court rejected the debtor's argument that SBRA applied retroactively to pending cases, concluding, "Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect."[616] The court observed that to rule otherwise would create a "procedural quagmire" in that the debtor would be unable to comply with the statute's requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA's effective date. The debtor's failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[617]

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.[618] Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor's amendment to the petition to elect subchapter V in an existing case means

[616] *In re* Double H Transportation, LLC, 614 B.R. 553 (Bankr. W.D. Tex. 2020).
[617] *Id.* at 554.
[618] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re* Moore Properties of Person County, LLC, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re* Progressive Solutions, Inc., 615 B.R. 894 (Bankr. C.D. Cal. 2020). *Accord, In re Easter,* 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC,* 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re* Blanchard, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re* Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re* Bonert, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re* Bello, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

that the case proceeds under subchapter V unless and until the court orders otherwise;[619] the court need not approve the election.[620]

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.[621]

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[619] *See* Section III(A).

[620] *In re* Body Transit, Inc., 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor's motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re* Progressive Solutions, Inc., 615 B.R. 894, 900-01 (Bankr. C.D. Cal. 2020).

[621] *In re* Ventura, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022) ("Given that the Debtor's case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor."); *In re* Progressive Solutions, Inc., 615 B.R. 894, 899-900 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord, In re Easter,* 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC,* 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan);
*In re* Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020).

In *In re Trepetin,* 617 B.R. 841 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor's report, status conference, and filing of a plan after it had granted the debtor's motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

> The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.
>
> The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.
>
> Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to

The opposite view is that the inability of a debtor to meet the statutory deadlines when it elects subchapter V after they have expired is not due to a circumstance beyond its control. Because the debtor makes the election after the deadlines expired, the circumstances are within the debtor's control.[622] If the debtor makes the election after expiration of the deadlines and the court does not extend them, the election is nevertheless effective, and the debtor is in default of the deadlines. Thus, the court may dismiss the case under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.[623]

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC.*[624] The *Moore Properties* court and others[625] have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*[626] in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

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Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. The court in *In re Wetter,* 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor's motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. In *In re Tibbens,* 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable. *Id.* at *9.

[622] *In re* Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. 2020).

[623] *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020). Query whether a debtor may amend the petition to withdraw the election in this situation.

[624] *In re* Moore Properties of Person County, LLC, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).

[625] *In re* Ventura, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020), *rev'd on other grounds sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022); *In re* Body Transit, Inc., 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020)

[626] Landgraf v. USI Film Products, 511 U.S. 244, 264-71 (1994).

One canon, said the *Landgraf* Court, is that "a court is to apply the law in effect at the time it renders its decision."[627] The conflicting one is that "[r]etroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[628]

The *Landgraf* Court explained that the presumption against retroactive application arises from "[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and from the principle that "settled expectations should not be lightly disrupted."[629] The presumption against retroactivity particularly applies, the Court reasoned, to "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[630] The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee's appeal after a bench trial was pending, did not apply to the employee's action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank*.[631] At issue in *Security Industrial* Bank was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest in exempt personal property.[632] The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

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[627] *Id.* at 264, *quoting* Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).
[628] *Id.* at 264, *quoting* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988).
[629] *Id.* at 265.
[630] *Id.* at 271. Among other cases, the Court cited United States v. Security Industrial Bank, 459 U.S. 70, 79-82 (1982), which the text discusses next.
[631] United States v. Security Industrial Bank, 459 U.S. 70 (1982).
[632] 11 U.S.C. § 522(f)(1)(B).

The Court in *Security Industrial Bank* recognized that the Constitution's bankruptcy clause[633] "has been regularly construed to authorize the retrospective impairment of contractual obligations"[634] but that the bankruptcy power could not be exercised "to defeat traditional property interests" because the bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.[635] The Court thus recognized a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.[636]

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress."[637]

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created "none of the taking or retroactivity concerns" that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank.*[638] With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not "alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights."[639]

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[633] U.S. Const. Art. I, § 8, cl. 4.
[634] United States v. Security Industrial Bank, 459 U.S. 70, 74 (1982), *citing* Hanover National Bank v. Moyses, 186 U.S. 181 (1902).
[635] *Id.* at 75, *citing* Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935).
[636] *Id.*
[637] *Id.* at 81, *citing* Holt v. Henley, 232 U.S. 637 (1913) and Auffm'ordt v. Rasin, 102 U.S. 620 (1881).
[638] *In re Moore Properties of Person County, LLC,* 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).
[639] *Id.*

The *Moore Properties* court explained that the modification of prepetition contractual relationships in a chapter 11 case occurs through a plan. The court then set out the changes that subchapter V made to existing requirements for the contents of the plan and for its confirmation and concluded that none of them amounted to an impermissible retroactive taking.

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. Section 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.[640] The third change is that §1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.[641]

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.[642]

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[640] See Section VII(A).

[641] See Section VII(B).

[642] *In re* Moore Properties of Person County, LLC, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

In a footnote, the court observed that § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan, rendered § 1123(a)(8) superfluous and that § 1123(c) is inapplicable because only the debtor can propose a plan. *Id.* at *4 n. 13.

In another footnote, the court explained that the exception to the antimodification provision did not prohibit the availability of subchapter V in the case before it for two reasons. First, the exception could not apply because the debtor was an artificial entity with no principal residence. Second, even if it did apply, the question would be whether its application would constitute an impermissible taking. If it did, the court said, it would not apply the exception rather than declare the entirety of subchapter V inapplicable, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *Id.* at *4, n. 14.

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under §1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.[643]

Section 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of "fair and equitable" for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.[644]

The court concluded, "The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking."[645]

The court acknowledged that, if a case were pending for an extended period of time on SBRA's effective date, the case "could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights."[646] In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider "the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make

[643] *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.
[644] *Id.* See Section VIII(B)(3), (4).
[645] *Id.*
[646] *Id.*

its application offend '[e]lementary considerations of fairness' such that the parties 'have an opportunity to know what the law is and to conform their conduct accordingly.'"[647]

Because the application of new subchapter V in the existing case did not violate the Supreme Court's rulings in *Landgraf* or *Security Industrial Bank,* the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.[648]

The bankruptcy court in *In re Body Transit*[649] applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA's effective date to reject the secured creditor's contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor's argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor's assets and business, would also have the right to file a plan.[650]

The *Body Transit* court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.[651] In addition, the court noted that a debtor's ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would

[647] *Id., quoting* Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), and *citing In re* Progressive Solutions, Inc., 615 B.R. 894 (Bankr. E.D. Cal. 2020).
[648] *Id.*
[649] *In re* Body Transit, Inc., 613 B.R. 400 (Bankr. E.D. Pa. 2020).
[650] The court had scheduled a hearing on the creditor's motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.
[651] *Id.* at 408.

unduly prejudice a party.[652] The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.[653]

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its burden of showing prejudice in the case before it.[654] The court summarized, "[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor's right to amend its petition under [Bankruptcy Rule] 1009."[655]

In *In re Ventura,*[656] an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA's effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a "residence" based on her use of it as a bed and breakfast. After the bankruptcy court had ruled that the exception applied as long as the debtor used any party of the property for her

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[652] *Id.* at 408-09, *citing In re* Cudeyo, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re* Brooks, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re* Romano, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re* Bendi, Inc., 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).
[653] 213 B,R. at 409.
[654] *Id.* at 409.
[655] *Id.* at 410.
[656] *In re* Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022). .

residence,[657] it scheduled a hearing on confirmation of the lender's plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA's effective date.[658]

The bankruptcy court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had vested rights at the time of the amendment in that its plan was ripe for confirmation.[659] The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

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[657] Other courts have accepted the debtor's position. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE, § 5:42 (2d ed. 2019).

[658] *In re* Ventura, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020), *rev'd sub nom.* Gregory Funding v. Ventura (*In re* Ventura), 638 B.R. 499 (Bankr. E.D. N.Y. 2022).

[659] *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were "primarily consumer debts." *Id.* at 8. The debtor owed $ 1,678.664.80 on the mortgage, and the property was worth no more than $ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

The lender asserted that, in these circumstances, the debtor did not qualify as a small business debtor, and that, even if she did, she should be judicially estopped from amending her petition to designate herself as a small business debtor based on her representations in the previous and current cases.

The court acknowledged that a purchase money mortgage on a residence is generally a consumer debt, but ruled that "the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is a consumer debt." *Id.* at 19. The test, the court explained, is whether a debt is incurred with an eye toward profit. "Courts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction," the court stated. *Id., quoting In re* Martin, 2013 WL 54233954, at *6 (S.D. Tex. 2013) and *citing In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988) (debt incurred with an eye toward profit is a business debt, rather than a consumer debt).

The court found that the property was the debtor's residence but that the primary purpose of purchasing it was to own and operate a bed and breakfast. The court concluded that the mortgage was a business debt and that she qualified as a small business debtor. *Id.* at 20.

The court declined to apply judicial estoppel to bar her amendment to designate herself as a small business debtor. The court ruled that her amendment to describe the mortgage as a business debt was not necessarily with her prior descriptions of the debt. She had referred to it as a bed and breakfast and described it on her Schedule A/B as a "B & B Inn" rather than as a "single-family" home. Moreover, the court had taken no action in any of the cases based on the description of the mortgage debt as a consumer debt, so it was not misled. Nor had the debtor taken unfair advantage of the lender by changing the description of her debt to fit within a statute that did not exist when she filed her cases. *Id.* at 20-22.

