

2025 EDITION

# Bankruptcy Practice in Virginia

---

EDITORS

Hon. Kevin R. Huennekens  
H. David Cox



Continuing Legal Education by the Virginia Law Foundation



## Bankruptcy Practice in Virginia

Copyright © 2004, 2008, 2012, 2017, 2025  
Virginia Law Foundation. All rights reserved.

This electronic book is licensed for use on a single personal computer only. It must be treated in the same way as the print edition. It may not be copied, made accessible on a computer network, or otherwise shared by electronic or optical means. No derivative works may be made, but the purchaser may electronically copy short passages to include in memoranda, briefs, and similar documents.

This publication is presented with the understanding that the authors, the reviewers, and the publisher do not render any legal, accounting, or other professional service. It is intended for use by attorneys licensed to practice law in Virginia. Because of the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, an attorney using this material must always research original sources of authority and update information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of this material. The views expressed herein do not necessarily represent those of the Virginia Law Foundation.

Citations to statutes, rules, and regulations are to the versions in effect at the time the material was written, unless otherwise noted. An effort has been made to ensure the material is current as of April 2025.

Click the left mouse button twice on the link below to view tips on using Virginia CLE Electronic Books (requires Adobe® Reader version 6 or later).



VIRGINIA LAWYERS PRACTICE HANDBOOK

**BANKRUPTCY PRACTICE  
IN VIRGINIA**

*Fifth Edition*

Hon. Kevin R. Huennekens, Editor  
United States Bankruptcy Court, Eastern District of Virginia / *Richmond*

H. David Cox, Editor  
Cox Law Group PLLC / *Lynchburg*

 VirginiaCLE®  
Publications

## TABLE OF CONTENTS

|   |        |
|---|--------|
| <i>Chapters and Authors</i> .....                     | iii    |
| <i>About the Editor and Authors</i> .....             | vii    |
| <i>In Memoriam</i> .....                              | xxvii  |
| <i>Acknowledgments</i> .....                          | xxix   |
| <i>Preface</i> .....                                  | xxxii  |
| <i>Electronic Forms: Instructions and Table</i> ..... | xxxiii |

### Volume 1

#### CHAPTER 1: OVERVIEW OF BANKRUPTCY LAW

|     |  |    |
|-----|--|----|
| 1.1 | INTRODUCTION.....  | 1  |
| 1.2 | HISTORY OF BANKRUPTCY .....  | 2  |
|     | 1.201 Colonial United States .....   | 2  |
|     | 1.202 The Bankruptcy Act of 1898 .....   | 3  |
|     | 1.203 The Chandler Act .....   | 4  |
|     | 1.204 The Bankruptcy Reform Act of 1978 .....  | 4  |
|     | 1.205 The Bankruptcy Judges, United States Trustees, and<br>Family Farmer Bankruptcy Act of 1986 ..... | 6  |
|     | 1.206 The Bankruptcy Abuse Prevention and Consumer<br>Protection Act .....                             | 6  |
|     | 1.207 The Coronavirus Aid, Relief, and Economic<br>Security Act .....                                  | 7  |
|     | 1.208 The Consolidated Appropriations Act .....  | 7  |
| 1.3 | STRUCTURE OF THE CODE AND BANKRUPTCY<br>PARTICIPANTS.....  | 8  |
|     | 1.301 Organization of Title 11 .....   | 8  |
|     | 1.302 The Trustee.....   | 9  |
|     | 1.303 The United States Trustee.....   | 10 |
|     | 1.304 The Judge.....   | 11 |
|     | 1.305 The Debtor .....   | 12 |
|     | 1.306 The Creditor.....  | 13 |
| 1.4 | TYPES OF RELIEF .....  | 14 |
|     | 1.401 Chapter 7 .....  | 14 |
|     | 1.402 Chapter 11 .....   | 15 |

TABLE OF CONTENTS

---

|       |  |    |
|-------|--|----|
| 1.403 | Chapter 12 .....   | 17 |
| 1.404 | Chapter 13 .....   | 18 |
| 1.405 | Chapter 15 .....   | 19 |
| 1.5   | BANKRUPTCY ABUSE PREVENTION AND CONSUMER<br>PROTECTION ACT OF 2005.....      | 19 |
| 1.6   | GLOSSARY OF FREQUENTLY USED TERMS AND<br>SUMMARIES OF RELATED CASE LAW ..... | 20 |
| 1.601 | Adequate Protection.....   | 20 |
| 1.602 | Applicable Commitment Period .....   | 21 |
| 1.603 | Automatic Stay.....  | 22 |
| 1.604 | Claim.....   | 25 |
| 1.605 | Confirmation .....   | 26 |
| 1.606 | Conversion .....   | 29 |
| 1.607 | Core Proceeding .....  | 31 |
| 1.608 | Cramdown .....   | 34 |
| 1.609 | Cure and Maintain.....   | 36 |
| 1.610 | Current Monthly Income .....   | 40 |
| 1.611 | Discharge .....  | 41 |
| 1.612 | Disposable Income .....  | 42 |
| 1.613 | Domestic Support Obligation .....  | 44 |
| 1.614 | Executory Contracts .....  | 46 |
| 1.615 | Exemptions.....  | 47 |
| 1.616 | Fee Application .....  | 49 |
| 1.617 | Lien Avoidance.....  | 52 |
| 1.618 | Means Test .....   | 56 |
| 1.619 | Plan Modification .....  | 59 |
| 1.620 | Reaffirmation .....  | 61 |
| 1.621 | Serial Filers.....   | 63 |
| 1.622 | “Till Rate” .....  | 67 |
| 1.623 | Trustee (and Debtor-in-Possession) .....                                     | 69 |

**CHAPTER 2: COMMENCEMENT OF A CASE**

|       |  |    |
|-------|--|----|
| 2.1   | ADMISSION TO PRACTICE IN BANKRUPTCY COURT.....       | 75 |
| 2.101 | In General.....                                      | 75 |
| 2.102 | Requirements for Admission .....                     | 75 |
| 2.103 | Practice by Attorneys Not Licensed in Virginia ..... | 77 |
| 2.104 | Application and Certification Forms.....             | 80 |
| 2.105 | Non-Attorney Representatives .....                   | 81 |
| 2.106 | Attorneys’ Ethical Obligations .....                 | 83 |

TABLE OF CONTENTS

---

|       |  |     |
|-------|--|-----|
| 2.2   | INITIAL PLEADINGS.....                                     | 86  |
| 2.201 | Petition.....  | 86  |
| 2.202 | Matrix of Creditors.....                                   | 91  |
| 2.203 | Creditor’s Address .....                                   | 92  |
| 2.204 | Filing Fees .....  | 92  |
| 2.205 | Amendment of Pleadings .....                               | 93  |
| 2.206 | Electronic Case Filing.....                                | 93  |
| 2.3   | SCHEDULES AND STATEMENTS .....                             | 94  |
| 2.301 | In General.....  | 94  |
| 2.302 | Schedules A-J .....  | 95  |
| 2.303 | Statements.....  | 96  |
| 2.304 | Redaction of Personal Information.....                     | 98  |
| 2.4   | OTHER NECESSARY PLEADINGS AND PAPERS.....                  | 99  |
| 2.401 | Homestead Deed.....  | 99  |
| 2.402 | Corporate Resolution.....                                  | 99  |
| 2.403 | Additional Papers for Chapter 11 Cases .....               | 99  |
| 2.404 | Chapter 12 Repayment Plan.....                             | 99  |
| 2.405 | Chapter 13 Repayment Plan.....                             | 100 |
| 2.406 | Most Recent Tax Return .....                               | 100 |
| 2.407 | Interest in Education IRA.....                             | 100 |
| 2.408 | Proof of Identity .....                                    | 101 |
| 2.409 | Statement Disclosing Postpetition Change in Income .....   | 101 |
| 2.5   | SUBSTANTIVE CONSOLIDATION AND JOINT<br>ADMINISTRATION..... | 101 |
| 2.501 | In General.....  | 101 |
| 2.502 | Substantive Consolidation .....                            | 102 |
| 2.503 | Joint Administration.....                                  | 102 |
| 2.6   | ELIGIBILITY OF DEBTOR .....                                | 103 |
| 2.601 | In General.....  | 103 |
| 2.602 | Briefing with Budget and Credit Counseling Entity.....     | 104 |
| 2.603 | Section 109(g) Limitations on Eligibility .....            | 105 |
| 2.604 | Chapter 7 .....  | 105 |
| 2.605 | Chapter 9 .....  | 106 |
| 2.606 | Chapter 11 .....   | 107 |
| 2.607 | Chapter 12 .....   | 107 |
| 2.608 | Chapter 13 .....   | 109 |

TABLE OF CONTENTS

---

|       |  |     |
|-------|--|-----|
| 2.7   | TYPES OF PROCEEDINGS .....   | 109 |
| 2.701 | “Adversary Proceedings” and “Contested Matters”<br>Distinguished ..... | 109 |
| 2.702 | Caption of the Pleadings.....  | 110 |
| 2.8   | ADVERSARY PROCEEDINGS .....  | 110 |
| 2.801 | Specific Actions Deemed Adversary Proceedings .....                    | 110 |
| 2.802 | Applicable Bankruptcy Rules: Part VII .....                            | 115 |
| 2.803 | Initial Pleadings.....   | 116 |
| 2.804 | Service of Summons and Complaint .....                                 | 117 |
| 2.805 | Discovery Conference and Required Disclosures .....                    | 121 |
| 2.806 | Pretrial Conference .....  | 121 |
| 2.807 | Additional Forms Available at Eastern District<br>Website .....        | 122 |
| 2.9   | CONTESTED MATTERS.....   | 122 |
| 2.901 | Initiation by Motion .....   | 122 |
| 2.902 | Matters Commenced by Objection to Motion .....                         | 124 |
| 2.903 | Rules Applicable to Contested Matters.....                             | 124 |
| 2.904 | Form of Pleading .....   | 126 |
| 2.905 | Filing Pleadings After Case Closed.....                                | 127 |
| 2.906 | Service .....  | 128 |
| 2.907 | Response to a Motion .....   | 129 |
| 2.908 | Local Rules .....  | 130 |

