SOUTHEASTERN BANKRUPTCY LAW INSTITUTE

RECENT SUBCHAPTER V CASES

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U.S. Bankruptcy Judge, N.D. Georgia

References in these materials to the "SBRA Guide" are to Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (June 2022 rev. ed.), *available at*:

https://www.ganb.uscourts.gov/sites/default/files/sbra_guide_pwb.pdf.

References in these materials to "Update" are to an Update to the SBRA Guide that accompany these materials.

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I. REPORT OF ABI TASK FORCE ON SUBCHAPTER V

The American Bankruptcy Institute established a Task Force to evaluate subchapter V and recommend improvements. In April 2024, the Task Force issued its Final Report after a comprehensive review. A free copy is available at https://subvtaskforce.abi.org/.

The American Bankruptcy Institute is continuing its study of Subchapter V. ABI is particularly interested in learning more about the real-world impact of Subchapter V. Accordingly, ABI is asking bankruptcy professionals to submit stories about a distressed business or creditor who has used or benefited from the subchapter and comments about whether that case could still happen under the lower debt cap for Subchapter V debtors. The link for submissions is https://www.abi.org/subvstories.

II. APPLICATION OF § 523(A) EXCEPTIONS TO DISCHARGE OF CORPORATION AFTER CRAMDOWN DISCHARGE

In a subchapter V case, consensual confirmation under § 1191(a) results in a discharge under § 1141(d)(1). A corporation's discharge under § 1141(d)(1) after consensual confirmation is not subject to the § 523(a) exceptions.[1] When confirmation occurs under the cramdown provisions of § 1191(b), however, § 1141(d) does not apply. § 1181(c). Instead, § 1192 governs the discharge.

Section 1192(2) provides that the discharge does not discharge any debt "of the kind" specified in § 523(a). Section 523(a) provides that a discharge under § 1192 does not discharge an *individual* debtor from the 21 categories of debt § 523(a) lists.

SBRA Guide § X(D)(2) and Update III discuss whether the § 523(a) exceptions apply to the discharge under § 1192 of an entity after cramdown confirmation under § 1191(b). Those discussions explain the disagreement among courts about whether the exceptions apply.

A direct appeal to the Eleventh Circuit of the ruling of a Florida bankruptcy court that the exceptions are not applicable was argued in December. [2]

In addition to the texts of §§ 1192(2) and 523(a), the debate involves analysis of the context of the statutes, chapter 11 policy, and legislative history. For a detailed discussion of the

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[1] Autotech Technologies, LP v. Palmer Drives Controls and Systems, Inc. (*In re* Palmer Drives Controls and Systems, Inc.), 657 B.R. 650 (Bankr. D. Col. 2024).

[2] BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC). 650 B.R. 521 (Bankr. M.D. Fla. 2023), certified for direct appeal to Eleventh Circuit, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023), leave for direct appeal granted, No. 23-90009 (11th Cir., July 19, 2023), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023).

reasons that support each of the competing interpretations and why the interpretation of the bankruptcy courts is the better one, see Paul W. Bonapfel and Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under § 1191(b)?* 32 NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE (No. 4 Dec. 2023). *See also* 8 COLLIER ON BANKRUPTCY ¶ 1192.03[2] (16th ed.); SBRA Guide § X(D)(2).

A creditor seeking to assert an exception to discharge of a corporation under § 523(a) must be aware that the exceptions do not apply to a debtor's discharge after confirmation of a consensual plan under § 1191(a). [3]

In *Halo Human Resources, LLC v. American Dental of LaGrange (In re American Dental of LaGrange),* 2025 WL 384536 (Bankr. M.D. Ga. 2025), the creditor filed a complaint to except its debt from discharge and objected to confirmation of the debtor's plan. A stipulation between the debtor and creditor resolved the objection to confirmation, and the court confirmed the plan under § 1191(a). The stipulation provided that the withdrawal of the objection to confirmation "shall not be construed as waiving any claims or defenses by either party" in the dischargeability action. *Id.* at *2 & n. 8.

After confirmation, the debtor moved to dismiss the complaint for failure to state a claim on which relief could be granted on the same day the court entered the confirmation order. The court granted the motion to dismiss because § 523(a) exceptions do not apply to the discharge of a corporation under § 1141(d), which is the discharge a debtor receives in a subchapter V case upon confirmation of a plan under § 1191(a). *Id.* at * 6-7. The court declined to address the debtor's alternative arguments that the § 523(a) exceptions also do not apply to a corporate discharge after cramdown confirmation under § 1191(b) or that the debtor would not receive a discharge under § 1141(d)(3) because the plan provided for liquidation. *Id.* at *7.

III. CAN COURT REQUIRE DEBTOR TO PAY PROJECTED DISPOSABLE INCOME BASED ON ACTUAL RESULTS?

Update § VI(A) discusses whether the projected disposable income requirement in § 1191(c)(2) can require a debtor to pay projected disposable income based on actual results, sometimes referred to as a "true-up."

The Update discusses two earlier cases that involve the issue. *Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc.* (*In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (B.A.P. 9th Cir. 2022), indicates that the requirement is the payment of disposable income as projected.

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[3] Halo Human Resources, LLC v. American Dental of LaGrange (*In re* American Dental of LaGrange), 2025 WL 384536 (Bankr. M.D. Ga. 2025); Autotech Technologies, LP v. Palmer Drives Controls and Systems, Inc. (*In re* Palmer Drives Controls and Systems, Inc.), 657 B.R. 650 (Bankr. D. Col. 2024).

In re Staples, 2023 WL 119431 (M.D. Fla. 2023), held that the bankruptcy court's decision requiring a *pro se* debtor who proposed to pay projected disposable income of $150 per quarter for five years to pay actual disposable income as reflected on quarterly reports, with a minimum quarterly payment of $150.00, did not violate the projected disposable income requirement.

The court in *In re Packet Construction, LLC,* 2024 WL 1926345 (Bankr. W.D. Tex. 2024), conducted a thorough analysis of whether cramdown confirmation requires that a plan contain a "true up" provision for the debtor to pay more if actual disposable income exceeds projections. The court ruled that it does not, *id.* at * 1:

> [S]ubchapter V does not include a requirement that debtors true up their plan payments if actual income exceeds projected income. There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors. But in general, the Court does not believe that a true-up requirement can be imposed on subchapter V debtors.

