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CHAPTER 11 AT THE SCHOOL OF SUBCHAPTER V: PART II

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CHAPTER 11 AT THE SCHOOL OF SUBCHAPTER V: PART II

*Daniel J. Bussel and Austin J. Damiani**

This Part II is the second installment of an analysis of Subchapter V. The essay notes various issues arising as the bankruptcy bar and courts adapt and apply the new procedures. It also sets Subchapter V in a historical and statutory context and suggests that experience under Subchapter V may enrich and improve chapter 11's overall performance. It highlights a fundamental tradeoff embodied in Subchapter V: Creditors of insolvent small business debtors can be forced to share reorganization value with equity in exchange for speed, efficiency, cost savings, and the finality of a payment plan with liquidation or other appropriate remedies in the event of default. How well this experiment works for distressed small businesses may influence the future reform of chapter 11 itself.

Part I, published in last month's *Bankruptcy Law Letter*,[1] noted that Subchapter V's reforms are not so novel. Many elements of Subchapter V hearken back to chapter XI of the 1938 Chandler Act's bifurcated reorganization scheme,[2] elements that were discarded in the 1978 Bankruptcy Code's codification of modern chapter 11.[3] As with the Chandler Act, the availability of a less expensive, more flexible, and more debtor-friendly reorganization track inevitably engenders litigation over debtor eligibility for the more streamlined procedure. Part I ended with a discussion of Subchapter V's nonconsensual plan confirmation provisions, which substantially relax chapter 11's cramdown rules. At first glance, the ability to swiftly confirm a nonconsensual plan in which the debtor retains equity without complying with the absolute priority rule[4] while maintaining unlimited plan exclusivity[5]—appears to overwhelmingly favor debtor reorganization over creditor protection. The net effect of these debtor-favorable features of Subchapter V is to systematically redistribute any excess over the judicially determined value of the collateral away from the secured and unsecured creditors and in favor of the equity interest.

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IN THIS ISSUE:

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This raises the question of what value there is, if any, for creditors in the move from chapter 11 to Subchapter V, if their ability to capture much (if any) of the collateral's going concern value is taken away. The promise of Subchapter V to creditors is that the speed, cost-effectiveness and finality that may be achieved through a Subchapter V reorganization will reduce the risk that the forced liquidation value that exists at the inception of the case will be squandered in legal expenses, delay, and false starts on failed reorganization efforts.[6]

Moreover, from a practical perspective, at least for sole proprietorships or family businesses, allocating going concern value primarily to equity may be reasonable given the identity between ownership and management. Substantially all the going concern premium that exists in such firms may be fairly attributable to the continuing efforts and entrepreneurial value contributed by the equity owners. From a creditor perspective, the reasonableness of this shift towards reorganization under existing ownership, however, depends in significant part on the ability to obtain prompt forced liquidation at low cost if confirmation standards cannot be met, or if confirmed Subchapter V plans fail.[7]

This Part II addresses Subchapter V's heightened feasibility requirement, a principal counterbalance to its debtor-favorable cramdown standard. Self-executing creditor remedies built into the plan buttress plan feasibility and reduce creditor risk by aligning debtor incentives with creditor recovery pursuant to Subchapter V's disposable income payment provisions. Part II then provides an overview of the controversy surrounding the scope of discharge in Subchapter V, including the controversial question of the availability of nondebtor releases for the affiliates and principals of Subchapter V debtors. This essay then concludes with a reflection on how Subchapter V may influence the reform of chapter 11 practice more broadly.

I. FEASIBILITY

Chapter 11, of course, has always had a feasibility requirement for plan confirmation, but it is understood that bankruptcy court approval of a plan as feasible is no guarantee of a successful reorganization. The feasibility finding only requires a showing by the preponderance of the evidence that there is a reasonable probability of success.[8] Plans often fail,[9] and the feasibility standard is loosely applied absent a well-funded opposition from a dissenting class.[10] The mere potential for failure of the plan is not sufficient to negate the feasibility of a proposed chapter 11 reorganization plan.[11]

Unless all impaired classes accept the plan, Subchapter V elevates the feasibility standard from chapter 11's baseline.[12] The Subchapter V debtor has one of two options. It can make a heightened showing that it "will" be able to make all the payments required by the plan. Presumably, this will require a stronger showing (per-

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haps by clear and convincing proof) than chapter 11's "more likely than not" probability of success.[13] Alternatively, the plan will be confirmable if (i) there is a "reasonable likelihood" of making all the plan payments *and* (ii) a mechanism is built into the plan for "appropriate" creditor remedies such as liquidation of non-exempt assets.[14] By providing creditors with either an elevated degree of confidence in the feasibility finding or a remedy in the event of default under the plan that gives the creditor either an alternative source of payment or the ability to compel a liquidation, creditors should have greater assurance of finality in Subchapter V than they would receive in chapter 11.