The *Ventura* bankruptcy court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit.* In addition, the court concluded that the revision of the definition of "small business debtor" does not appear to affect contractual or vested property rights.[660]

The bankruptcy court then addressed whether the exception in §1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender's property rights that vested prior to SBRA's effective date. The court held that, because the debtor had discharged her personal liability in her previous chapter 7 case, application of §1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the bankruptcy court observed, even if the debt had not been discharged, §1190(3) might not "raise significant Constitutional doubts to warrant only prospective application."[661] Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of § 1190(3) to modify the mortgage would not violate the lender's Fifth Amendment rights.[662] The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.[663]

The *Ventura* bankruptcy court found no prejudice to the lender based on the history of the case, including the fact that the lender's plan was before the court for confirmation. The court

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[660] *Id.* at 16-17, *citing* Moore Properties of Person County, LLC, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).
[661] *Id.* at 17.
[662] *Id.* at 17.
[663] *Id.* at 24-25. Section VII(B) discusses this aspect of the court's ruling in connection with consideration of § 1190(3).

saw no Constitutional issues and declined to treat its prior rulings as creating "vested" rights. The bankruptcy court reasoned, "Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender]."[664]

The district court reversed, concluding that the bankruptcy court had not properly considered the substantial prejudice that the creditor faced due to the belated amendment to elect subchapter V. *Gregory Funding v. Ventura (In re Ventura)*, 638 B.R. 499 (E.D. N.Y. 2022). The district court noted that the amendment did not occur until 16 months after the filing of the chapter 11 case and that allowing it caused "substantial prejudice" to the creditor. The district court observed, *id.* at 505 (emphasis in original; interior punctuation and citation omitted):

> By [the time of the amendment], both the parties and the Bankruptcy Court spent considerable time to get to a point in which [the creditor] was posed to confirm its plan. The Bankruptcy Court held numerous hearings and the parties, after significant negotiations, agreed [the creditor] could pursue its unopposed plan of reorganization if the Debtor failed to submit a plan by September 30, 2019. In reliance on this agreement and on the Debtor's representation that her petition would proceed under Chapter 11, [the creditor] Filed its plan of reorganization, solicited the necessary votes, and was on the cusp of confirming it when the Debtor sought to amend her petition. Moreover, because the SBRA grants the Debtor the sole right to confirm a plan of reorganization, the Debtor's amendment had the further prejudicial effect of terminating [the creditor's] right to pass *any* plan, thereby completing changing the rights of [the creditor] as a creditor and resetting the litigation posture of the proceedings.

[664] *Id.* at 18.

The district court in *Ventura* concluded that the amendment to elect subchapter V "cannot be allowed to cause such prejudice." 638 B.R. at 505. In addition, the court observed, prejudice to the debtor did not outweigh prejudice to the creditor because "she remains in the Chapter 11 process. While this may prevent her from accessing some of the tools afforded by Subchapter V, the Debtor's interests are still protected by Chapter 11, which requires [the creditor's plan] to be 'fair and equitable,' 11 U.S.C. § 1191(c), proposed in good faith, deemed to be 'reasonable,' and in comportment with existing law. *Id.* § 1129(a)."[665] 638 B.R. at 505. Accordingly, the court held that the bankruptcy court abused its discretion by overruling the creditor's objection to the debtor's amendment of her petition to proceed under subchapter V.

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a subchapter V debtor under SBRA's revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.[666] Another court refused to permit a debtor to proceed under subchapter V in a case filed a month before its effective date. The court determined that the debtor had waited too

[665] *Id.* It is unlikely that the requirements for confirmation the court referenced would provide any material protection for the interests of the debtor as compared to the provisions of her plan.
[666] *In re* Body Transit, Inc., 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).

long to make the sub V election and had amended its petition to do so only after two attempts to confirm a traditional chapter 11 plan had failed.[667]

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to $ 7.5 million.[668] Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than $ 7.5 million cannot amend its petition to elect application of subchapter V.[669] Although the CARES Act provided for the increased debt limit to expire on year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021[670] amended the CARES Act to extend the increased debt limit for an additional year.

A possible alternative for a debtor in a pre-subchapter V case who wants to be in a subchapter V case is to obtain dismissal of the pending case and then file a new one in which it elects subchapter V. In *In re Slidebelts, Inc.,* 2020 WL 3816290 (Bankr. E.D. Cal. 2020), the court permitted dismissal of a chapter 11 case for this purpose. The court in *In re Twin Pines, LLC,* 2020 WL 5576957 at * 6 (Bankr. D. N.M. 2020), noted that a debtor could, upon dismissal of the pending case, file a new one and elect subchapter V in exercising its discretion to extend the deadlines for the status conference and filing of a plan so that the debtor could proceed under subchapter V.

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[667] *In re* Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. 2020). *Cf. In re* Tibbens, 2021 WL 1087260 at * 9 (Bankr. M.D.N.C. 2021) (After denial of confirmation of two chapter 13 plans, the debtor sought to convert to chapter 11 and elect subchapter V after the deadline for the filing of a plan had expired; the court converted the case to chapter 11 but declined to extend the deadline because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should be held accountable.).
[668] Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See* Section III(B).
[669] See In *In re* Peak Serum*,* 623 B.R. 609 (Bankr. D. Col. 2020) (Debtors in pending chapter 11 cases may not elect application of subchapter V upon becoming eligible for subchapter V under the increase in the debt limit upon enactment of the CARES Act; increased debt limit applies only in cases filed after enactment.)
[670] Covid-19 Bankruptcy Relief Extension Act of 2021§ 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

In *In re Peak Serum,* 623 B.R. 609 (Bankr. D. Col. 2020), a corporation and its principal, in response to a creditor's motion to appoint a trustee in their jointly administered cases, moved to dismiss them to permit their re-filing as subchapter V cases after the CARES Act increased the debt limit so that they became eligible to proceed under subchapter V. The court found cause to appoint a trustee in the corporate case and concluded that the facts warranted appointment of a trustee. Because the creditor failed to establish cause for appointment of a trustee in the individual case, however, the court dismissed it, observing that subchapter V contained sufficient protections for creditors such that a re-filed case under subchapter V would not unduly prejudice creditors.

The strategy did not work well for the individual debtors in *In re Crilly,* 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in 2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

The court concluded that no change of circumstances had occurred between the filing of their two cases that would permit them to avoid the presumption. The availability of subchapter V in the new case, the court explained, could not supply such a change because it was in effect at the time of the dismissal and filing of the cases. The court for a variety of reasons refused to extend the automatic stay beyond 30 days.

In *In re Hunts Point Enterprises, LLC,* 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. The court ruled that the debtor's debts did not exceed the eligibility limit but concluded that allowing the case to proceed under subchapter V would be an abuse of its provisions because only the debtor could file a plan, and its request for dismissal demonstrated that it no longer wanted to do so. The court concluded that cause existed for its dismissal and prohibited the debtor from filing another bankruptcy petition for a year unless the debtor sought and obtained relief from that prohibition based on changed circumstances or good cause shown.

# Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019

**Enacted August 23, 2019, Effective February 19, 2020**

**(As Amended By The CARES Act, Enacted and Effective March 27, 2020; The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act for an additional year.)**

May 2020

| | **Sections of The Small Business Reorganization Act of 2019** | |
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| SBRA § 1 | Short Title – "The Small Business Reorganization Act of 2019" | |
| SBRA § 2 | Enacts Subchapter V of Chapter 11 of the Bankruptcy Code, new §§ 1181—1195. | |
| SBRA § 3(a) | Amends 11 U.S.C. § 547(b) to provide that trustee's avoidance of preferential transfer must be "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c). Applicable in all bankruptcy cases. | |
| SBRA § 3(b) | Amends 28 U.S.C. § 1409(b) to provide for venue only in the district of the defendant, for a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000. Applicable in all bankruptcy cases. | |
| SBRA § 4(a) | Conforming amendments to the Bankruptcy Code. | |
| SBRA § 4(b) | Conforming amendments to Title 28. | |
| SBRA § 5 | Effective date. | |
| SBRA § 6 | Determination of budgetary effects. | |
| 11 U.S.C. | **Amendments Relating to Cases of All Small Business Debtors** | SBRA |
| § 101(51C) | New definition of "small business case" as a case in which a small business debtor (defined in § 101(51D)) does not elect application of subchapter V | § 4(a)(1)(A) |
| § 101(51D) | Revised definition of "small business debtor"; CARES Act makes technical correction dealing with exclusion of public companies | § 4(a)(1)(B); CARES Act § 1113(a)(4)(A) |

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| § 103(*i*) | New subsection (*i*) provides that subchapter V applies only to a case in which a small business debtor elects its application<br><br>CARES Act amendment provides that subchapter V applies only to a case in which a "debtor (as defined in section 1182)" elects its application. | § 4(a)(2); CARES Act § 1113(a)(2) |
| §1102(a)(3) | No committee of unsecured creditors will be appointed in the case of a small business debtor (regardless of election), unless the court orders otherwise | § 4(a)(11) |

| 11 U.S.C. | **Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases** | New Subchapter V Section |
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| § 105(d) | § 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it. | New § 1181(a) |
| § 327(a) | New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than $ 10,000. | New § 1195(a) |
| § 365(d)(3) | The Consolidated Appropriations Act, 2021, temporarily added provisions to extend time for debtor as lessee under a nonresidential lease of real property to comply with its obligations under the lease based on financial hardship arising from COVID-19. | |
| § 1101(1) | § 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2). | New § 1181(a) |
| § 1102(a)<br>§ 1102(b)<br>§ 1103 | Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees.<br><br>These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise. | New § 1181(b) |
| § 1104<br>§ 1105 | Provisions for appointment of trustee (§ 1104) and termination of trustee's appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession) | New § 1181(a) |
| § 1106 | § 1106 specification of duties of trustee and examiner is inapplicable.<br><br>New § 1183(b) states the trustee's duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new | New § 1181(a) |