The *Packet Construction* court first looked to the language of the statute. It concluded that the ordinary meaning of "projected" is "estimated or forecast on the basis of current trends or data." A true-up requirement, the court reasoned, would read the word "projected" out of the statute. A forward-looking approach, the court continued, was consistent with the approach of the Supreme Court in the chapter 13 context in *Hamilton v. Lanning,* 560 U.S. 505 (2010). *Packet Construction,* 2024 WL 1926345 at * 3.

The court declined to follow *In re Staples,* 2023 WL 119431 (M.D. Fla. 2023), discussed above, noting that *Staples* did not purport to announce a general rule and that the authorities it cited did not support the imposition of a true-up requirement as a general rule. 2024 WL 1926345 at * 3.

The court then discussed the chapter 12 and chapter 13 case law regarding projected disposable income, observing that the chapter 13 cases overwhelmingly adopt a prospective interpretation but that some chapter 12 cases require a true up. 2024 WL 1926345 at * 4-7. The court explained that the approach of the chapter 12 cases had been criticized and that the amendment of chapter 12's PDI test indicated that the chapter 12 approach should not be followed. Moreover, the court noted, the chapter 12 result was contrary to the Supreme Court's ruling in *Hamilton v. Lanning* in analyzing a closely analogous statute. *Id.* at 5-6.

Finally, the *Packet Construction* court noted that the inability of anyone other than the debtor to modify a plan after confirmation indicated that "unless the debtor so chooses, no other party can force [the debtor] to increase projected payments to meet the actual income." *Id.* at *7.

The court acknowledged that a debtor after cramdown confirmation can modify a plan to reduce payments but concluded that "this result is not absurd." *Id.* at * 7. The court explained, *id.* (footnote omitted):

> [D]etermining projected disposable income is not a fanciful exercise; it must be established based on objective evidence, and it sets out a demanding standard for many debtors to meet. Vigilant creditors can and should evaluate and, if necessary, challenge projections before plans are confirmed. But construed properly, this aspect of subchapter V also provides incentive for debtors to exceed projections, because they get to keep the surplus. Perhaps Congress structured the statute this way precisely to induce small business growth and to provide yet another incentive for parties to bargain on consensual plans.
>
> In any case, whether it is ideal policy is not for courts to say. Congress has spoken and, in this Court's view, it has done so clearly. The result is not absurd, and the Court has no hesitation enforcing it.

The court concluded with an observation about the possibility of requiring a true up in other circumstances, *id.* at *7-8 (footnotes omitted):

> [S]ubchapter V includes no general rule imposing a true-up requirement on debtors confirming cramdown plans. It does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. After all, section 1191 states that the "fair and equitable" test "includes" the requirement of meeting one of the alternative "projected disposable income" tests; because "includes" is expressly non-limiting in the Bankruptcy Code, other elements could be added to the test, as circumstances warrant, beyond those actually present in the statute.
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> The Court is skeptical that circumstances exist in which it is appropriate to require a true up. It appears that Congress has spoken squarely on this issue, ordaining that it is future-looking projections and not subsequent realities that determine the income to be contributed to a plan. Courts should be very wary of altering this policy choice in a significant way by requiring the devotion of not just projected but also actual disposable income, as determined retrospectively, to the plan.
>
> But this question need not be determined here. No special circumstances have been alleged, and therefore no true up is warranted.

The court in *In re Premier Glass Services, LLC,* 664 B.R. 465, 478 (Bankr. N.D. Ill. 2024), addressed the "true-up" issue in the context of a debtor's calculation of projected disposable income that included deductions for reimbursements to the debtor's members for taxes they would incur on "pass-through" income of the debtor, capital replacement costs, and attorney's fees for ongoing litigation with a creditor. The court noted that the plan provided no upward adjustment in payments for creditors if these amounts were less than projected and observed, *id.* at 478 (footnote in original):

> While courts disagree about whether a bankruptcy judge can *require* a true-up, there is no binding precedent to prevent a court from confirming a plan where a debtor

has included such a provision.[4] A true-up may be especially appropriate where, as here, a debtor sets aside large reserves for projected capital expenditures that benefit its insiders at the expense of its creditors.

A true-up seems especially appropriate for the legal fees deduction, because it does not appear there is any real relationship between past legal expenses and projections.

The *Premier Glass* court did not rule on the true-up issue, holding that the plan did not meet the "fair and equitable" requirement for cramdown confirmation, as Update § XV(D) discusses.

IV. DETERMINATION OF LENGTH OF PERIOD FOR PAYMENT OF PROJECTED DISPOSABLE INCOME

SBRA Guide § VIII(B)(4)(ii) discusses the "fair and equitable" requirement for cramdown confirmation in § 1191(c)(2) that the debtor commit projected disposable income for three years "or such longer period not to exceed 5 years as the court may fix." Section VIII(B)(4) discusses *In re Urgent Care Physicians, Ltd.,* 2021 WL 6090985 (Bankr. E.D. Wisc. 2021), in which the court reasoned that Congress's recognition that small businesses typically have shorter lifespans "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.

In re Trinity Family Practice & Urgent Care PLLC, 661 B.R. 793 (Bankr. W.D. Tex. 2024), adopts a different approach. The *Trinity Family Practice* court ruled that a plan for payment of PDI for three years satisfied the good faith requirement of § 1129(a)(3) but that the debtor had not established that the three-year PDI period was fair and equitable under § 1191(b) and (c)(2)(A). Because the court concluded that the evidence was insufficient for it to determine if it should fix a longer plan payment period up to five years, the court denied confirmation and allowed the debtor an opportunity to propose an amended plan. The opinion analyzes the court's role in considering the term of the plan and sets out the non-exclusive factors that guide a court in exercising its discretion to determine the term of the plan.

The debtor proposed to pay PDI for three years, resulting in a distribution to the unsecured class of $ 38,761.29, an 8.2% distribution. A partially secured creditor voted its

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[4] Courts are split as to whether a court can require payments based on actual results. Paul W. Bonapfel, *Subchapter V Update*, pp. 11-13 (March 2024) https://www.ganb.uscourts.gov/sites/default/files/sub_v_update_march_2024_331-24.pdf, *archived at* https://perma.cc/73AH-JVZ4– (*citing* Legal Service Bureau, Inc., v. Orange County Bail Bonds, Inc. (*In re* Orange County Bail Bonds, Inc.), 638 B.R. 137 (B.A.P. 9th Cir. 2022); In *Staples v. Wood-Staples (In re Staples)*, No. 2:22-cv-157-JES, 2023 WL 119431, 2023 U.S. Dist. LEXIS 2684 (M.D. Fla. 2023)). *See also In re* Packet Construction, LLC, 2024 WL 1926345, (Bankr. W.D. Tex. 2024) (collecting cases and concluding that both statutory language and policy militate against requiring true-ups as a general rule but conceding that there may be a circumstance in which a true-up provision would be necessary to confirm a fair and equitable nonconsensual plan).

secured and unsecured claims to reject the plan and objected to cramdown confirmation on the grounds that the three-year period was not proposed in good faith as § 1129(a)(3) requires and that the plan was not fair and equitable under § 1191(b) and (c).