**CHAPTER 3: AUTOMATIC STAY**

|       |   |     |
|-------|---|-----|
| 3.1   | INTRODUCTION .....  | 131 |
| 3.101 | The Statute.....  | 132 |
| 3.102 | Purpose and Effect of the Automatic Stay.....                                 | 135 |
| 3.103 | Voidness or Voidability of Actions in Violation of the<br>Automatic Stay..... | 136 |
| 3.104 | Prepetition Claims .....  | 137 |
| 3.105 | Property Interests Subject to Automatic Stay.....                             | 138 |
| 3.106 | Property Exempt from the Automatic Stay .....                                 | 139 |
| 3.107 | Actions Excluded from the Automatic Stay.....                                 | 143 |
| 3.108 | Codebtor Stay .....   | 145 |
| 3.109 | Violations of the Automatic Stay .....  | 147 |
| 3.110 | Duration of the Stay .....  | 149 |

TABLE OF CONTENTS

|       |  |     |
|-------|--|-----|
| 3.2   | RELIEF FROM THE AUTOMATIC STAY .....             | 150 |
| 3.201 | The Statute .....                                | 150 |
| 3.202 | Bankruptcy Rule 4001.....                        | 152 |
| 3.203 | Stay Pending Appeal.....                         | 155 |
| 3.204 | Local Rules.....                                 | 155 |
| 3.205 | Grounds for Relief from the Automatic Stay ..... | 155 |
| 3.206 | Motion for Relief.....                           | 170 |
| 3.207 | Form of Motion .....                             | 170 |
| 3.208 | Ex Parte Relief.....                             | 171 |
| 3.209 | Notice .....                                     | 171 |
| 3.210 | Notice to Adverse Parties.....                   | 172 |
| 3.211 | Expert Testimony .....                           | 172 |
| 3.212 | Non-Expert Opinion .....                         | 173 |
| 3.213 | Trial.....                                       | 173 |
| 3.214 | Relief .....                                     | 175 |
| 3.215 | “Comfort Orders” .....                           | 177 |

**CHAPTER 4: PROPERTY OF THE BANKRUPTCY ESTATE**

|       |  |     |
|-------|--|-----|
| 4.1   | INTERESTS IN PROPERTY .....                                    | 179 |
| 4.101 | Concepts .....   | 179 |
| 4.102 | Property Owned with Another.....                               | 183 |
| 4.103 | Interests in Personal Property .....                           | 187 |
| 4.2   | INTERESTS IN REAL PROPERTY .....                               | 201 |
| 4.201 | Life Estates .....   | 201 |
| 4.202 | Equity or Rights of Redemption .....                           | 201 |
| 4.203 | Leases and Contracts for Sale .....                            | 202 |
| 4.204 | Partition .....  | 202 |
| 4.205 | Quiet Title.....   | 203 |
| 4.3   | INTERESTS IN PROPERTY FROM A DIVORCE .....                     | 203 |
| 4.301 | Debtor’s Entitlement to the Asset .....                        | 203 |
| 4.302 | Necessity of Court Order or Property Settlement Agreement..... | 203 |
| 4.303 | Future Spousal Support.....                                    | 203 |
| 4.304 | Vested Equitable Rights of Non-Debtor Spouse .....             | 204 |
| 4.4   | INTERESTS ARISING UPON THE DEATH OF A NON-DEBTOR.....          | 204 |
| 4.401 | In General.....  | 204 |
| 4.402 | Death Occurring Before the Bankruptcy Filing .....             | 205 |
| 4.403 | Death Occurring After the Bankruptcy Filing.....               | 206 |

TABLE OF CONTENTS

---

|        |   |     |
|--------|---|-----|
| 4.404  | Life Insurance Policies or Death Benefit Plans.....                         | 206 |
| 4.405  | Non-Retirement Spendthrift Trusts .....                                     | 207 |
| 4.5    | PROPERTY INTERESTS PRESERVED FOR THE BENEFIT<br>OF THE ESTATE .....         | 208 |
| 4.501  | In General.....   | 208 |
| 4.502  | Liens Securing Subordinated Claims .....                                    | 209 |
| 4.503  | Miscellaneous Avoidable Transfers.....                                      | 209 |
| 4.504  | Liens Securing Disallowed Claims.....                                       | 210 |
| 4.505  | Effect of Avoidance.....  | 211 |
| 4.6    | PROPERTY GENERATED POSTPETITION.....  | 211 |
| 4.601  | In General.....   | 211 |
| 4.602  | Proceeds.....   | 212 |
| 4.603  | Rents .....   | 213 |
| 4.7    | POSTPETITION ACQUISITIONS .....   | 214 |
| 4.701  | In General.....   | 214 |
| 4.702  | Bankruptcy Trustee Contracts.....   | 214 |
| 4.8    | CONVERSIONS .....   | 214 |
| 4.801  | Proceeding Converted from Chapter 11 to Chapter 7.....                      | 214 |
| 4.802  | Proceeding Converted from Chapter 13 to Chapter 7.....                      | 215 |
| 4.9    | INTERESTS IN PROPERTY RECOVERED BY TRUSTEE<br>OR DEBTOR-IN-POSSESSION ..... | 216 |
| 4.901  | In General.....   | 216 |
| 4.902  | Property Recovered from a Custodian .....                                   | 216 |
| 4.903  | Property Recovered Under the Trustee's Strong<br>Arm Powers .....           | 217 |
| 4.904  | Recovered Preferences .....   | 217 |
| 4.905  | Fraudulent and Voluntary Conveyances .....                                  | 218 |
| 4.906  | Postpetition Transfers .....  | 218 |
| 4.907  | Setoffs .....   | 218 |
| 4.908  | Recoveries by Partnership Trustee .....                                     | 218 |
| 4.909  | Attorney Fees .....   | 219 |
| 4.910  | Recovery from a Colluding Buyer .....                                       | 219 |
| 4.10   | POWERS EXERCISABLE FOR THE BENEFIT OF A NON-<br>DEBTOR .....                | 219 |
| 4.1001 | Powers of Appointment.....  | 219 |
| 4.1002 | Corporate Powers .....  | 220 |
| 4.1003 | Failed Trusts .....   | 220 |

TABLE OF CONTENTS

---

|        |   |     |
|--------|---|-----|
| 4.11   | EXPIRED AND EXPIRING LEASES .....                       | 220 |
| 4.1101 | Commercial Leases.....                                  | 220 |
| 4.1102 | Residential or Personal Property Leases .....           | 221 |
| 4.12   | PROTECTION FOR INSOLVENT DEBTOR’S PROPERTY RIGHTS ..... | 221 |

**CHAPTER 5: USE AND SALE OF PROPERTY**

|       |   |     |
|-------|---|-----|
| 5.1   | THE TRUSTEE IN CASE ADMINISTRATION .....  | 223 |
| 5.101 | Role of United States Trustee in Appointment and Supervision of Trustees.....                       | 223 |
| 5.102 | Election of Trustee at Meeting of Creditors.....  | 224 |
| 5.103 | Administration by Debtor-in-Possession.....   | 226 |
| 5.104 | Duties of a Trustee .....   | 226 |
| 5.105 | Attorney-Client Privilege.....  | 227 |
| 5.106 | Conduct of Section 341 Hearing .....  | 228 |
| 5.107 | Scrutiny of Debtor’s Financial Affairs.....   | 228 |
| 5.108 | Employment of Professionals.....  | 228 |
| 5.109 | Distribution of Liquidated Estate .....   | 229 |
| 5.2   | USE, SALE, OR LEASE OF ASSETS OR PROPERTY—SECTION 363.....  | 229 |
| 5.201 | Statutory Authority and Trustee’s Powers .....  | 229 |
| 5.202 | Use, Sale, or Lease in Ordinary Course of Business .....  | 230 |
| 5.203 | Use, Sale, or Lease Outside Ordinary Course of Business .....                                       | 230 |
| 5.204 | Sales Free and Clear of Interests .....   | 232 |
| 5.205 | Sale of Interests of Co-owners .....  | 233 |
| 5.206 | Credit Bids by Secured Parties.....   | 234 |
| 5.207 | Effect of Law or Contract Provisions Prohibiting Use, Sale, or Lease of Property of the Estate..... | 235 |
| 5.208 | Effect of Reversal or Modification upon Appeal.....   | 235 |
| 5.209 | Prohibition Against Collusive Bidding.....  | 235 |
| 5.210 | Bidding Procedures and Buyer Protection Devices .....   | 236 |
| 5.3   | EXECUTORY CONTRACTS AND UNEXPIRED LEASES—SECTION 365.....   | 238 |
| 5.301 | Introduction .....  | 238 |
| 5.302 | Definitions .....   | 239 |
| 5.303 | Assumption or Rejection .....   | 240 |
| 5.304 | Time Periods to Assume or Reject.....   | 241 |

TABLE OF CONTENTS

---

|       |   |     |
|-------|---|-----|
| 5.305 | Trustee's Duties or Obligations Pending Assumption<br>or Rejection..... | 243 |
| 5.306 | Effect of Rejection .....   | 244 |
| 5.307 | Assignment.....   | 245 |
| 5.308 | Forfeiture Clauses.....   | 246 |
| 5.4   | CASH COLLATERAL AND POSTPETITION FINANCING.....                         | 247 |
| 5.401 | Cash Collateral—Section 363.....  | 247 |
| 5.402 | Postpetition Financing—Section 364.....                                 | 250 |
| 5.5   | CONVERSION AND DISMISSAL OF CASES.....                                  | 255 |
| 5.501 | In General.....   | 255 |
| 5.502 | Conversion and Dismissal by Chapter.....                                | 255 |
| 5.503 | Bad Faith Dismissal—Section 109(g) .....                                | 263 |
| 5.504 | Effect of Conversion .....  | 263 |
| 5.505 | Effect of Dismissal .....   | 264 |
| 5.506 | Rules and Procedures for Dismissal or Conversion—<br>Rule 1017.....     | 265 |
| 5.507 | Other Grounds for Dismissal or Transfer.....                            | 265 |