In *Curiel*, the Ninth Circuit BAP found that the debtor's Subchapter V plan could not even meet the "50-yard line plus an inch" standard to feasibility applied by the bankruptcy court because of the lack of evidentiary support for the finding below that the debtor would be able to meet the monthly payments called for by the plan or be able to sell the real property securing the objecting creditor's mortgage for an amount greater than the balloon payments scheduled at the end of the five-year term of the plan.[15] Curiel's self-serving assertions of feasibility and unsupported projections were undermined by its own historical operating performance. The BAP found them insufficient to establish a reasonable probability that it would be able to perform the plan.[16]

Although the objecting creditor prevailed on this basis, the *Curiel* court also discussed in *dicta* the nature of the "appropriate" creditor remedies necessary to sustain a feasibility finding based on "reasonable likelihood" under section 1191(c)(3)(B). It criticized the default provisions in Curiel's plan, which left the secured party to exercising remedies provided by otherwise applicable law on 60 days' notice, as "toothless" thereby suggesting that they would have not been found "appropriate" had the creditor attacked the feasibility finding below on that ground. It noted an important relationship between the strength of the creditor's default remedies and the likelihood of default. If the plan were to provide the creditor with powerful remedies upon default (such as a prompt auction, stipulated foreclosure or automatic deed in lieu), the debtor would be strongly incentivized to obtain the money necessary to refinance the payments required by the plan, thereby lessening the likelihood of default, and perhaps establishing feasibility.[17]

Foreclosure or other state law remedies may be appropriate for secured creditors, but in *In re Channel Clarity Holdings LLC*, a case with no real property, $300,000 in liquid assets, and $4 million in unsecured claims, the bankruptcy court found ordinary state law remedies insufficient to meet the "appropriate remedies" standard.[18] The court hypothesized that the estate might well be depleted by the time a default occurred, and unsecured creditors would be left to "race to the courthouse."[19] The bankruptcy court suggested immediate conversion to chapter 7 upon default as an alternative remedy.[20]

These cases seem to recognize that Subchapter V plans offer debtors a very favorable mechanism for dealing with business debts on a basis that promises their creditors little more than liquidation value over three to five years' time, but that the availability of this form of relief ought to be a one-time affair. If the debtor defaults on its Subchapter V plan, prompt liquidation or payment of creditor claims by alternative means should be required. Subchapter V should not become Subchapter X or XV based on repeated defaults under confirmed plans.

II. DISCHARGE & THIRD-PARTY RELEASES

Perhaps no Subchapter V issue has generated as much heat as the fight over whether the chapter 7 exceptions to individual discharge apply to corporate debtors in Subchapter V cramdowns. From a chapter 11 policy perspective, saddling reorganizing corporate debtors with nondischargeable debts seems bizarre. Those exceptions do not apply to corporations in chapter 11, and to make them applicable to entities in Subchapter V cramdowns—which will be the usual route to confirmation—severely limits the utility of Subchapter V for corporations. Congress in 1978 expressly rejected the chapter XI practice of incorporating discharge exceptions into reorganization proceedings. So the bankruptcy reaction to assertions of corporate nondischargeability in Subchapter V is quite naturally: "Why are we even having this discussion? This is a battle that we fought and won long ago."[21]

The reason we are having this discussion, of course, is that now two Courts of Appeals have spoken on the issue and both have concluded that the § 523 exceptions do apply in Subchapter V cramdowns.[22] These decisions acknowledge that the applicable statutes seem to conflict and could be read, consistent with chapter 11 policy, to make the exceptions applicable only to individuals in Subchapter V cramdown. They note, however, that Subchapter V's discharge seems to be more closely modeled after chapter 12's discharge provision than chapter 11's, and that there is some authority under chapter 12 for applying the chapter 7 exceptions to the chapter 12 discharge (without distinguishing between cramdown and consensual plans).[23] But these courts go on to claim that policy and equity are consistent with tightening Subchapter V discharge when plans were confirmed nonconsensually because other traditional creditor protections from nonconsensual confirmation are stripped away by Subchapter V.

