A Look at the Small Business Reorganization Act

by:
Hon. Eduardo V. Rodriguez
U.S. Bankruptcy Court, Southern District of Texas, McAllen Division

Hon. Stacey G. C. Jernigan
U.S. Bankruptcy Court, Northern District of Texas, Dallas Division

Eric Terry
Eric Terry Law, PLLC, San Antonio Texas

Alicia Barcomb[1]
Trial Attorney, United States Trustee, Houston Texas

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SBRA Case Update as of February 2021

I. Case Commencement Issues

A. Retroactive Application

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

    a. Dismissing Subchapter V case after Debtor filed chapter 11 in June 2019 and then amended petition on June 19, 2020.

    b. Court analyzes phrase "circumstances for which the debtor should not justly be held accountable" and, drawing on analysis of same phrase in chapter 12, concludes that this is a stringent standard that is more demanding that "for cause."

    c. Debtor's decision to amend petition to proceed under Subchapter V is entirely circumstances of its own making, even if the inability to make the case deadlines is due to the fact that the law did not become effective until after the Debtor had filed BK.

2. *In re Wetter,* 620 B.R. 243 (Bankr. W.D. Va. 2020)

    a. Chapter 7 debtor sought to convert to chapter 11 / Subchapter V.

    b. Debtor was a dentist who sold his practice. The practice filed chapter 11 triggering personal guarantees he had made on several loans.

    c. Debtor had a ½ interest in an LLC holding real estate, which was worth almost $1M. He transferred this interest to himself and his wife as TBE. The chapter 7 trustee sought to deny his discharge and UST sought to revoke his discharge.

    d. After a trial, the court concluded that the Debtor owned $924k worth of the LLC as of the petition date, which was part of his chapter 7 estate.

    e. Debtor seeks to file Subchapter V to retain his interest in the LLC and pay his projected disposable income under a nonconsensual plan.

    f. *Marrama* says that a Debtor acting in bad faith loses his right to convert.

    g. Court does not need to get to *Marrama* though because it finds that the Debtor is a "small business debtor" under chapter 11 and if he converted, he would immediately be in default of § 112 l(e)(2) for failure to file a plan within 300 days. The time for this deadline to be extended has expired and it would result in automatic dismissal under § 1112. So, if converted, Debtor would immediately be in default under a non-Subchapter V case.

    h. Moreover, as the Debtor had elected to proceed under Subchapter V, he had to establish

cause to enlarge these deadlines to tile a plan.

i. Court can only enlarge the deadline to file a plan if the need is due to circumstances for which the debtor shall not justly be held accountable.

j. Court rejects *Seven Stars* as "too rigid" and instead follows *Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020).

k. "The Court sees no reason why a delayed conversion to Subchapter V cannot occur when the Section 1189(b) plan filing deadline can be adjusted by the Court to run from the new election, especially when no party in interest objects and the means and opportunity exist for one to do so." In this case, however, the Debtor had previously acted in bad faith in chapter 7 regarding his investment in the real estate company. He had been evasive and misleading and has played "fast and loose" with the facts and should therefore not be given the benefit of the doubt.

l. Court also looked at whether Debtor could satisfy the best interests of the creditor test which "bleeds into a good faith analysis."

m. "Because the Debtor would immediately run afoul of Section 1112(b)(4)(J) if the Motion were granted and the election made, the Court will deny the Motion to Convert."

3. *In re Greater Blessed Assurance Apostolic Temple, Inc*., 624 B.R. 742 (Bankr. M.D. Fla. 2020)

a. Debtor filed a regular chapter 11 case on January 10, 2020, following a years-long dispute with its secured lender. Debtor "repeatedly violated this Court's rules or the Bankruptcy Code" and failed on two attempts at confirming a plan.

b. The Debtor could have converted to Sub V in February 2020 but chose to proceed under a traditional chapter 11 and failed.

c. Court will not give Debtor another "bite at the apple" after two failed attempts to confirm a plan in chapter 11. Debtor could not establish any basis for the delay.

4. *In re Double H Transportation LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020)

a. Debtor filed a Chapter 11 petition on November 4, 2019. On February 28, 2020, Debtor filed an Amended Petition requesting Subchapter V designation. Court sua sponte struck amended petition ruling that case could not be designated as a Subchapter V after mandatory deadlines, such as status conference had already expired.

5. *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020)

a. On eve of confirmation hearing, court adjourned hearing to allow Debtor to consider

whether to amend to change to Subchapter V. Court held that statute was silent as to whether new statute would apply to pending cases. Debtor was not judicially estopped from amending and amendment did not constitute a "taking" of the creditor's property rights.

There are many additional cases going both ways. A lawyer arguing this point can find plenty of cases for whatever position she takes. However, both Judge Mott and Judge King have ruled that a case may not be converted to Subchapter V after deadlines have run.

