

# Subchapter V vs. Chapter 13

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## Chapter 11 “Sub V” Refreshers

- Effective February 19, 2020
  - COVID caused a slow roll
  - Significant increase recently (78%)
- Designed to allow small business debtor a more efficient and less expensive manner of reorganizing under Chapter 11
- New act excludes only ‘single asset real estate’ real estate business debtors
- At least 50% of the debt arose from the business activity
- Debt limits – currently \$3,024,725 (commenced after 6/21/24)

# Chapter 11 “Sub V” Refreshers

- Shortened Timelines
  - Status conference held 60 days after entry of the order for relief
  - 14 days prior to status conference debtor must file report detailing efforts taken or which will be taken to attain a consensual plan
  - Debtor must file a plan within 90 days, unless extended by court, for matters which the ‘debtor should not justly be held accountable’



# Chapter 11 “Sub V” Refreshers

## Chapter 11 Trustee Appointed

- Oversee and monitor the case
- Facilitate the development of consensual plan of reorganization
- Make distributions under non-consensual plan, unless plan or order states otherwise
- Make a final report and file a final account of administration of the estate
- Service terminates upon substantial consummation
  - Ordinarily when distributions commence, first payment date
  - Non-consensual plans, trustee service will terminate after commitment period

# Chapter 11 “Sub V” Refreshers

- Primary Residence/Business Purpose
  - Modification of a claim secured only by a security interest in real property that is the primary residence of the debtor is **allowed** if the new value received in connection with the granting of the security interest was not used primarily to acquire the real property, **but was used primarily in connection with the small business of the debtor**



# Chapter 11 “Sub V” Refreshers

- Confirmation can be obtained without the support of any class of claims
  - Confirmation standards limited to ‘fair and equitable’ and not ‘unfairly discriminate’
  - New ‘best efforts’ test for unsecured creditors
  - New feasibility test – reasonable likelihood that the debtor will be able to make all payments under the plan
  - Absolutely priority rule and new value exception are not applicable
  - No quarterly trustee fees
  - No creditors committee will be appointed – unless court orders otherwise

# Chapter 11 “Sub V” Refreshers

- DISCHARGE

- Under consensual plan, debtor will receive discharge upon confirmation
- Under non-consensual plan, discharge does not occur until debtor completes plan payments for a period of at least 3 yrs or such longer time as the court fixes, not to exceed 5yrs.

- SERVICING RECOMMENDATIONS

- No POC Deadline – suggest 70-day internal deadline
- Status Conference
- No co-debtor stay
- No obligation for debtor to commence payments prior to confirmation
- 1111B Election deadlines – request deadline be set if not otherwise ordered
- No confirmation deadline
- No disclosure statement - plan will contain the required disclosures
- Administrative expenses paid through the plan rather than on the Effective Date
- For consensual plan – stay will terminate upon confirmation

How does Subchapter V differ  
from Chapter 13?

# Different Confirmation Consequences

- Discharge
- Property of the estate – post-petition assets and earnings
- Post-confirmation modification
- Role of trustee

# Projected Disposable Income

## Chapter 13 – §1325(b)

- Applies if trustee or unsecured creditor objects
- “Means test” standards apply to above-median debtor
- “Applicable commitment period” is five years for above-median debtor

## Subchapter V – § 1191(c)

- Applies only if *class* of creditors objects to confirmation
- “Means test” standards do not apply
- Commitment period is three to five years

# Modification of Secured Claims

## Chapter 13

- “Hanging paragraph” requires treatment of some claims secured by PMSI in personal property as fully secured
- Equal monthly payments required
- Cannot modify residential mortgage

## Subchapter V

- No hanging paragraph; PMSI claims can be bifurcated
- No requirement for equal monthly payments
- Residential mortgage can be modified in some circumstances

# Payment of administrative expenses and priority claims under the plan

## Chapter 13

- Debtor may pay administrative and priority claims (including DSO) through plan payments; no interest on tax claims

## Subchapter V

- Administrative and priority claims must be paid in full on the effective date, except taxes that may be paid, with interest, over a five-year period beginning on date of filing petition, with interest at governmental rate under § 1129(a)(9)(C)
- § 1191(e) permits payment of administrative expenses under the plan if cramdown confirmation occurs

# Post-petition Assets and Earnings

## Chapter 13 –

### §§ 1306(a), 1327(b)

- Property of the estate includes post-petition assets and earnings
- Confirmation vests property of estate in debtor unless plan or confirmation order provides otherwise – §1327(b)

## Subchapter V –

### § 1186(a)

- Post-petition assets and earnings are property of estate only after cramdown confirmation – §1115(a) does not apply (§1181(a))
- Confirmation vests property of the estate in the debtor unless plan or confirmation order provides otherwise – §1141(b)

# Post-confirmation Modification of Plan

## Chapter 13 –

### § 1329(a)

- Debtor, trustee, or unsecured creditor may modify plan

## Subchapter V –

### § 1193(b), (c)

- Only the debtor may modify plan
- No post-confirmation modification of consensual plan after “substantial consummation”

# Chapter 11 “Sub V” Case Law Update

- *Cantwell-Cleary, Co. v. Cleary Packing, LLC* (In Re Cleary Packing, LLC), 36 F.4<sup>th</sup> 509
  - *Debts described in 11 U.S.C. 523(a) can be nondischargeable as to corporate debtors, not just individual debtors, if the plan is nonconsensual.*
- *Avion LLC v. GFS Industries, LLC* (In Re GFS Industries, LLC), 647 B.R. 337 (Bankr. W.D. Tex. Nov 10, 2022)
  - *Statutory language by Judge Duncan*
  - *Section 523 dischargeability subject to both individual and corporate debtors.*

# Chapter 11 “Sub V” Case Law Update

- *In Re Macedon Consulting, Inc.* 652 B.R. 480 (EDVA)
  - *All future amounts due under an expired lease qualify as “noncontingent and liquidated” debts that should be counted towards the sub V eligibility cap.*
- *In Re Cortlandt Liquidation, LLC* (No. 20-12097), 2023 WL 1483783 (Bankr. S.D.N.Y.)
  - *Proper method for calculating the cap on lease rejection damages under section 502(b)(6)*

# Chapter 11 “Sub V” Case Law Update

- *Single Asset Real Estate Debtor*
  - *Not Eligible for subchapter V if its primary activity is the business of owning a single asset real estate 11 U.S.C. 1182(1)(A)*
  - *In Re Evergreen Site Holdings, 625 B.R. 307 (Bankr. S.D. Ohio, 2023)*
    - *Debtor who owned two adjacent properties would likely conduct business on the properties other than leasing and collecting rent. Court held that the debtor was eligible for subchapter V.*
  - *In Re Brindle Path Partners, LLC, 2024 WL 86601 (Bankr. D. Utah, 2024)*
    - *Court held that the debtor was not eligible for subchapter V, when the single asset real estate debtor was a part of development of an equestrian community- it was in four phases, that were not yet complete.*