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| | § 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c). | |
| § 1107 | § 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties.<br><br>§ 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than § 10,000 impliedly has the same effect. | New § 1181(a) |
| § 1108 | § 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business) | New § 1181(a) |
| § 1115 | § 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor. | New § 1181(a) |
| § 1116 | § 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties. | New § 1181(a) |
| § 1121 | Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a). | New § 1181(a) |
| § 1123(a)(8) | Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable.<br><br>New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan. | New § 1181(a) |
| § 1123(c) | Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a). | New § 1181(a) |
| § 1125 | Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c). | New § 1181(b) |

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| § 1127 | Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193. | New § 1181(a) |
| § 1129(a)(9)(A) | Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b). | New § 1191(e) |
| § 1129(a)(15) | Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan. | New § 1181(a) |
| § 1129(b) | "Cramdown" provisions are not applicable.<br><br>New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met.<br><br>New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is "fair and equitable with respect to" each impaired, nonaccepting class. The "fair and equitable" requirement in subchapter V does not include the absolute priority rule.<br><br>For a secured creditor, the "fair and equitable" requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1).<br><br>To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3). | New § 1181(a) |
| § 1129(c) | Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a). | New § 1181(a) |
| § 1129(e) | Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation. | New § 1181(a) |

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| § 1141(d) | Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs.<br><br>In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a). | New § 1181(c) |
| | **Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V** | |
| 11 U.S.C. | | SBRA |
| § 322(a) | Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183. | § 4(a)(3) |
| § 326(a) | Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases. | § 4(a)(4)(A) |
| § 326(b) | Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.) | § 4(a)(4)(B) |
| § 347 | Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b).<br><br>Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor's assets under the plan. SBRA § 4(a)(5)(B) added new § 1194 to the list of plans confirmed, but the CARES Act made a technical correction to change this to § 1191. Accordingly, § 347(b) as amended and corrected provides for property that is distributed | § 4(a)(5); CARES Act § 1113(a)(4)(B) |

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| | under a confirmed plan and that is unclaimed to become property of the debtor.<br><br>It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b). | |
| § 363(c)(1) | Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.) | § 4(a)(6) |
| § 364(a) | Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.) | § 4(a)(7) |
| § 523(a) | Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals. | § 4(a)(8) |
| § 524(a)(1) | Makes discharge injunction applicable to discharge granted under new § 1192. | § 4(a)(9)(A)(i) |
| § 524(a)(3) | Makes discharge provisions relating to community claims applicable to discharge under new § 1192. | § 4(a)(9)(A)(ii) |
| § 524(c)(1)<br>§ 524(d) | Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192. | § 4(a)(9) |
| § 557(d)(3) | Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities | § 4(a)(10) |
| § 1146(a) | Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191. | §4(a)(12) |

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| | **Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter** | SBRA |
| 28 U.S.C. § 586(a)(3), (b), (d)(1), (e) | Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V.<br><br>Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee's services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation "consistent with services performed by the trustee and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]." | § 4(b)(1) |
| 28 U.S.C. § 589b | Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases. | § 4(b)(2) |
| 28 U.S.C. § 1930(a)(6)(A) | Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees | § 4(b)(3) |
| | **Amendments Applicable in All Cases** | |
| 11 U.S.C. § 547(b) | As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c). | SBRA § 3(a) |
| 28 U.S.C. § 1409(b) | As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than $ 25,000. | SBRA § 3(b) |

# Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in "small business case" also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a "small business case," although a subchapter V debtor is a "small business debtor.")

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

**Note: The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act referenced herein for an additional year.**

# Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13
## Prepared by Mary Jo Heston's Chambers
(Updated July 6, 2020)

| SUBSTANTIVE Categories | Ch. 11 | Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020) | Ch. 12 | Ch. 13 |
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| **Eligibility Requirements** | Ch. 11:<br>Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).[1]<br><br>No debt limit or income requirement.<br><br>Small Business Debtors:<br>Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person who primary activity is the business of owning single asset real estate or operating real property or | At least 50% of small business debtor's debt is from commercial or business activities.<br><br>Aggregate noncontingent, liquidated, secured and unsecured debts of not more than $7,500,000 (will return to $2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act.<br><br>Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended | For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below $10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below $2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f).<br><br>For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the | Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); § |

[1] Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

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| | conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is "an affiliate of an issuer" under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act.<br><br>Aggregate noncontingent, liquidated, secured and unsecured debts of $2,725,625 or less.<br><br>No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over $2,725,625. § 101(51D).<br><br>No unsecured creditors committee (or committee is sufficiently inactive). Status as a "small business debtor" hinges, at least in part, upon whether a creditor's committee is appointed, and on how much that creditor's committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor's committee thereby extinguishing | § 101(51D)(A); new § 103(i); BR 1020(a).<br><br>No committee of creditors unless the court orders for cause. § 1102(a)(3). | farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below $10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B).<br><br>Family farmer must be engaged in a farming operation, including "farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." § 101(21). | 1113, CARES Act. |

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| | debtor's small business status. The UST appoints any such committee. *Id.*<br><br>Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020. | | | |
| **Filing Fees** | $1,717 paid when petition is filed. 28 U.S.C. § 1930. | Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V. | $275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed. | $310. Fee may be paid in installments within 120 days after the petition is filed. |
| **UST Quarterly Fees** | UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is $325 for disbursements up to $15,000.<br>Code does not define "disbursements."<br>Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K). | None. Subchapter V debtors are exempt from paying UST quarterly fees.<br>28 U.S.C. § 1930(a)(6)(A). | UST Fees for ch. 12 debtors shall not exceed 10% of the first $450,000 paid under the plan, and 3% of any payments in excess of $450,000.<br>28 U.S.C. § 586(e)(1)(B).<br>28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund. | No UST fees. |
| **Reports** | Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when | No separate rule. | Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b). | No monthly operating reports required by ch. 13 debtors not engaged in business. |

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| | final decree is entered. BR 2015(a).<br><br>Small Business Debtors:<br>Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116. | | | |
| **Automatic Stay & Co-Debtors** | Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief. | No separate rule. | Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201.<br>Section 1201 is identical to the co-debtor provision applicable to ch. 13. *See* § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. See *In re SFW, Inc.* 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply). | Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8). |
| **Trustees** | Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in | A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13 | A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11 | A disinterested trustee is appointed in every ch. 13 case. § 1302. |

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| | Possession (DIP) falters.<br><br>Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee.<br>§ 1104(b)(1).<br><br>Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case.<br>DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business. | trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP.<br>§ 1183(b)(5).<br><br>The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194.<br>The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b).<br><br>If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise. | cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions.<br><br>A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor.<br>§ 1202(b)(1)-(3).<br><br>The trustee conducts any asset sales of farmland and farm equipment. § 1206.<br><br>If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5).<br><br>Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee,<br>§ 1222(a)(1), guaranteeing the trustee is in the game until the | A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b).<br><br>If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c).<br><br>The ch. 13 trustee may seek dismissal under § 1307(c) for "cause." |

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| **Trustee Fees** | No rule. | Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330. | plan is completed.<br><br>The ch. 12 trustee may seek dismissal under § 1208(c) for "cause."<br><br>Plan payments bear a trustee's fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases. | Plan payments bear a trustee's fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1). |
| **Estate Property**<br><br>**Estate Property Post-confirmation** | Section 541 defines estate property except as to individuals.<br><br>For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.<br><br>Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1141(b) & (c). | Section 1186 augments § 541 and parallels § 1115 in ch. 11.<br><br>No separate rule. | Section 1207 augments § 541 and parallels § 1115 in ch. 11.<br><br>Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1227 (b) & (c). | Section 1306 augments § 541, and parallels § 1115 in ch. 11.<br><br>Post-confirmation, except as provided in the plan or confirmation order, all the estate's property revests in the debtor free and clear of all liens. § 1327(b) & (c). |

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| **Adequate Protection** | Section 361 applies.<br><br>Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361. | Section 361 applies.<br><br>After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim.<br>§ 1194(c). | Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a).<br><br>Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b). | Section 361 applies.<br><br>The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property.<br>§ 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property.<br>§ 1325(a)(5)(B)(iii)(II). |
| **Avoidance Powers** | Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate.<br><br>A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order. | Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185. | The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203. | The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee. |

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| | § 1123(b)(3)(B). | | | |
| **Plan Exclusivity** | Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan. | Only the debtor can file a plan. § 1189(a). | Only the debtor can file a plan. § 1221. | Only the debtor can file a plan. § 1321. |
| **Plan Deadlines** | Ch. 11:<br>No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d).<br><br>Small Business Debtors:<br>Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e). | Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b). | The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221. | The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b). |
| **Disclosure Statement** | Ch. 11:<br>The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes. | None required unless otherwise ordered by the court. § 1181(b). | None required. | None required. |