B. Eligibility

1. *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020)

   a. Should lease rejection claims and PPP loan be counted as debt for the purpose of deciding eligibility under Subchapter V?

      i. Lease and Contract Rejection

         a) Lease and contract rejection claims should not be counted.

         b) "Until an executory contract is assumed or rejected, the debtor's obligations under the contract are an administrative expense claim of the estate."

         c) "The ... plain language of § 109(e) requires consideration of the debts as they exist as of the petition date, irrespective of postpetition events."

         d) "Opening up eligibility determinations to post-petition events, even if deemed to apply retroactively, is contrary to the purpose and spirit of Subchapter V and could nullify the very benefits it is intended to convey."

      ii. PPP Funds

         a) PPP loan should not be counted.

         b) PPP funds are a "unique government financial accommodation." In the context of bankruptcy discrimination, other bankruptcy courts have not found the PPP to be a grant.

         c) "[A]s of the petition date, the debtor's liability to repay the PPP is dependent on it using the funds for ineligible expenses or failing to meet employee retention criteria." The debtor's liability to repay the PPP "relies on some future extrinsic event which may never occur."

         d) "The PPP obligation was not liquidated as of the petition date because it was not then known, and could not be determined, whether the debtor would use the PPP funds for ineligible expenses or would fail to maintain employee

staffing levels in accordance with the PPP. Thus, it could not be determined what amount, if any, of the PPP funds the debtor would be obligated to repay."

2. *In re 305 Petroleum, Inc.*, 622 B.R. 209 (Bankr. N.D. Miss. 2020)

   a. Five affiliates filed under Subchapter V. One, Premier Petroleum, is a SARE and amended its petition to proceed under normal chapter 11.

   b. If the SARE's debt were included, the debtors would collectively be over the $7.5M statutory cap.

   c. Section 101(51D), defining "small business debtor" excludes any debtor whose total debt, plus the debt of all its affiliates, exceeds the current small business threshold of $7.5M. While subsection (A) excludes single asset real estate debtors from the definition of "small business debtor", subsection (B) does not exclude single asset real estate debtors from the definition of "affiliates".

   d. Section 101(51D)(A)'s opening sentence begins with "subject to subparagraph (B)". Additionally, subsection (A) and (B) are joined by the term "and". "[T]he joinder of two clauses with the word 'and'... means that the legislature intended that a potential candidate for statutory relief fulfill both clauses, not just one".

   e. A debtor must satisfy both provisions of section 101(51D) to be eligible for Subchapter V.

3. *In re Serendipity Labs, Inc.*, 620 B.R. 679 (Bankr. N.D. Ga. 2020)

   a. Debtor is parent company of a group of affiliates that franchise, manage, and own 35 co-working spaces nationally branded as "Serendipity Labs".

   b. Debtor's charter grants the holders of Common Stock and each of the various types of preferred stock one vote per share. Series C Group stock has exclusive voting rights with respect to certain enumerated tasks, including actions to reorganize or liquidate the business.

   c. Debtor has 33 stockholders, including Steelcase, which owns 21.1799% of the fully diluted ownership. When all non-voting options, restricted stock units, and common warrants are excluded, Debtor has 3,303,690 shares and Steelcase owns 27.7%.

      i. Steelcase is an issuer under the '34 Act.

      ii. Section 1182 defines "Debtor" for Subchapter V and excludes any debtor that is an affiliate of an "issuer" under the '34 Act because it is a publicly traded company whose shares are traded on a stock exchange.

iii. Section 101(2)(A) defines "affiliate" as an "entity that directly or indirectly owns, controls, or holder with power to vote, 20 percent or more of the outstanding voting securities of the debtor".

iv. Because Steelcase owns more than 27% of the Debtor's voting securities, it is an affiliate of the Debtor.

d. The Bankruptcy Code does not define "voting securities", but the Court applied the SEC regulations definition 17 C.F.R. § 230.405 as "securities the holders of which are presently entitled to vote for the election of directors". Because each of Steelcase's Series A, Series B. and Series C group were entitled to vote on the election of Debtor's directors, all of its shares constituted "voting securities".

e. The Court held that it was irrelevant that only Series C could vote to put the Debtor into bankruptcy, and Steelcase held less than 20% of those particular voting securities.

f. The Court followed the standard set forth in *In re Interlink Home Health Care, Inc.*, 283 B.R. 429 (Bankr. N.D. Tex. 2002) in finding three conditions upon which affiliation to a debtor exists:

1. ownership of 20% or more of the debtor's voting securities;
2. control of 20% of more of the debtor's voting securities; or
3. the holding of 20% or more of debtor's voting securities if the holder has the power to vote the securities.

g. If # 1 or #2 are met, it is not necessary that the entity have the power to vote the securities.

h. In so holding, the Court rejected the "opportunity to control" approach.