**CHAPTER 6: DISCHARGE AND DISCHARGEABILITY**

|       |  |     |
|-------|--|-----|
| 6.1   | DISCHARGE IN BANKRUPTCY GENERALLY .....    | 267 |
| 6.101 | In General.....                            | 267 |
| 6.102 | Procedures for Objecting to Discharge..... | 267 |
| 6.103 | Time Limitations.....                      | 267 |
| 6.104 | Burden of Proof .....                      | 269 |
| 6.2   | CHAPTER 7 DISCHARGE .....                  | 269 |
| 6.201 | In General.....                            | 269 |
| 6.202 | Grounds for Objecting to Discharge.....    | 269 |
| 6.203 | Revocation of Chapter 7 Discharge .....    | 275 |
| 6.3   | CHAPTER 13 DISCHARGE .....                 | 277 |
| 6.301 | In General.....                            | 277 |
| 6.302 | Hardship Discharge .....                   | 278 |
| 6.303 | Limitation on Chapter 13 Discharge .....   | 279 |
| 6.304 | Discharge of Postpetition Debts .....      | 280 |
| 6.305 | Revocation of Chapter 13 Discharge.....    | 280 |

TABLE OF CONTENTS

---

|  |  |     |
|--|--|-----|
| 6.4  | CHAPTER 11 DISCHARGE.....  | 281 |
| 6.401  | In General.....  | 281 |
| 6.402  | Not Granted in Liquidation .....   | 281 |
| 6.403  | Subchapter V of Chapter 11—Consensual Plan .....                           | 281 |
| 6.404  | Subchapter V of Chapter 11—Nonconsensual Plan .....                        | 282 |
| 6.5  | CHAPTER 12 DISCHARGE.....  | 282 |
| 6.501  | In General.....  | 282 |
| 6.502  | Hardship Discharge.....  | 283 |
| 6.503  | Denial of Discharge .....  | 283 |
| 6.504  | Revocation of Discharge .....  | 283 |
| 6.6  | EFFECT OF DISCHARGE.....   | 284 |
| 6.601  | In General.....  | 284 |
| 6.602  | Enjoins Creditor Action.....   | 284 |
| 6.603  | Release from Liability .....   | 284 |
| 6.604  | Some Liens Still Enforceable.....  | 286 |
| 6.605  | Liability of Codebtors or Makers.....                                      | 286 |
| 6.7  | OBJECTIONS TO DISCHARGEABILITY OF SPECIFIC DEBTS.....                      | 287 |
| 6.701  | Objection to Discharge Versus Objection to Dischargeability of a Debt..... | 287 |
| 6.702  | Nondischargeable Debts .....   | 288 |
| 6.703  | Procedures for Objecting to Dischargeability of a Debt .....               | 289 |
| 6.704  | Time for Filing.....   | 289 |
| 6.705  | Extensions of Time .....   | 289 |
| 6.706  | Timing of Other Objections.....  | 290 |
| 6.707  | Exceptions to the Dischargeability of Debts .....                          | 290 |
| <br><b>CHAPTER 7: AVOIDANCE OF PRE- AND POSTPETITION TRANSFERS</b> |  |     |
| 7.1  | INTRODUCTION.....  | 307 |
| 7.2  | SECTION 544: STRONG-ARM POWERS.....  | 307 |
| 7.201  | Trustee as Judicial Lien Creditor.....                                     | 309 |
| 7.202  | Trustee as Execution Lien Creditor .....                                   | 310 |
| 7.203  | Trustee as Bona Fide Purchaser of Real Property .....                      | 310 |

TABLE OF CONTENTS

---

|       |   |     |
|-------|---|-----|
| 7.3   | SECTION 545: STATUTORY LIENS.....   | 313 |
| 7.301 | Insolvency Liens—Section 545(1).....  | 314 |
| 7.302 | Unperfected/Unenforceable Liens—Section 545(2).....                             | 315 |
| 7.303 | Landlords’ Liens—Section 545(3) and (4).....                                    | 316 |
| 7.304 | Avoidance Powers Subject to Sellers’ Reclamation<br>Rights.....                 | 316 |
| 7.4   | SECTION 547: PREFERENCES.....   | 316 |
| 7.401 | In General.....   | 316 |
| 7.402 | Elements.....   | 316 |
| 7.403 | Transfer of an Interest in Property.....  | 317 |
| 7.404 | When Does a Transfer Occur?.....  | 318 |
| 7.405 | Antecedent Debt.....  | 318 |
| 7.406 | Transfer Made While Debtor Is Insolvent.....                                    | 319 |
| 7.407 | Creditor Receives More Than if the Case Had Been a<br>Chapter 7 Proceeding..... | 320 |
| 7.408 | Transfers to Insiders.....  | 321 |
| 7.409 | Burden of Proof.....  | 323 |
| 7.410 | Affirmative Defenses.....   | 323 |
| 7.5   | SECTION 548: FRAUDULENT TRANSFERS.....  | 326 |
| 7.501 | Actual Intent to Hinder, Delay, or Defraud.....                                 | 326 |
| 7.502 | Transfers for Less Than Reasonably Equivalent Value.....                        | 328 |
| 7.503 | Reasonably Equivalent Value.....  | 328 |
| 7.504 | Insolvency.....   | 330 |
| 7.505 | Undercapitalization.....  | 330 |
| 7.506 | Inability to Pay Debts.....   | 330 |
| 7.507 | Transfer to Insider Under Employment Contract.....                              | 331 |
| 7.508 | Charitable Transfers.....   | 331 |
| 7.509 | Protection of Good Faith Transferees.....                                       | 331 |
| 7.6   | SECTION 549: POSTPETITION TRANSFERS.....  | 331 |
| 7.601 | Transfers Made in the Ordinary Course of Business.....                          | 332 |
| 7.602 | Involuntary Transfers.....  | 333 |
| 7.603 | Transfers to Good Faith Purchasers.....   | 333 |
| 7.604 | Statute of Limitations.....   | 333 |
| 7.605 | Jury Trial.....   | 333 |
| 7.7   | SECTION 550: LIABILITY OF TRANSFEREE OF AVOIDED<br>TRANSFER.....                | 334 |
| 7.701 | In General.....   | 334 |
| 7.702 | Limitations on Recovery.....  | 335 |

TABLE OF CONTENTS

---

|   |  |     |
|---|--|-----|
| 7.8   | SECTION 551: AUTOMATIC PRESERVATION OF AVOIDED TRANSFER .....          | 336 |
| 7.9   | LIMITATIONS ON AVOIDANCE POWERS .....                                  | 336 |
| 7.901   | In General .....   | 336 |
| 7.902   | Seller's Right of Reclamation.....                                     | 337 |
| 7.903   | Certain Transfers Not Avoidable.....                                   | 339 |
| <br><b>CHAPTER 8: DEBTOR EXEMPTIONS AND AVOIDANCE ACTIONS</b> |  |     |
| 8.1   | EXEMPTION SYSTEM .....   | 341 |
| 8.2   | METHOD OF CLAIMING EXEMPTIONS .....                                    | 342 |
| 8.201   | Schedule C of the Bankruptcy Schedules .....                           | 342 |
| 8.202   | State Law Perfection .....   | 344 |
| 8.3   | AVAILABLE EXEMPTIONS .....   | 345 |
| 8.301   | Homestead Exemption .....  | 345 |
| 8.302   | Poor Debtor's Exemption .....  | 350 |
| 8.303   | Other Exemptions .....   | 355 |
| 8.4   | PROPERTY HELD AS TENANTS BY THE ENTIRETY .....                         | 359 |
| 8.401   | In General .....   | 359 |
| 8.402   | Grant Must Be Specific .....   | 360 |
| 8.403   | Real and Personal Property Coverage.....                               | 360 |
| 8.404   | Impact on Joint Bankruptcy Cases .....                                 | 360 |
| 8.405   | Entireties Property Is Not Immune from Tax Liens .....                 | 361 |
| 8.5   | EXEMPTION PLANNING AND DEBTOR AVOIDANCE ACTIONS.....                   | 361 |
| 8.501   | In General .....   | 361 |
| 8.502   | Trustee's Ability to Retain or Offset Exempt Property .....            | 363 |
| 8.6   | OBJECTIONS TO EXEMPTIONS.....  | 364 |
| 8.601   | Deadlines for Objections .....   | 364 |
| 8.602   | Deadlines for Objections to Amended Exemptions.....                    | 364 |
| 8.603   | Inappropriate or Frivolous Exemptions .....                            | 365 |
| 8.604   | Objection Period in Converted Cases .....                              | 366 |
| 8.605   | Basis for Objections.....  | 366 |
| 8.606   | Basis for Attorney Fee Award for Litigation of Allowed Exemption ..... | 366 |

