A FEW HIGHLIGHTS OF SUBCHAPTER V OF CHAPTER 11[1]

By Sheila R. Schwager
Hawley Troxell Ennis & Hawley, LLP
Matthew T. Christensen
Angstman Johnson
Gary L. Rainsdon, Sub V Trustee
Matt Grimshaw, Sub V Trustee

I. THE POLICIES AND PURPOSES UNDERLYING SUBCHAPTER V AND THE BALANCING ACT.

For a small business needing to reorganize its financial affairs, a Chapter 11 bankruptcy case can be prohibitively expensive. *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 340 (Bankr. S.D. Fl. 2020). Recognizing that small business Chapter 11 cases "continue to encounter difficulty in successfully reorganizing," Congress enacted the Small Business Reorganization Act ("**SBRA**") to "streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs." *Id*. The SBRA created a new SubChapter V of Chapter 11 of the Bankruptcy Code that permits qualifying 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." *Id.* SubChapter V by its very nature is intended to be an expedited process. *Id.* Its purpose is to provide qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to Chapter 11 debtors.

As set forth in *In re Progressive Solutions, Inc.*, 615 B.R. 894, 897-98 (Bankr. C.D. Cal. 2020), public statements from various co-sponsors of the bill are insightful:

> "Our bankruptcy system is designed to help highly complex businesses reorganize after falling on hard times, but for many small businesses going through bankruptcy, these requirements can create unnecessary burdens that stall recovery. The Small Business Reorganization Act takes into account the unique needs of small businesses and streamlines existing reorganization processes. A well-functioning bankruptcy system, specifically for small businesses, allows businesses to reorganize, preserve jobs, maximize the value of assets and ensure the proper allocation of resources." - Sen. Charles Grassley
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> "The strength of Rhode Island's economy depends on the strength of the nearly one hundred thousand small businesses that have set up shop here.

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> We need to improve the bankruptcy process to give smaller employers who are struggling better tools to get back on their feet and preserve jobs." - Sen. Sheldon Whitehouse
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> "We need to make sure that businesses on Main Street have the same opportunities as big businesses to utilize the protections offered by our bankruptcy laws. This legislation will help streamline bankruptcy procedures for small businesses, ensuring that when mom-and-pop businesses fall on hard times, they have a chance to recover and be successful." - Sen. Amy Klobuchar
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> "Iowa is home to more than 267,700 small businesses, making up just over 99% of the businesses in our state. While many of these businesses are thriving, those that experience financial distress face an overly burdensome and costly bankruptcy system. Our bipartisan bill would streamline the reorganization process, preserve jobs, and allow small business owners to maintain control and negotiate a successful reorganization." - Sen. Joni Ernst
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> "All too often, an outdated bankruptcy system forces small businesses to close their doors when they hit hard times. When a small business owner requires relief from overwhelming debt, bankruptcy should offer a path forward to preserve jobs - not an endless, money-draining process. Our bipartisan legislation implements thoughtful, commonsense reforms to make our bankruptcy system work for small businesses instead of against them." - Senator Richard Blumenthal

That being said, "[t]he overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief." And to balance the special new powers available to small business debtors, Congress granted creditors a very important protection: the requirement that a SubChapter V case proceed expeditiously. In furtherance of that creditor protection, SubChapter V requires the court to conduct a status conference within 60 days of the order for relief. It also requires the debtor to file a status report 14 days before that status conference; and requires the debtor to file a plan within 90 days of the order for relief. As with many other deadlines in the Bankruptcy Code, these deadlines can be extended. But, for a court to grant an extension, the court must find that the "need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 340-341 (Bankr. S.D. Fla. 2020).

The schedule for the filing of the plan in a SubChapter V case differs from the schedule in a non-Sub V 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. Second, the Sub V debtor faces no deadline for obtaining confirmation after the filing of the plan. Nevertheless, if a plan is filed, but not confirmed, the debtor faces a risk that the creditors or UST will file a motion for conversion for dismissal.

Further, as in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires is cause for conversion or dismissa1. 11 USC 1112(c)(4)(J). Section 1112(b)(1) states that the court *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interest of creditors and the Estate, unless the court determines that the appointment of a trustee or an examiner

under § 1104 is in the best interests of the estate. 11 USC § 1112(b)(1). Because § 1104 does not apply in a Sub V case, the court apparently has no alternative to conversion or dismissal.