4. *In re Two Wheels Properties, LLC*, --- B.R. ---, No. 20-35372, 2020 WL 7786927, at *1 (Bankr. S.D. Tex. Dec. 30, 2020)

a. Debtor corporation formed under Texas law forfeited in charter prior to the entry for the order of relief. Under Texas law its only option was to liquidate.

b. In support of its ability to proceed in Subchapter V, the Debtor cited two prior bankruptcy decisions interpreting Texas tax law, which provides that a dissolved corporation continues in its existence for three years for the limited purpose of liquidation and distribution of assets. In this case, the Debtor dissolved in 2018 and filed in 2020.

c. Eligibility to "operate" is determined by state law.

i. Texas corporate law permitted a terminated entity to continuing existing for three year for the limited purpose of liquidation. The Texas law expressly stated that the

company could not reinstate a charter that was forfeited for tax reasons or continue its business.

d. HELD: Because the terminated corporation was prohibited from conducting business under state law, it was not eligible for relief under Subchapter V and its only available bankruptcy relief was chapter 7.

5. *In re Thurmon*, No. 20-41400-can11, 2020 WL 7249555, at *1 (Bankr. W.D. Mo. Dec. 8, 2020)

a. Husband & Wife owned 70% of an LLC that operated two pharmacies. In April, the LLC closed the pharmacies and sold almost all of the business assets, leaving several business debts unsatisfied.

b. Debtors filed a plan which was supported by all their creditor classes.

c. UST objected to Debtors' eligibility for Subchapter V because they ceased operating their business and sold their assets prior to filing.

d. Court declined to follow the bankruptcy court decisions in *Wright*, *Bonert*, *and Blanchard*. Instead, it looked at the way Congress used the word "engaged in" in other sections of the Bankruptcy Code and federal statutes. Specifically, the Court looked to chapter 12 cases considering whether particular debtors were "engaged in a farming operation".

e. HELD: engaged in means to be "actively and currently involved in".

f. The Debtors were not engaged in business on the petition date because "they had in fact sold the business with no intent to return to it and were otherwise not active or involved in any commercial or business activities". It was not enough for the Court that the LLC remained in good standing with the Missouri Secretary of State's office.

g. Having removed the Subchapter V designation, the Court took up the UST's objection that the Debtor owed UST fees for being in normal chapter 11.

h. On the UST's objections to the plan, the Court found that the Debtors were in Subchapter V "unless and until" the Court entered an order finding that their statement was incorrect. The UST had waived a request to file a disclosure statement with the Plan. Moreover, the Plan contained adequate information anyway.

i. The Court did require the Debtors to pay UST fees, however, and ordered that they modify their Plan.

6. *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020)

a. Was Debtor eligible for Subchapter V where majority of debt consisted of mortgage

encumbering property which was Debtor's residence, and which was operated as a bed and breakfast? With no definition of what it meant to be engaged in "commercial or business activities," Court looked instead to whether debtor had primarily "consumer" debt. Mortgage on principal residence would be consumer debt. However, where purpose of acquiring property was to operate bed and breakfast, it constituted business debt which could be included in Subchapter V.

b. Court used following factors to consider whether debt could be modified under Subchapter V:

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.

c. The court concluded that the Debtor was a person engaged in commercial or business activities despite the fact that she lived in her bed and breakfast. Therefore, Debtor was eligible for Subchapter V.

7. *In re Wright*, No. 20-01035-HB, 2020 Bankr. LEXIS 1240, at *1 (Bankr. D.S.C. Apr. 27, 2020)

a. Individual filed Chapter 11 and elected Subchapter V status. Debtor previously owned businesses whose assets were sold. The U.S. Trustee moved to strike the Subchapter V designation. To qualify for Subchapter V, a person must be "engaged in commercial or business activities", not be a single asset real estate entity, have debts below $2,725,625 and at least 50% of the debts must arise from the commercial or business activities. Debtor met the 50% threshold.

b. Court concluded that person need not be presently engaged in business or commercial activities. It was sufficient to qualify that person was dealing with residual debts from business or commercial activities.

9. *In re Ellingsworth Residential Community Association*, 619 B.R. 519 (Bankr. M.D. Fla. 2020)

a. Non-profit association which maintained common areas of community filed under Subchapter V.

b. Court concluded that nothing in the definition of Subchapter V Debtor required that it operate for profit.