TABLE OF CONTENTS

---

APPENDIX 8-1: HOMESTEAD DEED FOR REAL PROPERTY..... 369

APPENDIX 8-2: HOMESTEAD DEED FOR PERSONAL PROPERTY ..... 371

APPENDIX 8-3: OBJECTION TO EXEMPTIONS ..... 373

APPENDIX 8-4: COMMONLY USED EXEMPTION STATUTES..... 375

**CHAPTER 9: CHAPTER 7: LIQUIDATION PLAN**

9.1 INTRODUCTION ..... 377

    9.101 Source of Law ..... 377

    9.102 Overview of the Process ..... 378

    9.103 Nature of the Discharge..... 385

    9.104 Automatic Dismissal ..... 385

9.2 PRE-INTERVIEW INFORMATION..... 386

    9.201 Providing Advance Information ..... 386

    9.202 Alternatives to Bankruptcy..... 386

    9.203 Pre-Consultation Questionnaire ..... 388

    9.204 Obtaining Client Credit Reports ..... 389

    9.205 Information and Materials ..... 390

    9.206 Prior Bankruptcies..... 390

    9.207 Prior Homestead Deeds ..... 391

9.3 INITIAL MEETING WITH CLIENTS ..... 392

    9.301 Explaining the Process ..... 392

    9.302 Relevant Factors ..... 392

    9.303 Choice of Chapter..... 392

    9.304 Full Disclosure ..... 393

    9.305 Effect on Future Credit..... 394

    9.306 Timing the Filing ..... 394

    9.307 Where to File ..... 396

    9.308 Client Communication..... 396

    9.309 Handling Creditor Contacts ..... 396

    9.310 Continued Use of Credit Cards ..... 397

    9.311 Redemption..... 398

    9.312 Reaffirmation ..... 399

    9.313 Engagement Agreement ..... 402

    9.314 Recovery of Property ..... 403

    9.315 Protecting Cash Accounts..... 404

    9.316 Pension or Retirement Accounts ..... 405

TABLE OF CONTENTS

---

|        |                                       |     |
|--------|---------------------------------------|-----|
| 9.317  | Codebtors or Guarantors.....          | 405 |
| 9.318  | Nondischargeable Debts .....          | 405 |
| 9.319  | Tax Debts .....                       | 406 |
| 9.320  | Fraud and Other Problems .....        | 406 |
| 9.321  | United States Trustee’s Office.....   | 407 |
| 9.322  | Action List.....                      | 408 |
| 9.4    | PREPARATION OF SCHEDULES.....         | 410 |
| 9.401  | Office Procedures.....                | 410 |
| 9.402  | Encouraging Client Compliance .....   | 410 |
| 9.403  | Attorney and Client Review.....       | 410 |
| 9.5    | TITLE SEARCH ON REAL ESTATE .....     | 410 |
| 9.501  | Reasons for the Search.....           | 410 |
| 9.502  | Timing of the Title Search .....      | 411 |
| 9.503  | Malpractice Concerns.....             | 411 |
| 9.6    | VALUATION ISSUES .....                | 411 |
| 9.601  | Verification of Payoff and Value..... | 411 |
| 9.602  | Perfection Issues.....                | 411 |
| 9.7    | FILING THE BANKRUPTCY PETITION .....  | 412 |
| 9.701  | General Information.....              | 412 |
| 9.702  | Schedules of Debts.....               | 413 |
| 9.703  | Schedules of Assets .....             | 414 |
| 9.704  | Monthly Budget.....                   | 415 |
| 9.705  | Statement of Financial Affairs .....  | 416 |
| 9.706  | Statement of Intention.....           | 416 |
| 9.8    | AFTER THE PETITION IS FILED .....     | 417 |
| 9.801  | Debtor’s Duties .....                 | 417 |
| 9.802  | Creditors’ Meeting.....               | 418 |
| 9.803  | Subsequent Hearings .....             | 419 |
| 9.804  | Working with the Trustee.....         | 419 |
| 9.805  | Discharge .....                       | 420 |
| 9.9    | POSTPETITION CREDITOR ACTION.....     | 421 |
| 9.10   | DISCRIMINATORY TREATMENT .....        | 422 |
| 9.1001 | In General.....                       | 422 |
| 9.1002 | By Governmental Units .....           | 422 |
| 9.1003 | By Private Employers .....            | 422 |

TABLE OF CONTENTS

---

|   |   |     |
|---|---|-----|
| 9.11  | LEGAL AND ETHICAL ISSUES .....  | 422 |
| 9.1101  | In General.....   | 422 |
| 9.1102  | Protecting Assets.....  | 423 |
| APPENDIX 9-1: CHECKLIST .....   |   | 425 |
| APPENDIX 9-2: INITIAL CLIENT QUESTIONNAIRE.....                       |   | 435 |
| APPENDIX 9-3: COVER LETTER ACCOMPANYING<br>BANKRUPTCY SCHEDULES ..... |   | 443 |
| APPENDIX 9-4: LETTER TO CLIENT.....                                   |   | 445 |
| <br><b>CHAPTER 10: CHAPTER 13: WAGE EARNER PLAN</b>                   |   |     |
| 10.1  | INTRODUCTION .....  | 449 |
| 10.2  | NATURE OF A CHAPTER 13 CASE .....   | 449 |
| 10.201  | In General.....   | 449 |
| 10.202  | Choice of Chapters .....  | 450 |
| 10.3  | INITIATING A CHAPTER 13 CASE.....   | 450 |
| 10.301  | Chapter 13 Petition.....  | 450 |
| 10.302  | Automatic Dismissal.....  | 452 |
| 10.303  | Getting the Documents Together .....  | 454 |
| 10.304  | Practice Pointers .....   | 454 |
| 10.4  | FORMULATING AND FILING A CHAPTER 13 PLAN.....                                 | 457 |
| 10.401  | In General.....   | 457 |
| 10.402  | Form Chapter 13 Plan for Virginia .....                                       | 458 |
| 10.403  | Drafting the Plan .....   | 458 |
| 10.404  | Postpetition, Pre-Confirmation Motions and Orders .....                       | 475 |
| 10.405  | Section 341 Meeting of Creditors .....  | 478 |
| 10.406  | From 341 Meeting to the Confirmation Hearing .....                            | 480 |
| 10.5  | CONFIRMATION OF THE PLAN .....  | 481 |
| 10.501  | The Confirmation Hearing .....  | 481 |
| 10.502  | Confirmation Criteria .....   | 482 |
| 10.503  | Proving Confirmation over an Objection: Carrying the<br>Burden of Proof ..... | 484 |
| 10.504  | The Effect of Plan Confirmation .....   | 488 |
| 10.505  | Effect of Plan Confirmation on Property of the Estate .....                   | 490 |

TABLE OF CONTENTS

---

|   |   |     |
|---|---|-----|
| 10.6  | POSTCONFIRMATION PRACTICE: WHAT CAN HAPPEN<br>AFTER THE PLAN IS CONFIRMED ..... | 491 |
| 10.601  | In General.....   | 491 |
| 10.602  | Debtor Education.....   | 491 |
| 10.603  | Claims Review .....   | 491 |
| 10.604  | Postconfirmation Plan Modification.....   | 492 |
| 10.605  | Postconfirmation Motions .....  | 493 |
| 10.7  | COMPLETION AND DISCHARGE.....   | 497 |
| 10.701  | Discharge Requirements.....   | 497 |
| 10.702  | Debts that May Be Discharged.....   | 498 |
| 10.703  | Hardship Discharge.....   | 499 |
| 10.704  | Eligibility for Discharge in Future Case .....                                  | 499 |
| 10.705  | Retention of Records and Reestablishment of Credit.....                         | 499 |
| 10.706  | When the Debtor Dies .....  | 500 |
|   | APPENDIX 10-1: STATEMENT OF CURRENT MONTHLY INCOME.....                         | 501 |
| <br><b>CHAPTER 11: CHAPTER 11: REORGANIZATION</b> |   |     |
| 11.1  | INTRODUCTION.....   | 517 |
| 11.101  | In General.....   | 517 |
| 11.102  | Planning Stage.....   | 518 |
| 11.103  | Early Days .....  | 519 |
| 11.104  | Business Stabilization.....   | 519 |
| 11.105  | Plan Process.....   | 519 |
| 11.106  | Creditor Perspective.....   | 520 |
| 11.2  | DEBTOR-IN-POSSESSION .....  | 521 |
| 11.3  | UNSECURED CREDITORS' COMMITTEES.....  | 522 |
| 11.4  | OPERATING ISSUES .....  | 524 |
| 11.5  | TRANSACTIONS IN THE ORDINARY COURSE OF<br>BUSINESS .....                        | 524 |
| 11.6  | TRANSACTIONS OUTSIDE THE ORDINARY COURSE OF<br>BUSINESS .....                   | 525 |
| 11.7  | EXAMINER-TRUSTEE.....   | 526 |

TABLE OF CONTENTS

---

|        |                                    |     |
|--------|------------------------------------|-----|
| 11.8   | EXCLUSIVITY.....                   | 527 |
| 11.801 | Extension of Exclusivity .....     | 528 |
| 11.802 | Termination of Exclusivity .....   | 531 |
| 11.9   | ELEMENTS OF A CHAPTER 11 PLAN..... | 533 |
| 11.10  | DISCLOSURE STATEMENT .....         | 535 |
| 11.11  | CONFIRMATION OF THE PLAN .....     | 537 |
| 11.12  | EFFECT OF CONFIRMATION.....        | 541 |
| 11.13  | POSTCONFIRMATION ISSUES .....      | 543 |
|        | <b>INDEX</b> .....                 | I-1 |

**Volume 2**

**CHAPTER 12: SUBCHAPTER V: SMALL BUSINESS  
REORGANIZATION**

|        |  |     |
|--------|--|-----|
| 12.1   | INTRODUCTION .....                           | 545 |
| 12.101 | In General.....                              | 545 |
| 12.102 | Subchapter V Cases Are Chapter 11 Cases..... | 546 |
| 12.2   | PROCEEDING UNDER SUBCHAPTER V .....          | 546 |
| 12.201 | Election of Subchapter V .....               | 546 |
| 12.202 | Eligibility.....                             | 548 |
| 12.3   | DEBTOR-IN-POSSESSION.....                    | 551 |
| 12.301 | In General.....                              | 551 |
| 12.302 | Requirements and Duties .....                | 552 |
| 12.303 | Removal of the Debtor-in-Possession.....     | 552 |
| 12.4   | PROPERTY OF THE ESTATE.....                  | 553 |
| 12.401 | In General.....                              | 553 |
| 12.402 | Postpetition Acquired Property.....          | 553 |
| 12.403 | Vesting of Property of the Estate .....      | 554 |
| 12.5   | CASE ADMINISTRATION .....                    | 555 |
| 12.501 | In General.....                              | 555 |
| 12.502 | Additional Petition Requirements .....       | 555 |

