

**8th Semi-Annual
2026 SOUTHERN DISTRICT OF TEXAS
BANKRUPTCY BENCH BAR CONFERENCE**

CONFERENCE MATERIALS

April 27 – April 29, 2026

Earn up to 10.5 Hours of CLE Credit including .75 Hours of Ethics Credit
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PLENARY SESSION

9:00 a.m. Case Law Update: Fifth Circuit Bankruptcy Year in Review

10:00 a.m. Ethics Jeopardy

MODULE 1: CONSUMER & SMALL BUSINESS

10:45 a.m. Understanding Property Taxes in Consumer Bankruptcy Cases

11:15 a.m. Collateral Damage: The Impact of Bankruptcy on Co-Signers, Co-Debtors, and Third-Party Liability in Sub V and Ch 13

1:00 p.m. Chapter 13 Trustee Panel: Asked & Answered!

2:00 p.m. Barely Yours: Property Interests That Become Bankruptcy Estate Assets

3:15 p.m. MCA Lenders in the Crosshairs: Traps for Trustees and Debtors

4:00 p.m. Bassel v. Durand-Day and the Evolving Landscape of Student Loan Discharge

MODULE 2: COMPLEX BUSINESS

10:45 a.m. Lone Star Restructurings: Navigating the Unique Rules, Procedures, and Practices in SDTX Bankruptcy

11:15 a.m. Who's Really in Control? The Role of Special Committees and Independent Directors in Complex Chapter 11

1:00 p.m. Sunnova Redux – From the Trenches to the Confirmation Order

2:00 p.m. The Rise of Strategic Chapter 11s: Distinguishing Reorganization from Litigation Tactics in Mass Torts

3:15 p.m. David in a Court of Goliaths: Strategically Championing Small Creditors in Mega-Bankruptcies

SDTX 2026 Bankruptcy Bench Bar Conference - Case Summaries

Cases:

Supreme Court

1. *Coney Island Auto Parts Unlimited, Inc. v. Burton*, 146 S. Ct. 579 (2026)
2. *United States v. Miller*, 604 U.S. 518 (2025)

Fifth Circuit

3. *In re Instant Brands Acquisition Holdings Inc.*, 2026 WL 765627 (5th Cir. March 18, 2026)
4. *In re EP Energy E&P Co., L.P.*, 169 F.4th 609 (5th Cir. 2026)
5. *In re Carbo Ceramics, Inc.*, No. 24-20439, 2026 WL 625928 (5th Cir. Mar. 5, 2026)
6. *In re Jet Oilfield Services*, 160 F.4th 679 (5th Cir. 2025)
7. *In re Royal Alice Properties, L.L.C.*, 159 F.4th 355 (5th Cir. 2025)
8. *In re Sanchez Energy Corp.*, 159 F.4th 309 (5th Cir. 2025)
9. *In re Dynamic Offshore Res. NS, L.L.C.*, No. 23-20218, 2025 WL 1651901, (5th Cir. June 11, 2025)
10. *In re Sanchez Energy Corp.*, 139 F.4th 411 (5th Cir. 2025)
11. *In re Serta Simmons Bedding, L.L.C.*, 125 F.4th 555, 564 (5th Cir. 2024)
12. *Dondero v. Jernigan (In re Highland Capital Mgmt.)*, 2025 WL 1122466 (5th Cir. April 16, 2025)
13. *In re Adair*, 137 F.4th 384 (5th Cir. 2025)
14. *In re Durand-Day*, 134 F.4th 846 (5th Cir. 2025)

District Court for the Southern District of Texas

15. *In re Steward Health Care Sys. LLC*, No. 4:25-CV-01584, 2026 WL 879529 (S.D. Tex. 2026)
16. *GE Steam Power Inc. v. Talen Energy Corp. (In re Talen Energy Corp.)* No. BR 22-90339, 2026 WL 836671 (S.D. Tex. Mar. 26, 2026)
17. *In re Container Store Grp.*, 676 B.R. 356 (S.D. Tex. 2026)
18. *In re First Brands Group, LLC*, No. H-26-73, 2026 WL 253634 (S.D. Tex. Jan. 31, 2026)
19. *Cluster Holdco, LLC v. Byman (SmileDirect)*, No. BR 23-90786, 2026 WL 150306 (S.D. Tex. Jan. 20, 2026)
20. *Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.*, 2025 WL 3514358 (S.D. Tex. Dec. 8, 2025)
21. *In re ConvergeOne Holdings, Inc.*, No. 4:24-cv-02001 (S.D. Tex. Sept. 25, 2025)

Bankruptcy Court for the Southern District of Texas

22. *In re Lois Bus. Development Corp.*, No. 22-90267, 2026 WL 898513 (Bankr. S.D. Tex. Apr. 1, 2026)
23. *In re Alpine Summit Energy Partners, Inc.*, No. 23-90739, 2026 WL 823740 (Bankr. S.D. Tex. 2026)
24. *Phillips v. Electric Reliability Council of Texas, Inc. (ERCOT)*, No. 21-31070, 2026 WL 693219, (Bankr. S.D. Tex. Mar. 11, 2026)