10. *In re Johnson*, No. 19-42063-ELM, 2021 WL 825156, at *1 (Bankr. N.D. Tex. Mar. 1, 2021).

a. Individual debtors filed motion to convert their Chapter 7 to a Chapter 11 case conditioned on the case being authorized to proceed under Subchapter V of Chapter 11.

b. The court was presented with two issues. First, whether an individual who previously owned and managed certain now-defunct businesses and who, on account of such ownership and involvement, has mostly business-related debts, is "engaged in" commercial and business activities for purposes of eligibility under Subchapter V.

c. Second, whether an employed officer of a non-debtor business entity, having no ownership in or ultimate control over the non-debtor business entity, is engaged in "commercial or business activities" for purposes of Subchapter V.

d. Held: The court concluded that the debtor was not engaged in commercial or business activities and therefore was not eligible for Subchapter V.

e. The court performed a thoughtful and thorough analysis of the meaning of "engaged in Commercial or Business Activities."

f. The evidence demonstrated that the defunct entities had ceased all business activity prior to the petition date, and therefore, the debtor did not meet the "engaged in" requirement.

g. Further, the court found that a W-2 employee of a non-debtor, even one having the title of President, is not engaged in commercial or business activities.

C. Extending Automatic Stay/Effect of Stay

1. *In re Crilly*, No. 20-11637, 2020 WL 3549848, at *1 (Bankr. W.D. Okla. June 30, 2020)

a. Husband and wife debtors voluntarily dismissed chapter 11 case on May 13, 2020 and then filed a second case that same day under Subchapter V.

b. Debtors moved to extend the automatic stay under section 362(c)(3) because they had a previous case dismissed within the last year.

c. In the first case, the Debtors did not identify any business income from the rental of the second floor of their house.

d. HELD: Debtors had not rebutted the presumption that their second case was filed in bad faith. “With only five hours and eighteen minutes lapsing between the dismissal of the First Case and the filing of the Second Case, the Court cannot fathom any change in circumstances”. The enactment of the SBRA itself is not a change in the Debtors’ financial or personal affairs.

e. Moreover, the Debtors’ largest claim, arose from an attempt to provide care and security for aging parents, and not from a business activity motivated by profit.

2. *In re Abundant Life Worship Center of Hinesville, Ga, Inc*., No. 20-40959-EJC, 2020 WL 7635272, at *1 (Bankr. S.D. Ga. Dec. 16, 2020)

a. Church filed a small business bankruptcy case in 2019. Case was dismissed in 2020. Debtor then filed second case under Subchapter V. Creditor proceeded with foreclosure proceeding in belief that stay did not apply.

b. Court ruled that under 11 U.S.C. § 362(n), stay did not come into effect because Debtor had a prior small business case dismissed within two years. Electing Subchapter V status did not remove Debtor from the prohibition on the stay coming into effect.

D. Retroactive Application of the CARES Act

1. *In re Peak Serum, Inc.* 623 B.R. 609 (Bankr. D. Colo. 2020)

a. Owner and business filed chapter 11 cases in November 2019. Both Debtors amended their petitions to proceed under Subchapter V after CARES Act increased the debt limit. Debtors alternatively requested that their cases be dismissed so that they can re-file as Subchapter V cases.

b. HELD: CARES Act is unambiguous. It shall only apply with respect to cases commenced under title 11 “on or after the fate of enactment of this Act”.

c. Creditor asked for appointment of a chapter 11 trustee.

d. The Court’s analysis for dismissal under section 1112 asks if (1) cause exists and (2) whether dismissal is in the best interests of creditors and the estate.

e. The Court found the appointment of a chapter 11 trustee to be in the best interests of the creditors and estate on account of the corporate Debtor's fraud, incompetency, and gross mismanagement.

f. The Court concluded separately that dismissal of the individual case was preferable because the individual debtor did not generate his own income outside of his connection with Peak and, therefore, the costs of a chapter 11 trustee would outweigh the benefit in an individual case.

II. Case Dismissal

1. *In re SlideBelts, Inc.*, No. 2019-25064-A-11, 2020 WL 3816290, at *1 (Bankr. E.D. Cal. July 6, 2020)

    a. Debtor originally filed under chapter 11. It incurred professional fees to its counsel and the Committee.

    b. Debtor sought to dismiss chapter 11 case, obtain a PPP loan, and refile under Subchapter V.

    c. Committee opposed dismissal citing *Jevic*.

    d. Section 349(b)(3) says that "unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title ... (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title".

    e. HELD: committee professionals had relied upon the bankruptcy case that they would be paid. Court conditioned dismissal on paying the Committee.