TABLE OF CONTENTS

---

|   |  |     |
|---|--|-----|
| 12.503  | No Committee of Unsecured Creditors .....  | 555 |
| 12.504  | Required Status Conference and Report from Debtor.....                                   | 555 |
| 12.505  | Who May File the Plan.....   | 556 |
| 12.506  | Time for Filing the Plan.....  | 556 |
| 12.507  | No Disclosure Statement .....  | 556 |
| 12.508  | No United States Trustee Fees.....   | 557 |
| 12.509  | Disinterestedness .....  | 557 |
| 12.510  | Local Rules.....   | 557 |
| 12.6  | ROLE OF THE SUBCHAPTER V TRUSTEE.....  | 558 |
| 12.601  | In General.....  | 558 |
| 12.602  | Duties of the Subchapter V Trustee .....   | 558 |
| 12.603  | Compensation of Subchapter V Trustee.....  | 559 |
| 12.604  | Deferral of Subchapter V Trustee Fees.....   | 560 |
| 12.605  | Employment of Professionals.....   | 560 |
| 12.7  | CONTENTS OF THE PLAN AND CONFIRMATION<br>REQUIREMENTS .....                              | 561 |
| 12.701  | Contents of the Plan.....  | 561 |
| 12.702  | Disposable Income.....   | 562 |
| 12.703  | Balloting.....   | 563 |
| 12.704  | Confirmation.....  | 563 |
| 12.8  | DISCHARGE.....   | 564 |
| 12.801  | In General.....  | 564 |
| 12.802  | Consensual Plan and Exceptions.....  | 564 |
| 12.803  | Cramdown Plan and Exceptions.....  | 565 |
| 12.804  | <i>Cantell-Cleary Co. v. Cleary Packaging LLC (In re<br/>Cleary Packaging LLC)</i> ..... | 565 |
| 12.9  | POSTCONFIRMATION ISSUES.....   | 567 |
| 12.901  | In General.....  | 567 |
| 12.902  | Trustee as Disbursing Agent .....  | 567 |
| 12.903  | Postconfirmation Plan Modifications .....  | 567 |
| 12.904  | Plan Default.....  | 568 |
| 12.905  | Effective Dates of Subchapter V.....   | 570 |
| <b>CHAPTER 13: CHAPTER 12: FAMILY FARMERS AND FISHERMEN</b> |  |     |
| 13.1  | INTRODUCTION.....  | 573 |
| 13.101  | What Is Chapter 12 Bankruptcy?.....  | 573 |
| 13.102  | Benefits for Family Farmers and Fishermen .....  | 573 |

TABLE OF CONTENTS

---

|  |  |     |
|--|--|-----|
| 13.103   | Eligibility to File .....  | 575 |
| 13.104   | Practice Tips for a Potential Case and Pre-Filing<br>Requests for Information..... | 576 |
| 13.2   | CHAPTER 12 PROCESS—FILING SEQUENCE OF EVENTS.....                                  | 579 |
| 13.201   | In General.....  | 579 |
| 13.202   | Initial Petition and Filing.....   | 580 |
| 13.203   | Trustee.....   | 581 |
| 13.204   | Reorganization Plan.....   | 582 |
| 13.205   | Modification of the Plan.....  | 587 |
| 13.206   | Feasibility of the Plan.....   | 587 |
| 13.207   | Confirmation of the Plan .....   | 592 |
| 13.208   | Discharge .....  | 594 |
| 13.3   | DEBTOR’S ATTORNEY FEES.....  | 594 |
| 13.4   | PRACTICE TIPS FOR COUNSEL .....  | 595 |
| 13.5   | CREDITOR’S PERSPECTIVE .....   | 596 |
| 13.501   | In General.....  | 596 |
| 13.502   | Creditor’s Attention to Accounts .....   | 596 |
| 13.503   | Actions to Be Taken Once a Bankruptcy Is Filed .....                               | 597 |
| 13.504   | 341 Meeting of Creditors .....   | 597 |
| 13.505   | Proofs of Claim .....  | 599 |
| 13.506   | Automatic Stay Imposed by a Bankruptcy Filing .....                                | 600 |
| 13.507   | Seeking Relief from the Automatic Stay.....  | 601 |
| 13.508   | Available Relief from Stay for “Cause” .....                                       | 603 |
| 13.509   | What Is Adequate Protection?.....  | 603 |
| 13.510   | Scheme to Delay, Hinder, and Defraud Creditors.....                                | 605 |
| 13.511   | Procedure for a Motion for Relief from Stay .....                                  | 606 |
| 13.512   | Surrender of Collateral and Cramdown Plans .....                                   | 606 |
| 13.513   | Objections to Confirmation of Debtor’s Proposed Plan .....                         | 607 |
| 13.514   | Dismissal “For Cause” Under 11 U.S.C. § 1208 .....                                 | 608 |
| APPENDIX 13-1: SAMPLE CHAPTER 12 PLAN AND RELATED<br>MOTIONS .....         |  | 611 |
| APPENDIX 13-2: SAMPLE AMENDED CHAPTER 12 PLAN .....                        |  | 621 |
| APPENDIX 13-3: SAMPLE AMENDED CHAPTER 12 PLAN AND<br>RELATED MOTIONS ..... |  | 629 |
| APPENDIX 13-4: SAMPLE AMENDED CHAPTER 12 PLAN .....                        |  | 639 |

TABLE OF CONTENTS

---

APPENDIX 13-5: OFFICIAL FORM 410—PROOF OF CLAIM AND INSTRUCTIONS..... 655

**CHAPTER 14: JURISDICTIONAL ISSUES**

14.1 BANKRUPTCY JURISDICTION..... 661

    14.101 History ..... 661

    14.102 Background..... 661

    14.103 Jurisdiction ..... 663

    14.104 Referral from the District Court..... 664

    14.105 Core Proceedings ..... 666

    14.106 Withdrawal of Reference..... 667

    14.107 Abstention..... 668

14.2 SOVEREIGN IMMUNITY ..... 669

    14.201 Statutory Framework..... 669

    14.202 *Central Virginia Community College v. Katz*..... 670

    14.203 Lower Court Decisions Interpreting *Katz* ..... 671

    14.204 United States Supreme Court Cases Prior to *Katz* ..... 674

    14.205 Section 106..... 676

14.3 STATE COURT JUDGMENTS ..... 683

    14.301 The *Rooker-Feldman* Doctrine..... 683

    14.302 Collateral Estoppel and Res Judicata ..... 687

14.4 JURY TRIALS ..... 691

    14.401 Right to a Jury Trial ..... 691

    14.402 Jury Trial Demand..... 693

    14.403 28 U.S.C. § 1411 ..... 694

    14.404 Jury Trials in Removed Actions ..... 695

    14.405 Withdrawal of Reference..... 695

    14.406 Waiver of Right to Jury Trial..... 695

    14.407 Manufactured Jurisdiction ..... 697

**CHAPTER 15: COMPENSATION FOR ATTORNEYS AND OTHER PROFESSIONALS**

15.1 PAYMENT OF DEBTOR'S COUNSEL IN CHAPTER 7 CASES ..... 699

    15.101 Source of Payment..... 699

    15.102 Timing of Payment ..... 699

TABLE OF CONTENTS

---

|        |  |     |
|--------|--|-----|
| 15.103 | Requirement for Disclosure .....                                       | 700 |
| 15.104 | Court Review of Fees Charged by Debtor’s Counsel .....                 | 701 |
| 15.2   | PAYMENT OF DEBTOR’S COUNSEL IN CHAPTER 13<br>CASES .....               | 702 |
| 15.201 | Source of Payment .....  | 702 |
| 15.202 | Standard for Approval .....  | 704 |
| 15.203 | Procedure .....  | 706 |
| 15.204 | Supplemental Fees .....  | 706 |
| 15.205 | Opinions Concerning Chapter 13 Fees .....                              | 708 |
| 15.3   | PAYMENT OF ESTATE PROFESSIONALS .....                                  | 710 |
| 15.301 | Standard for Approval .....  | 710 |
| 15.302 | Opinions Concerning Fee Awards for Estate<br>Professionals .....       | 712 |
| 15.4   | APPLICATIONS TO EMPLOY PROFESSIONALS .....                             | 713 |
| 15.401 | Submission and Service of Application .....                            | 713 |
| 15.402 | Necessity for Court Approval of Employment .....                       | 713 |
| 15.403 | Retroactive Approval of Employment .....                               | 713 |
| 15.404 | Approval of Individual Extends to Whole Firm .....                     | 714 |
| 15.405 | In-House Professionals .....   | 714 |
| 15.406 | Who Is a Professional? .....   | 714 |
| 15.407 | Qualifications for Employment .....                                    | 715 |
| 15.408 | Procedure .....  | 716 |
| 15.5   | DISINTERESTEDNESS .....  | 718 |
| 15.501 | “Disinterested Person” Defined .....                                   | 718 |
| 15.502 | Grounds for Disqualification .....                                     | 719 |
| 15.503 | Estate Professional Allowed to Retain Prepetition<br>Claim .....       | 720 |
| 15.6   | FIDUCIARY OBLIGATIONS OF PROFESSIONALS<br>EMPLOYED BY THE ESTATE ..... | 720 |
| 15.601 | Background .....   | 720 |
| 15.602 | Fiduciary Obligation of Professionals .....                            | 722 |
| 15.7   | FEE APPLICATIONS .....   | 725 |
| 15.701 | Statutory Framework .....  | 725 |
| 15.702 | Bankruptcy Rules and Local Bankruptcy Rules .....                      | 727 |
| 15.703 | Sample Fee Application .....   | 729 |

TABLE OF CONTENTS

---

|         |  |     |
|---------|--|-----|
| 15.8    | UNITED STATES TRUSTEE GUIDELINES .....   | 729 |
| 15.801  | Statutory Authority.....   | 729 |
| 15.802  | The Guidelines.....  | 730 |
| 15.803  | Guidelines for Larger Chapter 11 Cases.....  | 730 |
| 15.804  | Assistance of Other Professionals .....  | 732 |
| 15.9    | DISGORGEMENT IN THE ADMINISTRATIVELY<br>INSOLVENT CASE .....   | 732 |
| 15.901  | Applicable Bankruptcy Code Provisions .....  | 732 |
| 15.902  | Whether Disgorgement of Fees Is Appropriate in<br>Administrative Insolvency .....                            | 733 |
| 15.10   | ETHICAL ISSUES FOR ATTORNEYS.....  | 735 |
| 15.1001 | Attorney’s Duties to Client .....  | 735 |
| 15.1002 | Special Issues in Bankruptcy .....   | 742 |
| 15.1003 | Attorneys as Debt Relief Agencies.....   | 746 |
|         | APPENDIX 15-1: SAMPLE ENGAGEMENT AGREEMENT.....  | 751 |
|         | APPENDIX 15-2: CONSULTATION AGREEMENT WITH<br>NOTIFICATIONS .....  | 759 |
|         | APPENDIX 15-3: LOCAL RULE 2016-1 (EASTERN DISTRICT).....   | 773 |
|         | APPENDIX 15-4: STANDING ORDER NO. 25-1 (EASTERN<br>DISTRICT) .....   | 779 |
|         | APPENDIX 15-5: STANDING ORDER NO. 22-001 WITH<br>AMENDED GUIDELINES (WESTERN DISTRICT) .....                 | 783 |
|         | APPENDIX 15-6: APPLICATION FOR SUPPLEMENTAL<br>COMPENSATION OF ATTORNEY FOR DEBTOR(S) .....                  | 791 |
|         | APPENDIX 15-7: APPLICATION TO EMPLOY COUNSEL FOR A<br>CHAPTER 11 DEBTOR-IN-POSSESSION.....                   | 793 |
|         | APPENDIX 15-8: APPLICATION FOR APPROVAL OF<br>COMPENSATION BY DEBTOR’S COUNSEL IN A<br>CHAPTER 13 CASE ..... | 797 |
|         | APPENDIX 15-9: FINAL APPLICATION FOR COMPENSATION<br>AND REIMBURSEMENT.....                                  | 799 |