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| **Status Conference** | Small Business Debtors:<br>A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f). | Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c). | None required. | None required. |
| **Commencement of Plan Payments** | None required.<br><br>Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan. | | Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019). | Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1). |
| **Plan Content** | Plans *must*: 1) designate classes of | Plans *must*: 1) provide a brief history of the business operations of the debtor; 2) | Mirrors those of ch. 13. ch. 12 plans *must*: 1) provide future earnings or future income to | Plans *must*: 1) provide future earnings or future income to the trustee; 2) provide all |

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| | claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123.<br><br>Plans *may*: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123."<br><br>Cannot modify consensual liens on a principal residence. | provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2).<br><br>Plans *may*: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3). | the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222.<br><br>Under § 1222(b)(1)-(12), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property.<br><br>Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232. | priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322.<br><br>Under § 1322(b)(1)-(11), the plan *may* designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts.<br><br>Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan.<br><br>Cannot modify consensual liens on a principal residence. |
| **Sales Free and Clear of Liens** | Ch. 11 *debtors in possession* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable | | Ch. 12 debtors in possession *and* trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206.<br><br>In addition, § 1206, which | Ch. 13 *debtors* may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of |

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| | nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5). | | applies only in ch. 12, allows *trustees* under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 "modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court." 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206. | the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; *or* 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5). |
| **Special Tax Provisions for Chapter 12** | | | Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) "reclassifies" these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228.<br><br>Section 1232 was signed into law on October 26, 2017. | |

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| | | | Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act.<br><br>Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly.<br><br>Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not *pro rata*) distribution amongst unsecured claimants. | |

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| **Plan Confirmation Requirements** | Ch. 11:<br>After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b).<br><br>To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b).<br><br>Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. *In re Rogers*, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016).<br><br>Creditors must object to the plan or risk forfeiting their objection. BR 3015(f).<br><br>Small Business Debtors:<br>Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed.<br><br>Small business plans follow the same confirmation requirements | To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191.<br><br>No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b).<br><br>A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c).<br><br>The absolute priority rule does not apply. § 1181(a). | Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8).<br><br>Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors.<br><br>With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property.<br><br>Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b).<br><br>Permissible plan duration is up to 5 years. No "means test" for disposable income. | Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b).<br><br>Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors.<br><br>With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property.<br><br>Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f). |

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| | as their larger ch. 11 counterparts. | | Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f). | |
| **Plan Modifications** | The plan proponent may modify a plan any time before confirmation. § 1127(a), (c).<br><br>After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c). | The debtor may modify the plan at any time prior to confirmation. §1193(a).<br><br>After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, *and* finds that circumstances warrant the modification. § 1193(b).<br><br>After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), *and* the court must find that circumstances warrant the modification. § 1193(c).<br><br>A consensually confirmed plan may only be modified by consent. § 1193(b). | Debtor may modify the plan at any time before confirmation. § 1223.<br><br>Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229.<br><br>Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229.<br><br>Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3). | Debtor may modify the plan at any time before confirmation. § 1323.<br><br>Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329.<br><br>Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329.<br><br>The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has |

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| | | | | experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act. |
| **Conversion** | A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.*<br><br>A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a).<br><br>The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b).<br><br>The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c).<br><br>A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor | No separate rule. | A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.*<br><br>A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a).<br><br>The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d).<br><br>The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. *See In re Campbell*, 313 B.R. 871 (B.A.P. 10th Cir. 2004), *and see In Re Ridgely*, 93 B.R. 683 (Bankr. E.D. Mo. 1988); *but cf. In re Feely*, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch. | A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. *Id.*<br><br>A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a).<br><br>The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c).<br><br>At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d).<br><br>The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the |

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| | requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d). | | 12 based on the motion date, not the petition date).<br><br>There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13. | conversion. § 1307(f). |
| **Debtor Discharge** | A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a).<br><br>For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units).<br><br>For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523. | If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation.<br><br>If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion 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. § 1192.<br><br>Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case. | Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a "hardship discharge" whether or not debtor has completed all payments. § 1228.<br><br>To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b).<br><br>Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232. | Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328.<br><br>To receive a hardship discharge, the debtor's failure to complete plan payments must be due to circumstances beyond the debtor's control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b).<br><br>With some exceptions, the "full compliance" discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy.<br><br>Debts excepted from |

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| | Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a).<br><br>A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1).<br><br>An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met. | | | discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement, or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328. |

Key Events in the Timeline of Subchapter V Cases[1]

Benjamin A. Kahn[2]
Samantha M. Ruben[3]

- Election to Have Subchapter V Apply

  - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).[4]

  - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).[5]

[1] A chart containing more detailed subchapter V deadlines follows.

[2] United States Bankruptcy Judge, Middle District of North Carolina. No copyright is claimed in these materials by the authors, who give permission to reproduce in whole or in part.

[3] Law Clerk to Judge Benjamin A. Kahn. B.A., University of Miami, Departmental Honors in International Studies; J.D., Chicago-Kent College of Law, *magna cum laude*, Order of the Coif.

[4] All references to rules herein are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein.

[5] There is no deadline in the rules for a debtor to amend its statement or election, and Rule 1009 permits a debtor to amend any statement as a matter of course at any time before the case is closed. Nevertheless, § 1188 of subchapter V requires the court to hold a status conference no later than 60 days after the order for relief, and requires the debtor to serve and file a report detailing efforts to attain a consensual plan no later than 14 days prior to the status conference. The court may extend the period of time for holding the status conference only "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." Similarly, § 1189(b) requires a debtor under subchapter V to file a plan no later than 90 days after the order for relief, and permits the court to extend this period only "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." If the debtor does not elect subchapter V, but seeks to amend its statement to elect subchapter V more than 30 days after the order for relief, the court and the debtor will not be able to comply with the time requirements under §§ 1188 and 1189, unless the court extends these periods, and the court only may do so if the need to do so is attributable to circumstances for which the debtor should not justly be held accountable.

- Status Conference

  - Not later than 60 days after the order for relief the court shall hold a status conference "to further the expeditious and economical resolution of a case under this subchapter." 11 U.S.C. § 1188(a).

  - 14 days BEFORE the status conference under 11 U.S.C. § 1188(a), the debtor shall file and serve on all parties in interest "a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c).

- Filing Plan of Reorganization

  - Not later than 90 days after the order for relief, the debtor shall file a plan. The court may extend this period if the need for an extension "is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b).

- Confirmation Hearing[6]

  - 28 days' notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.[7] Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).

- Appointment and Termination of Service of Trustee

  - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).

  - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

[6] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

[7] Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of "small business case").

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

  - Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).[8]

  - Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion 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 . . . ." 11 U.S.C. § 1192.[9]

- Modification of a Plan

  - The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).

  - After confirmation, the debtor may modify a plan consensually confirmed under § 1191(a) prior to substantial consummation of the plan. 11 U.S.C. § 1193(b).[10]

  - After confirmation, the debtor may modify a plan confirmed under § 1191(b) at any time within 3 years, or such longer period not to exceed 5 years, as fixed by the court. 11 U.S.C. § 1193(c).

- Plan Term

  - Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a

[8] Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

[9] Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

[10] A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments

  - The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines[11]

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

| **Entity** | **Deadline** | **Act to Be Performed** | **Code or Rule**[12] |
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| Voluntary debtor | Petition Date | State whether the debtor is a small business debtor or a debtor as defined under § 1182(1) and, if so, whether the debtor elects to have subchapter V apply | Interim Federal Rule of Bankruptcy Procedure 1020(a) |
| Subchapter V DIP, or Trustee if debtor removed from possession | As soon as possible after the commencement of the case | Give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor | Federal Rule of Bankruptcy Procedure ("Rule") 2015(a)(4) |
| Subchapter V debtor | Upon electing to proceed under subchapter V | Append to its petition its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed | 11 U.S.C.A § 1187(a); 11 U.S.C. § 1116(1)(A), (B)[13] |
| Involuntary debtor | 14 days after the entry of the order for relief | File a statement indicating whether the debtor is a small business debtor and, if so, | Rule 1020(a) |

[11] On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference ("Rules Committee") distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 ("SBRA"). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein. Deadlines and notations set forth herein that existed under the Federal Rules of Bankruptcy Procedure prior to enactment of subchapter V and that have not been modified by the proposed interim rules have been excerpted from COLLIER PAMPHLET EDITION 2018 Supplement, Time Periods Prescribed by the Bankruptcy Rules (Richard Levin & Henry Sommer eds., Matthew Bender) (the "Collier Supplement").

[12] With respect to deadlines under title 11, only those time periods and deadlines arising under subchapter V of title 11 are included herein. Time periods relating to adversary proceedings, appeals, and claims are not included. For comprehensive deadlines generally applicable to all cases, including subchapter V, see the Collier Supplement.

[13] Section 1181(a) provides that 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(a).