II. WHO CAN BE A SUBCHAPTER V DEBTOR

SBRA added new § 1182, which defined "debtor" in subsection (1) as meaning a "small business debtor," a term defined in § 101(51D). SBRA also revised the § 101(51D) definition of "small business debtor." Under pre-SBRA law, paragraph (A) of § 101(51D) defined a "small business debtor" as a person (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 non-contingent liquidated secured and unsecured debts' as of the date of the filing of the petition or the date of the order for relief in an amount not more than $ 2,725,625, (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 has aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

SBRA did not change the requirement in § 101(51D) that the debtor be engaged in "commercial or business activities" or the aggregate debt limit, but it modified each of the other requirements. First, revised subparagraph (A) of § 101(51D) requires that 50 percent or more of the debt must arise from the commercial or business activities of the debtor. In In *re Wright*, 2020 WL 2193240 (Bankr. D. S.C., April 27, 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. For a family farmer, fifty percent (50%) of the debts must arise from a farming operation. § 101(18)(A). In addition, fifty percent (50%) 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 eighty percent (80%), and more than eighty percent (80%) of the value of its assets must be related to the fishing operation. § 101(19A)(B).

Second, amended § 101(51D)(A) excludes a debtor engaged in owning or operating real property from being a small business debtor, if the debtor owns or operates single asset real estate. § 101(51B). 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 fanner 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).

Third, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in the case of a small business debtor unless the court orders otherwise.)

Finally, SBRA added two additional types of debtors to those that subparagraph (B) excludes from being a small business debtor. One exclusion (in (B)(ii), as amended) was for a corporate debtor subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act of 1934. § 101(51D)(B)(ii). The second (in (B)(iii), as amended) was for a corporate debtor subject to the reporting requirements of those sections that is an affiliate of a debtor. The CARES Act made a technical

correction to eliminate the second provision and to insert a new (B)(iii) to exclude "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)). Cares Act § 1113(a)(4)(A).

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 though a Sub V debtor necessarily is a "small business debtor." And as a result of the CARES Act amendments increasing the debt limits, a debtor may be a SubChapter V debtor under § 1182(1) (until its expiration) but not a "small business debtor."

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, except that the amount of the debt limit is increased to $7.5 million. The debt limit in revised § 101(51D) is unchanged. The CARES Act amendment to new § 1182(1) is effective for only one year after enactment of the statute on March 27, 2020. At that time, the CARES Act provides for the amendment of § 1182(1) to return to its original language, so that "debtor" will mean "a small business debtor." The effect of all these provisions is that, for one year after the enactment of the CARES Act, new (and amended) § 1182(1) states the definition of a debtor eligible to be a Sub V debtor. After that, new § 101(51D) will state the definition. The only difference in the language of the two statutes is the higher debt limit in the temporary CARES Act version of § 1182(1). (Because the CARES Act does not change 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.)

III. SOME OF THE COST-SAVING RESTRUCTURING TOOLS NOT OTHERWISE AVAILABLE TO CHAPTER 11 DEBTORS IN SUBCHAPTER V.

The Bankruptcy Court out of the Southern District of Florida summarized well the cost-saving restructuring tools arising out of SubChapter V for small businesses:

> SubChapter V by its very nature is intended to be an expedited process. It provides qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to Chapter 11 debtors. Among these benefits are:
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> (1) elimination of the absolute priority rule, which allows equity holders to retain their ownership interests without paying all creditors in full;
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> (2) no mandatory appointment of a creditors committee;
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> (3) no mandatory requirement to file a disclosure statement;
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> (4) appointment of a SubChapter V trustee to assist in developing a consensual plan, while leaving the debtor in possession of its assets and in control of its business;
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> (5) the exclusive right (which cannot be terminated) to file a plan;

> (6) the ability to modify a claim secured only by a security interest in the debtor's principal residence, if new value received in connection with granting the security interest was used primarily in connection with the debtor's business and not primarily to acquire the property;
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> (7) the ability to confirm a plan even if all classes reject the plan;
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> (8) the ability to pay administrative expenses over time under a plan;
>
> (9) modification of the disinterestedness requirements of Section 327(a) for a professional that holds a prepetition claim of less than $10,000; and
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> (10) elimination of the requirement to pay quarterly U.S. Trustee fees.
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> These extraordinary powers and cost-saving provisions granted to small business debtors are certainly laudable and are both helpful and necessary in making Chapter 11 more affordable for small businesses.

In re Seven Stars on the Hudson Corp., 618 B.R. 333, 340-341 (Bankr. S.D. Fla. 2020).

One of the largest cost-saving procedures is the condensed timeline of a SubChapter V case. For instance, in every case the court must hold a status conference within 60 days of the filing, and a plan must be proposed within 90 days of the filing. (The ninety-day deadline may still be extended under certain circumstances.) Additionally, prior to the status conference, the Debtor must file a report detailing its efforts to attain a consensual plan. There is a strong preference in the new Code provisions for consensual plans.