25. *In re Siu-Fung Ceramics Holdings Ltd.*, 2026 WL 382424 (Bankr. S.D. Tex. Feb. 10, 2026) (Pérez, J.)
26. *In re ENKB-Monticello LLC*, 2026 WL 363028 (Bankr. S.D. Tex. Feb. 7, 2026)
27. *In re Anadrill Directional Services Inc. v. Capybara Capital*, No. 23-31199, 2026 WL 305023 (Bankr. S.D. Tex. Feb. 4, 2026)
28. *In re Loyalty Ventures, Inc.*, No. 23-90111, 2026 WL 801210 (Bankr. S.D. Tex. Jan. 22, 2026)
29. *In re Redfish Property Holdings LLC*, No. 25-80614, 2026 WL 159550 (Bankr. S.D. Tex. 2026)
30. *In re Orb Energy Co.*, No. 25-80363, 2025 WL 3635773 (Bankr. S.D. Tex. Dec. 15, 2025)
31. *In re Entrust Energy, Inc.*, No. 21-31070, 2025 WL 3558739 (Bankr. S.D. Tex. Dec. 11, 2025)
32. *In re Mining Project Wind Down Holdings Inc.*, No. 22-90273, 2025 WL 3522403 (Bankr. S.D. Tex. Dec. 8, 2025)
33. *In re Zachry Holdings, Inc.*, 2025 WL 3272295 (Bankr. S.D. Tex. Nov. 24, 2025)
34. *In re Wahl*, No. 24-35395, 2025 WL 3164728 (Bankr. S.D. Tex. 2025)
35. *In re Wellpath SF Holdco, LLC*, No. 24-90566, 2025 WL 3165423 (Bankr. S.D. Tex. Nov. 12, 2025)
36. *In re Zachry Holdings, Inc. (v. OPPD Venue)*, No. 24-90377, 2025 WL 3056951 (Bankr. S.D. Tex. Oct. 31, 2025)
37. *In re Mountain Express Oil Company*, 674 B.R. 747 (Bankr. S.D. Tex. 2025)
38. *In re Rhodium Encore LLC*, 2025 WL 3017436 (Bankr. S.D. Tex. Oct. 28, 2025)
39. *In re Hornblower Consulting, LLC*, No. 24-90155, 2025 WL 2738231, (Bankr. S.D. Tex. Sept. 25, 2025)
40. *In re Rhodium Encore LLC*, 675 B.R. 502 (Bankr. S.D. Tex. Aug. 30, 2025)
41. *In re Geden Holdings, Ltd.*, 674 B.R. 732 (Bankr. S.D. Tex. 2025)
42. *In re Tehum Care Services, Inc.*, 672 B.R. 108, 672 B.R. 108, 110 (Bankr. S.D. Tex. 2025)
43. *In re Griddy Energy LLC*, No. 21-30923, 2025 WL 1521719 (Bankr. S.D. Tex. May 28, 2025)
44. *In re Sandridge Energy, Inc.*, 2025 WL 1490539, (Bankr. S.D. Tex. May 23, 2025)
45. *In re BMI Oldco Inc.*, 671 B.R. 215 (Bankr. S.D. Tex. 2025)
46. *In re BMI Oldco Inc.*, 2025 WL 1446214 (Bankr. S.D. Tex. May 14, 2025)
47. *In re Container Store Group, Inc.*, No. 24-90627, 2025 WL 4226766 (Bankr. S.D. Tex. Apr. 7, 2025)
48. *In re Red River Talc*, 670 B.R. 251 (Bankr. S.D. Tex. 2025)
49. *In re Kheir*, 674 B.R. 631 (Bankr. S.D. Tex. 2025)
50. *In re Hughes*, No. 25-31870 (Bankr. S.D. Tex. June 27, 2025)

Summaries:

Supreme Court

1. Rule 60(b)(4) “Void Judgment” Motions Are Still Subject to Rule 60(c)(1)’s Reasonable-Time Requirement, Affirming Denial of a Six-Year-Late Bid to Vacate a Bankruptcy Default Judgment

Coney Island Auto Parts Unlimited, Inc. v. Burton, 146 S. Ct. 579 (2026) (Alito, J.)

A chapter 11 debtor filed an adversary proceeding to recover around \$50,000 in unpaid invoices and mailed the summons and complaint to the defendant at its corporate address; the mailing was not addressed to a specific corporate officer because the corporation listed itself as the agent for the service of process. The bankruptcy court entered a default judgment in favor of the debtor when the corporation failed to respond. The debtor’s chapter 11 case was later converted to chapter 7. Five years after the entry of the default judgment, the chapter 7 trustee seized funds from the defendant’s bank account. In response, the defendant moved under Bankruptcy Rule 9024 and Federal Rule 60(b)(4) to set aside the default judgement as void due to improper service. The bankruptcy court never reached the question of whether the judgment was void for failure to address the papers to a corporate officer. Rather, the bankruptcy court denied the motion to void the judgment on the grounds that the delay in filing the Rule 60(b)(4) motion was unreasonable, which was affirmed by the district court and the Sixth Circuit, over a dissent.

On appeal, the Supreme Court held that the requirement that motions for relief from judgement be made within a “reasonable time” applies to motions alleging that a judgment is void, rejecting prior 5th Circuit precedent that there is no time limit on Rule 60(b)(4) motion. The Supreme Court explained that the structure of Rule 60 confirms the plain-text interpretation of Rule 60(c)(1) and that Rule 60 expressly modifies the default reasonable-time limit, imposing a one-year limit on Rule 60(b) motions alleging mistakes, new evidence, or fraud. The Supreme Court rejected the arguments that (i) because a “void judgement is a legal nullity,” no time limit should apply, and (ii) courts have historically allowed litigants to seek relief from void judgments at any time. Litigants seeking relief under Rule 60(b)(4) thus must comply with Rule 60(c)(1) and file a motion within a reasonable time.

2. § 106(a) Sovereign Immunity Waiver Does Not Extend to Underlying State-Law Fraudulent Transfer Claim Incorporated into § 544(b) Action

United States v. Miller, 604 U.S. 518 (2025) (Jackson, C.J.)

In the chapter 7 bankruptcy of Utah transportation company All Resort Group, the trustee brought an action under 11 U.S.C. § 544(b) against the United States to avoid the transfer of \$145,000 misappropriated by shareholders in 2014 to pay their personal federal income taxes, allegedly without providing any value to the company in return. The trustee relied on Utah’s fraudulent-transfer statute, which allows avoidance where the debtor was insolvent and received less than reasonably equivalent value. The bankruptcy court granted summary judgment for the trustee, rejecting the United States’s sovereign-immunity defense. The district court and the Tenth Circuit affirmed. The Supreme Court granted certiorari to resolve a circuit split over whether section 106(a) of the Bankruptcy Code abrogates sovereign immunity for the state-law cause of action incorporated into a section 544(b) claim.

The Supreme Court reversed, holding that section 106(a) of the Bankruptcy Code waives sovereign immunity only for the federal cause of action under section 544(b) itself, not for the underlying state-law fraudulent-transfer claim that supplies the “applicable law.” The Court explained that waivers of sovereign immunity are jurisdictional in nature and do not create substantive rights, and it pointed to section 106(a)(5), which expressly states that nothing in section 106 creates a substantive claim for relief that does not otherwise exist under non-bankruptcy law. Because section 544(b) requires the trustee to identify an “actual creditor” who could have avoided the transfer under applicable law outside bankruptcy, and because the United States could invoke sovereign immunity to defeat a state fraudulent-transfer action outside bankruptcy, the trustee could not use section 106(a) to satisfy section 544(b)’s actual-creditor requirement by expanding state-law liability. The Court further underscored that waivers of sovereign immunity must be unmistakably clear and strictly construed, and concluded that section 106(a) does not unmistakably waive immunity for the embedded state-law claim.