III. Plan Procedures

A. Under What Circumstances May the Debtor Obtain an Extension to File a Plan?

1. *In re Baker*, --- B.R. ---, No. 20-33465, 2020 WL 7501941, at *1 (Bankr. S.D. Tex. Dec. 21, 2020)

    a. Debtor filed petition under Subchapter V on July 7, 2020.

    b. The 341 notice included a claims bar-date of November 9, 2020, but erroneously failed to set a deadline for government proofs of claim.

    c. Following the section 1188 conference on August 12, 2020, the Court ordered the Debtor to file a plan no later than October 5, 2020.

    d. Thereafter, the debtor sought an extension to file his plan to November 23, 2020 because many of his unsecured debts were listed as disputed and he wanted to wait until the bar date had passed to file his plan.

    e. Once he realized that there was no government bar date, however, the debtor filed a motion to set the governmental claims bar date and requested a further extension to file a plan.

    f. CONCLUSIONS OF LAW

i. Section 1189, requiring that a plan be filed not later than 90 days after the order for relief is not jurisdictional, meaning that the court is not stripped of jurisdiction over the debtor's case if the debtor has not filed a plan within 90 days.

ii. Section 1189 says that the Court may extend the period for filing a plan "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable".

a) The court would rely on cases interpreting identical language in § 1221 for guidance in determining under what circumstances a court should extend a plan filing deadline.

b) The plain language of "attributable to circumstances for which the debtor should not justly be held accountable" evinces a higher standard that the "for cause" standard set forth in FRBP 9006(b) and 1121(d)(1) (the exclusivity provision).

c) "[I]n determining whether to grant the extension, this Court considers whether the need for an extension is attributable to circumstances for which Debtor is not fairly responsible or, to borrow from COLLIER, whether Debtor can 'clearly demonstrate that the inability to file a plan of reorganization was due to circumstances beyond his control.'"

iii. Court considered the following factors:

a) Whether the circumstances raised by Debtor were within his control.

- Court agrees that both the failure to set a governmental bar date and the death of his brother were not within his control and these weigh in favor of granting him additional time.

b) Whether Debtor has made progress in drafting a plan.

- Court found that the Debtor had made progress where he had resolved and settled the claims of two creditors, had reviewed all proofs of claim filed to date and reported that he intended to file 4 claim objections, and provided for the surrender of a vehicle. The only remaining issues were how to maximize his interest in an LLC (through an auction) and treat the governmental claims (which had yet to be filed).

c) Whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances,

- Court found that they were.

d) Whether any party-in-interest has moved to dismiss or convert Debtor's case or

otherwise objected to a deadline extension in any way.

- Court found that no party had objected or moved to dismiss or convert the debtor's case.

iv. "A placeholder plan is a waste of time and resources for all parties-in-interest and does not represent Congress's intent in enacting the SBRA. [T]his Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable."

2. *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020)

   a. Debtor filed a Chapter 7 case on February 10, 2020 and then moved to convert case to Chapter 11 and elect Subchapter V status. Debtor filed a timely motion to extend deadlines under Subchapter V. Deadlines to conduct status conference and to file plan may be extended based on circumstances for which Debtor should not justly be held accountable. If Debtor had filed regular Chapter 11 case, deadlines would have run from conversion. However, that is not the case with Subchapter V.

   b. Court concluded that deadlines should be extended. Because deadlines expired while Debtor was in Chapter 7, Debtor could not have complied with them. Court did not find any gamesmanship on Debtor's part in delaying conversion. Had Debtor manipulated system, ruling would have been different.

3. *In re Online King LLC*, No. 1-20-42591-las, 2021 Bankr. LEXIS 198, at *1 (Bankr. E.D.N.Y. Jan. 19, 2021)

   a. Debtor did not file a plan within 90 days of filing. Thirteen days after deadline expired, Debtor requested an extension for an additional 90 days. Debtor failed to mention that it was seeking extension after expiration of deadline. Court found that nothing in the statute prevented it from granting the extension retroactively. However, Debtor failed to establish that failure to timely file was due to circumstances for which the Debtor should not justly be held accountable. Therefore, the motion was denied.

B. Can Nonvoting Creditors be Counted?

1. *In re Bressler*, No. 20-31024, 2021 WL 126184, at *1 (Bankr. S.D. Tex. Jan. 13, 2021) Note: not a Subchapter V case

   a. Nonvotes do not satisfy the 2/3 in amount and ½ in number numerosity requirements of section 1126(c). If the creditor has not returned a written ballot in adherence with Bankruptcy Rule 3018(c), then it has not accepted or rejected the plan.

   b. Classes of claims are deemed to have accepted a plan when those accepting are the requisite sum of those that have accepted or reject the plan, as dictated by section

1126(c).

2. *In re Olson*, No. 20-23408 (RKM), 2020 Bankr. LEXIS 2439, at *1 (Bankr. D. Utah Sept. 16, 2020)

    a. Under *Ruti-Sweetwater* decision, impaired classes which did not vote are bound by classes which did vote to accept plan.