Taking a "totality of the circumstances" approach to the question of good faith, the court concluded that the plan satisfied the factors the courts have considered in evaluating the good faith requirement of § 1129(a)(3): (1) whether the plan provides a result consistent with the Bankruptcy Code's objectives; (2) whether the proposed plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected; and (3) whether the debtor exhibited fundamental fairness in dealing with its creditors. 661 B.R. at 813.

Specifically, the court ruled that the proposal of a three-year plan, as § 1191(c)(2) expressly permits, "does not constitute lack of good faith solely because the Debtor could pay more if the proposed period of plan payments were longer. The Debtor's proposal of a three-year plan payment period is not consistent with the type of misconduct, actions, and behavior often accompanying a finding of a bad faith plan proposal." *Id.* at * 11 (footnotes omitted).

The *Trinity Family Practice* court interpreted the "fair and equitable" requirement of § 1191(b) and the provision in § 1191(c)(2) for the court to fix the PDI period between three and five years as involving two inquiries when a plan provides for payment of PDI for three years. First, the court must determine whether the three-year plan is "fair and equitable." Second, the court must determine whether it should fix a longer period not to exceed five years. [5]

The court began by noting that the "fair and equitable" provision in § 1191(b) *includes* the requirement that it comply with § 1191(c). 661 B.R. at 815-16. The court explained, *id.*:

> After the court determines that the proposed plan is in compliance with the baseline requirements of § 1191(c), the court has the "discretion to require more as a condition of finding [that the] plan is fair and equitable."[6]. . . In other words, meeting the baseline requirements of § 1191(c) is a *necessary* condition for the subchapter V plan to be fair and equitable, but does not assure that the plan is fair and equitable.

The *Trinity Family Practice* court noted the ruling in *In re Urgent Care Physicians,* 2021 WL 6090985 at * 10 (Bankr. E.D. Wisc. 2021),[7] that "a plan term of three years is more reasonable, generally speaking (or as a default) that a five-year term, absent unusual circumstances." *Trinity Family Practice,* 661 B.R. at 818.

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[5] The *Trinity Family Practice* court did not expressly state that the inquiry includes two separate components. It did, however, explain that its task was to determine "whether a subchapter V plan that provides for payment of all of the Debtor's projected disposable income to creditors for a period of three years is fair and equitable under § 1191(b) and (c)(2), or if the Court should fix a longer payment period." 661 B.R. at 812. Moreover, the court consistently noted that its determination involved both questions. *Id.* at 816, 823, 825, 827. Separate identification of both components is helpful for analytical purposes.

[6] The court quoted *In re* Orange Cnty. Bail Bonds, Inc.*,* 638 B.R. 137, 146 (B.A.P. 9th Cir. 2022), discussed in SBRA Guide § VIII(B)(4)(ii).

[7] SBRA Guide § VIII(B)(4)(ii) discusses the *Urgent Care* decision.

The *Trinity Family Practice* court agreed that the language of § 1191(c)(2)(A) creates a "baseline plan payment period" of three years but disagreed with *Urgent Care's* statement that a three-year period is generally more reasonable absent "unusual circumstances." 661 B.R. at 818. The court reasoned that requiring an objecting party to prove "unusual circumstances," would "impermissibly shift the burden under § 1191(c)(2)(A) from the debtor to the creditor," contrary to the court's conclusion that the debtor has the burden of proof regarding confirmation of a plan. *Id.* Further, the court observed, *Urgent Care* did not consider what "unusual circumstances" might be or identify factors for a court to consider in deciding whether to approve a three-year payment period or, if necessary, fix a longer payment up to five years. *Id.*

The *Trinity Family Practice* court observed that § 1191(c)(2)(A) provides no guidance or standards on how the court should fix the plan payment period and that provisions for determining the period for plan payments in chapter 12 and 13 cases and in individual chapter 11 cases likewise provide no guidance because the court does not fix the time in such cases. 661 B.R. at 820. The court concluded that "Congress intended to leave to the sound discretion of bankruptcy courts the sole authority to fix the plan payment period in subchapter V cases." 661 B.R. at 819.

Based on this analysis, the court concluded that it had "broad discretion" in deciding whether the proposed three-year period was "fair and equitable" or whether it should fix a longer period not exceeding five years. 661 B.R. at 821. The court then discussed the confirmation process for addressing the payment period issue and identified the non-exclusive factors that guide the court's determinations.

Because § 1189 provides that only the debtor may file a plan and because § 1191(c)(2)(A) establishes a three-year baseline payment period, the court reasoned, a bankruptcy court should give "appropriate deference" to the debtor's business judgment when considering the debtor's proposed period of payments. This is consistent, the court continued, with the intent of Congress to create a quick, efficient reorganization process that results in discharge as soon as possible. In addition, it acknowledges the shorter lifespan of the average small business while properly balancing competing interests of debtors and creditors. 661 B.R. at 821. In the absence of an objection to a three-year period, the court said, it would not likely raise the issue of a longer period *sua sponte*, although it has the discretion to do so.

If an objection is filed, however, the debtor's proposal is no longer entitled to deference, and the debtor bears the burden of showing that the proposed payment period is fair and equitable. 661 B.R. at 821-22.

After the hearing on whether the court should require a longer period, the court explained, it has these alternatives, 661 B.R. at 822:

1. Conclude that a three-year period is fair and equitable and confirm the plan;

2. Conclude that the three-year period is not fair and equitable and deny confirmation;

3. Fix a longer period up to five years and confirm the plan; or

4. Determine it has insufficient evidence to fix the payment period and deny confirmation.

The *Trinity Family Practice* court then identified five factors for a court to consider in determining whether a three-year payment period is fair and equitable and whether to fix a longer period, 661 B.R. at 822:

1. Capital reserves or capital expenditures during the period of plan payments;

2. Reasonableness of income and expenses set forth in the plan projections during the period of plan payments as compared to historical operations and operations during the post-petition, pre-confirmation time period;

3. Salary and/or other payments to insiders during the period of plan payments;

4. Risks and consequences of a longer period of plan payments; and

5. Any other unique or extraordinary facts specific to the case.

The court emphasized that the debtor has the burden to prove that each of the factors support the proposed payment period, that the factors are not exclusive, and that no factor alone is dispositive or controlling with regard to fixing the payment period under § 1191(c)(2)(A). *Id.*

The *Trinity Family Practice* court concluded that the debtor had presented insufficient evidence relating to the first four factors for it to decide whether the three-year payment period was fair and equitable or to fix a longer plan payment. 661 B.R. at 823-27. Neither the debtor nor the creditor offered any argument or evidence of unique or extraordinary facts or circumstances. *Id.* at 827. Accordingly, the court denied confirmation without prejudice and allowed the debtor an opportunity to file an amended plan.