Fifth Circuit

3. Individual Purchase Orders Found as Divisible, Nonexecutory Contracts Separable from the Master Supply Agreement, Allowing Debtor to Retain Pre-Assignment Indemnification Rights Under Completed Purchase Orders Without Violation of Section 365(f)

In re Instant Brands Acquisition Holdings Inc., 2026 WL 765627 (5th Cir. March 18, 2026) (Duncan, J.)

The creditor-appellant companies, who manufacture Instapot cooking appliances (collectively, “Midea”), objected to the chapter 11 plan of reorganization of the debtor-appellees (collectively, “Corelle”) because the plan contemplated Corelle retaining the post-bankruptcy indemnification rights against Midea for products Corelle purchased from Midea under completed purchase orders notwithstanding that the master supply agreement (the “MSA”) governing the purchase orders was assigned to a purchaser. The district court affirmed the bankruptcy court’s finding that both the structure of the MSA and the evidence of the course of performance showed that the parties intended to, and did in practice, separately assent to each individual purchase order.

The Fifth Circuit affirmed the district court’s decision, upholding the bankruptcy court’s denial of Midea’s plan objections, finding that the purchase orders (including the indemnification provisions contained therein) were contracts severable from the MSA. As a result, Corelle retained the indemnification rights under such purchase orders post-effective date. The Fifth Circuit observed that the plain language of the MSA did not unambiguously demonstrate the parties intended the contracts to be indivisible; instead, each purchase order included separately negotiated and varying terms, including price and quantity, and constituted a separate transaction, while the MSA merely governed the ongoing relationship between the parties for purchasing Instapots. As such, the Fifth Circuit reasoned that the intention of the parties, the subject matter of the agreement, and the course of performance rendered the purchase orders divisible from the MSA. Thus, Corelle’s retention of indemnity rights found in individual purchase orders did not violate Section 365(f) despite assignment of the MSA because the purchase orders were nonexecutory, separate contracts from the MSA.

4. Fifth Circuit Holds Temporary 40-Day Production Cessation Did Not Terminate Mineral Leases Under Texas Law, Denies Administrative Expense Claims

In re EP Energy E&P Co., L.P., 169 F.4th 609 (5th Cir. 2026) (Engelhardt, J.)

EP Energy E&P Co., L.P. (“EP”), a Chapter 11 debtor, was the lessee/operator of non-standard oil and gas mineral leases on land in South Texas. During the pendency of EP’s bankruptcy case, a substantial decrease in oil demand associated with the COVID-19 pandemic caused prices to collapse, prompting EP to temporarily cease production on wells located on the leased premises. EP resumed production within 40 days. The mineral lessors (“MSB Owners”) filed a motion for allowance of administrative expense claims under 11 U.S.C. § 503(b)(1)(A), contending that EP’s interim cessation of production had caused the leases to terminate under Texas law and that EP’s continued operations thereafter constituted trespass giving rise to damages qualifying as administrative expenses. The bankruptcy court found the leases had not been terminated and denied the administrative expense claims.

On appeal, the MSB Owners challenged the bankruptcy court’s jurisdiction, arguing that it lacked authority to adjudicate the underlying state-law lease-termination and trespass claims. The Fifth Circuit disagreed, holding that the bankruptcy court had subject-matter jurisdiction because a proceeding to determine a request for payment of administrative expenses under § 503 is a core proceeding, and the court’s determinative authority necessarily encompasses the underlying state-law matters that must be resolved in adjudicating that core matter. The Court further rejected the MSB Owners’ ripeness challenge, finding that the claims were neither abstract nor hypothetical. The underlying events had already occurred before the administrative expense motion was filed, and the determinative issues presented disputed questions of law that did not require further factual development.

The Fifth Circuit affirmed that EP’s 40-day cessation of production did not cause the leases to automatically terminate, even though EP did not also commence and diligently pursue new drilling or reworking operations within 120 days from the initial cessation date. The Court construed the lease’s temporary-cessation provision in light of the lease-maintenance provision, which required ongoing production or operations, not both, to maintain the lease. The Court reasoned that adopting the MSB Owners’ construction would mean that any temporary interruption of production from an existing, fully-functional well, regardless of its brevity, would require the lessee to undertake costly and unnecessary drilling or reworking operations solely to avoid automatic lease termination. The Court reasoned that such a wasteful expenditure of resources was contrary to industry norms and the parties’ contractual objectives of mutually profitable production. The judgment of the bankruptcy and district courts was affirmed.

5. Adversary Proceedings Contesting Proofs of Claim for Ad Valorem Taxes Can Turn On State-Law Contract Interpretation Questions

In re Carbo Ceramics, Inc., No. 24-20439, 2026 WL 625928 (5th Cir. Mar. 5, 2026) (Jones, Graves, Rodriguez, J.J.)

This is an unpublished, per curiam opinion from the Fifth Circuit reversing the bankruptcy court and district court in an adversary proceeding arising out of a Chapter 11 case. The dispute concerned the proper valuation of the debtor’s manufacturing equipment for ad valorem tax

purposes under a 2008 Memorandum of Understanding (“MOU”) between the debtor and local government entities in Wilkinson County, Georgia.

CARBO Ceramics manufactures ceramic proppants used in oil and gas well fracturing. To attract CARBO’s manufacturing operations, the Development Authority of Wilkinson County entered into a “bond-for-title” arrangement with CARBO, structured to circumvent Georgia’s constitutional prohibition on governmental donations and gratuities. Under this arrangement, CARBO transferred title to its manufacturing facilities to the Authority, leased them back, and made Payments in Lieu of Taxes (“PILOTs”) rather than standard ad valorem taxes. The PILOTs were calculated by applying a formula that assessed machinery and equipment at 40% of assessed value, multiplied by a “value percentage” that ramped up over time.