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| | | whether the debtor elects to have subchapter V apply | |
| Chapter 11 parties in interest | 30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the debtor's statement under Rule 1020(a), whichever is later | File objection to the chapter 11 debtor's designation as a small business debtor | Rule 1020(b)[14] |
| Involuntary debtor | 7 days after entry of the order for relief | File a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H | Rule 1007(a)(2) |
| Chapter 11 debtor | 14 days after entry of the order for relief | File a list of the debtor's equity security holders, with the number and kind of interests, and the last known address or place of business of each holder | Rule 1007(a)(3) |
| Voluntary debtor | 14 days after filing petition | File the schedules, statements and other documents required by 1007(b)(1) | Rule 1007(c) |
| Individual chapter 11 debtor | 14 days after filing the petition | File a statement of current monthly income | Rule 1007(c) |
| Voluntary individual debtor | 14 days after entry of the order for relief | File a certificate of credit counseling if debtor filed a statement that debtor received counseling but did not have the certificate on the filing date | Rule 1007(c) |
| Petitioning creditor(s) in an involuntary case | 7 days after issuance of the summons | Serve the summons and a copy of the petition on the debtor | Rule 1010(a); Rule 7004(e) |
| Involuntary debtor | 14 days after entry of the order for relief | File the schedules, statements, and other documents required by Rule 1007(b)(1) | 1007(c) |
| Involuntary chapter 11 reorganization on debtor | 2 days after entry of the order for relief | File a list of creditors holding the 20 largest unsecured claims | Rule 1007(d) |

[14] Any objection is governed by Rule 9014. See F.R.B.P 1020(c).

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| Involuntary debtor | 21 days after service of the summons, unless made by publication on a party not residing or found within the state in which the court sits | File and serve defenses and objections to an involuntary petition | Rule 1011(b) |
| U.S. Trustee in a chapter 11 health care business case | 21 days after the commencement of the case | File motion to appoint a patient care ombudsman | Rule 2007.2(a) |
| Debtor's attorney | 14 days after the order for relief | File statement whether the attorney has shared or agreed to share the compensation with any other entity | Rule 2016(b) |
| The court | 60 days after entry of the order for relief | Hold a status conference to further the expeditious and economical resolution of a case under subchapter V[15] | 11 U.S.C. § 1188(a) |
| Subchapter V debtor | 14 days before the date of the § 1888(a) status conference | Debtor file and serve on the trustee and all parties in interest a report that details the efforts debtor has undertaken and will undertake to attain a consensual plan of reorganization | 11 U.S.C. § 1188(c) |

TIME PERIODS RELATED TO PLANS

| **Entity** | **Deadline** | **Act to Be Performed** | **Code or Rule** |
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| Subchapter V debtor | 90 days after the order for relief | File a chapter 11 plan[16] | 11 U.S.C. § 1189 |
| Chapter 11 plan proponent | With the plan or within a time fixed by the court | File a disclosure statement or evidence of prepetition acceptance of a plan if the court has ordered that 11 U.S.C. 1125 will apply[17] | Rule 3016(b) |

[15] Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

[16] The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

[17] No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

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| Class Including Secured Creditor | Date fixed by the court | Make the election under § 1111(b) | Rule 3014 |
| Clerk, or some other person as the court may direct | 28 days | Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. See note 17, infra. | Rule 2002(b) |
| Clerk, or some other person as the court may direct | 28 days | Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. See note 17, infra. | Rule 3017(a) |
| Clerk, or some other person as the court may direct | 28 days | Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan | Rule 2002(b) |
| Clerk, or some other person as the court may direct | 28 days | Provide notice of time for filing objections to an injunction provided in a chapter 11 plan | Rule 3017(f)(1) |
| The court | No deadline | Fix a date for the hearing on confirmation. | Rule 3017.2(c) |
| Holders of claims or interests | Time fixed by the court | Accept or reject the plan | Rule 3017.2(a) |
| Equity security holder | Time fixed by the court | Record date for eligibility to accept or reject the plan | Rule 3017.2(b) |

projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

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|---|---|---|---|
| Subchapter V debtor in possession, trustee, or clerk, as directed by the court | Times fixed by the court | Transmit the plan, provide notice of the time to accept or reject the plan, and provide notice of hearing on confirmation[18] | Rule 3017.2(d) |
| Chapter 11 parties in interest | 14 days after entry of the order | Stay of order confirming a chapter 11 plan | Rule 3020(e) |
| Subchapter V debtor | Any time prior to confirmation | Modify the plan. After the modification is filed with the court, the plan as modified becomes the plan. | 11 U.S.C. § 1193(a) |
| Subchapter V debtor | Any time after confirmation of the plan and before substantial consummation of the plan | May seek to modify a plan that was consensually confirmed under section 1191(a). The plan, as modified under this subsection, becomes the plan only if the court confirms the plan as modified by consent under section 1191(a) of this title.[19] | 11 U.S.C. § 1193(b) |
| Subchapter V debtor | Any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court | May seek to modify the plan if the plan was confirmed under section 1191(b). | 11 U.S.C. § 1193(c) |
| Clerk, or some other person as the court may direct | 21 days | Provide notice by mail of time for filing objections to modification of an individual's chapter 11 plan and of hearing on objections | Rule 3019(b), (c) |

[18] In traditional chapter 11 cases under chapter 11, Rule 3017(c) requires that, on or before approval of the disclosure statement, the court shall fix a time within which holders of claims and interests may accept or reject a plan and may fix the date for notice of the confirmation hearing. Rule 3017(d) requires transmission of the plan and the notice of the times so fixed in traditional chapter 11 cases "in accordance with Rule 2002(b)." Despite the lack of any similar reference to Rule 2002(b) in Rule 3017.2(d), nothing in the interim rule purports to affect the minimum 28 days' notice required of the time fixed for acceptance or rejection of the plan and the hearing to consider confirmation under Rule 2002(b).

[19] Subchapter V does not provide for a contested modification of a consensually confirmed plan.

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| Any holder of a claim or interest that has accepted or rejected the plan | Within a time fixed by the court | Change the previous acceptance or rejection of the plan if the plan is later modified | 11 U.S.C. § 1193(d) |
| The subchapter V trustee | Until confirmation or denial of confirmation of a plan | Retain payments and funds received pending confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deductions under 11 U.S.C. § 1194(a)(1)-(3). | 11 U.S.C. § 1194(a) |
| The court | After notice and a hearing, and prior to confirmation of a plan | May authorize the trustee to make payments to the holder of a secured claim to provide adequate protection of an interest in property | 11 U.S.C. § 1194(c) |

DEADLINES THROUGHOUT THE CASE

| **Entity** | **Deadline** | **Act to Be Performed** | **Code or Rule** |
|---|---|---|---|
| Subchapter V debtor | Periodically throughout the case | Comply with the requirements of 11 U.S.C. §§ 308 and 1116(2), (3), (4), (5), (6), and (7) | 11 U.S.C. § 1187(b)[20] |

[20] Section 1181(a) provides that § 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(b).

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|---|---|---|---|
| Subchapter V debtor | 14 days after the information comes to the debtor's knowledge | File supplemental schedule disclosing acquisition of property by bequest, devise, inheritance, property settlement agreement, or as a beneficiary of a life insurance policy or death benefit plan.[21] | Rule 1007(h) |
| Subchapter V debtor | At any time before the case is closed | File an amendment of any voluntary petition, list, schedule, or statement | Rule 1009(a) |
| Chapter 11 DIP or trustee in case converted from chapter 7 | 14 days after conversion of the case | File a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim | Rule 1019(5)(A)(i) |
| Chapter 11 DIP or trustee in case converted to chapter 7 | 30 days after conversion of the case | File and transmit to the U.S. Trustee a final report and account | Rule 1019(5)(A)(ii) |
| Clerk, or some other person as the court may direct | 21 days | Provide notice by mail of meeting of creditors under § 341 | Rule 2002(a)(1) |
| Clerk, or some other person as the court may direct | 21 days | Provide notice by mail of proposed use, sale, or lease of property of the estate other than in the ordinary course of business | Rule 2002(a)(2) |
| Clerk, or some other person as the court may direct | 21 days | Provide notice by mail of hearing on approval of a compromise or controversy other than pursuant to Rule 4001(d) | Rule 2002(a)(3) |
| Clerk, or some other person as the court may direct | 21 days | Provide notice by mail of hearing on any entity's request for compensation or reimbursement of expenses in excess of $1000 | Rule 2002(a)(6) |

[21] The obligation to supplement continues post-confirmation for plans confirmed under 11 U.S.C. § 1191(b).

| | | | |
|---|---|---|---|
| U.S. Trustee in a chapter 11 reorganization case | Between 21 and 40 days after the order for relief | Call a meeting of creditors, except where a prepetition plan has been accepted | Rule 2003(a) |
| U.S. Trustee | 2 years after the conclusion of the meeting of creditors | Preserve recording of § 341 meeting for public access | Rule 2003(c) |
| Subchapter V debtor | 14 days after the plan is substantially consummated | File notice of substantial consummation with the court and serve on the trustee, the U.S. Trustee, and all parties in interest | 11 U.S.C. § 1183(c)(2) |
| Subchapter V trustee | Periodically | File reports and summaries of the operation of the debtor's business, including a statement of receipts and disbursements, if the debtor ceases to be a DIP | 11 U.S.C. § 1183(b)(5); 11 U.S.C. §§ 1106(a)(1), (2), (6); 11 U.S.C. § 704(a)(8) |
| The court | On request and after notice and a hearing | Order that the debtor not be a DIP 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 | 11 U.S.C. § 1185(a) |
| The court | On request and after notice and a hearing | Reinstate the DIP. | 11 U.S.C. § 1185(b) |
| Subchapter V debtor | Periodically | File periodic financial and other reports as required by 11 U.S.C. § 308(b) | 11 U.S.C. § 1187(b); 11 U.S.C. § 308(b) |
| Subchapter V debtor | 25 days before the date of the hearing on confirmation of the plan | Mail a conditionally approved disclosure statement if the court directs application of 11 U.S.C. § 1125 | 11 U.S.C. § 1187(c); 11 U.S.C. § 1125(f) |
| Subchapter V DIP, or trustee if debtor removed from possession | Periodically | Keep records of receipts and dispositions of money, file reports required by 11 U.S.C. § 704(a)(8) | Rule 2015(b) |