In *In re Edgewood Food Mart, Inc.,* 2024 WL 4712996 (Bankr. N.D. Ga. 2024), the court confirmed a plan providing for payment of projected disposable income for three years. Noting the different approaches of *Urgent Care* and *Trinity Family Practice,* the court concluded that a three-year period was appropriate under either analysis. *Id.* at *14. The court observed that the plan paid creditors over three years what they would have received in a five-year plan. The quicker payment was possible because the debtor's principal had committed to fund professional fees and had caused an affiliated entity, the debtor's landlord, to agree to assumption of the lease with its cure claim treated as a general unsecured claim. The court also observed that the

debtor's principal would provide postpetition management services without compensation, whereas he had previously received a salary.

In *In re Premier Glass Services, LLC,* 664 B.R. 465, 473-74 (Bankr. N.D. Ill. 2024), the court noted that the debtor's projections should be for five years, not the four years proposed in the plan, in view of the court's authority under § 1191(c)(2) to fix a commitment period of five years. The *Premier Glass* court did not expressly fix five years as the commitment period, but it analyzed the *Trinity Family Practice* factors in determining that the proposed plan was not "fair and equitable." Update § XV(D) further discusses the *Premier Glass* application of the "fair and equitable" requirement.

The debtor in *Multiple Energy Technologies, LLC v. Hologenix (In re Hologenix),* 2024 U.S. Dist. LEXIS 59741 (C.D. Cal. 2024), proposed a plan to pay projected disposable income to non-insider unsecured creditors in Class 3 for three years, resulting in a 12.5 percent distribution. The claims of insiders in classes 2 and 4 would not receive any payments of PDI, but they retained their right to full payment after the payments to unsecured creditors. Multiple Energy Technologies, LLC ("MET"), an unsecured creditor in Class 3 holding a $2.4 million claim, objected to the plan because, among other things, the plan favored insider unsecured creditors and, therefore, discriminated unfairly. *Id.* at *5.[8]

The bankruptcy court confirmed the plan, concluding that creditors could not demand more than payment of projected disposable income for the required period. The district court summarized the bankruptcy court's ruling, 2024 U.S. Dist. Lexis 59741 at *5-6 (docket citations omitted):

> With the "fair and equitable" treatment statutorily capped at three-to-five years of Disposable Income, creditors cannot demand anything more. . . .Congress enacted a structure where creditors like MET and Class 3 are entitled to nothing more than three-to-five years' of projected Disposable Income. . . . After that three-to-five-year period, the Debtor and its insiders can pay whatever they find agreeable. And, in the meantime, the voluntary subordination of the Class 2 and 4 claims so as not to dilute Class 3 recovery only benefits Class 3.

The district court reversed, concluding that the bankruptcy court's incorrect application of the law was an abuse of discretion. 2024 U.S. Dist. Lexis 59741 at *6. The district court reasoned that the "fair and equitable" requirement in § 1191(c) *includes* the projected disposable income requirement in § 1191(c)(2) and that use of the word "includes" indicated that the list was not exhaustive.

The district court then ruled, *id.* at 7:

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[8] The opinion does not include any discussion of whether the PDI commitment period should have been five years. Further, although the plan provided that the distribution to non-insider creditors could be reduced, at debtor's election, by 40 percent if paid within 90 days, the opinion does not discuss whether payment of the discounted amount would satisfy the PDI test.

> Thus, not only was the Bankruptcy Court required to consider whether MET's recovery was unfairly discriminatory in light of the disposition of assets beyond disposable income, it was also required to consider how MET's recovery compared to the recovery of other creditors during the entire duration of the Plan – not just the five years after confirmation.

The district court observed that if subchapter V plans were "truly limited to disposable income and capped at five years, the Plan's provisions for Class 2 and 4 creditors would contravene both requirements." *Id.* at 7.

The district court reasoned that two other provisions of the Bankruptcy Code reinforced its interpretation.

First, the Court examined the requirement in § 1129(c)(2)(A) that a debtor pay all its projected disposable income within the commitment period. Emphasizing the requirement that a debtor pay *all* of its disposable income within the commitment period, the court concluded that the provision prohibited a plan from requiring that the debtor pay *all* of its PDI after the commitment period but did not prohibit a provision for the payment of less than all of the debtor's disposable income in years after year five. *Id. at* *8-9.

Second, the court noted that, although Chapter 13 has a five-year temporal limitation for plan payments (§ 1322(d)(1)), chapter 11 does not. *Id.* at * 9-10.

The *Hologenix* district court summarized its holding, 2024 U.S. Dist. LEXIS 59741 at * 10-11 (C.D. Cal. 2024) (docket citation omitted):

> In sum, the Bankruptcy Court erred in finding that MET was entitled to only "three-to-five years' of projected disposable income," which led the Bankruptcy Court to overlook a substantial part of the Plan, including the provisions entitling certain creditors to 100% recovery. Although the court makes no conclusion regarding whether the plan unfairly discriminates against Class 3 creditors as opposed to Class 2 and 4 creditors, it does note that the disparity between 12.5% (Class 3 recovery) for some creditors and 100% (Class 2 and 4) recovery for others is dramatic.

Update § XV(D) further discusses *Hologenix*.

V. DETERMINATION OF PROJECTED DISPOSABLE INCOME: ADEQUACY OF PROJECTIONS AND PERMISSIBLE DEDUCTIONS

Courts addressing the adequacy of a debtor's financial projections have noted, "Nothing in the Code requires an audit or independent verification of a debtor's financial projections. 'The creation of a liquidation analysis and financial projections is not an exact science, so the Courts typically defer to the debtors' projections, subject to cross-examination and/or a competing set of

projections.'" *In re Channel Clarity Holdings, LLC,* 2022 WL 3710602, at * 6 (Bankr. N.D. Ill. 2022), *quoting In re Lost Cajun Enters., LLC,* 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

But the situation changes when a party challenges the projections.