TABLE OF CONTENTS

---

APPENDIX 15-10: GUIDELINES FOR REVIEWING  
APPLICATIONS FOR COMPENSATION AND  
REIMBURSEMENT OF EXPENSES..... 825

**CHAPTER 16: TAX AND ACCOUNTING ISSUES**

16.1 INDIVIDUAL BANKRUPTCIES..... 835  
16.101 Bankruptcy Estate a Separate Tax Entity ..... 835  
16.102 Initial Duties of Trustee ..... 836  
16.103 Trustee’s Duty to File Tax Returns..... 839  
16.104 Trustee’s Liability for Estate Taxes..... 839  
16.105 Computation of Tax ..... 840  
16.106 Administrative Expenses..... 844  
16.107 Net Operating Losses..... 845  
16.108 Property Taxes ..... 845  
16.109 Estimated Taxes..... 845  
16.110 Abandonment of Property to the Debtor..... 846

16.2 CORPORATE BANKRUPTCIES..... 847  
16.201 Taxable Entity..... 847  
16.202 Tax Attributes ..... 848  
16.203 Filing Requirements ..... 848  
16.204 Subchapter S Corporations..... 849

16.3 PARTNERSHIP BANKRUPTCIES..... 850  
16.301 Taxable Entity..... 850  
16.302 Filing Requirements ..... 851  
16.303 Partnership Income ..... 851

16.4 CANCELLATION OF DEBT ..... 851  
16.401 Cancellation of Debt (COD) Income Defined ..... 851  
16.402 Items That Do Not Constitute COD Income..... 854  
16.403 COD Income That Is Excluded from Gross Income..... 856  
16.404 Special Rules Relating to Partnerships and  
S Corporations..... 858  
16.405 The Impact of Excluding COD Income ..... 858

16.5 SECTION 505(B) 60-DAY CLEARANCE..... 861  
16.501 Application for Determination of Unpaid Liability..... 861  
16.502 Failure of IRS to Timely Respond ..... 862  
16.503 Expedited Audit ..... 862  
16.504 Audit When Income Insufficient to Require Return ..... 862

TABLE OF CONTENTS

---

|  |  |     |
|--|--|-----|
| 16.505   | Partnerships, Certain S Corporations, and Grantor Trusts Created Pursuant to a Confirmed Chapter 11 Plan ..... | 862 |
| 16.506   | Request for Determination of Refund .....  | 862 |
| 16.507   | Chapter 13 Cases.....  | 863 |
| 16.6   | FEDERAL FORM W-2 AND RELATED TAX FILINGS .....   | 863 |
| 16.601   | Trustee's Responsibility for Wage-Related Tax Filings .....  | 863 |
| 16.602   | Form W-2 .....   | 866 |
| 16.7   | FEDERAL FORM 1099 .....  | 868 |
| 16.701   | Trustee's Responsibility to File .....   | 868 |
| 16.702   | Distributions for Which Filing Is Not Required .....   | 869 |
| 16.703   | Obtaining Required Information .....   | 870 |
| 16.8   | OTHER TAXES .....  | 870 |
| 16.801   | Sales Tax.....   | 870 |
| 16.802   | Transfer Taxes.....  | 870 |
| 16.9   | PENALTIES .....  | 871 |
| 16.901   | Failure to File Return .....   | 871 |
| 16.902   | Failure to Pay Tax.....  | 871 |
| 16.903   | Failure to File Correct Information Returns .....  | 872 |
| 16.904   | Failure to Furnish Correct Payee Statements.....   | 872 |
| 16.905   | Penalty for Noncompliance with Electronic Filing Requirements.....   | 872 |
| 16.906   | Relief from Tax Penalties.....   | 873 |
| 16.10  | FINANCIAL REPORTING.....   | 874 |
| 16.1001  | Full Disclosure of Financial Information .....   | 874 |
| 16.1002  | Bankruptcy Schedules.....  | 875 |
| 16.1003  | Statement of Financial Affairs .....   | 882 |
| 16.1004  | Monthly Operating Reports .....  | 883 |
| 16.1005  | Access to the Official Forms.....  | 885 |
| 16.1006  | Small Business Requirements.....   | 886 |
| 16.1007  | Other Reporting Requirements .....   | 887 |
| 16.1008  | Financial Reporting When Entities Emerge from Chapter 11 .....   | 887 |
| APPENDIX 16-1: CHAPTER 11 MONTHLY OPERATING REPORT FORM AND INSTRUCTIONS ..... |  | 893 |

TABLE OF CONTENTS

---

|  |     |
|--|-----|
| APPENDIX 16-2: MONTHLY OPERATING REPORT FOR SMALL BUSINESS UNDER CHAPTER 11 AND 2017 COMMITTEE NOTES—FORM 425C ..... | 911 |
| APPENDIX 16-3: DEBTOR’S BALANCE SHEET—FRESH START ACCOUNTING .....   | 919 |
| <br><b>CHAPTER 17: CLAIMS AGAINST THE BANKRUPTCY ESTATE</b>  |     |
| 17.1 INTRODUCTION .....  | 921 |
| 17.2 PROOFS OF CLAIM .....   | 921 |
| 17.201 In General.....   | 921 |
| 17.202 Definition of Claim.....  | 922 |
| 17.203 Bar Date .....  | 923 |
| 17.204 Secured Claims.....   | 923 |
| 17.205 Mechanics of Filing and Maintaining Claims .....  | 925 |
| 17.206 Common Mistakes.....  | 926 |
| 17.207 Allowance of Claims and Objections .....  | 927 |
| 17.208 Effect of Filing a Proof of Claim .....   | 929 |
| <br><b>CHAPTER 18: BANKRUPTCY ETHICS VIOLATIONS, FRAUD, AND CRIME</b>  |     |
| 18.1 INTRODUCTION .....  | 931 |
| 18.2 ETHICS VIOLATIONS .....   | 932 |
| 18.201 In General.....   | 932 |
| 18.202 Attorney-Client Privilege and the Duty to Disclose.....   | 935 |
| 18.203 Violations of Federal Rule of Bankruptcy Procedure 9011.....  | 938 |
| 18.204 Duty to Disclose Adverse Authority.....   | 941 |
| 18.205 Ethical Issues with Electronic Case Filing.....   | 942 |
| 18.206 “Ghostwriting” in Bankruptcy Courts .....   | 943 |
| 18.207 Unauthorized Practice of Law in Bankruptcy Court .....  | 944 |
| 18.208 Flat Fees in Chapter 7 Cases .....  | 946 |
| 18.209 Courts’ Role in Enforcing Ethical Standards .....   | 948 |
| 18.3 BANKRUPTCY CRIMES .....   | 949 |
| 18.301 Criminal Intent .....   | 949 |
| 18.302 Concealment of Assets .....   | 950 |

TABLE OF CONTENTS

---

|        |   |     |
|--------|---|-----|
| 18.303 | False Oath.....   | 954 |
| 18.304 | False Claims .....  | 956 |
| 18.305 | Bribery and Extortion .....                                   | 957 |
| 18.306 | Fraudulent Transfers.....                                     | 958 |
| 18.307 | Destruction, Concealment, or Withholding of Records .....     | 958 |
| 18.308 | Embezzlement .....  | 959 |
| 18.309 | Conflicts of Interest.....                                    | 960 |
| 18.310 | Illegal Fee Agreements .....                                  | 961 |
| 18.311 | Improper Petition Preparer Conduct .....                      | 962 |
| 18.312 | Bankruptcy Fraud.....   | 963 |
| 18.313 | Statute of Limitations .....                                  | 964 |
| 18.314 | Required Reference of Criminal Matters .....                  | 964 |
| 18.4   | RELATED CRIMES.....   | 965 |
| 18.401 | Aiding and Abetting .....                                     | 965 |
| 18.402 | Conspiracy .....  | 966 |
| 18.403 | False Statements—Perjury.....                                 | 966 |
| 18.404 | Fraud.....  | 967 |
| 18.405 | Obstruction of Justice .....                                  | 967 |
| 18.406 | Money Laundering .....  | 967 |
| 18.407 | Racketeer Influenced and Corrupt Organizations<br>(RICO)..... | 967 |
| 18.5   | PRACTICE CONSIDERATIONS.....                                  | 967 |
| 18.501 | Pre-Bankruptcy Planning .....                                 | 967 |
| 18.502 | Petition, Schedules, and Statements.....                      | 969 |
| 18.503 | Section 341 Meeting and the Debtor’s Duties.....              | 971 |
| 18.504 | Attorney Fees: Agreements and Disclosure .....                | 974 |
| 18.505 | Assets Sales .....  | 975 |
| 18.6   | CONCLUSION.....   | 977 |

**CHAPTER 19: BANKRUPTCY APPEALS**

|        |                                    |     |
|--------|------------------------------------|-----|
| 19.1   | INTRODUCTION.....                  | 979 |
| 19.101 | In General.....                    | 979 |
| 19.102 | Jurisdiction .....                 | 979 |
| 19.2   | FORUM FOR BANKRUPTCY APPEALS ..... | 980 |
| 19.201 | Appellate Options Generally.....   | 980 |
| 19.202 | Appeals to the District Court..... | 980 |

