

PRESENTED AT**42nd Annual Jay L. Westbrook Bankruptcy Conference****November 16–17, 2023****Austin, TX****Hot Cases and Current Issues in Subchapter V****The Honorable Eduardo V. Rodriguez****The Honorable Michelle M. Harner****Brad W. Odell****Alicia L. Barcomb**

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Moderator – The Honorable Eduardo V. Rodriguez*

Panelists – The Honorable Michelle M. Harner,* Brad W. Odell, Alicia L. Barcomb¹

Summary of Case Law for Select Subchapter V Issues²

Debtor Eligibility

1. *In re Evergreen Site Holdings, Inc.*, 652 B.R. 307 (Bankr. S.D. Ohio 2023)

Issue: Whether debtor was a single asset real estate debtor and, thus, ineligible to proceed under subchapter V.

Held: The Court held that the debtor met its burden of proving eligibility to proceed under subchapter V and that's the debtor's project was not single asset real estate. The debtor owned 2 adjoining parcels of real property. On the petition date, the debtor held a lease with a commercial tenant for one of the properties, otherwise the remaining property was leased by residents occupying mobile homes. The objecting creditors asserted that the debtor has treated and continues to treat the two adjacent parcels as a single property. The debtor disputed the alleged commonality of purposed noting that it distinguished its right and duties as a commercial landlord from its right and duties as a residential landlord. Applying a preponderance of the evidence standard, the Court concluded that the debtor's properties were not being used together in a common scheme and did not constitute single asset real estate.

2. *In re Heaven's Landing, LLC*, 649 B.R. 812 (Bankr. N.D. Ga. 2023)

Issue: Consideration of debtor's subchapter V eligibility if it confirmed plan with no impaired classes of claims

Held: The plan proposed to pay the principal, interest, costs, charges, and any accrued and due profit participation on the creditors' claims on the effective date. Because this was what the creditor's loan documents provided for there was no impairment. The motion objecting to debtor's eligibility was moot because voting was unnecessary, and it did not make a difference if debtor proceeded under subchapter V or not.

Moreover, the Court rejected the secured creditor's argument that the Bankruptcy Code did not allow subrogation. Section 1123(a)(5) requires a plan to provide adequate means for implementation. Among the enumerated means are satisfaction or modification of any lien, the cancellation or modification of any indenture or similar instrument, and the merger or substantive consolidation of the debtor with one or more persons. Subrogation upon full payment of an obligation is consistent with these other means of implementation. Given that

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¹ Any views expressed are those of the speaker and do not necessarily represent the views of and should not be attributable to the United States Trustee Program or the U.S. Department of Justice.

² The speakers credit prior presenters on this topic and their work to amass the wealth of knowledge presented here. Portions of this summary were derived from STEVEN J. BRUJIC ET AL., SUBCHAPTER V CASE LAW UPDATE (NABT 42nd Annual Conference, 2023) and FRANCES A. SMITH ET AL., SUBCHAPTER V BANKRUPTCY: A LIMITED REVIEW (State Bar of Texas Bankruptcy Law Section Bench Bar Conference, 2023).

the secured creditor would be paid in cash in full within weeks, it would be inequitable to the debtor if it were not allowed to step into the secured creditor's shoes.

3. *In re Free Speech Sys., LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023)

Issues:

- (1) On what date should the Court consider the debtor's eligibility, particularly when there is a subsequent affiliate filing with the debt that exceeds the applicable threshold?
- (2) Whether there was sufficient cause to revoke the debtor's subchapter V designation?

Held: The debtor's statement that it was a subchapter V debtor was correct on the date that it was made—the petition date. Because the debtor's statement was correct when made, the debtor remains eligible notwithstanding the affiliate's subsequent bankruptcy filing. In addition, Bankruptcy Rule 1020(b) provides a deadline for eligibility objections (i.e., 30 days after the 341 meeting or an amendment to the election statement, whichever is later); thus, the eligibility analysis is not an ongoing inquiry throughout the case. The court concluded, "[i]f post-petition affiliate filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time." The Court allowed the debtor to continue to proceed under subchapter V.

4. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Va. 2023)

Issue: The effect of lease obligations as of the date of the petition on subchapter V eligibility.

Held: The court revoked the debtor's subchapter V designation, concluding that its liability under office leases exceeded \$7.5 million. Absent rejection, the debtor owed over \$14 million under the leases. The debtor argued the lease liabilities were contingent because they were not yet owing, and, alternatively, the bankruptcy court should look to the capped rejection damages. The court found that while the payments under the leases may not yet be due, "absent the end of the world," the payments will come due. As such, the debtor's liability under the leases must be considered noncontingent and liquidated. Rather than dismiss the case, the court revoked the debtor's subchapter V designation.

5. *In re Nuovo Ciao-Di, LLC*, 650 B.R. 785 (Bankr. S.D.N.Y. 2023)

Issue: Whether the debtor was a SARE and, thus, ineligible for subchapter V relief.

Held: The bankruptcy court held that two condominiums owned and operated by the debtor were not a "single project" and did not render the debtor a single asset real estate debtor. Although the debtor purchased the units under a single deed and subject to a single mortgage, there was no evidence of a common scheme or development. The units were unique, separately leased when leased, and the debtor intended to sell one unit.

6. *In re Dobson*, No. 23-60148, 2023 WL 3520546 (Bankr. W.D. Va. May 17, 2023)

Issues:

- (1) Whether there was sufficient cause to revoke the debtor's subchapter V designation?
- (2) Was the timing of the debtors' petitions for purposes of the election an abuse?

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