In *In re Premier Glass Services, LLC,* 664 B.R. 465 (Bankr. N.D. Ill. 2024), the debtor's calculation of projected disposable income for the four-year term of its plan included deductions for depreciation, reimbursement of its members for taxes they would incur based on the "pass-through" to them of the debtor's income, and legal fees for ongoing litigation with its major creditor over its claim. The creditor objected to the inclusion of these deductions in the PDI calculation.

The court acknowledged that, although a small business debtor's projections "deserve some deference, since looking into the future 'is not an exact science,'" the court must "consider whether the estimate of projected disposable income is reliable and accurate based on the evidence presented" when an objection is filed. 664 B.R. at 471.[9] Further, the court explained, because the PDI requirements are a statutory minimum for determining that a plan meets the "fair and equitable" requirement in § 1191(c) for cramdown confirmation under § 1191(b), the court may consider other relevant factors in determining whether to confirm a plan. *Id.* at 472.

The *Premier Glass* court concluded that, to meet the burden of showing that a plan is fair and equitable, a debtor must show a "sincere effort" regarding two things. First, a reasoned basis must exist for the debtor's projections. Second, the debtor must show that the line items deducted from disposable income are "indeed 'necessary for the continuation, preservation, and operation of the debtor's business' and therefore fair and equitable to the unsecured creditors." § 1191(c) and (d)." 664 B.R. at 473.

The court acknowledged that the calculation of income on an after-tax basis could be necessary given the debtor's status as a pass-through entity but ruled that the debtor had not demonstrated a reasoned basis for its projections. 664 B.R. at 474-75.

Similarly, the court observed that the depreciation deduction, which it found to be a reserve for replacement costs for broken or outdated equipment, could be necessary, but the debtor had provided no credible evidence about what equipment it would have to replace or what other capital expenditures might be required. *Id.* at 475-76.

The *Premier Glass* court concluded that the debtor had failed to show that the legal fees were based on a reasoned projection and that they were necessary for the continuation, preservation, or operation of the debtor's business. Moreover, the court ruled, the evidence did

[9] The court quoted *In re* Channel Clarity Holdings, LLC, 2022 WL 3710602 at *15 (Bankr. N.D. Ill. 2022), *quoting In re* Lost Cajun Enters., LLC, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021).

not show that the legal fees were fair and equitable. 664 B.R. at 476. Update § XV(D) discusses this aspect of the court's ruling.

In *In re Edgewood Food Mart, Inc.,* 2024 WL 4712996 (Bankr. N.D. Ga. 2024), the court found that the debtor's calculation of projected disposable income was credible based on the testimony of the debtor's accountant, an expert in forensic analysis and accounting with extensive experience in bankruptcy cases, who had been working with the debtor before the filing of the petition. *Id.* at *8.

VI. CONFLICTS OF INTEREST BETWEEN INSIDERS AND THE ESTATE IN SUBCHAPTER V CASES

A debtor's estate may include claims against the debtor's insiders for the avoidance of preferential or fraudulent transfers or for the recovery of money or property from them for other reasons, such as a loan to the debtor, breach of fiduciary duties, or because the debtor has the actual beneficial interest in and ownership of property titled in the insiders' names.

Because a subchapter V debtor, like a traditional chapter 11 debtor, is a debtor in possession and has the rights and powers of a trustee regarding such potential claims, a conflict of interest arises between the debtor's principals who control the debtor and the estate.

The existence of a conflict of interest may create cause for conversion or dismissal of the case or for removal of the debtor from possession. Further, the existence of potential claims raises confirmation issues because recoveries on them must be taken into account for purposes of the "best interest of creditors" or liquidation test under § 1129(a)(7).

One common way to resolve conflicts of interest in a traditional chapter 11 case short of dismissal, conversion, or appointment of a trustee is an arrangement whereby an independent party assumes responsibility for evaluation and potential prosecution of claims against insiders. The independent party may be the Committee of Unsecured Creditors, an examiner, or an estate representative appointed under a plan for that purpose.

A possible alternative in a subchapter V case is to expand the duties of the subchapter V trustee to include evaluation and prosecution of claims against insiders.

Several cases address the issue of whether such an alternative is permissible in a subchapter V case.

The court in *In re Roe,* 2024 WL 206678 (Bankr. D. Ore. 2024), addressed the issue of the trustee's powers in the context of a subchapter V trustee's motion under § 363(b) to require the debtor to post a retainer for the trustee's fees and expenses. The court observed that § 1184 does not provide for the subchapter V debtor in possession to have the rights and powers of a trustee exclusive of the subchapter V trustee and concluded, *id.* at *2:

> [A] subchapter V trustee may use the trustee's rights and powers under the Bankruptcy Code to the extent it is necessary for a subchapter V trustee to fulfill the statutory duties given to subchapter V trustees in section 1183. Such authority is concurrent with the debtor's authority to use those same trustee's rights and powers under the Bankruptcy Code to fulfill the debtor's duties as a debtor in possession, including those duties under section 1184.

The *Roe* court held that it could not grant the trustee's motion because the trustee had not served it on all parties in interest, as Bankruptcy Rule 2002(a)(2) requires for a motion to use property outside of the ordinary course of business. The court ruled, however, that it would require the debtor to establish a trust account for the benefit of all administrative claimants if, after service of the motion on all parties in interest, no one objected. *Id.* at *5.

Update § VIII(C) discusses the *Roe* court's reasoning in support of its decision.

In *Singh v. Price (In re Turkey Leg Hut & Co., LLC),* 659 B.R. 539 (Bankr. S.D. Tex. 2024), the subchapter V trustee filed a complaint and motion for a temporary restraining order and preliminary injunction on behalf of the debtor in possession to restrain the spouse of the debtor's principal from interfering with the debtor.

The court dismissed the complaint and motion *sua sponte* for lack of standing, concluding that the subchapter V trustee had no statutory authority to bring an action on the debtor's behalf. The court ruled, *id.* at 544:

> None of the subchapter V trustee's general duties authorize the Subchapter V Trustee to pursue claims belonging to the estate, on behalf of the estate. Therefore, this Court finds, that the debtor in possession has exclusive standing to pursue causes of action pursuant to 11 U.S.C. § 1184.