Of course, nothing in the legislative record indicates that Congress intended to codify such a compromise. Moreover, from a structural point of view, consistent with the overall debtor favorable *gestalt* of Subchapter V, it makes far more sense to see the distinction in scope of discharge depending on whether or not there is a cramdown as an extra incentive for *individual* debtors to pursue consensual Subchapter V plans. Individual debtors cannot escape the chapter 7 limitations on discharge by filing individually in chapter 11 even when they obtain the requisite class consents. Subchapter V thus *strengthens* the discharge for eligible individual debtors who obtain the consent of all impaired classes. It should not *weaken* the discharge otherwise available to corporate debtors under chapter 11. These provisions were intended to incrementally *encourage*—not discourage—the use of Subchapter V by eligible debtors. As Ralph Brubaker has noted, we learned long ago from the chapter XI experience that imposing limitations on small business discharge in reorganization did not work.[24] As Bonapfel & Schaaf, conclude:

> Perhaps Congress in 2019 had a different view of exceptions to a corporation's discharge in the case of cramdown confirmation in a subchapter V case than Congress in 1978. But it is difficult to conclude that, in enacting a statute universally proclaimed to have the purpose of facilitating reorganization of smaller businesses by, among other things, eliminating the absolute priority rule in a cramdown situation, Congress in 2019 intended to re-introduce all the problems with exceptions to the discharge of a corporation that it eliminated over 50 years earlier. It is even more difficult, if not impossible, to conclude that it did so without any mention of it.[25]

. . .

Finally, we come to nonconsensual third-party releases, the hottest issue today in bankruptcy. Nonconsensual third party releases outside of the mass-asbestos cases are not permitted in the Fifth, Ninth, and Tenth Circuits,[26] and the bankruptcy community continues to wait with bated breath for the Supreme Court decision in *Purdue Pharma*[27] to see if they will continue to be permitted anywhere. It is a bit jarring to see a doctrine that is nominally tied to rare and exceptional cases pop up in small business cases.[28] But small business debtor principals do sometimes seek personal releases for themselves and other nondebtor affiliates in Subchapter V, as chapter 11 debtor principals and their affiliates do in their cases. Thus, in *In re Hal Luftig Co.*, a Subchapter V cramdown plan containing a nondebtor release for the corporate debtor's principal was overturned on appeal.[29] The bankruptcy arose from a $2.6 million judgment awarded against the production company of the Broadway musical *Kinky Boots*, jointly and severally with its owner.[30] The district court cast doubt on the permissibility of nondebtor releases more generally in Subchapter V,[31] while admonishing the bankruptcy court for approving the third-party release notwithstanding the nonconsensual nature of the plan. It noted that overwhelming consent of the affected creditors is a key justification supporting nonconsensual nondebtor releases in those cases where they have been approved.[32]

In re Central Florida Civil, LLC,[33] is a Subchapter V case in which the court enjoined enforcement of personal guaranties against the nondebtor principals of the Subchapter V debtor during the five-year period of its plan notwithstanding that the objecting creditors were not receiving full payment of their claims. The result apparently turned on the court's finding that the released principals' services were necessary for the reorganization to succeed and that many other guaranteed creditors had consented to the plan enjoining enforcement of their guaranties during the term of the plan. The court also relied on the fact that the plan injunction would toll the statute of limitations on the claims against the guarantors so they could enforce their guarantees after the plan was completed. These justifications for the injunction are reminiscent of the controversial *Otero Mills* case,[34] in which a bank holding a guarantee from the debtor's principal in a chapter 11 case was enjoined from enforcing the guarantee during the pendency of the chapter 11 case so the guarantor could fund the debtor's plan.

Even accepting that in *Central Florida* the principals' services were necessary to the plan and that the plan was in the interest of employees and most of the creditors, it remains unclear why enjoining collection from the guarantors for the five-year term of the plan was necessary to its success, whether or not a class of guaranteed unsecured creditors overwhelmingly consented to release the owners, or why the owners should not file for bankruptcy relief personally if they want relief from personal debts. Perhaps the net disposable income tests applicable to individuals in chapter 11, Subchapter V, and chapter 13, which limit individual debtors to retaining income sufficient to maintain themselves and their dependents until their debts are paid in full, are overly harsh. But absent some express congressional authorization, a nondebtor injunction against enforcement of a guaranty in an affiliate's Subchapter V case does not seem to be the appropriate mechanism for ameliorating that hardship. Conceptually, the bankruptcy court in *Central Florida* may be correct in believing there is a role for third-party releases of principals in small business reorganizations where the principals' contributions are essential to success and the guaranteed creditors overwhelmingly agree to release the owners in order to induce them to contribute those essential services and property to the reorganization effort. But Subchapter V as currently constituted fails to furnish an appropriate framework for authorizing and regulating third-party releases.[35]