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|---|---|---|---|
| Subchapter V DIP, or trustee if debtor removed from possession | Within the time fixed by the court, if so directed | File and transmit to the United States trustee a complete inventory of the property of the debtor | Rule 2015(b) |
| Subchapter V debtor | No later than 21 days after the last day of each calendar month | File monthly reports as contemplated by 11 U.S.C. § 308 | Rule 2015(b)[22] |
| Chapter 11 trustee or DIP | 7 days before the first date set for the § 341 meeting of creditors | File first periodic report of the value, operations, and profitability of each entity that is not a publicly traded corporation or chapter 11 debtor and in which the estate holds a substantial or controlling interest | Rule 2015.3(b) |
| Chapter 11 trustee or DIP | No less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted | File subsequent periodic reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a chapter 11 debtor in which the estate holds a substantial or controlling interest | Rule 2015.3(b) |
| Chapter 11 trustee or DIP | 14 days before filing the first periodic financial report required by this rule | Send notice to each entity in which the estate has a substantial or controlling interest, and to all holders of an interest in that entity, that it expects to file and serve financial information relating to that entity | Rule 2015.3(e) |

[22] The proposed interim rule contemplates that the debtor shall be required to file monthly reports under § 308 and Rule 2015(a)(6) even if removed from possession.

TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

| **Entity** | **Deadline** | **Act to Be Performed** | **Rule** |
|---|---|---|---|
| Clerk of court, or some other person as the court may direct | 21 days | Provide notice by mail of time for hearing on the dismissal or conversion of a chapter 7, 11, or 12 case, unless the hearing is under § 707(a)(3) or (b) or is on dismissal of the case for failure to pay the filing fee | Rule 2002(a)(4) |
| The court | As soon as practicable after completion by the debtor of all payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix | Grant the debtor a discharge[23] | 11 U.S.C. § 1192 |
| Chapter 11 party in interest | No later than the first date set for the hearing on confirmation | File complaint objecting to discharge[24] | Rule 4004(a) |
| Creditor | Any time | File complaint under § 523(a)(2), (4), or (6) | Rule 4007(b) |
| Creditor in a chapter 11 case | No later than 60 days after the first date set for the § 341 meeting of creditors, with 30 days' notice | File complaint under § 523(a)(2) or (4) | Rule 4007(c) |

[23] Such discharge pertains to debts as provided under 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).

[24] A complaint seeking revocation of a chapter 11 discharge as procured by fraud may be filed any time before 180 days after the date of the entry of the order of confirmation. 11 U.S.C. § 1144.

# APPENDIX E

# Comparison of Subchapter V With Chapter 13 and Chapter 11

This paper is based on materials originally prepared for a program titled *Eeny, Meeny, Miny, Moe* presented on March 25, 2022, at the 48th Annual Southeastern Bankruptcy Law Institute in Atlanta, Georgia.

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## I. Introduction

A debtor who is eligible to be a debtor under Subchapter V of Chapter 11 has the option of seeking relief under other provisions of the Bankruptcy Code. Subchapter V applies only if the debtor elects it.

All debtors eligible for Subchapter V may be a Chapter 7 debtor, and debtors who qualify as family farmers or fishers may file a Chapter 12 case. These materials consider the Chapter 11 and 13 alternatives.

Which options are available depends on whether the debtor is an individual and the amount of debt.

Chapter 13 is available only for an individual with regular income whose noncontingent, liquidated debts do not exceed specified debt limits. The debt limits under § 109(e) effective as of April 1, 2022, as adjusted under § 104 under § 109(e), were $ 465,275 for unsecured debts and $ 1,395,875 for secured debts.

Effective June 21, 2022, the debt limit in a chapter 13 case is temporarily increased to $ 2,750,000 for both secured and unsecured debts under the Bankruptcy Threshold Adjustment and Technical Corrections Act ("BTATCA").[1] On June 21, 2024, the debt limits return to $ 465,275 for unsecured debts and $ 1,395,875 for secured debts.

Individuals and entities may file a Chapter 11 case. Absent a Sub V election, the type of chapter 11 case will depend on the amount of the debtor's noncontingent, liquidated debts.

If the debt is less than $ 3,024,725, adjusted as of April 1, 2022 under § 104, the debtor is a "small business debtor" under § 101(51D),[2] and the debtor is in a "small business case." § 101(51C).

The Bankruptcy Code has provisions that apply specifically in a small business case. A debtor does not elect to be in a small business case; the provisions for small business cases apply if the debtor is a small business debtor and does not elect Subchapter V. If the debt exceeds the small business limit, the debtor is in a traditional chapter 11 case.

[1] Bankruptcy Threshold Adjustments and Technical Corrections Act § 2(a), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter "BTATCA"). The increased debt limits apply retroactively in any bankruptcy case commenced on or after March 27, 2020 that is pending on the date of BTATCA's enactment. *Id.* § 2(h)(2(A).

## II. Subchapter V vs. Chapter 13

Chapter 13 is an option only if the debtor is (1) an individual with (2) regular income (3) whose debts are within the debt limits discussed above. § 109(e). Key differences between relief under Chapter 13 as compared to Subchapter V include the following.

***Noneligible spouse cannot be a debtor in a joint Sub V case***

The spouse of a debtor eligible for Chapter 13 is eligible to be a debtor in a jointly filed Chapter 13 case, even if the spouse does not have regular income.[2] Subchapter V does not have a provision that permits a noneligible spouse to file jointly with an eligible debtor. Although an affiliate of a Subchapter V debtor is eligible to be a Sub V debtor, a spouse is not an affiliate.[3]

***Attorney's and trustee's fees may be lower in a Chapter 13 case***

In general, a Chapter 13 case is likely to be simpler and cheaper than a Sub V case. The debtor files a plan in the form the court requires and creditors do not vote. The case moves promptly to confirmation. The Chapter 13 process may thus require less time for the debtor's attorney, resulting in a lower attorney's fee.

The Chapter 13 trustee receives a commission based on disbursements under the plan. In a Sub V case, the Sub V trustee receives compensation based on services rendered. Depending on how much money will be disbursed to creditors and the percentage commission the Chapter 13 trustee charges, the Chapter 13 trustee's fees may be lower.

This may not make any difference to the debtor unless the debtor is in a position that payment of claims in full is necessary. If not, the amount of the trustee's fee in either case will

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[2] See § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 12:7.

[3] *In re Johnson,* 2021 WL 825156 (Bankr. N.D. Tex. 2021).

be paid before claims of creditors from the plan payments the debtor makes. The amount of the fees will reduce what creditors receive but will not affect how much the debtor pays.

***Subchapter V provides more flexibility for modification of secured claims***

Subchapter V differs from Chapter 13 in its provisions for the treatment of certain secured claims.

Chapter 13 has provisions that prevent the "strip-down" of a residential mortgage[4] and that require certain secured claims to be paid in full, regardless of the value of the collateral. For example, a Chapter 13 debtor cannot "strip down" a claim secured by a purchase-money security interest in a vehicle purchased within 910 days of the filing of the petition under the so-called "hanging paragraph" to § 1325(a)(5), which prohibits bifurcation under § 506(a) of such claims.[5]

In a Subchapter V case, § 1190(3) permits modification of a residential mortgage if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."

For example, assume that the debtor's principal residence is worth $ 300,000 and is encumbered by a first mortgage in the amount of $ 270,000 and a second mortgage that secures a debt of $ 100,000 that the debtor incurred for use in the debtor's business. A debtor cannot

[4] § 1322(b)(5). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:26.
[5] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:20.

reduce the secured portion of the business debt to $ 30,000 in a chapter 13 case but can do so in a Subchapter V case.

Subchapter V does not contain a special provision like the "hanging paragraph" that prohibits bifurcation of certain secured claims. Thus, for example, if the debtor owns a motor vehicle subject to the "hanging paragraph" worth $ 15,000 encumbered by a $ 25,000 debt, the Subchapter V debtor may pay the value of the vehicle, with interest, and treat the $ 10,000 deficiency as an unsecured claim. In a Chapter 13 case, the debtor must treat the entire claim as secured.

On the other hand, the § 1111(b)(2) election is applicable in a Subchapter V case. It permits an undersecured creditor to elect to treat its claim as fully secured, unless the collateral is of "inconsequential value."[6] In this circumstance, if the debtor is retaining the property, cramdown requires that the creditor retain its lien[7] and receive payments over time that (1) have a value that equals the value of the collateral and (2) total the amount of the entire claim.[8]

[6] SBRA Guide § VIII(E)(1).
[7] § 1129(b)(2)(A)(i)(I), applicable under § 1191(b)(1).
[8] § 1129(b)(2)(A)(i)(II), applicable under § 1191(b)(1).