IV. THE ROLE OF A SUBCHAPTER V TRUSTEE.

In a traditional chapter 11 case, the trustee's role is defined by 11 U.S.C. §1106. In essence, the trustee assumes the role as the responsible party for the estate, takes over debtor's operations, and performs various attendant duties.

The United States Trustee appoints the Sub V trustee. The role of the Sub V trustee is outlined in Section 1183 and includes duties to monitor the case, to appear and be heard on specified matters and at the status conference, to facilitate a consensual plan, and to make distributions under a nonconsensual plan.

A Subchapter V trustee's role is different in large part because the debtor remains a debtor-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. The SubChapter V Debtor in Possession has the same rights and responsibilities as a regular Chapter 11 Debtor in operating the business.. According to 11 U.S.C. §1183, a Subchapter V trustee has seven categories of duties. Most, if not all, of those duties revolve around the Subchapter V trustee's primary goal—to facilitate the development, confirmation, and consummation of a consensual plan.

There are provisions that allow for the removal of the debtor as a debtor-in-possession. In those circumstances, the Code contemplates the Subchapter V trustee becoming a trustee-in-possession and

assuming a role that is substantially similar to the role of a traditional chapter 11 trustee. Notably, even when a Subchapter V debtor is removed as a debtor-in-possession, the debtor continues to be the only party authorized to propose a plan.

V. THE ATTRIBUTES OF A GOOD SUB V TRUSTEE.

To be eligible for inclusion in the Subchapter V trustee pool, an applicant must possess strong administrative, financial and interpersonal skills. Fiduciary and bankruptcy experience is desirable but not mandatory. Those with business, managerial, consulting, mediation, and operational experience are encouraged to apply. Candidates for consideration must:

1. Possess integrity and good moral character;
2. Be physically and mentally able to satisfactorily perform a trustee's duties;
3. Be courteous and accessible to all parties with reasonable inquiries or comments about a case for which such individual is serving as private trustee;
4. Be free of prejudices against any individual, entity, or group of individuals or entities;
5. Not be related by affinity or consanguinity within the degree of first cousin to any employee of the Executive Office for United States Trustees of the Department of Justice, or to any employee of the office of the U.S. Trustee for the district in which he or she is applying;
6. Possess one or more of the following minimum qualifications:
    - Be a member in good standing of the bar of the highest court of a state or of the District of Columbia;
    - Be a certified public accountant;
    - Hold a bachelor's degree from a full four-year course of study (or the equivalent) of an accredited college or university with a major in a business-related field of study or at least 20 semester-hours of business-related courses; or hold a master's or doctoral degree in a business-related field of study from a college or university of the type described above; or
    - Have equivalent experience as deemed acceptable by the U.S. Trustee; and,
7. Provide reports as required by the U.S. Trustee. https://www.justice.gov/ust/eo/private_trustee/vacancies/11ad

Important business skills for Subchapter V trustees include (but not limited to):

- Business analysis (cash flow, financial statements, debt amortization, tax return analysis, trend analysis).
- Broad business background to understand generally how business works, and identify the many available resources which provide benchmark ratios and rules-of-thumb to consider when analyzing a particular type of business.
- Ability to identify areas for potential concessions/expectation adjustments, and recommend alternatives and solutions to the parties.
- Amenable personality, ability to be agreeable without always agreeing.
- Administrative skills to receive and distribute payments or estate property if necessary.

A challenge for Subchapter V trustees who also serve as Chapter 7 trustees may be establishing a level of trust and cooperative working relationship with debtor’s counsel.

The goal is for the trustee to work with debtors, and creditors to achieve a consensual plan (meets the requirements of 11 U.S.C. 1129(a) [except (a)(15) which doesn't apply in sub V]). Some of the particularly challenging requirements of plan confirmation include:

- Filing all required tax documents.
- Plan proposed in good faith.
- Meets the best interest test (creditors better off in Chapter 11 than in Chapter 7).
- Impaired creditors accept the plan.
- The plan is feasible.

Even though the Subchapter V trustee typically isn't completing the comprehensive investigation required under 11 U.S.C. 1106(a)(3), the trustee must investigate enough to calculate the best interest test (including liquidation analysis, pre-petition transfers, and lien avoidances, which might be recovered by a Chapter 7 trustee), and plan feasibility.

VI. THE MODIFICATIONS TO THE REQUIREMENTS OF PROFESSIONALS HIRED BY THE DEBTORS IN A SUBCHAPTER V AND WHY THAT FACILIATES THE PURPOSE OF SUB V.