The 2008 MOU specified that the equipment fell within “Economic Life Group III” under the Georgia Department of Revenue’s rules and “shall be valued for ad valorem tax purposes at cost less depreciation,” with depreciation “calculated based on Department of Revenue requirements.” These requirements are codified in the Appraisal Procedures Manual (“APM”), which prescribes a “cost approach” methodology and further requires appraisers to consider “physical deterioration,” “functional obsolescence,” and “economic obsolescence.”

Beginning in 2014, CARBO suffered a sharp economic downturn after losing its largest client to cheaper frac-sand proppants and weathering a broader oil and gas market collapse. CARBO invoked the MOU’s force majeure clause and also argued that its equipment should be assessed at a lower value due to obsolescence and inutility. The Assessors responded by terminating CARBO’s tax incentives entirely. The parties settled for tax years 2015–2017, with the Assessors agreeing to assess property at “fair market values” going forward, but disputes continued for tax years 2018–2022.

CARBO filed for Chapter 11 in the Southern District of Texas in March 2020. The Assessors and the Authority filed a Proof of Claim for unpaid ad valorem taxes covering tax years 2018–2020. CARBO initiated an adversary proceeding objecting to the claim, seeking a refund of approximately \$2.6 million, and alleging due process violations. The Assessors sought an additional payment of roughly \$1.7 million.

At the bench trial, the bankruptcy court raised sua sponte whether the 2008 MOU “allow[s] for obsolescence” and halted the trial for briefing on that threshold question. The bankruptcy court ruled against CARBO, holding that the MOU’s language stating that equipment “shall be operated on a continuous 24 hour per day basis” was not a covenant but rather a “stipulation” that foreclosed any economic obsolescence or inutility deduction. The bankruptcy court then determined that CARBO owed the County \$3,395,872.59—more than the County had sought—plus prejudgment interest exceeding \$4.4 million in total. The district court affirmed.

The Fifth Circuit reversed on three grounds. First, the court held that the 2008 MOU textually incorporated the APM’s cost approach. The MOU’s references to “Economic Life Group III,” valuation “at cost less depreciation,” and “Department of Revenue requirements” had a “reasonably clear and ascertainable meaning” that effectively incorporated the APM by reference. The court noted that the Assessors’ own litigation conduct—including stipulations in the Joint

Pretrial Statement and references to the APM in their answer and memorandum of law—undermined their contrary arguments.

Second, because the MOU incorporated the APM’s cost approach, the APM’s mandate that appraisers “shall consider any evidence” of physical deterioration, functional obsolescence, and economic obsolescence was binding on the Assessors. The court emphasized that obsolescence under this framework “is not optional; it’s a requirement.”

Third, the court rejected the bankruptcy court's interpretation of the “24-hour-per-day” clause as a stipulation barring obsolescence claims, finding it resulted in an impermissible forfeiture under Georgia law. The court observed that the bankruptcy court itself acknowledged the clause was ambiguous, and under Georgia law, forfeitures cannot be implied and “all ambiguities in a contract are to be resolved against the existence” of forfeitures. The court further held that characterizing the clause as a “stipulation” rather than a covenant did not insulate it from the forfeiture doctrine. Finally, the court rejected the bankruptcy court’s equity-based reasoning—that CARBO should not benefit from breaching its 24-hour operating obligation—because Georgia law only excuses a party’s performance where the other party’s nonperformance *caused* the failure to perform, and causation was absent here.

The Fifth Circuit reversed the judgments of the bankruptcy court and district court and remanded for further proceedings, holding that the 2008 MOU requires the Assessors to consider obsolescence and inutility when appraising CARBO’s property for tax years 2018–2022.

6. Member Lacked Apparent Authority to Bind LLC to Factoring Agreement; Claim Against Debtor Unenforceable

In re Jet Oilfield Services, 160 F.4th 679 (5th Cir. 2025) (Smith, J.)

After Jet Oilfield Services filed for chapter 11, creditor Spin Capital, a factoring company, sought to enforce a 2022 agreement signed by a member of the debtor by which Spin purchased \$4.5 million of Jet’s future receivables for \$3 million. Spin filed a proof of claim and an adversary proceeding. Jet’s LLC agreement required its members to obtain the consent of at least one other member to bind the company to transactions. Spin had reviewed bank statements showing that the executing member had electronic access to Jet’s accounts and a tax return listing him as “Partnership Representative” and “General Partner or LLC member-manager,” although the return was not signed by any member-manager. The bankruptcy court held Spin’s claim unenforceable because the executing member lacked both actual and apparent authority and because the agreement lacked consideration. The district court dismissed Spin’s appeal with prejudice after Spin failed to file a court-ordered supplemental brief. Spin then appealed to the Fifth Circuit.

The Fifth Circuit affirmed the dismissal. Applying Texas apparent-authority principles, the court held that the executing member lacked apparent authority because Jet’s principals did not hold him out as authorized, the unsigned tax return was not a “clear statement” by Jet’s principals conferring authority, and Spin’s reliance was unreasonable. Spin never communicated with Jet’s member-managers, did not review Jet’s certificate of formation, and could not reasonably infer authority solely from the executing member’s access to Jet’s bank accounts. Having concluded that Spin failed to establish authority, the court did not reach the consideration issue and held that Spin’s claim against Jet was unenforceable.

7. Failure to Attach Judgment to Notice of Appeal Is Not Jurisdictional; Dismissal as Sanction Was Abuse of Discretion

In re Royal Alice Properties, L.L.C., 159 F.4th 355 (5th Cir. 2025) (Ramirez, J.)

The chapter 11 trustee settled a claim premised upon the debtor’s liability for its affiliates’ obligations by assigning the debtor’s claims against its affiliates to the creditor. The bankruptcy court approved the settlement, permitted the creditor to intervene in the debtor’s disputes with its affiliates, and entered a final judgment of \$233,548.51 against the affiliates. The affiliates filed a timely notice of appeal, but failed to attach the judgment being appealed. The clerk issued a deficiency notice directing the appellants to cure the defect within two business days, and they missed the deadline. The district court dismissed the appeal for lack of jurisdiction, and in the alternative, as a discretionary sanction for noncompliance with the bankruptcy rules and the deficiency notice.

The affiliates appealed to the Fifth Circuit on three issues: (1) whether failing to attach the judgment to a timely notice of appeal is a jurisdictional defect, (2) whether dismissal as a sanction constituted an abuse of discretion, and (3) whether the bankruptcy court lacked jurisdiction over the adversary proceeding filed by the chapter 11 trustee.