In the mortgage example, assuming an interest rate of six percent, a monthly payment of $ 1,667 for five years,[9] or $ 883 for ten years,[10] meets the payment requirement. Monthly payments are $ 555 over 15 years and $ 417 over 20.[11]

In a Chapter 13 case, the plan generally must provide for a secured claim either by (1) curing prepetition arrearages during the term of the plan and providing for the continuation of regular postpetition payments, which may extend beyond the term of the plan under § 1322(b)(5) or (2) paying the amount of the allowed secured claim, with interest, over the term of the plan, which may not exceed five years,[12] under § 1325(a)(5)(B).[13] The second alternative requires that the monthly payments be in equal amounts.

Subchapter V, however, does not have a restriction on the term of the plan or a requirement for equal monthly payments.

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[9] The value of the collateral is $ 30,000. The monthly payment to amortize that amount over five years with six percent interest is $ 580, a total of $ 34,800. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another $ 65,200, which can be paid in monthly payments over five years of $ 1,067. The total monthly payment is $ 1,667 ($ 580 + $1,067).

[10] The value of the collateral is $ 30,000. The monthly payment to amortize that amount over ten years with six percent interest is $ 333, a total of $ 39,968. This satisfies the requirement that the creditor receive payments with a value equal to the value of the collateral. For the creditor to receive payments that total the amount of its claim, the creditor must receive another $ 60,032, which can be paid in monthly payments over ten years of $ 500. The total monthly payment is $ 833 ($ 333 + $ 500).

[11] SBRA Guide VIII(E)(1) contains a table that shows calculations for monthly payments for the terms stated in the text and for terms of 25 years ($ 333), and 30 years ($ 278). Amortization of $ 30,000 with interest at six percent over 53 years requires monthly payments of $ 156.43, which results in payments that total $ 100,113.

[12] § 1322(d). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9

[13] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman CHAPTER 13 PRACTICE AND PROCEDURE § 5:10, 5:13.

***The Subchapter V PDI test is more favorable to debtors***

Both Chapter 13 and Subchapter V have "projected disposable income" ("PDI") tests, but they differ.

In a Chapter 13 case, if a plan provides for less than full payment of unsecured claims, a debtor must pay "projected disposable income" to unsecured creditors if the trustee or a creditor objects to confirmation. § 1325(b). (The Chapter 13 trustee always objects.)

The PDI requirement in a Sub V case applies only in the cramdown situation. If all classes of impaired creditors accept the plan, the PDI requirement is not applicable.[14] In a cramdown case, the requirement is applicable regardless of whether an objection is filed.

Subchapter V has a different method for the calculation of disposable income. In a Chapter 13 case, the calculation of disposable income is based on the debtor's "current monthly income,"[15] and an "above-median" debtor[16] must use the so-called "means test" standards in calculating permissible deductions.[17]

In a Subchapter V case, § 1191(d) defines disposable income as "income that is received by the debtor and that is not reasonably necessary to be expended" for support, payment of

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[14] *See In re Walker,* 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8). In *Walker,* the debtor's plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan, but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate. The creditor urged the court to extend the time for payment of PDI to five years. The court on the facts held that the creditor had not shown a lack of good faith.

[15] Section 101(10A) defines "current monthly income." It is the average of the debtor's income (as the statute defines it) in the full six months preceding the filing of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:8, 8:9, 8:10.

[16] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12.

[17] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:30.

domestic support obligations, and business expenditures. The PDI definition in subchapter V does not use "current monthly income," and it does not require the "means test" standards.[18]

The "applicable commitment period" for the payment of projected disposable income in a Chapter 13 case under § 1325(b)(4) is three years for a "below-median" debtor and five years for an "above-median" debtor. The required time for payment of PDI in a Sub V case is a minimum of three years and a maximum of five years. § 1191(c)(2). The court determines the length of the period, but the statute provides no standards for making the decision.[19] For an above-median debtor, therefore, the *maximum* period for payment of PDI in a Sub V case is five years, the *minimum* (and only) period in a Chapter 13 case.

Finally, a debtor cannot "prepay" PDI in a Chapter 13 case and end the case; the case must remain open for the entire applicable commitment period.[20] The Sub V PDI test permits the debtor to pay the value of projected disposable income, thus permitting payment in a lump sum or over a shorter period. § 1191(c)(2)(B).

***Times for filing of plan and commencement of payments***

In a Chapter 13 case, the debtor must file the plan within 14 days of the filing of the petition (or the date of conversion to Chapter 13, if originally filed under another chapter), Bankruptcy Rule 3015(b), and must commence payments under the plan within 30 days, § 1326(a), unless the court orders otherwise.

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[18] SBRA Guide VIII(B)(4)(i).
[19] SBRA Guide VIII(B)(4)(ii).
[20] *E.g.,* Whaley v. Tennyson (*In re Tennyson),* 611 F.3d 873 (11th Cir. 2010) (Above-median debtor with no disposable income must remain in Chapter 13 case for five years.). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:66.

The time for the filing of a Sub V plan is 90 days, unless the court extends it. § 1189(b). Subchapter V does not require payments before confirmation.

***Payment of administrative and priority claims under the plan; interest on priority tax debts.***

Chapter 13 permits payment of administrative and priority claims in deferred payments over the term of the plan. § 1322(b)(2). The debtor does not have to pay postpetition interest on unsecured priority tax claims.[21]

In a Chapter 11 case, a plan must pay administrative and priority claims, other than priority tax claims, in full on the effective date, unless the creditor agrees to different treatment, § 1129(a)(9)(A), (B), except that, in the case of cramdown confirmation of a plan in a subchapter V case, the plan may provide for payment of administrative expenses under the plan. § 1191(e). For example, although a Chapter 13 plan may provide for payment of a prepetition domestic support obligation over the term of the plan, a Sub V debtor must pay it in cash on the effective date.

Section 1129(a)(9)(C) permits payment of a priority tax claim in installments but requires payment of interest at the applicable governmental rate.

***Only the debtor may propose a postconfirmation modification of the plan in a Sub V case***

The Chapter 13 trustee or a creditor, as well as the debtor, may propose a postconfirmation modification of a plan. § 1329(a). The trustee or a creditor may do so, for example, to require the debtor to increase payments based on higher earnings or reduced

[21] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 6:16.

expenses or the debtor's receipt of proceeds from the postpetition sale of an asset.[22] Only the debtor may propose a postconfirmation modification in a Sub V case. § 1193(b), (c).[23]

***Postpetition assets and earnings as property of the estate***

In a Chapter 13 case, postpetition assets and earnings are property of the estate under § 1306(a). Depending on the terms of the plan and the confirmation order and the court's interpretation of the vesting provisions of § 1327(b), postpetition assets and earnings may continue to be property of the estate after confirmation.[24]

Postpetition assets and earnings are not property of the estate in a Sub V case when it is filed.[25] If the court confirms a plan under the "cramdown" provisions of § 1191(b), however, postpetition assets and earnings are included in property of the estate. § 1186(a).

An important consequence of these rules is what happens in the event of conversion of the case to Chapter 7.

In a Chapter 13 case converted to Chapter 7, postpetition assets and earnings are not property of the Chapter 7 estate, § 348(f)(1)(A), unless the case is converted in bad faith. § 348(f)(2).[26] Absent bad faith, therefore, a Chapter 13 debtor retains all postpetition earnings and assets upon conversion to Chapter 7, regardless of whether conversion occurs before or after confirmation.

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[22] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 11:12, 11:13.
[23] SBRA Guide VIII(C).
[24] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:19, 10:11, 10:12.
[25] SBRA Guide XI.
[26] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 20:11.

Preconfirmation conversion of a Sub V case has the same consequence, except that the debtor's bad faith is not a consideration. Conversion to Chapter 7 after confirmation of a *consensual* plan has the same result, because confirmation of a consensual plan does not put postpetition assets and earnings into the estate.

When conversion of a Sub V case occurs after cramdown confirmation under § 1191(b), the issue is more complicated. Section 1186(a) states that, if a plan is confirmed under § 1191(b), property of the estate includes postpetition assets and earnings. Accordingly, the Chapter 7 estate at the time of conversion would include the debtor's postpetition assets and earnings.

Section 1141(b), however, provides that confirmation of a Chapter 11 plan vests property of the estate in the debtor, unless the plan or confirmation order provides otherwise. If property of the estate vested in the debtor at confirmation, that property would remain property of the debtor upon postconfirmation conversion to Chapter 7. SBRA did not change the applicability of § 1141(b) in Sub V cases.

Section § 1141(b) conflicts with § 1186(a). Presumably, the later and more specific provisions of § 1186(a) prevail over § 1141(b) in a Sub V case.[27] Under this view, the debtor's postpetition assets and earnings are property of the Chapter 7 estate upon conversion.

***Timing and scope of discharge***

Discharge in a Chapter 13 case occurs under § 1328(a) after the debtor completes payments or under § 1328(b) if the court at the end of the case permits a hardship discharge based on the debtor's justified inability to complete plan payments.

In a Subchapter V case, discharge occurs upon confirmation of a consensual plan.[28]

[27] SBRA Guide XI(B)(1).
[28] SBRA Guide X(A).

In the cramdown situation, discharge does not occur until the debtor completes payments due within the first three to five years of the plan, as the court determines. § 1192.[29] A chapter 13 discharge after completion of plan payments under § 1328(a) applies to more debts than a discharge in a Chapter 7 case,[30] and a Sub V discharge is subject to the same exceptions as a Chapter 7 discharge.[31] The § 1328(a) discharge, therefore, discharges some debts that are excepted in a Sub V case.