Whatever one thinks of third-party releases in chapter 11 generally,[36] Subchapter V seems particularly ill-suited to afford this form of nonconsensual nondebtor relief. The absence of robust disclosure, creditors' committees, absolute priority, voting, creditor plan alternatives, the small dollars involved in these cases, the typically low percentage recoveries for unsecured creditors, and the lack of any overriding public interest beyond the general pro-reorganization policy of Subchapter V, all suggest that the established standards for granting third-party releases in those jurisdictions that permit them at all cannot be met in these cases.[37]

III. CONCLUSION: LEARNING FROM SUBCHAPTER V

As the ABI recently noted after completing its yearlong study, Subchapter V remains in its infancy, and it is premature to make any final assessment or draw final lessons from the limited experience we have had so far under the new statute.[38] Nevertheless, it is not too early to observe that over the last 150 years, the warp and woof of bankruptcy reorganization law has been the tension between the push from outsiders for greater regulation of the process to prevent perceived abuses, and the desire within the bankruptcy community for greater flexibility in order to achieve more efficient, less costly, and more successful reorganizations.

Subchapter V is a novel and promising experiment that represents a decisive move in favor of more flexibility for small business debtors. As noted above,[39] the early reviews are very favorable. Meanwhile complaints about the cost and difficulty of the standard chapter 11 process fester and attempts to creatively find work-arounds increasingly dominate standard chapter 11 practice. We may be on the threshold of discovering that some flexible Subchapter V practices, perhaps subject to somewhat greater regulation, may be readily adapted to larger reorganizations to increase efficiency, reduce costs, and achieve more successful outcomes. The experience of chapter XI ultimately largely supplanting and then serving as a benchmark for reforming chapter X, may repeat itself in the guise of a successful Subchapter V encroaching on the territory of chapter 11 and ultimately enriching and improving chapter 11 generally.

Some Subchapter V innovations seem to be readily adapted for chapter 11 practice. Do we really need the one-impaired-consenting class rule at all?[40] Do disclosure statements really need to do that much more than summarize the debtor's history and operation and provide a liquidation analysis and financial projections?[41] If so, how much more? Does chapter 7 nondischargeability policy really need to be dragged into chapter 11 for individuals confirming fully consensual plans?[42]

But Subchapter V also raises a far more fundamental issue concerning the role of the absolute priority rule in chapter 11. That rule has been viewed as a central principle of reorganization law for more than a century at least by the Article III courts and lawmakers.[43] Market-oriented academics have consistently rallied to its defense, arguing that it provides certainty for financiers that is socially desirable both from *ex-ante* and *ex-post* perspectives.[44]

The bankruptcy community, however, has long had a love-hate relationship with absolute priority. Early reorganization law was largely premised on relative priority, not absolute priority[45] and the Supreme Court's narrow endorsement of absolute priority in *Boyd*[46] was viewed with shock and dismay.[47] Famously, chapter XI abandoned absolute priority and *Los Angeles Lumber* cracked open a door to its evasion in chapter X through its new value exception.[48] The 1973 Commission sought to water down the rule by turning it into a collective, waivable right and expanding the new value exception, but succeeded only in the former.[49]

Later, a farm depression in the early 1980s, coupled with the Supreme Court's refusal to endorse a sweat equity exception to the rule,[50] caused Congress to abandon the rule in family farmer cases.[51] Early practice under the 1978 Code seemed to honor the rule largely in the breach by routinely including distributions on account of arguably out-of-the-money equity in consensual plans.[52] Gifting,[53] structured dismissals,[54] and a variety of other controversial priority-altering practices were later experimented with as work-arounds.[55] ABI has sought unsuccessfully to reintroduce the idea of relative priority through its "redemption option value" and "363X" legislative proposals.[56]

Subchapter V, like chapter XI, and chapter 11 itself, may prove to be a watershed event in the history of *Boyd's* "fixed principle" of absolute priority.[57] If the present consensus that Subchapter V is working holds and strengthens over time, that should generate pressure to open access to Subchapter V to more and larger firms and, ultimately, further reform of chapter 11.[58]

In Subchapter V we see absolute priority exchanged for a time-limited priority claim against future operating cash flow plus a tightened one-bite-at-the-apple concept of feasibility absent a fully-consensual plan.[59] Certainly there are important differences in allocating the going concern value between seniors and juniors, debt and equity, in cases where ownership and management are not wedded together, as they are in typical sole proprietorships and small family businesses. One wonders, nevertheless, whether aspects of this core concept can be translated into large chapter 11 cases involving complex capital structures and if so, how. Pressure to relax, then tighten, then relax, traditional understandings of absolute priority has been a constant theme in reorganization practice for more than a century. We have been in a tightening phase for 30 years, but Subchapter V—like chapter XI before it—may demonstrate that it is time for the pendulum to swing back. If so, a more flexible chapter 11 process may prove to be the greatest legacy of Subchapter V.