The Fifth Circuit reversed, holding that the omission of the judgment from the notice of appeal was not jurisdictional because Bankruptcy Rule 8003(a)(3)(B)’s attachment requirement does not stem from a clear statutory command and therefore cannot deprive the district court of jurisdiction where a timely notice of appeal has been filed under Bankruptcy Rule 8002. The court therefore concluded that the district court had jurisdiction over the appeal. The Fifth Circuit also held that the district court abused its discretion in dismissing the appeal as a sanction under Rule 8003(a)(2), emphasizing that dismissal is an “extremely severe” remedy typically reserved for truly egregious misconduct. The district court did not consider lesser sanctions, there was no meaningful prejudice beyond delayed enforcement, the deficiency notice did not expressly warn that dismissal could result, and the record did not show obstinately dilatory conduct.

8. Bankruptcy Court Lacked Jurisdiction Over Non-Debtor’s State Law Claims Arising from Debtor’s Post-Confirmation Settlement Agreements

In re Sanchez Energy Corp., 159 F.4th 309 (5th Cir. Nov. 13, 2025) (Jones, J.)

Carnero G&P (“Carnero”), a non-debtor midstream service provider, was a party to a prepetition gas gathering, processing, and purchasing contract with debtor-gas producer Sanchez Energy Corp. (“Sanchez”) and others. At the date of confirmation, Sanchez expressly assumed the contract and was thereby committed to perform under the agreement. Before the plan’s effective date, Carnero and the debtors entered into an agreement for the debtors to pursue the rejection of existing midstream contracts, which efforts ultimately failed. The debtors later terminated such agreement with Carnero and excluded Carnero from contract negotiations with the parties whose contracts it previously sought to reject. These parties (excluding Carnero) executed a new Midstream Restructuring Agreement and a Master Settlement Agreement (“MSA”) with reorganized Sanchez, which together incorporated over a dozen subsidiary contracts (collectively, the “Agreements”). After the effective date, Carnero brought a state-court action against Sanchez and counterparties to the Agreements. Carnero alleged that these new agreements interfered with

Carnero's rights under its assumed contract with Sanchez and sought declaratory and monetary relief under state law. The defendants removed the case to the bankruptcy court, and Carnero's motion to remand or abstain was denied. The defendants then moved for judgment on the pleadings. The defendants contended that Carnero did not have the ability to challenge the MSA, and the bankruptcy court agreed, concluding that Carnero was barred from pursuing its contract claims because it (a) failed to object to the terms of the plan and (b) voiced no objection to the MSA's approval during a post-confirmation hearing. The bankruptcy court granted the defendants' motion, which the district court affirmed.

The Fifth Circuit reversed the lower court decisions and remanded the case to state court, holding that the bankruptcy court lacked jurisdiction to adjudicate the post-effective date state law dispute and rejecting the bankruptcy court's interpretation that the Agreements were executory contracts under the plan. The debtors argued that the contracts comprising the Agreements were compiled with unique procedures implemented by the plan and that they should be characterized as executory contracts under the plan; however, the Fifth Circuit found that they could not be executory contracts because the Agreements represented a new, fully integrated set of agreements that did not exist before the bankruptcy filing. The Fifth Circuit held that the plan could not expand the definition of executory contracts to include all manner of new, amended, post-confirmation, and non-debtor contracts. The Fifth Circuit held that the parties' dispute over the state-law ramifications did not pertain to the plan's implementation or execution, necessary for determining the bankruptcy court's post-confirmation "related-to" jurisdiction. The Fifth Circuit also noted that the plan did not bar Carnero from challenging Sanchez's agreements nor was Carnero barred by its failure to object to the plan as its claim arose 18 months after confirmation.

9. Fieldwood's Chapter 11 Plan "Satisfaction" and "Settlement" Language Did Not Extinguish Atlantic's Louisiana Oil Well Lien Act Privileges Against Non-Debtor Property

In re Dynamic Offshore Res. NS, L.L.C., No. 23-20218, 2025 WL 1651901, (5th Cir. June 11, 2025) (Graves and Wilson, JJ.) (per curiam)

The Fifth Circuit examined whether Fieldwood Energy's ("Fieldwood") chapter 11 reorganization plan extinguished statutory privileges granted to Atlantic Maritime Services' ("Atlantic") over non-debtor property under the Louisiana Oil Well Lien Act ("LOWLA"). Reversing the bankruptcy court's decision, the Fifth Circuit held that Atlantic's privileges were not extinguished by Fieldwood's plan.

Fieldwood, an operator of various oil-and-gas wells, hired Atlantic to provide drilling services, and Atlantic accrued over \$13 million in prepetition claims. Atlantic then sought to recover on the claims by asserting statutory privileges under LOWLA over the property of third-party non-debtors, which led to two lawsuits in Louisiana seeking recognition and enforcement of these privileges. In response, Fieldwood initiated an adversary proceeding to extend the automatic stay to the Louisiana lawsuits, which the bankruptcy court granted. Fieldwood later amended its adversary complaint to seek a declaration that its reorganization plan would extinguish Atlantic's LOWLA privileges and sought a permanent injunction. Atlantic moved to dismiss Fieldwood's request for declaratory relief, and Fieldwood moved for summary judgment.

Before ruling on either Atlantic's motion or Fieldwood's motion, the bankruptcy court confirmed Fieldwood's plan. Fieldwood's plan included several provisions relevant to those motions including three provisions that purported to satisfy and settle creditors' claims and two optional non-debtor releases. Atlantic opted out of non-debtor releases, voted to reject the plan, and objected to provisions affecting its privileges. The bankruptcy court overruled Atlantic's objection in the confirmation order, and Atlantic did not appeal. After confirming the plan, the bankruptcy court denied both Fieldwood's motion for summary judgment and Atlantic's motion to dismiss before issuing a bench ruling that the terms "satisfaction" and "settlement" are colloquial terms dealing with a discharge, allowing the litigation in Louisiana to proceed. Following the bankruptcy court's decision, Fieldwood's successor moved for reconsideration based on purportedly incorrect factual finds that supported the bankruptcy court's bench ruling, which the bankruptcy court granted and flipped its ruling, entering judgement for Fieldwood's successor on its claims. In its reconsideration opinion, the bankruptcy court determined that the plan's "satisfaction" and "settlement" language extinguished Atlantic's LOWLA privileges, and Atlantic appealed this decision.