In *Ghatanfard v. Zivkovic (In re Ghatanfard),* 2024 WL 4707931 (S.D.N.Y. 2024), the district court affirmed conversion of the subchapter V case to chapter 7 because of conflicts of interest between the debtor arising from substantial prepetition transfers to his "life partner." The debtor had acknowledged the conflict of interest and proposed that the subchapter V trustee's powers be expanded to permit the trustee to take over the fraudulent transfer claims arising from the transfers. The bankruptcy court, however, determined that it could not order such relief over the opposition of a creditor and the subchapter V trustee. *Id.* at *3.

The district court affirmed the bankruptcy court's ruling that the conflict of interest was cause for conversion to chapter 7 and ruled that the bankruptcy court had not "abused its discretion in determining that it did not have the authority, over the objection of a creditor, to expand the Subchapter V Trustee's powers to include litigation of the fraudulent conveyance claims on behalf of the estate." *Id.* at *8. In its analysis, the district court observed that the debtor had provided no authority for the proposition that a Subchapter V trustee can be empowered to pursue avoidance actions and that *Singh v. Price (In re Turkey Leg Hut & Co., LLC),* 659 B.R. 539 (Bankr. S.D. Tex. 2024), discussed above, held to the contrary. *Id.* at *8.

(The court did not cite *In re Roe,* 2024 WL 206678 at *2 (Bankr. D. Ore. 2024), which states that the subchapter V trustee has concurrent authority with the debtor to exercise trustee powers "to fulfill the statutory duties given to subchapter V trustees in section 1183.")

The district court's ruling in *Ghatanfard* is correct to the extent of its holding that a bankruptcy court has discretion to determine whether a conflict of interest requires conversion as opposed to expansion of the subchapter V trustee's powers to handle litigation that the conflict involves. The *Turkey Leg* decision, likewise, is correct to the extent that it holds that a subchapter V trustee cannot pursue estate claims in the specific context of that case, where the debtor was in possession and the court had not entered any order regarding the subchapter V trustee's pursuit of estate claims.

Turkey Leg does not address whether a bankruptcy court may exercise its discretion to authorize a subchapter V trustee to pursue claims where a conflict of interest exists or, more generally, to authorize a trustee to exercise other estate powers (such as liquidation of the debtor's assets) in appropriate circumstances. *Ghatanfard* does not hold that a court may not do so. Careful analysis of the issue shows that a bankruptcy court does have such discretion and that its exercise may be a useful tool in a subchapter V case.

The Bankruptcy Code vests avoidance powers[10] and authority over assets (including their sale[11] and assumption or rejection of executory contracts[12]) and other matters in the trustee. Section 1184, however, provides that a debtor in possession in a subchapter V case has all the rights of a chapter 11 trustee, other than the right to compensation. This vesting of rights in the debtor in possession is not unconditional. Importantly, § 1184 begins with the limitation that the debtor's trustee powers are "subject to such limitations or conditions as the court may prescribe."

Because § 1184 permits the court to condition or limit the trustee's powers, it provides authority for the court to remove specified trustee powers from the debtor in possession, thereby necessarily vesting them in the trustee.

The fact that § 1182(b) does not impose a *duty* on the subchapter V trustee to pursue avoidance actions or exercise other trustee powers does not mean that the trustee does not have the *power* to exercise trustee powers that the court removes from the debtor in possession.

The ability of the bankruptcy court to exercise its discretion to authorize a subchapter V trustee to exercise certain trustee powers instead of the debtor is important. Conflicts of interest in subchapter V cases are not uncommon, and the enlisting the trustee to independently manage such matters on a fiduciary basis allows other aspects of the debtor's reorganization to proceed under the debtor in possession. A subchapter V debtor who candidly discloses potential claims involving a conflict of interest at the outset of the case should not face conversion, dismissal, or

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[10] 11 U.S.C. §§ 544 – 549, 553(b).
[11] 11 U.S.C. §§ 363, 542, 543.
[12] 11 U.S.C. § 365.

removal from possession if the conflict can be managed by putting the trustee in charge of matters involving the conflict.

In *In re Edgewood Food Mart, Inc.,* 2024 WL 4712966 (Bankr. N.D. Ga. 2024), the court confirmed a plan over the objection of a creditor who contended that it did not adequately account for various claims against the principal and affiliates. Without addressing the conflict of interest issue, the court analyzed each potential claim and determined that none of them were viable.

VII. GOOD FAITH (§ 1129(A)(3))

In re Edgewood Food Mart, Inc., 2024 WL 4712996 (Bankr. N.D. Ga. 2024), discusses several objections of a creditor based on the good faith requirement of 11 U.S.C. §1129(a)(3) in the context of cramdown confirmation of a subchapter V plan. The court concluded that the debtor had filed its liquidation plan in good faith where the plan would pay more to creditors than a chapter 7 liquidation because it included concessions from insiders, including waiver of the principal's salary, and the operation of the business for a limited time to pay creditors more. The debtor's financial projections were reliable, the court found.

The court also rejected the creditor's arguments that the plan was not in good faith because it did not provide for the pursuit of claims against the principal. The court noted that the plan provided for meaningful distributions to creditors and that the evidence did not support a finding that the debtor had viable claims or that the debtor violated the business judgment rule by not pursuing them.

Finally, the court rejected the contention that the fact that the principal would retain his equity interest, which could enable him to retain future profits without paying creditors in full, showed the absence of good faith. Because subchapter V has no absolute priority rule, the court explained, the principal could retain his equity interest even if it had value without full payment to creditors. The court stated, 2024 WL 4712996 at * 10:

> So long as a debtor complies with the other confirmation requirements unique to Subchapter V, a plan that takes advantage of this feature of Subchapter V is not proposed in bad faith.

VIII. TERMINATION OF TRUSTEE'S SERVICE AFTER CRAMDOWN CONFIRMATION; ENTRY OF FINAL DECREE

As SBRA Guide IV(D)(1) discusses, the time for termination of the trustee's service depends on whether the court confirms a consensual plan under §1191(a) or under § 1191(b), when one or more impaired classes of creditors have not accepted it.

When the court confirms a consensual plan under §1191(a), the trustee's service terminates upon substantial consummation,[13] which ordinarily occurs when distribution commences. § 1183(c)(1).

Subchapter V does not specify a termination date for the trustee's service when confirmation of a plan occurs under the cramdown provisions of §1191(b). The statute contemplates that the trustee continue to serve and make payments under the plan as §1194(b) ordinarily requires. Thus, the appropriate time to terminate the trustee's service is when the debtor has completed the required payments. See SBRA Guide § IX(B).