ENDNOTES:

[1]Daniel J. Bussel & Austin J. Damiani, *Chapter 11 at the School of Subchapter V: Part I*, 44 Bankr. L. Letter, June 2024, at 1 [hereinafter "Part I"]. Unless otherwise defined here, capitalized terms herein carry the meaning ascribed to them in Part I.

[2]Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840; *see generally*, Note, *Requirements for Filing Petition under Chapter XI of the Chandler Act*, 49 Yale L.J. 927 (1940).

[3]*See* H.R. Rep. No. 93-137, pt. 1, at 23 (1973).

[4]*Compare* § 1129(b)(2)(B) (absolute priority rule) *with* § 1191(c) (disposable income test). The Subchapter V version of "absolute priority" in effect rejects the traditional understanding of absolute priority in chapter 11, as set forth in Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) P 77924 (1999), Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 204-05, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988), and Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939), by authorizing nonconsensual confirmation of a plan in which an insolvent debtor's equity is left unimpaired notwithstanding the lack of a market-tested contribution of money or money's worth in new value.

[5]*Compare* § 1121 (debtor plan exclusivity terminable for cause and in any event limited to no more than 18 months from the order for relief) *with* § 1189(a) (only the debtor may file a Subchapter V plan).

[6]In its extensive review of the available data, the ABI reports that "Subchapter V debtors are confirming plans at higher rates, more quickly, and at lower costs than non-Subchapter V small business cases and regular Chapter 11 cases," and that debtor refiling rates under Subchapter V are "extremely low." Am. Bankr. Inst., Final Report of the American Bankruptcy Institute Subchapter V Task Force 2, 5 (2024), https://subvtaskforce.abi.org/. *See also*, Edith Hotchkiss, Benjamin Iverson & Xiang Zheng, *Can Small Businesses Survive Chapter 11?* (Mar. 24, 2024), https://ssrn.com/abstract=4726391 (regression-discontinuity and difference-in-differences analysis shows that many small businesses reorganize under Subchapter V that otherwise would have been liquidated, creditor recoveries are at least as high in Subchapter V as in similar small business reorganizations, and post-bankruptcy survival rates are no lower).

[7]Part I, *supra* note 1, text at nn.104-108.

[8]§ 1129(a)(11) (requiring the court to find that "[c]onfirmation of 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."). In chapter 11, the feasibility standard has been operationalized as a "reasonable probability of success." In re Acequia, Inc., 787 F.2d 1352, 1364, 14 Bankr. Ct. Dec. (CRR) 595, Bankr. L. Rep. (CCH) P 71111 (9th Cir. 1986).

[9]A 2014 study found that approximately 18.25% of those independent entities emerging from bankruptcy under confirmed chapter 11 plans subsequently refiled. Edward I. Altman, *Revisiting the Recidivism—Chapter 22 Phenomenon in the U.S. Bankruptcy System*, 8 Brook. J. Corp. Fin. & Com. L. 253, 257 (2014).

[10]In re Orfa Corp. of Philadelphia, 129 B.R. 404, 410 (Bankr. E.D. Pa. 1991) ("The standards for determining plan feasibility are not rigorous."). One prominent example of a chapter 11 plan that nevertheless failed to pass the feasibility test is Judge Sontchi's 2016 unpublished opinion in In re Paragon Offshore PLC, 2016 WL 6699318 (Bankr. D. Del. 2016). After subsequent confirmation of a revised plan the appeal of this ruling was dismissed on procedural grounds. In

re Paragon Offshore plc, 597 B.R. 748, 760 (D. Del. 2019), aff'd, 2022 WL 1055574 (3d Cir. 2022).