Under § 1328(c), the exceptions to a "hardship discharge" under § 1328(b) are the same as in a Chapter 7 or Subchapter V case.

## III. Subchapter V vs. Chapter 11 Small Business Case

If a debtor eligible for Subchapter V has debts less than $ 3,024,725, the Chapter 11 case of a debtor who does not elect Subchapter V will be a "small business case."

### A. Advantages of Small Business Case

A small business case offers some advantages for the debtor.

There is no trustee. The debtor has a longer time to file a plan, 300 days instead of 90.

"Cramdown" confirmation in a small business case does not require satisfaction of the projected disposable income test for an entity. (A creditor's objection in the case of an individual will trigger a PDI requirement. § 1129(a)(15)).

A small business debtor that is an entity receives its discharge upon confirmation of the plan, regardless of whether it is consensual or cramdown. § 1141(d)(1). The same rule applies in a subchapter V case when the court confirms a consensual plan under § 1191(a).[32] Upon

[29] SBRA Guide X(B).
[30] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 21:16, 21:18.
[31] SBRA Guide X.
[32] SBRA Guide X(A).

cramdown confirmation of a plan, however, the Sub V debtor does not get a discharge until completion of payments for three to five years, as the court determines. § 1192.[33] In addition, it is clear that the exceptions to discharge in § 523(a) do not apply to an entity in a small business case or in a Sub V case when consensual confirmation occurs.[34], whereas courts disagree as to whether the exceptions apply in the case of an entity.[35]

**B. Disadvantages of Small Business Case**

A small business case has significant disadvantages for a debtor, especially an individual.

***Requirement of § 1125 disclosure statement***

Section 1125 requires the proponent of a Chapter 11 plan to provide a disclosure statement to creditors prior to the solicitation of votes on the plan containing "adequate information" to enable creditors to make an informed judgment about the plan. The court must approve the disclosure statement after notice and a hearing.

In a small business case, § 1125(f) permits the court to determine that the plan itself provides "adequate information" and allows the court to conditionally approve the disclosure statement, with a hearing on final approval occurring at the confirmation hearing.

Section 1125 does not apply in a Sub V case unless the court orders otherwise. Instead, Subchapter V requires only that the plan contain a brief history of the business operations of the debtor, a liquidation analysis, and projections regarding the ability of the debtor to make payments under the proposed plan. § 1190(1). The Sub V plan does not have to include "adequate information," and the court's approval of the information is not required.

[33] SBRA Guide X(B).
[34] SBRA Guide X(A).
[35] SBRA Guide X(B).

Presumably, materially inaccurate or misleading information could result in a court finding that the plan is not proposed in good faith.

***Deadline for confirmation***

In a small business case, the court must confirm the plan within 45 days of its filing under § 1129(f), unless the court extends the time under § 1121(e)(3). The order extending time must be signed before the deadline expires. § 1121(e)(3)(C). Subchapter V contains no deadline for confirmation.

***Cramdown confirmation is more difficult for a debtor in a small business case***

Confirmation in a Chapter 11 case requires that at least one impaired class of creditors, determined without regard to the votes of insiders, accept the plan. § 1129(a)(10).

If this requirement is met but one or more classes do not accept the plan, § 1129(b) permits cramdown if the plan is "fair and equitable." With regard to a class of unsecured creditors, § 1129(b)(2)(B) contains the "absolute priority rule." The absolute priority rule provides that, unless the claims are paid in full, holders of equity interests may not receive or retain anything under the plan.

Neither obstacle exists in a Sub V case. The court may confirm a plan even if no impaired class of creditors accepts, and the absolute priority rule is eliminated. § 1191(b), (c).[36]

Instead, cramdown requires satisfaction of a projected disposable income test,[37] a heightened feasibility finding,[38] and the inclusion in the plan of "appropriate remedies" for creditors in the event of default.[39] The projected disposable income rules apply to cramdown confirmation in the case of an entity as well as in the case of an individual.

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[36] SBRA Guide VIII(B).
[37] §1191(c)(2). SBRA Guide VIII(B)(4)
[38] § 1191(c)(3)(A). SBRA Guide VIII(B)(5).
[39] § 1191(c)(3)(B). SBRA Guide VIII(B)(5).

Provisions with regard to the cramdown of secured claims are the same. § 1191(c)(1).

***Subchapter V permits modification of a residential mortgage in some circumstances***

In a traditional Chapter 11 case, as in a Chapter 13 case, a plan cannot modify a claim secured only by real estate that is the debtor's principal residence. § 1123(b)(5). Accordingly, a plan may not "strip down" a residential mortgage claim to the value of the collateral and treat the deficiency claim as unsecured.

In a Sub V case, § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was "not used primarily to acquire the real property." Subparagraph (B) requires that the new value have been "used primarily in connection with the small business of the debtor."[40]

***Only the debtor may file a plan in a Sub V case***

In a small business case, a party other than the debtor may file a plan after the expiration of the debtor's exclusivity period of 180 days. § 1121(e). The court may extend the period or order otherwise for cause. Only the debtor may file a plan in a Sub V case. § 1189(a).

[40] Query whether an individual whose debts exceed the limits for qualification as a "small business debtor" under § 101(51D)(A) but who qualifies for subchapter V under the temporary $ 7.5 million debt limit under the CARES Act and BTATCA meets the requirement in (B) for use of loan proceeds for the debtor's "small business" because such a debtor is not a "small business debtor."

***In an individual small business case, property of the estate includes postpetition assets and earnings***

In a traditional Chapter 11 case, § 1115(a) includes postpetition assets and earnings in the estate of an individual.[41] An important consequence for the debtor is that, if the case converts to Chapter 7, the Chapter 7 estate includes postpetition assets and earnings.[42]

Section 1115(a) is not applicable in a Sub V case. § 1181(a). Section 1186(a) provides, however, that if the court confirms a plan under the cramdown provisions of § 1191(b), property of the estate includes postpetition assets and earnings.

If a Sub V case of an individual is converted to Chapter 7 prior to confirmation, it is clear that the Chapter 7 estate does not include postpetition earnings and assets. As the earlier discussion of the issue in connection with Chapter 13 cases indicates, however, it is likely that postpetition assets and earnings will be property of the Chapter 7 estate if conversion occurs after cramdown confirmation.

***A single unsecured creditor may invoke the PDI requirement in an individual's small business case***

Section 1129(a)(15) provides that confirmation of a plan in an individual case requires the debtor to commit projected disposable income to the plan if a creditor objects, unless the plan provides for payment in full. The requirement is applicable if a single creditor objects, even if the class of unsecured creditors has accepted the plan. If the PDI requirement is applicable, the debtor must use PDI to make plan payments for the longer of five years or the term of the plan.

Section 1129(a)(15) is inapplicable in Subchapter V cases. §§ 1181(a), 1191(a), 1191(b). Thus, the PDI requirement is not applicable at all if all impaired classes accept the

[41] SBRA Guide XI(A).
[42] *Id.*

plan.[43] Moreover, when the PDI requirement applies in the cramdown situation, the *maximum* period for the payment of PDI is five years, even if the plan extends for a longer period.

***Discharge of an individual in a Subchapter V case occurs at confirmation of a consensual plan***

In a Chapter 11 case, discharge of an individual does not occur until completion of payments under the plan under § 1141(d)(5)(A), or the court grants a "hardship" discharge at the end of the case under § 1141(d)(5)(B).

Section 1141(d)(5) does not apply in a Sub V case. § 1181(a). Accordingly, if the court confirms a consensual plan under § 1191(a), discharge occurs upon confirmation. As a result, an individual gets a discharge upon confirmation of a consensual plan.

If cramdown confirmation occurs, the debtor's discharge does not occur until completion of payments for three to five years, as the court determines, under § 1192.

Sub V does not contain a provision for a hardship discharge. It is not necessary in the case of consensual confirmation because discharge occurs at confirmation. In the case of cramdown confirmation, the debtor may seek postconfirmation modification of the plan under § 1193(b) to deal with postconfirmation inability to make payments.

***Automatic stay is effective in later case filed by Subchapter V debtor, but not by debtor in a small business case***

Section 362(n) generally provides that the automatic stay of § 362(a) does not apply in a case in which the debtor was the debtor in a small business case that was dismissed in the two years preceding the filing of the current case or in which a plan was confirmed during that

[43] *See In re Walker,* 628 B.R. 9 (Bankr. E.D. Pa. 2021), discussed in SBRA Guide VIII(D)(8) and *supra* note 14.

period. Because it applies to a debtor in a "small business case," it does not apply to a debtor in a Sub V case.

## V. Subchapter V vs. Traditional Chapter 11

If a debtor eligible for Subchapter V is not a small business debtor, it will be in a traditional chapter 11 case if it does not elect application of Subchapter V.

A traditional Chapter 11 case generally has the same advantages and disadvantages for a debtor as a small business case, with these differences.

1. No deadline for confirmation exists in a traditional Chapter 11 case.

2. The modifications to the disclosure statement rules applicable in a small business case under § 1125(f) do not apply.

3. The exclusivity period for the debtor to file a plan is 120 days, rather than 180. § 1121(b).

4. The rules in § 1116 for the filing and reporting of financial and other information that govern a small business case, which apply in a Sub V case, § 1187(a), do not apply in a traditional Chapter 11 case.

5. The provision for elimination of creditors' committees unless the court orders otherwise apply only in Subchapter V and small business cases.