Section 1194(b) permits the debtor, rather than the trustee, to make plan payments if the plan or order confirming the plan so provides. See SBRA Guide § IX(B). The practice is common because, in many cases, no one, including the subchapter V trustee, wants the added expense of compensating the trustee for making distributions.

Three bankruptcy courts have concluded that, when the debtor will make payments under a plan after cramdown confirmation, the court may order the termination of the subchapter V trustee's service upon substantial consummation of the plan and the trustee's filing of a final report shortly after substantial consummation.

In *In re DynoTec Industries, Inc.,* 2024 WL 2003065 (Bankr. D. Minn. 2024), the court confirmed a liquidation plan for the debtor under the cramdown provisions of § 1191(b). After confirmation, the subchapter V trustee sought compensation for postconfirmation services in connection with the collection of accounts receivable and sought to "surcharge" the final plan payment due to the creditor secured by the accounts. After ruling that the trustee was not entitled to compensation because he had no duties to perform after confirmation and because the application was time-barred under the terms of the confirmation order, *id.* at 2-3, the court addressed termination of the subchapter V trustee's services.

The court summarized subchapter V's provisions for terminating a subchapter V trustee's services, *id.* at 3 (footnote omitted):

> If the Plan in this case had been confirmed under § 1191(a), the Trustee's appointment would have terminated automatically, by operation of law, upon substantial consummation. 11 U.S.C. § 1183(c)(1). Termination is more fluid when a plan is confirmed under § 1191(b). For nonconsensual plans, the "default" role of the trustee is to administer all plan payments for the life of the plan. 11 U.S.C. § 1194(b). The plan commitment period in a nonconsensual plan can vary from 3 to 5 years, due to the rule of construction set forth in § 1191(c). Alternatively, a debtor can opt out of the default and administer its own plan payments after confirmation. 11 U.S.C. § 1194(b). It is quickly

[13] Section VIII(C)(1) discusses substantial consummation in the context of postconfirmation modification of a consensual plan.

> apparent why the Code does not include a parallel provision for cases confirmed under § 1191(b): a trustee could have a duty to handle plan payments for 3 years, 5 years, or not at all, depending on the specific terms of the plan and confirmation order in each nonconsensual case.
>
> This is not a drafting error. Flexibility improves success rates in small business cases. A contentious case may justify the ongoing administrative expense of maintaining the trustee's appointment for the entire plan commitment period. By contrast, some Subchapter V cases are confirmed under § 1191(b) solely due to the "apathetic creditor problem." Apathetic creditors do not warrant the expense of a trustee for the entire post-confirmation period. Similarly, a cash-strapped debtor may want to administer its own plan payments because it is an inexpensive option permitted by § 1194(b). To eliminate administrative expense entirely, frugal debtors can request a confirmation order that terminates the Trustee's appointment upon substantial consummation of their nonconsensual plan. And, there is scant risk to doing so. The Code permits trustees to be re-appointed in consensual cases, notwithstanding the automatic termination described in § 1183(c) (1). A fortiori, a trustee who is terminated after substantial consummation of a nonconsensual plan can also be reappointed, or the U.S. Trustee can serve as trustee, "as necessary," per § 1183(a). Alternatively, the debtor can reduce the scope of the trustee's post-confirmation duties without actually terminating its appointment, thereby reducing post-confirmation expense. Ultimately, a trustee's role should be "right sized" to suit the needs of each case.

The court speculated that, because the confirmation order "all but eliminated" the trustee's role after confirmation, the trustee's services should have been terminated upon substantial consummation of the plan. *Id.* at 3. The court then ordered termination of the trustee's services because he had filed a final report and had no further duties in the case, subject to reappointment if needed. *Id.*

The court in *In re Florist Atlanta, Inc.,* 2024 WL 3714512 (Bankr. N.D. Ga. 2024), applied the approach of *DynoTec* to terminate the services of the subchapter V trustee upon substantial consummation of a cramdown plan providing for the debtor to make plan payments and the trustee's filing of a final report within 14 days thereafter.

The court observed that, after the debtor made its first payment under the plan, substantial consummation would occur and that, thereafter, the subchapter V trustee would have only four duties: (1) the filing of a final report and account of the administration of the estate; (2) the filing of postconfirmation reports as the court orders; (3) appearance at any hearing concerning postconfirmation modification or sale of property of the estate; and (4) the performance of certain duties if the court removed the debtor from possession. *Id.* at 2.

The confirmed plan did not contemplate that the trustee perform any duties after its substantial consummation and no one had requested that the trustee file postconfirmation reports. Thus, the court reasoned, *id.* at 2:

> Because the Debtor will make plan payments in this case, the Subchapter V Trustee will have nothing to do after filing the final report, subject to the possible occurrence of future events that would require trustee services.

The court then considered whether, in these circumstances, it was appropriate to terminate the subchapter V trustee's services upon substantial consummation and the filing of the trustee's final report. The court concluded that it was. The court explained, *id.* at *3:

> Section 1183(c)(1) of the Bankruptcy Code provides for termination of the service of a subchapter V trustee upon substantial consummation of a consensual plan confirmed under § 1191(a). Subchapter V has no provision for termination of a subchapter V trustee's services after cramdown confirmation under § 1191(b). But nothing in subchapter V limits the court's authority to similarly terminate the services of a trustee upon substantial consummation of a cramdown plan confirmed under § 1191(b) when a subchapter V trustee will not be making payments to creditors and will have no postconfirmation duties to perform. None of the parties at the confirmation hearing objected to such termination of the Subchapter V Trustee's services in this case.
>
> In these circumstances, it is appropriate for the Court to order the termination of the services of the Subchapter V Trustee upon substantial consummation of the plan (which will occur when the debtor commences plan payments) and the filing of the Subchapter V Trustee's final report. *See In re DynoTec Industries, Inc.*, 2024 WL 2003065 (Bankr. D. Minn. 2024).

The *Florist Atlanta* court recognized that the services of a subchapter V trustee would be necessary if the Debtor sought postconfirmation modification of the plan, wanted to sell property of the estate, or was removed from possession. Accordingly, the court ordered that the termination of the trustee's services be without prejudice to the reappointment of a subchapter V trustee if any of these events occurred. 2024 WL 3714152 at * 3.

The debtors in *In re Lager,* 2024 WL 3928157 (Bankr. N.D. Tex. 2024), sought entry of a final decree after substantial consummation of a cramdown plan providing for the debtor to make plan payments and resolution of the subchapter V trustee's compensation. Bankruptcy Rule 3022 provides for entry of a final decree "after an estate has been fully administered."