[11]In re Seasons Partners, LLC, 439 B.R. 505, 515 (Bankr. D. Ariz. 2010), order confirmed, 2010 WL 6556774 (Bankr. D. Ariz. 2010). *See also* In re W.R. Grace & Co., 475 B.R. 34, 115 (D. Del. 2012), stay pending appeal denied, (3rd Circ. 12-2966)(June 27, 2012) and aff'd, (3rd Cir. 12-1402)532 Fed. Appx. 264 (3d Cir. 2013) and aff'd, (3rd Cir. 12-1402)729 F.3d 311, 58 Bankr. Ct. Dec. (CRR) 113 (3d Cir. 2013) and aff'd, (3rd Cir. 12-1402)729 F.3d 332, 58 Bankr. Ct. Dec. (CRR) 112 (3d Cir. 2013) ("In making this finding, the bankruptcy court need not require a guarantee of success, but rather only must find that 'the plan present[s] a workable scheme of organization and operation from which there may be reasonable expectation of success.' ") (citations omitted). Speculative prospects of failure cannot defeat feasibility. *See* In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 762 (Bankr. S.D. N.Y. 1992) ("The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds").

[12]In addition to satisfying the traditional standard of feasibility set forth in § 1129(a)(11), if the debtor seeks nonconsensual confirmation of a Subchapter V plan, it must meet the heightened standard of feasibility in § 1191(c)(2) to meet the "fair and equitable" standard of § 1191(b). In re Pearl Resources LLC, 622 B.R. 236, 269 (Bankr. S.D. Tex. 2020), subsequent determination, 651 B.R. 285 (Bankr. S.D. Tex. 2023) ("The new requirement fortifies the more relaxed feasibility test that § 1129(a)(11) contains.").

[13]§ 1191(c)(3)(A).

[14]§ 1191(c)(3)(B)(i) ("reasonable likelihood"); § 1191(c)(3)(B)(ii) ("appropriate" remedies "[. . .] which may include the liquidation of nonexempt assets . . ."). The statute was amended to retroactively apply this bifurcated standard to all cases pending on June 21, 2022, and thereafter by *The Bankruptcy Threshold Adjustment and Technical Corrections Act*, Pub. L. No. 117-151, § 2(f), 136 Stat. 1298, 1299 (2022).

[15]In re Curiel, 651 B.R. 548, 72 Bankr. Ct. Dec. (CRR) 168, 121 Fed. R. Evid. Serv. 1936 (B.A.P. 9th Cir. 2023) (reversing Subchapter V confirmation order on feasibility grounds), *appeal docketed* (9th Cir. July 31, 2023).

[16]*Id.* at 566. Other cases, however, have found feasibility on the basis of "expert" testimony tendered by the debtor itself or its own professionals. In re Moore & Moore Trucking, LLC, 2022 WL 120189, at *4 (Bankr. E.D. La. 2022) (finding feasibility standard met by credible testimony from debtor's accountant); In re Pearl Resources LLC, 622 B.R. 236, 269-70 (Bankr. S.D. Tex. 2020), subsequent determination, 651 B.R. 285 (Bankr. S.D. Tex. 2023) (finding feasibility standard met by credible testimony from the debtor, an oil exploration "expert," in conjunction with creditor remedies built into plan).

[17]In re Curiel, 651 B.R. at 562, n.11.

[18]In re Channel Clarity Holdings LLC, 2022 WL 3710602, at *16 (Bankr. N.D. Ill. 2022); *cf.,* In re Samurai Martial Sports, Inc., 644 B.R. 667, 691, 71 Bankr. Ct. Dec. (CRR) 259 (Bankr. S.D. Tex. 2022) (finding plan remedies "marginally sufficient" that called for state law collections to proceed after a 30-day default to creditors and as to the trustee, immediate conversion or dismissal upon a second default in a calendar year).

[19]In re Channel Clarity Holdings LLC, 2022 WL 3710602, at *16 (Bankr. N.D. Ill. 2022).

[20]*Id.*

[21]All of this and more is laid out comprehensively in a wonderful article by Paul Bonapfel & Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to the Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under § 1191(b)?* 32 J. Bankr. L. & Prac. 399 (Dec. 2023). Unsurprisingly, the great majority of bankruptcy judges facing the issue have resolved the issue by finding that the chapter 7 exceptions do not apply to corporate debtors under Subchapter V. Matter of GFS Industries, L.L.C., 99 F.4th 223, 2024 WL 1644229, at *1, n. 3 (5th Cir. 2024) (citing lower courts holding Subchapter V corporate debtors, as in chapter 11, are not subject to the nondischargeability exceptions of § 523(a)); *see also,* Bill Rochelle, *Eight Lower Courts Disagree with the Fourth Circuit on Sub V Nondischargeability*, Am. Bankr. Inst.: Rochelle's Daily Wire, (Feb. 13, 2024), https://www.abi.org/newsroom/daily-wire/eight-lower-courts-disagree-with-the-fourth-circuit-on-sub-v-nondischargeability; *but see* In re Van's Aircraft, Inc., No. 23-62260-DWH11, 2024 WL 2947601 (Bankr. D. Or. June 11, 2024) (holding that § 523(a) exceptions to discharge may apply to corporate debtors in Subchapter V).