On appeal, the Fifth Circuit primarily focused on whether the terms "satisfaction" and "settlement" in Fieldwood's plan extinguished Atlantic's statutory privileges. Under Louisiana law, a LOWLA privilege is extinguished upon the extinction of the obligation it secures. The Fifth Circuit noted that a bankruptcy discharge does not extinguish a debt but merely releases the debtor from personal liability. The Fifth Circuit disagreed with the bankruptcy court's conclusion that Fieldwood's plan provided more than a bankruptcy discharge, determining that the plan did not render Fieldwood's obligation to Atlantic extinct. Rejecting the debtors' argument that these terms had distinct meanings from "discharge," the Fifth Circuit emphasized that the terms "satisfaction" and "settlement" in Fieldwood's plan merely connoted a bankruptcy discharge. The Fifth Circuit also highlighted that Atlantic's choice to opt out of waiving its privileges would be meaningless if the terms of the plan extinguished its privileges.

10. Fifth Circuit Vacates Equity Allocation, Holds Bankruptcy Court Violated Single Satisfaction Rule by Awarding Value of Avoided Liens Already Returned to Estate
In re Sanchez Energy Corp., 139 F.4th 411 (5th Cir. 2025) (Jones, J.)

Sanchez Energy Corporation, a Texas-based oil and gas company, filed for Chapter 11 in August 2019 with \$500 million in secured notes and \$1.75 billion in unsecured notes. The secured creditors ("Ad Hoc Secured Creditors") held deeds of trust granting nonpossessory liens on virtually all corporate assets, including valuable oil and gas interests (the "HHK Leases"). Those liens were potentially defective, as correction affidavits were filed within the ninety-day preference period under § 547(b). The bankruptcy court approved DIP financing from the secured creditors, including a \$200 million superpriority credit facility. The confirmed Plan stipulated an enterprise value of \$85 million for the reconstituted entity, Mesquite Energy, Inc.

Through a three-phase litigation process, the bankruptcy court upheld the DIP Lenders' superpriority liens but found the pre-petition HHK liens were avoidable preferential transfers under § 547(b). In Phase Three, the court placed a hypothetical value of approximately \$200 million on the avoidance actions and awarded unsecured creditors 69.73% equity in Mesquite, leaving secured creditors with only 30.27%. The Ad Hoc Secured Creditors appealed.

The Fifth Circuit held the equity allocation contravened §§ 550(a) and (d). Section 550(a) provides the estate may “recover ... the property transferred, or ... the value of such property,” while § 550(d) limits recovery to “only a single satisfaction.” Because the secured creditors had already returned their liens to the estate under the Plan, the estate had received its single satisfaction. The Court rejected reading “or” conjunctively, explaining it is “logically impossible to ‘recover’ both transferred property and the ‘value’ of that property as a ‘single satisfaction.’”

The Court further rejected the bankruptcy court’s purposive interpretation that accepting “worthless” liens failed to return the estate to its pre-transfer position. Relying on *In re Trout*, the Court explained that the “property” under § 550 is the perfected security interest itself. The DIP Lenders were entitled to 100% equity in Mesquite because their superpriority liens exceeded the stipulated enterprise value. The Fifth Circuit vacated the judgment and remanded.

11. “Uptier” Lender Transaction Not an “Open Market Purchase”; Plan Indemnity for Participating Lenders Violates Equal Treatment and Disallowance Provisions

In re Serta Simmons Bedding, L.L.C., 125 F.4th 555, 564 (5th Cir. 2024), as revised (Jan. 21, 2025), as revised (Feb. 14, 2025) (Oldham, J.)

In 2020, Serta executed an uptier transaction with a majority of its existing first-lien lenders (the “Prevailing Lenders”). The Prevailing Lenders provided \$200 million in new money for super-priority debt and exchanged approximately \$1.2 billion of existing first- and second-lien loans for approximately \$875 million of new super-priority loans, leaving nonparticipating “Excluded Lenders” subordinated without consent. Serta and the Prevailing Lenders styled the deal an “Open Market Purchase and Cashless Exchange Agreement” to fit the “open market purchase” exception to the ratable treatment provisions under the § 9.05(g) of the credit agreements, which allowed Serta to repurchase loans from select lenders through undefined “open market” transactions.

In January 2023, Serta filed for chapter 11 and filed a plan with treatment based on the post-transaction capital structure, giving substantially all of the post-reorganization equity to the Prevailing Lenders. The debtors and the Prevailing Lenders also filed an adversary proceeding seeking (i) to extend the stay to the Prevailing Lenders, based on an indemnification obligation under the prepetition support agreement, and (ii) a declaration that the transaction was permitted under the credit agreements and did not violate the implied covenant of good faith and fair dealing. In March 2023, the bankruptcy court (Jones) granted summary judgment, holding that the term “open market purchase” was clear and unambiguous, and that the transaction was an “open market purchase.” The bankruptcy court denied summary judgment on the equitable claims. The non-participating lenders appealed directly to the Fifth Circuit.

In June 2023, the bankruptcy court confirmed the plan, after ruling that the debtors and participating lenders had acted in good faith. The plan provided for an indemnity to the Prevailing Lenders for any future liability arising from the uptier transaction, as a substitute for the prepetition indemnity.

The Fifth Circuit reversed, holding that the 2020 uptier was not a permissible “open market purchase” under the credit agreements. An “open market,” the court concluded, refers to a specific,

competitive marketplace—here, the secondary market for syndicated loans—not privately negotiated, non-coercive transactions. Because Serta privately engaged individual lenders outside that secondary market, the deal did not fall within § 9.05(g). The court also reasoned that Serta’s reading would make the Dutch auction exception surplusage, contrary to New York contract-interpretation principles, and rejected reliance on course-of-performance and industry materials to overcome the contract’s text.

The Fifth Circuit also reversed in part the plan confirmation order as it related to the indemnification provision for the 2020 uptier. The court applied a functional test and held that the “settlement indemnity” was substantively the same as the disallowed prepetition indemnity—same terms, purpose, and beneficiaries—so section 1123(b)(3)(A) of the Bankruptcy Code could not revive claims barred by section 502(e)(1)(B) of the Bankruptcy Code. The court further concluded that even if the settlement provision were otherwise permissible, it independently violated section 1123(a)(4) of the Bankruptcy Code because its expected value varied sharply within the same classes, offering potentially millions in protection to Prevailing Lenders with uptier exposure but little or nothing to super-priority lenders that lacked such exposure, exceeding “approximate equality.” The remedy was to strike the indemnity from the confirmed plan while leaving the rest of the plan in place.