C. Plan Confirmation: What is "Disposable Income"?

1. *In re Ellingsworth Residential Community Association, Inc*., No. 6:20-bk-01346-KSJ, 2020 WL 6122645, at *1 (Bankr. M.D. Fla. Oct. 16, 2020)

    a. Debtor was a homeowners' association representing 80 homes in three developments. All homeowners pay the same quarterly assessment of $240.

    b. Unsecured creditor with a litigation judgment opposed the plan, so court considered whether the plan met the requirements of section 1191(b).

    c. Under section 1191(c), a plan is "fair and equitable" to an unsecured creditor if: (1) the plan provides that the debtor's projected disposable income received in a three-year period, or such longer period not to exceed five years, is applied to make payments under the plan; (2) there is a reasonable likelihood the debtor can make all plan payments; and (3) the plan provides remedies to protect the holder of claims or interests if payments are not made.

    d. The term "disposable income" means income from all sources less amounts reasonably necessary to be expended "for the payment of expenditures necessary for the continuation, preservation or operation of the debtor's business".

    e. Plan created a Creditors' Trust consisting of (1) 25% of all accounts received that become older than 90 days past due for three year; (2) net proceeds received from all Causes of Action; and (3) net disposable income for three years, including a special assessment of $300,000 to make these payments.

    f. Debtor's projected disposable income projects $16,000 of funds available over three years net of the $300,000 special assessment.

    g. HELD: Plan as fair and equitable.

        i. Detailed financial information is not required beyond the liquidation analysis and the projections showing an ability to make plan payments.

        ii. "Reasonable likelihood" of performance requires the Court to find that the plan "is not likely to be followed by the liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless

such liquidation or reorganization is proposed in the plan".

iii. The Court did, however, require the Debtor to obtain approval of the $300,000 special assessment within a reasonable time after confirmation.

2. *In re Patel,* 621 B.R. 245 (Bankr. E.D. Cal. 2020)

a. Not a Subchapter V case, but a lot to say about disposable income.

b. Debtors owned a motel that they leased to their wholly-owned S corporation which employed them.

c. Under plan, the unsecured class was to receive "disposable income" as that term is defined in l129(a)(15).

i. "A disposable income plan payment means actual disposable income even though the plan confirmation standard at section 1129(a)(15)(B) focuses on projected disposable income".

ii. The question here was whether "disposable income" was limited to motel revenue, or the Debtors' income from all sources.

d. HELD: Court interprets plan (applying California contract law) to mean disposable income from all sources and the references to motel revenue as a representation regarding the then-existing business plan.

e. Are loss carryforwards and depreciation accounted for in determining disposable income?

i. As disbursing agent, the Debtors had a duty to account and were fiduciaries in control of the estate while the plan was pending. Court applied California trust law and found that Debtors had a fiduciary duty to account for actual disposable income.

ii. The Revested Debtors departed from the announced business plan to branch out into trading in securities options and margin accounts without notifying or accounting to the class V creditors. The magnitude of this activity was material. Diverting funds that should have been considered for disbursement to Class V creditors, without notice to those creditors, in order to gamble in the casino games of stock options and stock investments on margin is a Plan default.

D. Cramdown Plan "Indubitable Equivalent" Objection

1. *In re Pearl Resources LLC,* 622 B.R. 236 (Bankr. S.D. Tex. 2020)

a. Debtors run the finance and administrative functions of an oil & gas enterprise. Primary

asset is an oil & gas lease located in Pecos County.

b. Court finds that the Debtor's Plan provides a "more than" adequate history in satisfaction of § 1191(1)(A).

c. The liquidation analysis, supported by testimony from the Debtor's principal, showed that the Debtor's assets far exceeded the total amount of claims that would be required to be paid if Debtors were liquidated. The Plan provides for complete satisfaction of all claims with interest. The liquidation analysis satisfies § 1191(1)(8).

d. Financial Projections: based on July 2020 oil prices, yield a net cash flow of $150,000 per month.

e. Alternatively, if the debtors are unable to successfully drill a well within a reasonable time after confirmation, they will sell a 20 percent working interest in the lease to raise sufficient capital to pay all allowed claims in full.

f. Although Debtor's performance is not dependent on the generation of disposable income, they project to be able to pay allowed claims in full within 2 years. Court finds that § 1191(c) is satisfied.

g. Section 1190(2) requires plan to provide "all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan". Judge Rodriguez characterizes this requirement as a "feasibility prerequisite".

h. Court finds that the Plan meets the requirements of § 1191(c)(3)(B) because it details remedies necessary to protect claim holders if Plan payments are not made, including the liquidation of Debtors' nonexempt assets.

i. "If all the applicable requirements in [section] 1129(a) are met, except for the projected disposable income rule of paragraph (a)(15), [section] 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under [section] 1191(a) can occur only if all impaired classes have accepted it. This, of course, is more colloquially referred to as a consensual plan".