[22]In re Cleary Packaging, LLC, 36 F.4th 509 (4th Cir. 2022); Matter of GFS Industries, L.L.C., 99 F.4th 223 (5th Cir. 2024).

[23]*Cleary Packaging, LLC*, 36 F.4th at 517; Matter of GFS Industries, L.L.C., 99 F.4th 223, 2024 WL 1644229, at *1 (5th Cir. 2024). *But see* Bonapel & Schaaf, *supra* note 21, at 411-19 (discussing the divided authority over the scope of the chapter 12 discharge for corporate debtors).

[24]Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am.

Bankr. Inst. L. Rev. 757, 765-66 (2005) (the comprehensive scope of the chapter 11 discharge reflects Congress' "considered judgment that any corporate discharge exception 'would leave an undesirable uncertainty surrounding reorganizations that is unacceptable.' ") (quoting 124 Cong. Rec. 34,008 (1978) (statement of Sen. DeConcini); 124 Cong. Rec. 32,408 (1978) (statement of Rep. Edwards)).

[25]Bonapfel & Schaaf, *supra* note 21, at 422-23.

[26]*See* In re Pacific Lumber Co., 584 F.3d 229, 252, 52 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81642 (5th Cir. 2009); In re Lowenschuss, 67 F.3d 1394, 1401, 34 Collier Bankr. Cas. 2d (MB) 544, Bankr. L. Rep. (CCH) P 76673, 33 Fed. R. Serv. 3d 249 (9th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600-01, 21 Bankr. Ct. Dec. (CRR) 320, 24 Collier Bankr. Cas. 2d (MB) 1012, Bankr. L. Rep. (CCH) P 73754 (10th Cir. 1990), opinion modified, 932 F.2d 898 (10th Cir. 1991).

[27]In re Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023), cert. granted, 144 S. Ct. 44, 216 L. Ed. 2d 1300 (2023).

[28]As Justice Breyer warned, "once the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case.' " Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 470, 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017) (quoting Rudzik, *A Priority Is a Priority Is a Priority—Except When It Isn't*, 34 Am. Bankr. Inst. J. 16, 79 (2015)).

[29]In re Hal Luftig Company, Inc., 657 B.R. 704, 73 Bankr. Ct. Dec. (CRR) 95, 2024 WL 1197702, at *3 (S.D. N.Y. 2024), certificate of appealability denied, 2024 WL 1892256 (S.D. N.Y. 2024), *appeal docketed*, No. 24-890 (2d Cir. Apr. 3, 2023).

[30]*Id.* at *1. Incidentally, the musical *Kinky Boots* involves an out-of-court workout for a failing shoe factory reorganizing its business by pivoting its product line to fetish footwear.

[31]*Id.* ("[E]ven if nonconsensual releases may be available in small business reorganizations, this is not a case in which it should be permitted.").

[32]*Id.* at *3. For the seven-factor analysis some courts have applied in assessing nondebtor releases, *see, e.g.*, In re Purdue Pharma L.P., 69 F.4th at 78; In re Dow Corning Corp., 280 F.3d 648, 658, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 Fed. App. 0043P (6th Cir. 2002) (rejected by, In re PTI Holding Corp., 346 B.R. 820 (Bankr. D. Nev. 2006)).

[33]In re Central Florida Civil, LLC, 649 B.R. 77, 86 (Bankr. M.D. Fla. 2023).

[34]In re Otero Mills, Inc., 25 B.R. 1018, 9 Bankr. Ct. Dec. (CRR) 1400, 7 Collier Bankr. Cas. 2d (MB) 1017 (D.N.M. 1982) (affirming stay of bank suit on a guarantee from the debtor's owner Dugan pending the debtor's reorganization on the ground that Dugan was contributing assets to the debtor as part of the pending reorganization); *contra* Matter of Supermercado Gamboa, Inc., 68 B.R. 230, 234 (Bankr. D. P.R. 1986) (criticizing *Otero Mills*).

[35]*See* Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 Am. Bankr. L.J. 684, 728-35 (2024).

[36]*Id.* at 728-35.

[37]In re Dow Corning Corp., 280 F.3d 648, 658-59, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 Fed. App. 0043P (6th Cir. 2002) (rejected by, In re PTI Holding Corp., 346 B.R. 820 (Bankr. D. Nev. 2006)); In re Millennium Lab Holdings II, LLC., 945 F.3d 126, 139, Bankr. L. Rep. (CCH) P 83470 (3d Cir. 2019); In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 937-38, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994). *See also*, In re Purdue Pharma L.P., 69 F.4th at 78.