TABLE OF CONTENTS

---

|        |   |      |
|--------|---|------|
| 19.203 | Magistrate Review .....   | 981  |
| 19.204 | Direct Appeals to the Circuit Court and Related<br>Statutes and Rules.....                                    | 981  |
| 19.3   | WHO MAY APPEAL: STANDING .....  | 984  |
| 19.301 | Standing to Appeal.....   | 984  |
| 19.302 | Party Bringing Appeal.....  | 985  |
| 19.4   | BANKRUPTCY ORDERS THAT MAY BE APPEALED.....   | 986  |
| 19.401 | In General.....   | 986  |
| 19.402 | Differences Between Final and Interlocutory Orders .....  | 987  |
| 19.403 | Collateral Order Doctrine.....  | 992  |
| 19.5   | PROCESS FOR BANKRUPTCY APPEALS TO DISTRICT<br>COURT.....  | 993  |
| 19.501 | Notice of Appeal .....  | 993  |
| 19.502 | Deadline for Filing a Notice of Appeal.....   | 993  |
| 19.503 | Computing Time for the 14-Day Rule.....   | 994  |
| 19.504 | Filing a Notice of Appeal by Another Party.....   | 994  |
| 19.505 | Timely Filing of a Notice of Appeal Is Mandatory .....  | 995  |
| 19.506 | Exceptions to the 14-Day Rule .....   | 995  |
| 19.507 | Post-Judgment Motions and Tolling the Deadline to<br>File a Notice of Appeal.....                             | 997  |
| 19.508 | Form of Notice of Appeal .....  | 999  |
| 19.509 | Service of Notice of Appeal .....   | 999  |
| 19.510 | Sending Notice of Appeal to District Court .....  | 999  |
| 19.511 | Form of Notice of Appeal from Interlocutory Orders<br>Must Be Accompanied by Motion for Leave to Appeal ..... | 999  |
| 19.512 | Designating the Record and Statement of Issues on<br>Appeal.....  | 1003 |
| 19.513 | Corporate Disclosure Statement .....  | 1006 |
| 19.514 | Ordering and Paying for Transcript of Proceedings .....   | 1008 |
| 19.515 | Sealed Documents.....   | 1009 |
| 19.516 | Briefs.....   | 1009 |
| 19.517 | Oral Argument .....   | 1011 |
| 19.518 | Filing Fees for Appeals in Local Rules of the Eastern<br>District of Virginia .....                           | 1012 |
| 19.519 | Dismissal for Failure to Take Required Steps After<br>Filing Notice of Appeal .....                           | 1013 |
| 19.520 | Voluntary Dismissal of Appeals .....  | 1014 |

TABLE OF CONTENTS

---

|         |   |             |
|---------|---|-------------|
| 19.6    | PROCESS FOR DIRECT APPEALS TO THE CIRCUIT COURT .....                                   | 1014        |
| 19.601  | In General .....  | 1014        |
| 19.602  | Effective Date of Certification .....   | 1014        |
| 19.603  | Procedure for Certifying Direct Appeals to Circuit Court.....                           | 1016        |
| 19.604  | Duties After Certification .....  | 1018        |
| 19.7    | STANDARD OF REVIEW APPLIED BY THE DISTRICT COURT .....                                  | 1018        |
| 19.701  | In General .....  | 1018        |
| 19.702  | Noncore Proceedings Where Parties Did Not Consent to Bankruptcy Court Jurisdiction..... | 1019        |
| 19.703  | Proposed Findings of Fact and Conclusions of Law .....                                  | 1019        |
| 19.704  | Matters of Discretion.....  | 1020        |
| 19.8    | STANDARD OF REVIEW APPLIED BY CIRCUIT COURT .....                                       | 1021        |
| 19.9    | OPTIONS FOLLOWING DISTRICT COURT RULING ON BANKRUPTCY APPEAL .....                      | 1021        |
| 19.901  | In General .....  | 1021        |
| 19.902  | File a Motion for Rehearing with District Court .....                                   | 1021        |
| 19.903  | Appeal to Court of Appeals .....  | 1022        |
| 19.904  | Staying District Court Judgment .....   | 1023        |
| 19.10   | OBSTACLES TO SUCCESSFUL BANKRUPTCY APPEALS .....  | 1023        |
| 19.1001 | Mootness .....  | 1023        |
| 19.1002 | Stay Pending Appeal .....   | 1027        |
| 19.11   | MISCELLANEOUS ISSUES IN BANKRUPTCY APPEALS.....   | 1029        |
| 19.1101 | New Issues, Arguments, or Law .....   | 1029        |
| 19.1102 | Costs.....  | 1030        |
| 19.1103 | Frivolous Appeals .....   | 1031        |
| 19.1104 | Suspension of Rules in Part VIII.....   | 1031        |
|         | <b>TABLE OF AUTHORITIES .....</b>   | <b>1033</b> |
|         | <b>INDEX .....</b>  | <b>I-1</b>  |

## CHAPTER 12

### SUBCHAPTER V: SMALL BUSINESS REORGANIZATION

#### 12.1 INTRODUCTION

**12.101 In General.** Through the Small Business Reorganization Act of 2019 (SBRA), Congress created subchapter V of chapter 11. Subchapter V is intended to provide a streamlined chapter 11 process to remove some of the obstacles to reorganization by providing an economically feasible and efficient option for small business debtors. Subchapter V is limited to individuals and entities that qualify as a “small business debtor” under the updated definition of the term by the SBRA. Under the SBRA, a small business debtor was defined as a person or entity engaged in commercial or business activities that has aggregate secured and unsecured noncontingent liquidated debts as of the date of filing of less than \$2,725,625.<sup>1</sup> This threshold debt amount was increased in April 2020 to \$7,500,000 under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and then subsequently extended in June 2022 by the Bankruptcy Threshold Adjustment and Technical Corrections Act (Corrections Act). The extended debt limit increase in the Corrections Act reverted back to \$3,024,725<sup>2</sup> on June 21, 2024, and the 2025 limit is \$3,424,000.<sup>3</sup>

Debtors who qualify for subchapter V must affirmatively elect such treatment, otherwise their case will proceed under traditional chapter 11 or the current provisions of chapter 11 governing small business cases will apply. For debtors that elect to proceed under subchapter V, there are a number of important differences from traditional chapter 11. Most importantly, subchapter V (i) modifies confirmation requirements including elimination of the absolute priority rule; (ii) provides for the appointment of a trustee designed to facilitate confirmation while the debtor remains in possession of assets and operates the business as a debtor-in-possession; (iii) changes several administrative and procedural rules; (iv) alters the rules for the debtor’s discharge; and (v) modifies the definition of property of the estate with regard to property an individual debtor acquires postpetition, including postpetition earnings.

---

<sup>1</sup> This number continues to be adjusted for inflation pursuant to 11 U.S.C. § 104.

<sup>2</sup> See 11 U.S.C. § 101(51D).

<sup>3</sup> The Final Report of the American Bankruptcy Institute Subchapter V Task Force is available at <https://subvtaskforce.abi.org/>.

If the first few years after the enactment of the SBRA are any indication, subchapter V is an effective and popular tool for qualifying debtors. In comparing data from the Office of the United States Trustee, subchapter V has a substantially higher confirmation rate than non-subchapter V small business cases.<sup>4</sup> If the data is any indication, subchapter V is achieving its goals with a majority of cases reaching confirmation.

**12.102 Subchapter V Cases Are Chapter 11 Cases.** Though commonly referred to as “subchapter V” cases, it is important to note that subchapter V is part of chapter 11. As a result, many of the same issues, questions, requirements, and standards apply, such as cash collateral, assumption and rejection of leases, employment of professionals, and first-day motions. Those topics are addressed in detail in Chapter 11 of this book. This chapter addresses the areas in which a subchapter V case differs from a traditional chapter 11 filing.

## 12.2 PROCEEDING UNDER SUBCHAPTER V

**12.201 Election of Subchapter V.** Subchapter V is only applicable when a small business debtor, as defined by 11 U.S.C. § 1182, elects subchapter V treatment on the Voluntary Petition form.<sup>5</sup> In general, a debtor is eligible to elect subchapter V if the debtor: (i) is a “person”;<sup>6</sup> (ii) is engaged in “commercial or business activities”; (iii) does not have aggregate noncontingent liquidated debts in excess of the applicable debt limit; and (iv) at least 50 percent of debts arise from the debtor’s commercial or business activities.<sup>7</sup> However, a debtor cannot be a subchapter V debtor if they are (i) a member of a group of affiliated debtors that has aggregate noncontingent liquidated debts greater than the applicable debt limit, (ii) a corporation subject to reporting requirements under the Securities Exchange Act of 1934, or (iii) any debtor that is an affiliate of a

---

<sup>4</sup> See Chapter 11 Subchapter V Statistical Summary Through December 31, 2024, Office of the United States Trustee, [www.justice.gov/ust/page/file/1499276/dl?inline](http://www.justice.gov/ust/page/file/1499276/dl?inline) (last visited Mar. 19, 2025) (percentage of non-subchapter V plans confirmed in fiscal years 2020-2023 was 23%; percentage of subchapter V confirmed plans in the same fiscal years was 52%).

<sup>5</sup> See Official Forms 101, 201.

<sup>6</sup> Person, as defined by 11 U.S.C. § 101(41), includes individuals, corporations, and partnerships. A limited liability company is considered a person. See, e.g., *In re QDN, LLC*, 363 Fed. Appx. 873, 876 n.4 (3d Cir. 2010); *In re CWNevada, LLC*, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re 4 Whip, LLC*, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re ICLNDS Notes Acquisition, L.L.C.*, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio 2001); see also *In re Asociación de Titulares de Condominio Castillo*, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

<sup>7</sup> See 11 U.S.C. § 1182(1); see also 11 U.S.C. § 101(51D)(A).

corporation subject to SEC reporting requirements.<sup>8</sup> While the definition of a small business debtor on its face appears straightforward, many of the reported cases in the early years of the SBRA involved the interpretation of the elements.

Without the election of subchapter V, the debtor's case could continue as a small business case under section 101(51C) if it is within the debt limits. The SBRA amended the definition of "small business case" in section 101(51C) of the Bankruptcy Code to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has not elected application of subchapter V.

Bankruptcy Rule 1020(b) allows for a party in interest or the United States trustee to object to the debtor's election of subchapter V. Objections are required to be filed within 30 days after the conclusion of the section 341 meeting of creditors or within 30 days after an amendment to the designation electing subchapter V is filed, whichever is later.<sup>9</sup> Unlike other deadlines for objections (namely, objections to exemptions), the deadline to object to the election of subchapter V treatment is set as of the conclusion (not as of the date first set) of the section 341 meeting and, as a result, may lapse after other deadlines in the case if the meeting of creditors is held open. Generally, the burden is on the debtor to establish its eligibility if a party in interest lodges an objection.<sup>10</sup>

Written into Bankruptcy Rule 1020(b), there seems to be a mechanism to allow a delayed petition amendment to elect subchapter V. However, the SBRA provisions in the Bankruptcy Code do not clearly address if there is an ability to do so. Bankruptcy Rule 1020(a) requires a debtor in a voluntary case to elect subchapter V in the petition, and a debtor in an involuntary case must file a statement electing subchapter V within 14 days after the order for

---

<sup>8</sup> See 11 U.S.C. § 1182(1); see also 11 U.S.C. § 101(51D)(B).