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). A disinterested person cannot not have an interest "materially adverse to the interest of the estate. § 101(14)(C). 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 Section 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. § 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.

VII. HOW TO BEST UTILIZE A SUB V TRUSTEE TO MAXIMIZE THE BENEFITS OF SUBCHAPTER V.

COMMUNICATE WITH THE TRUSTEE (if this could be flashing red, it would be). If the trustee calls, take the call if you can, or promptly call back. Answer emails, ask questions, invite trustee to meet with client (either debtor or creditor), give trustee all the documents and explanation needed. Ask for help, ask for suggestions, and negotiate. Give information and answer questions early. Delays in

providing documents and answering concerns to last minute or final days before confirmation hearing doesn't increase the likelihood of plan confirmation.

Sound business principles are the same for bankruptcy reorganization as for business lending (character, capacity, capital, collateral, and conditions). https://www.extension.iastate.edu/smallfarms/5-cs-credit:

- Bankruptcy is for the honest but unfortunate debtor. Honesty will go a long way to support a debtor's plan and gain the support of the trustee and creditors. On the other hand, dishonesty (in all its forms) can destroy a debtor's chances for plan confirmation. https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics
- Cash flow is king. If after the proposed plan is confirmed, the justified projected cash flow is sufficient to cover reasonable business expenses and plan payments, the plan has a great chance for confirmation and success.
- Good equity in assets. If there is lots of equity, and the debtor will offer concessions to sure up the creditor's position, such as stay relief if can't pay, deed in lieu, planned liquidation, balloon payment, additional collateral (if available), the creditor is more likely to give the debtor a second chance at success.

COOPERATE. Rarely is a chapter 11 case filed without problems developing between the debtor and its creditors. As a result of those problems, "bad blood" often exists. In a traditional chapter 11, putting aside prior problems and working together through issues is important. The need for cooperation is magnified in a Subchapter V case. The debtor is incentivized to cooperate because of the accelerated timeline. Creditors are incentivized to cooperate because the cramdown standard for confirmation is easier in a Subchapter V case.

USE THE TRUSTEE. One of the Subchapter V trustee's roles is to facilitate the development of a consensual plan. The trustee can be as active as the parties' desire in negotiating and formulating the plan. Additionally, the trustee is required to participate in certain hearings and may participate in any other hearing. When a disagreement arises, the trustee may be an important ally at any hearing on the disputed issues.

VIII. TRUSTEE COMPENSATION.

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.

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error. 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. 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 may have 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.

The appropriate vehicle for a trustee's post-confirmation compensation is being worked through by the UST's office. In other districts, it has been based on a percentage of distributions, which is likely to be the basis here too. The actual percentage rate remains to be seen and is subject to the "reasonableness" standard.

IX. THE DISTINCTION IN SUBCHAPTER V IN THE ABILITY TO MODIFY A SECURED RESIDENTIAL CLAIM.

The third content provision in new § 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. The same anti-modification rule applies in chapter 13 cases under § 1322(b)(2).

New § 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 was "used primarily in connection with the small business of the debtor."'

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. 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 anti-modification 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. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, Chapter 13 Practice and Procedure, § 5:42 (2019).

The court in *In re Ventura* concluded that application of new § 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 re* Ventura, 2020 WL 1867898. 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, 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.

The 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" (new § 1190(3)(A)) and were "used primarily in connection with the small business of the debtor" (new § 11903(3)(B)).

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."

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." 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. New § 1190(3), the court explained, "asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence."

Subparagraph (B), the court stated, required it to determine "whether the mortgage proceeds were used primarily in connection with the debtor's business."

The 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."

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."

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 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.

Further, 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 restructure of debt. A potential issue is whether the § 1190(3) exception to the anti-modification rule applies in this situation when the debtor receives no additional loan proceeds.

X. THE SIGNIFICANCE OF WHEN A DISCHARGE IS GRANTED UNDER A SUBCHAPTER V.

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). § 1141(d)(2). One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C).

DISCHARGE — CRAMDOWN PLAN

If the court confirms a cramdown plan, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, new § 1192 provides for a 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.

Under new § 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). 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.

XI. NEW REQUIREMENTS FOR FEASIBILITY AND REMEDIES FOR DEFAULT.

New § 1191(c)(3) adds two additional factors to the "fair and equitable" analysis. First, new § 1191(c)(3)(A) requires that the debtor will be able to make all payments under the plan,' or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan. § 1191(c)(3)(A)(ii). The requirement strengthens 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 proposes it. Second, new § 1191(c)(3)(B) requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments. When one or more of impaired creditors do not accept the plan the requirements for cramdown confirmation in new § 1191(c) provide the source of remedies for default. Cramdown confirmation 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 payment is not made. § 1191(c)(3)(B).