   i. Section 1129(a)(1) Classification: The Plan properly classifies claims and interests in accordance with §§ 1122 and 1123(a)(1). The claims and interests placed in each class are substantially similar to other claims and interests in each such class. Valid business, factual, and legal reasons exist for separately classifying the various classes of claims and interests created under the Plan, and such classes, and the Plan's treatment thereof, do not unfairly discriminate between holders of claims or interests in each class. The Plan also provides for the same treatment by Debtors of each claim or interest in each respective class, thereby satisfying § 1123(a)(4).

   ii. Section1129(a)(2): The Debtor has complied with the applicable provisions of the

Bankruptcy Code because its Subchapter V plan contains a brief history of its business operations, a liquidation analysis, and projections with respect to the debtor's ability to make payments under the proposed plan of reorganization.

iii. Section 1129(a)(3): Good faith requirement and no means forbidden by law.

iv. Section 1129(a)(4): Payments for services in connection with the Plan must be approved by the court as reasonable.

v. Section 1129(a)(5): Disclose individuals who will serve as directors, officers, or voting trustee of the debtor. This plan proposes to reinstate the pre-petition management structure.

vi. Section 1129(a)(6): government approval of rates is not applicable.

vii. Section 1129(a)(7) Best interests test: Court finds liquidation analysis credible (all creditors would be paid in full).

viii. Section 1129(a)(8): Does not apply.

ix. Section 1129(a)(9): Payment of admin claims on effective date.

x. Section 1129(a)(10): Does not apply.

xi. Section 1129(a)(11): Plan not likely to be followed by liquidation or the need for further reorganization.

xii. Section 1129(a)(12): Payment of all fees payable under 28 U.S.C. § 1930, does not apply.

xiii. Section 1129(a)(13): Continuation of Retiree Benefits at level established under § 1114.

xiv. Section 1129(a)(14): Current on all DSOs.

xv. Section 1129(a)(15): Does not apply.

xvi. Section 1129(a)(16): Transfers of Property to be made in accordance with applicable laws.

j. Section 1191(b) Cramdown:

i. If all other requirements are met, Court must confirm the plan if (1) it does not discriminate unfairly and (2) is fair and equitable.

ii. Section 1191(c) provides a "rule of construction" for the "fair and equitable

requirement".

a) For secured claims, fair and equitable is determined by § 1129(b)(2)(A).

b) "The absolute priority rule has been replaced with the 'fair and equitable' requirement to protect dissenting unsecured classes similar to those requirements found in applicable chapters 12 and 13 cases and individual chapter 11 cases. The general standards for confirmation (i.e., that the Subchapter V plan does not discriminate unfairly against any impaired, non-consenting class and is fair and equitable) shall be evaluated in light of creditors' objections".

c) For unsecured claims, § 1191(c) imposes a "best efforts" test which requires debtors to commit all "disposable income" for the entire term of the Plan, a feasibility finding that debtors will be able to make those payments and requires that the plan provide appropriate remedies if payments are not made.

d) The maximum disposable income period is 5 years. "The involvement of the Court in choosing the commitment period is unique to Subchapter V cases."

e) Section 1191(c)(3)(A) also includes a feasibility test where the debtor either "will be able to make all payments under the plan" or "there is a reasonable likelihood that the debtor will be able to make all payments under the plan".

f) Section 1191(c)(3)(B) includes "appropriate remedies" to protect the holders of claims if the Debtor does not make the required plan payments.

g) *In this case, the Plan provided for payment of all objecting creditors' claims within 2 years, with interest.*

k. Secured Creditor cramdown under § 1129(b)(2)(A).

i. These requirements remain in Subchapter V.

a) "The indubitable equivalent is tied to a claim not the property securing the claim." Here, the objecting creditors have improperly focused on their pre-petition collateral and not their claim.

b) Here, there is a 6-to-1 value-to-debt equity cushion. Court had no issues finding the Debtor could remove creditors' liens and give them liens on different assets as the "indubitable equivalent."

c) Fifth Circuit has expressly found that an exchange of collateral satisfies the indubitable equivalent requirement.

d) Creditor must be fully compensated for the rights it is giving up. Secured creditor must remain oversecured beyond a reasonable doubt.

e) Under § 1123(a)(5)(E) a plan may modify any lien, including a Texas statutory mineral lien.