Finally, the court called into question the “equitable mootness” doctrine, calling it a “a judge-created doctrine of pseudo-abstention” and refusing to dismiss the appeal as equitably moot, noting that the indemnification could be excised from the plan without disturbing Serta’s reorganization.

12. Fifth Circuit Rejects Mandamus Relief and Upholds Judge Jernigan’s Refusal to Recuse in *Highland*

Dondero v. Jernigan (In re Highland Capital Mgmt.), 2025 WL 1122466 (5th Cir. April 16, 2025) (Wiener, Willett, & Duncan, JJ.) (per curiam)

Highland Capital Management (“Highland”), a Dallas-based investment firm filed for bankruptcy in Delaware in October 2019. The creditors committee successfully moved to transfer the cases to the Northern District of Texas on the basis that Chief Judge Jernigan was already familiar with the debtor’s complex organizational structure, having presided over two previous bankruptcy cases where James Dondero (the CEO of Highland) served as an executive. The appeal dealt specifically with a series of recusal motions filed by Dondero and other affiliated entities (the “Dondero Parties”) post-confirmation but prior to the effectiveness of Highland’s chapter 11 plan. The Dondero Parties alleged that Judge Jernigan had developed animus against the Dondero Parties that caused her impartiality to be reasonably questioned, thus requiring recusal under 28 U.S.C. § 455. Judge Jernigan denied the recusal motions, and the Dondero Parties filed a petition for writ of mandamus in the district court, which the district court denied, finding that the Dondero Parties had not proved “exceptional circumstances” sufficient to justify the extraordinary remedy of a writ of mandamus.

Affirming the district court’s order denying their petition, the Fifth Circuit found that the Dondero Parties failed to show a clear and indisputable right to mandamus relief. The Fifth Circuit found mandamus would be the appropriate means of relief; however, because the Dondero Parties failed to show that the district court “clearly and indisputably erred,” mandamus was not

appropriate under the circumstances. The Court also found that the Dondero Parties did not provide any evidence of bias demonstrating that Judge Jernigan based her rulings and comments on any extrajudicial information or pursued them for any personal (rather than judicial) reasons.

13. Prepetition Default Judgment Lacks Preclusive Effect on Dischargeability of Creditor’s Claim in Chapter 13 Case

In re Adair, 137 F.4th 384 (5th Cir. 2025) (Ho, J.)

On appeal from the Middle District of Louisiana, the Fifth Circuit held that a creditor’s prepetition default judgment against Chapter 13 debtor did not have preclusive effect and render that creditor’s claim non-dischargeable. The entry of a default through a one-page judgment devoid of findings of fact or conclusions of law did not support a finding that the debtor’s “unclean hands” defense was actually litigated. Also, in the state court action, Louisiana law did not provide the debtor with a “unclean hands” defense because the creditor’s action was based on a breach of contract claim.

14. Fifth Circuit Holds That Chapter 13 Plans Must Pay Student Loans in Full Within the Plan Period Under § 1325(b)(1)(A)

In re Durand-Day, 134 F.4th 846 (5th Cir. 2025) (Ramirez, J.)

On appeal from the Northern District of Texas, the Fifth Circuit held that under 11 U.S.C. § 1325(b)(1)(A), a Chapter 13 debtor’s plan which proposed to pay student loans in full over a longer period of time than the length of the debtor’s chapter 13 plan could not be confirmed over the objection of the student loan creditor. The Court interpreted § 1325(b)(1)(A)’s requirement that if a holder of an allowed unsecured claim objects, the court may not approve the plan unless “the value of the property to be distributed *under the plan* on account of such claim is not less than the amount of such claim” as requiring debtors to pay in full all allowed, unsecured claims—including their student-loan obligations—within the plan period.

District Court for the Southern District of Texas

15. District Court Affirms Bankruptcy Court’s Turnover Order Requiring Transfer of Deferred Compensation Plan Assets to Debtors’ Estate

In re Steward Health Care Sys. LLC, No. 4:25-CV-01584, 2026 WL 879529 (S.D. Tex. 2026) (Hanks, J.)

Steward Health Care System, LLC (“Steward”), a private hospital system, filed Chapter 11 bankruptcy in 2024. Steward and certain affiliates sponsored two deferred compensation plans that permitted certain professionals to defer a portion of their annual compensation with the benefit of reducing their tax liability. Upon Steward’s filing for bankruptcy, the plans were terminated, and the assets meant to fund the debtors’ obligations under the plans were placed in certain trusts. The debtors filed a Turnover Motion requesting that the bankruptcy court order the trustees to deliver the trust assets to the debtors, arguing that the plans qualified as “top hat” plans exempt from the presumptive fiduciary protections of ERISA. Plan participants objected, initiated an adversary proceeding seeking equitable relief, and filed a motion seeking mandatory withdrawal of the reference. The bankruptcy court granted the Turnover Motion.

The district court affirmed on all grounds. First, the court held that the bankruptcy court properly proceeded with the Turnover Motion under § 542 because the trustees holding the assets consented to the requested relief, making an adversary proceeding unnecessary. Second, the court rejected appellants' argument that the bankruptcy court was constitutionally barred from acting because a motion to withdraw the reference was pending, noting that bankruptcy courts frequently decide issues that moot withdrawal motions. Third, the court found no abuse of discretion in the bankruptcy court's refusal to stay the Turnover Hearing to allow additional discovery, and held the court had core-proceeding jurisdiction over the matter.

On the substantive ERISA issues, the district court upheld the bankruptcy court's determination that the deferred compensation plans qualified as "top hat" plans. Specifically, the plans were both unfunded and maintained primarily for a select group of management or highly compensated employees. Reviewing the factual findings for clear error, the court found no basis for reversal. The Turnover Order was affirmed.

16. A Debtor-In-Possession's Bona Fide Purchaser Status Under § 544(A)(3) Is Not Merely an Offensive Avoidance Tool but Also A Defensive Shield That May Be Invoked In Response To Proofs Of Claim Without Regard To The § 546(A) Statute Of Limitations

GE Steam Power Inc. v. Talen Energy Corp. (In re Talen Energy Corp.) No. BR 22-90339, 2026 WL 836671 (S.D. Tex. Mar. 26, 2026) (Rosenthal, J.)