<sup>9</sup> Fed. R. Bankr. P. 1020(b). The Federal Rules of Bankruptcy Procedure were amended April 2, 2024, effective December 1, 2024, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

<sup>10</sup> *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403, 405 (B.A.P. 9th Cir. 2022); *National Loan Invs., L.P. v. Rickerson (In re Rickerson)*, 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021); *Lyons v. Family Friendly Contracting LLC (In re Family Friendly Contracting LLC)*, No. 21-14213-TJC, 2021 Bankr. LEXIS 2945, at \*7, 2021 WL 5540887, at \*2 (Bankr. D. Md. Oct. 26, 2021); *In re Vertical Mac Constr., LLC*, No. 6:21-bk-01520-LVV, 2021 Bankr. LEXIS 2285, at \*4, 2021 WL 3668037, at \*2 (Bankr. M.D. Fla. July 23, 2021); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021); *In re Blue*, 630 B.R. 179, 187 (Bankr. M.D.N.C. 2021); *In re Offer Space, LLC*, 629 B.R. 299, 304 (Bankr. D. Utah 2021); *In re Ikalowych*, 629 B.R. 261, 275 (Bankr. D. Colo. 2021); *In re Johnson*, No. 19-42063-ELM, 2021 Bankr. LEXIS 471, at \*11, 2021 WL 825156, at \*4 (Bankr. N.D. Tex. Mar. 1, 2021); *In re Thurmon*, 625 B.R. 417, 419 n.4 (Bankr. W.D. Mo. 2020).

relief.<sup>11</sup> The 2022 Advisory Committee Note to Rule 1020 states that the “rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”<sup>12</sup> A delayed amendment to elect subchapter V creates a deadline issue as there are strict deadlines under sections 1188 and 1189 of the Bankruptcy Code for the bankruptcy court to hold the required status conference and the debtor to file a plan.

### 12.202 Eligibility.

**A. Debt Limit.** The SBRA originally adopted the debt limit for a small business debtor as defined in section 101(51D), however, the onset of the Coronavirus pandemic shortly after enactment resulted in a temporary increase in the debt limit for subchapter V cases to \$7,500,000. On June 20, 2024, the Bankruptcy Code reverted to the requirement that a debtor must be a small business debtor as defined by section 101(51D).<sup>13</sup>

The debt limit, analogous to cases under chapter 12 or chapter 13, focuses on liquidated noncontingent debt. This requires all events giving rise to the debt to have occurred before the filing of the petition and the amount to be readily determined.

### B. Commercial or Business Activities.

**1. In General.** Only individuals or entities engaged in commercial or business activities may be subchapter V debtors.<sup>14</sup> It is accepted that such business does not have to be profit motivated.<sup>15</sup>

---

<sup>11</sup> Fed. R. Bankr. P. 1020(a).

<sup>12</sup> See, e.g., *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 342 (Bankr. S.D. Fla. 2020) (“[N]othing in the text of Rule 1009 or Interim Rule 1020 prevents a small business debtor from filing an amended petition to elect to have Subchapter V apply to its case, even if it had not previously elected to proceed under Subchapter V (or even if it filed its case before Subchapter V became effective.)”; see also *In re Bello*, 613 B.R. 894, 895-96 (Bankr. E.D. Mich. 2020) (permitting debtor who had originally filed a chapter 13 case, then converted to chapter 11, to subsequently amend his petition to elect to proceed under subchapter V); *In re Blanchard*, No. 19-12440, 2020 Bankr. LEXIS 1909, at \*7-8, 2020 WL 4032411, at \*3 (Bankr. E.D. La. July 16, 2020) (overruling United States trustee’s objection to debtors amending their petition to elect subchapter V status after United States trustee had filed a motion to convert their case to chapter 7); *In re Bonert*, No. 2:19-bk-20836-ER, 2020 Bankr. LEXIS 1783, at \*20-23, 2020 WL 3635869, at \*2-3 (Bankr. C.D. Cal. June 3, 2020) (overruling objection of creditors committee to debtors amending their petition to elect to proceed under subchapter V). However, the Bankruptcy Court for the Western District of Virginia did not allow for the debtor to convert his case to one under subchapter V. See *In re Wetter*, 620 B.R. 243, 255 (Bankr. W.D. Va. 2020).

<sup>13</sup> The debt limit for 2025 is 3,024,725.

<sup>14</sup> See 11 U.S.C. § 1182(1); see also 11 U.S.C. § 101(51D) (definition of small business debtor).

<sup>15</sup> See, e.g., *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403, 413 (B.A.P. 9th Cir. 2022) (“[N]o profit motive is required for a debtor to qualify for subchapter V relief. To hold otherwise would

The more complicated question arises when a business is no longer operational or an individual debtor has changed employment. In those cases, as an initial matter, courts have had to determine whether the debtor is required to be engaged in commercial or business activities at the time of filing, whether the debtor has to be involved in the same commercial or business activity from which the debt arose, and what types of activities are “commercial or business.”

**2. Activities on the Petition Date.** The majority view is that the debtor does not need to be “maintaining its core or historical operations on the petition date” but that it must be engaged in “some type of commercial or business activities.”<sup>16</sup> But, other courts have found that a debtor must be *currently* engaged in commercial or business activities, finding that the plain meaning of “engaged in” means being actively and currently involved.<sup>17</sup>

**3. Whether the Debtor Must Be Involved in the Same Activity.** A subchapter V debtor must still have some activity in its small business, even if it is just winding down. Courts have determined that a debtor cannot elect subchapter V if the business has been sold, the debtor had no intent to return to the business, and the debtors were not engaged in any new or ongoing commercial or business activities.<sup>18</sup> However, the majority of courts have held that the commercial or business activities as of the petition date does not have to be the same commercial or business activity from which the debtor’s debts arose.<sup>19</sup> It is clear that for individual small business debtors, if their only income and activity as of the petition date is through W-2

---

wrongfully exclude nonprofits and other persons that lack such a motive.”); *In re Ellingsworth Residential Cmty. Ass’n*, 619 B.R. 519 (Bankr. M.D. Fla. 2020) (a nonprofit homeowner’s association was eligible for subchapter V election).

<sup>16</sup> *In re RS Air, LLC*, 638 B.R. at 410; see also *In re Blanchard*, 2020 Bankr. LEXIS 1909, 2020 WL 4032411; *In re Bonert*, 2020 Bankr. LEXIS 1783, 2020 WL 3635869; *In re Wright*, No. 20-01035-HB, 2020 Bankr. LEXIS 1240, 2020 WL 2193240 (Bankr. S.C. Apr. 27, 2020).

<sup>17</sup> *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020); see also *National Loan Invs., L.P. v. Rickerson (In re Rickerson)*, 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021) (eligibility requires the debtor to be engaged in commercial or business activities on the petition date); *In re Blue*, 630 B.R. 179, 188-89 (Bankr. M.D.N.C. 2021) (collecting and discussing cases); *In re Offer Space, LLC*, 629 B.R. 299, 305-06 (Bankr. D. Utah 2021); *In re Ikalowych*, 629 B.R. 261, 280-83 (Bankr. D. Colo. 2021); *In re Johnson*, No. 19-42063-ELM, 2021 Bankr. LEXIS 471, at \*3-4, 2021 WL 825156, at \*6-7 (Bankr. N.D. Tex. Mar. 1, 2021) (advancing three reasons: (i) engaged does not refer to past involvement; (ii) subchapter V is to facilitate expedience; and (iii) “engaged in” applicable to railroads under subchapter IV of chapter 11 and chapter 12 applies contemporaneously).

<sup>18</sup> See *In re Thurmon*, 625 B.R. at 423.

<sup>19</sup> See *In re Fama-Chiarizia*, 655 B.R. 48, 68-69 (Bankr. E.D.N.Y. 2023); *In re Offer Space, LLC*, 629 B.R. at 306.

employment, that is insufficient to meet the involvement in commercial or business activity standard.<sup>20</sup>

**4. Business Activities Includes Winddown.** If a business is no longer operational, courts have evaluated whether the principal or the entity itself is eligible based on activities such as winding down the business affairs. This is a fact-specific analysis, but the majority of courts to consider the question have held that business activities are not limited to ongoing business operation activities. At least one court has found that keeping the empty shell of the former business entity open did not qualify as being “engaged” in business activities.<sup>21</sup> In general, courts apply a totality of the circumstances test to determine whether activities were sufficient commercial or business activities.<sup>22</sup> As a result, the term “commercial or business activities” is generally applied in an exceptionally broad manner, including “any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).”<sup>23</sup> Based on this interpretation, winddown activities, such as interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records, constitute sufficient commercial or business activities.<sup>24</sup> In individual cases, receipt of a material contribution to the debtor’s income as a part-time independent contractor and rental of her former residence have been held to be within the scope of commercial or business activities.<sup>25</sup>

**C. Conversion or Revocation.** Despite the default position of the debtor remaining in possession in subchapter V, the SBRA provided for the situation where a debtor may need to be removed from possession.<sup>26</sup> The standard for removal (also referred to as “dispossession”) is “cause” including fraud, dishonesty, incompetence, or gross mismanagement. A removed debtor

---

<sup>20</sup> See, e.g., *In re Rickerson*, 636 B.R. at 429.

<sup>21</sup> *Id.*

<sup>22</sup> *In re Ikalowych*, 629 B.R. at 284-85.

<sup>23</sup> *Id.* at 276.

<sup>24</sup> *Id.* at 285-86; see also *In re Offer Space, LLC*, 629 B.R. at 303 (the debtor was not operating as a business and was only attempting to realize value from its assets and pay creditors).

<sup>25</sup> *In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021).

<sup>26</sup> 11 U.S.C. § 1185(a).