E. Cramdown Plan § 1111(b) Election

1. *In re Body Transit, Inc.*, 619 B.R. 816 (Bankr. E.D. Pa. 2020)

a. Debtor, which operated fitness clubs, filed bankruptcy and was granted authority to proceed under the SBRA.

b. After the debtor filed its plan, First Bank filed an election pursuant to 11 U.S.C. § 1111(b)(2) to have its undersecured claim treated as fully secured.

c. Debtor objected to the § 1111(b) election and filed a motion for valuation of the First Bank claim.

d. Per the debtor's plan, the debtor sought to (i) bifurcate the First Bank allowed claim into a secured and an unsecured component through section 506; (ii) provide for payment of First Bank's secured claim pursuant to section 1191(b); and (iii) pay nothing on account of First Bank's substantial allowed unsecured claim.

e. Debtor argued that First Bank should not be able to use § 1111(b)(2) because § 1111(b)(1)(B)(i) prevents the election when the interest is "inconsequential."

f. First Bank argued that its interest in the debtor's property is approximately $170,000 and its total claim is approximately $970,000. Therefore, its lien interest is approximately 17.5% of its claim, which is much higher than 4% held to be inconsequential by another court.

g. The court explains its analysis of its valuation conclusion (with a thorough discussion of the evidence, the debtor's witnesses, and First Bank's witnesses) and finds that the value of First Bank's interest in the Debtor's assets is $80,000.

h. The opinion does a good job of explaining the purposes for the § 1111(b) election and the incentives/tensions regarding the decision to make the election created in a traditional chapter 11 and in a Subchapter V. In a traditional chapter 11, an undersecured creditor that does not make the election may potentially hold a blocking position on confirmation. However, in a Subchapter V, the consent of the unsecured creditors is not required and there is no absolute priority rule. Accordingly, the "blocking position" for an undersecured creditor in a Subchapter V may be making the election.

i. Held: First Bank's interest is inconsequential, and therefore, First Bank may not take advantage of the § 1111(b) election.

i. "The key point here is that the 'inconsequential value' determination is not a bean counting exercise; the determination cannot be based solely on a mechanical, numerical calculation. Some consideration must be given to the policies underlying both the right to make the § 1111(b) election and the exception to that statutory right. In other words, while 'the numbers' provide an important starting point in deciding how much value is 'inconsequential,' the court also must consider other relevant circumstances presented in the case and make a holistic determination that takes into account the purpose and policy of the statutory provisions that govern the reorganization case. Analyzing this case in that fashion, I find that First Bank's $80,000.00 interest in the Debtor's property is inconsequential under 11 U.S.C. § 1111(b)(1)(B)(i)."

ii. The court reasoned that the purpose behind § 1111(b) was not served here because the value of the collateral would not be appreciating in the immediate future so as to give the debtor a windfall. Therefore, the court concluded that the interest was inconsequential.

iii. The court put a lot of weight on the fact that this was a Subchapter V case by explaining that its decision was consistent with the confirmation standards of Subchapter V and the purpose of the SBRA (only paying unsecured creditors projected disposable income over three to five years).

IV. Trustee Compensation and Employment Issues

1. *In re Tri-State Roofing*, No. 20-40188-JMM, 2020 WL 7345741, at *1 (Bankr. D. Idaho Dec. 7, 2020)

   a. Subchapter V case was consensually dismissed without a plan being confirmed.

   b. Subchapter V Trustee was appointed as a "disinterested person" by the United States Trustee under section 1183(a).

   c. Section 1194(a)(3) allows the Trustee to receive and hold funds during the case and, if the plan is not confirmed, deduct any fee owing to the Trustee before returning the remaining funds to the Debtor.

   d. Administrative expense claims are not monetary judgments but rather entitle the claimant to receive a distribution from the bankruptcy estate.

   e. Section 326(b) states: In a case *under Subchapter V of chapter 11* or chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, **but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title** for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

f. The Court believes that Congress probably intended to limit the compensation of non-standing Subchapter V trustees to 5% of payments under the plan. But it also holds that it is not free to rewrite the statute.

g. HELD: Section 326(b) does not prevent an award of compensation to the Trustee under § 326(b) nor does it place a cap on such compensation.

2. *In re Penland Heating & Air Conditioning, Inc.*, No. 20-01795-5-DMW, 2020 Bankr. LEXIS 1550, at *1 (Bankr. E.D.N.C. June 11, 2020).

a. Debtor filed Subchapter V bankruptcy on May 1, 2020.

b. Subchapter V Trustee filed application to employ attorney on May 15, 2020.

c. Held: The court denied the application to employ attorney because there was no need for the attorney's assistance considering the posture of the case.

d. The court referenced Judge Bonapfel's article recognizing the ability for a subchapter V Trustee to hire professionals but cautioning the use because of the increase in expense to the estate.

e. The court cited to the Department of Justice's handbook for Subchapter V Trustees which instructs Subchapter V Trustees to keep the statutory purpose in mind regarding hiring professionals especially when the debtor remains in possession.

f. The court found that the Trustee did not need to employ an attorney to fulfill his statutory duties. And further, the debtor was operating in possession and had employed counsel to represent it in legal matters.