XII. MODIFICATION OF A SUBCHAPTER V PLAN.

The rules for postconfirmation modification in new § 1193 differ depending on whether the court has confirmed a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b). The provisions in § 1127 for modification of a plan do not apply in a Sub V case. § 1181(a).

POSTCONFIRMATION MODIFICATION OF CONSENSUAL PLAN CONFIRMED UNDER NEW§ 1191(A)

If the court has confirmed a consensual plan under new § 1191(a), new § 1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

If modification is prior to substantial consummation, then the modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under new § 1191(a).[239] 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.[240] These are the same rules that govern postconfirmation modification in standard and non-Sub V cases under § 1127(b).

POSTCONFIRMATION MODIFICATION OF CRAMDOWN PLAN CONFIRMED UNDER NEW § 1191(B)

If the plan has been confirmed under new § 1191(b), new § 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. The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).

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, on condition that the modified plan meet confirmation requirements. Unlike the provisions in the other chapters, new § 1193(c) does not permit modification at the request of creditors or the trustee.

XIII. STATISTICS.

Case Number	***Date Filed***	***Debtor***	***Dtr Attorney***	***Sub V Trustee***	***Status***
20-20081-NGH	2/27/2020	IDC Enterprises, Inc.	Clark	Rainsdon	Filed as Sub V case; MTD filed by creditor. Case converted to Ch 7 on 9/30/2020.
20-40163-JMM	3/2/2020	Robert Allen Auto Group, Inc.	Taggart		Filed as Sub V case but amended to regular Ch 11 5/22/2020
20-40188-JMM	3/6/2020	Tri-State Roofing	Tolson	Rainsdon	Filed as Sub V case; pending; plan filed; MTD filed by Rainsdon 10/9/2020
20-00310-JMM	3/30/2020	Grand Slam Inc.	Christensen		Filed as Sub V case but amended to regular Ch 11 4/1/2020
20-00318-JMM	4/3/2020	Timothy & Patricia Davis	Christensen	Rainsdon	Filed as Sub V case; pending; plan filed
20-40485-JDP	6/23/2020	Scott Burpee	Robinson	Grimshaw	Filed as Sub V case; pending; plan filed; confirmation hrg set for 10/21/2020
20-40535-JMM	7/10/2020	Joseph & Jana Dille	Robinson	Grimshaw	Filed as Sub V case; pending; plan filed
20-00674-JMM	7/22/2020	Best View Construction & Development LLC	Christensen	Grimshaw	Filed as Sub V case; pending; no plan yet
20-40607-JMM	8/5/2020	Marco Garcia-Lozano & Clara Conde	Taggart	Rainsdon	Filed as Sub V case; pending; no plan yet
20-40698-JMM	9/4/2020	Dirk & Robyn Parkinson	Robinson	Grimshaw	Filed as Sub V case; pending; no plan yet
20-40701-JMM	9/8/2020	Jeffrey Katseanes	Tolson	Rainsdon	Filed as Sub V case; pending; no plan yet; MTD filed by creditor 10/9/2020
20-00854-NGH	9/23/2020	5CR Trailer Sales, Inc.	Clark	Grimshaw	Filed as Sub V case; pending; no plan yet
20-40785-JMM	10/6/2020	Myles Tortel	Tolson	Rainsdon	Filed as Sub V case; pending; no plan yet

SUMMARY in Idaho	
Pending:	10
Removed Sub V Designation:	2
Converted:	1
Dismissed:	0

Statistics provided by Alexandra Caval

Nationwide, approximately 800 cases had been filed by the end of September 2020. General assumptions among bankruptcy practitioners are that the federal, state and local assistance programs (CARES Act; PPP loans; state government grants, etc.) have caused a delay in many filings. When those funds expire, and as the temporary debt limit increase (i.e., $7,500,000 CARES Act limit) nears expiration, there is an anticipation of an increased volume of new cases.

XIV. CONCLUSION.

What will make SubChapter V a success for Debtors and Creditors is for all parties to (i) communicate; (ii) negotiate in good faith; (iii) realize the benefit of a consensual plan for all parties; and (iv) utilize the expertise and knowledge of the Sub V Trustee. The purpose of SubV is to make the process less expensive and more timely and efficient. With the professionals of the Idaho State Bankruptcy Bar there is groundwork for success.