The court noted that the Advisory Committee Note to Bankruptcy Rule 3022 identifies that the factors a court should consider in determining whether an estate has been administered include:

> (1) whether the order confirming the plan has become final;
>
> (2) whether deposits required by the plan have been distributed;
>
> (3) whether the property proposed by the plan to be transferred has been transferred;

(4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan;

(5) whether payments under the plan have commenced; and

(6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

The *Lager* court explained that the first and sixth factors were satisfied because a final confirmation order had become final, and nothing was pending before the court; the second factor was not applicable because the plan did not require any deposits. The remaining factors, the court noted, all relate to whether the plan has been substantially consummated. *Id.* at 9.

Because substantial consummation had occurred upon the commencement of payments, the court concluded that the case had been fully administered under a traditional analysis. *Id.* at 10.

The subchapter V trustee, however, objected to entry of a final decree because she still had duties to fulfill under the Bankruptcy Code, primarily the duty to file a final report as § 1183(b)(1) (incorporating § 704(a)(9)) requires. In the circumstances of the case, however, the court concluded that it was appropriate to order the termination of the trustee's services after substantial consummation. *Id.* at * 10.

The court reasoned that, if the need for the trustee's services other than the filing of a final report arose, the case could be reopened, and the trustee could be reappointed. Further, the court continued, because the trustee had not administered any assets and was not responsible for making plan payments, leaving the case open for the filing of a final report was not sufficient cause for keeping the case open. *Id.* at *11.

The court nevertheless concluded that entry of a final decree would be inappropriate because the debtor intended to reopen it after completion of plan payments to obtain a discharge. A logical alternative, the court concluded, was to administratively close the case, subject to reopening when the case was ripe for discharge.

The court, therefore, ordered that the trustee file a final report within 14 days and that the case be administratively closed after payment of the trustee's compensation for postpetition services, subject to reopening after completion of plan payments for the debtors to request a final decree, a discharge order, and the trustee's filing of a final report. *Id.* at * 12.

Although *Florist Atlanta* and *Lager* have the same practical result – effective termination of the trustee's services upon substantial consummation of a cramdown plan where the debtor makes plan payments – they employ different procedures.

The *Florist Atlanta* court terminated the trustee's services but did not address closing of the case. The *Lager* court administratively closed the case, subject to reopening, but did not

terminate the trustee's services. Although the *Lager* court stated that termination of the trustee's services would be appropriate, its order provided for the trustee to file a final report in connection with reopening of the case for entry of a final decree and for discharge of the trustee upon completion of plan payments.

IX. CONTINGENT AND UNLIQUIDATED DEBTS ARE NOT INCLUDED IN DETERMINATION OF AMOUNT OF COMMERCIAL OR BUSINESS DEBTS

It is usually the debtor who claims that a debt is contingent or unliquidated so that a debt is excluded from the calculation of the total amount of noncontingent and liquidated debts. In some instances, a creditor may assert that a debt is contingent or unliquidated to establish that the amount of debt arising from commercial or business activities is not enough to establish eligibility for purposes of the requirement that not less than 50 percent of the debtor's debts arise from commercial or business activity.

In *In re Wilson,* 2024 WL 5239995 (Bankr. M.D. Ga. 2024), the debtor's former employer sued him after he left to work for another company, asserting claims arising from the fact that many of the former employer's clients took their business to the new employer. The new employer had a claim against the debtor for advances of litigation expenses. The debtor had no other debts arising from commercial or business activities.

The former employer objected to the debtor's eligibility for subchapter V on the grounds that the debtor as an employee was not engaged in commercial or business activities and that less than 50 percent of his debts arose from commercial or business activities. As Update § IV(A) discusses, the court concluded that the debtor was engaged in commercial or business activities. The court ruled, however, that the debtor did not have any debt arising from commercial or business activities for eligibility purposes.

The court noted that the debt to the current employer did not count because calculation of the debt limit excludes debts owed to insiders. 2024 WL 5239995 at *8. The debt to the former employer did not count because it was unliquidated. *Id.* The court observed that contract claims ordinarily are liquidated because the contract usually determines the basis for determining the amount of damages for breach. Because the contract with the former employer had no language providing "for ready determination and precision in computation of the amount due" but would be determined in the pending litigation, the court concluded, the debt was unliquidated. *Id.* Because the debtor thus had no debt arising from commercial or business activities for purposes of the eligibility determination, therefore, the court ruled that the debtor was not eligible for subchapter V.

X. FINALITY OF ORDER DETERMINING ELIGIBILITY

Update § XVI discusses the finality of an order determining the eligibility of a debtor for purposes of appeal.

The Eleventh Circuit in *Guan v. Ellingsworth Residential Community Association, Inc., (In re Ellingsworth Residential Community Association, Inc.),* 2025 WL 78887 at *7 n. 7 (11th Cir. 2025), addressed the issue in the context of an appeal from the confirmation of the debtor's plan. The Eleventh Circuit noted, *id.* at *7 n.7:

> [The creditor's] challenge to the Bankruptcy Court's non-final order determining [the debtor's] subchapter V eligibility is properly before us because that interlocutory order merged into her appeal from the Bankruptcy Court's final order confirming the reorganization plan.

XI. SUNSET OF $ 7,500,000 DEBT LIMIT AND ADJUSTMENT ON APRIL 1, 2025

As SBRA Guide §§ III(A) and III(B) and Update § XV(K) explain, temporary legislation, effective until June 20, 2024, increased the debt limit for subchapter V eligibility to $ 7.5 million and amended § 1182(1) to state the requirements for eligibility for subchapter V. The provisions for subchapter V eligibility in temporary § 1182(1) were the same as the provisions in § 101(51D) that define a "small business debtor" except that the debt limit in § 101(51D) is $ 3,024,725 (as adjusted under § 104 on April 1, 2022).

Under the sunset provisions of the temporary legislation, § 1182(1) reverted to its previous language such that, effective on June 20, 2024, § 1182(1) now defines debtor as a "small business debtor." Section 103(j) provides that subchapter V applies in a chapter 11 case in which a debtor, as defined in § 1182(1), elects its application.

The effect of the sunset is that a debtor must be a "small business debtor" under § 101(51D) to be eligible for subchapter V. The only substantive effect is that the debt limit is $ 3,024,725, but § 101(51D) now states all the requirements for subchapter V eligibility.

As adjusted on April 1, 2025, under § 104, the debt limit is $ 3,424,000.