[38]Am. Bankr. Inst., Final Report of the American Bankruptcy Institute Subchapter V Task Force 4 (2024), available at: https://subvtaskforce.abi.org/.

[39]*See supra* note 6.

[40]§ 1129(a)(10) is inapplicable in Subchapter V under 1191(b). Some question whether it serves any legitimate purpose in chapter 11. *ABI Commission to Study the Reform of Chapter 11*, 23 Am. Bankr. Inst. L. Rev. 1, 257-58 (2015); Gregory K. Jones, Comment, *The Classification and Cram Down Controversy in Single Asset Bankruptcy Cases: A Need for the Repeal of Bankruptcy Code Section 1129(a)(10)*, 42 UCLA L. Rev. 623, 647-48 (1994).

[41]*Compare* § 1125 *with* § 1190(1).

[42]*Compare* §§ 1123(a)(8), (b)(5) & 1129(a)(15) *with* §§ 1190(3) & 1191(b).

[43]Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464, 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017) ("The Code's priority system constitutes a basic underpinning of

business bankruptcy law.").

[44]Mark Roe & Michael Simkovic, *Bankruptcy's Turn to Market Value*, 92 U. Chi. L. Rev. (forthcoming 2025); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 Va. L. Rev. 1235, 1245 (2013).

[45]Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 Sup. Ct. Rev. 393, 401-08 (1999); Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 81-83 (1991).

[46]Northern Pac. R. Co. v. Boyd, 228 U.S. 482, 507, 33 S. Ct. 554, 57 L. Ed. 931 (1913).

[47]John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 Mich. L. Rev. 963, 972 (1989); James M. Rosenberg, *Reorganization-The Next Step*, 22 Colum. L. Rev. 14, 14 (1922) ("The *Boyd* case was received by the reorganization bar and bankers with something akin to horror. It has been a nightmare to the lawyer who presents a decree for the sale of property to a reorganization committee.").

[48]Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 117, 60 S. Ct. 1, 84 L. Ed. 110 (1939).

[49]H.R. Rep. No. 93-137, Pt. 1, at 21, 27 (1973).

[50]Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 204-05, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988).

[51]§§ 1201 *et seq*. (chapter 12).

[52]Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. Pa. L. Rev. 125, 126 (1990); Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure under Chapter 11 of the Bankruptcy Code*, 57 Am. Bankr. L.J. 99 (1983).

[53]*Compare* In re DBSD North America, Inc., 634 F.3d 79, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011) and In re Armstrong World Industries, Inc., 432 F.3d 507, 513-14, 45 Bankr. Ct. Dec. (CRR) 222, 55 Collier Bankr. Cas. 2d (MB) 789, Bankr. L. Rep. (CCH) P 80434 (3d Cir. 2005) with In re SPM Mfg. Corp., 984 F.2d 1305, 1313, 23 Bankr. Ct. Dec. (CRR) 1529, 28 Collier Bankr. Cas. 2d (MB) 451, Bankr. L. Rep. (CCH) P 75090 (1st Cir. 1993) and In re World Health Alternatives, Inc., 344 B.R. 291, 298, 46 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2006).

[54]Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464, 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017).

[55]*Id*.

[56]*ABI Commission to Study the Reform of Chapter 11*, 23 Am. Bankr. Inst. L. Rev. 1, 221, 225 (2015).

[57]Northern Pac. R. Co. v. Boyd, 228 U.S. 482, 507, 33 S. Ct. 554, 57 L. Ed. 931 (1913).

[58]Ironically, as this Article goes to press, we are taking an interim step backward on access to Subchapter V. Notwithstanding the lobbying efforts of the bankruptcy community and bipartisan extension legislation pending in the Senate, on June 21, 2024, Congress allowed the CARES Act legislation increasing Subchapter V's maximum debt cap to $7.5 million to lapse. Given the consensus supporting extension, it is not too much to hope that Congress will promptly enact the pending corrective legislation with a retroactive effective date (as was done in 2022). *See* Dietrich Knauth, *Small Business Bankruptcy Rules Get Tighter After US Law Expiration*, Reuters (June 21, 2024), https://www.reuters.com/legal/government/small-business-bankruptcy-rules-get-tighter-after-us-law-expiration-2024-06-21/.

[59]*See* Part I, *supra* note 1, at nn.85-108 and accompanying text.

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