In May 2022, Talen Energy Supply, LLC, Barney Davis, LLC, Nueces Bay, LLC, and certain affiliates filed voluntary Chapter 11 petitions. GE Steam filed Proof of Claim No. 2911 against Barney Davis for \$80,683.54 as a secured claim. GEII filed Proof of Claim No. 37563 against Nueces Bay for \$383,785.18 and Proof of Claim No. 37564 against Barney Davis for \$294,287.70, both as secured claims. The aggregate amount of the secured claims at issue was \$758,756.42. Each claim was premised on unrecorded constitutional mechanics' liens under Article XVI, § 37 of the Texas Constitution. Critically, GE Steam and GEII did not file lien affidavits for any of the relevant claims. Talen Energy objected, arguing the liens were unenforceable against a bona fide purchaser under § 544(a)(3).

The central question was whether the Bankruptcy Court erred by allowing Talen Energy to defensively assert its bona fide purchaser status under § 544(a)(3) to challenge the enforceability of liens that existed before the bankruptcy filing but were unrecorded and thus unenforceable against a bona fide purchaser. The appellants raised two main arguments: first, that the "rights and powers" clause of § 544(a) does not extend to challenging pre-petition liens, and second, that the § 546(a) statute of limitations barred even a defensive invocation of § 544. In their reply brief, the appellants shifted emphasis to an argument that a time-barred avoidance action cannot be used defensively to disallow a claim under § 502(d).

Section 544(a)(3) grants the trustee—and by extension a debtor-in-possession under § 1107(a)—the rights and powers of a hypothetical bona fide purchaser of real property as of the commencement of the case, without regard to any actual knowledge. While the Bankruptcy Code creates the hypothetical bona fide purchaser status, state law defines its contours.

Under Texas law, an unrecorded constitutional mechanics' lien “will not be enforced against a purchaser who acquires title to the property in good faith, for valuable consideration, and without notice.” While federal law preempts state law on actual notice, state law of constructive notice remains applicable in the § 544(a)(3) context. A bona fide purchaser is charged with constructive notice of properly recorded lien affidavits, but failure to file such an affidavit renders a lien unenforceable against a bona fide purchaser.

Section 546(a) provides that an action or proceeding under § 544 “may not be commenced” after the earlier of two years from the order for relief (or one year from the appointment of the first trustee, if earlier) or the closing or dismissal of the case.

Section 502(b)(1) provides for disallowance of claims that are unenforceable against the debtor and property of the debtor under applicable law. Section 502(d) requires disallowance of claims of transferees of avoidable transfers unless the property is returned.

The district court affirmed the Bankruptcy Court’s order in all respects. The court rejected the appellants’ attempt to bifurcate § 544(a) into a narrow “First Clause” conferring only the power to prevent post-petition lien creation and a separate “Second Clause” governing avoidance. Relying on the Fifth Circuit’s decision in *In re Goodrich Petroleum Corp.*, 894 F.3d 192 (5th Cir. 2018), the court emphasized that § 544(a) “does not merely bestow upon a debtor-in-possession the ability to avoid either the transfer of a debtor’s property or its obligations; instead, a debtor-in-possession is endowed with ‘the rights and powers’ of . . . a ‘bona fide purchaser of real property.’” Because the statute is phrased in the disjunctive, the trustee obtains both a status and an avoiding power. The appellants cited no case law supporting their restrictive reading, and several of their own cited authorities directly contradicted it.

The court agreed with the weight of authority that § 546(a)’s limitation on “commencing” an action or proceeding does not restrict a debtor-in-possession’s ability to invoke bona fide purchaser status defensively in response to a proof of claim. As the Bankruptcy Court observed, Talen Energy was not “commencing anything.” This approach is consistent with the general treatment of affirmative defenses outside bankruptcy as not subject to statutes of limitations.

Although the Bankruptcy Court did not rely on § 502(d), the district court addressed the appellants’ argument that § 502(d) was implicitly being applied and that *In re Davis*, 889 F.2d 658 (5th Cir. 1989), foreclosed such defensive use. The court adopted the majority view—followed by the vast majority of courts—that § 502(d) permits defensive disallowance of claims based on avoidable transfers even after the § 546(a) limitations period has run.

Regarding policy considerations, the court noted that allowing defensive use of avoidance powers is “perfectly consonant” with the Bankruptcy Code’s chief policy concern of equitable distribution among creditors. The court also rejected the appellants’ complaint about creditor uncertainty, observing that GE Steam and GEII assumed the risk of unenforceability by failing to file lien affidavits. As the Bankruptcy Court had pointed out, ruling otherwise would leave the estate “defenseless” against creditors with unrecorded liens choosing to “ride through” the case.

17. District Court Upholds Third-Party Opt-Out Releases as Consensual and Effective Under Federal Law, but Declines to Bind Classes Deemed to Reject the Plan

In re Container Store Grp., 676 B.R. 356 (S.D. Tex. Feb. 12, 2026) (Rosenthal, J.)

Container Store Group, Inc. and its affiliates (“Container Store”) commenced their prepackaged cases in late 2024. The bankruptcy court confirmed the plan over the U.S. Trustee’s objections to the plan’s release, injunction, and gatekeeping provisions, who argued, in part, that opt-out mechanisms are not sufficient to obtain a consensual third-party release.

The U.S. Trustee appealed the plan’s confirmation to the district court, arguing that state law governs whether parties have consented to a release, and holders remaining silent by failing to check a box to opt-out does not constitute consent under applicable state law. The district court held that the opt-out mechanism was sufficient to obtain a consensual third-party release, except as applied to the deemed-to-reject classes, Class 5 (subordinated claims) and Class 8 (existing equity interests).

Citing § 1123(b)(6) and § 105(a) of the Bankruptcy Code and the court’s inherent authority to enter consent decrees, the district court held that federal law, rather than state law, governs whether notice and the opportunity to opt out render the releases consensual and therefore binding on the releasing parties. The district court rejected the U.S. Trustee’s argument that state law governs whether a claimant has consented to a release, holding that generally failing to opt out can manifest consent. The district court also found that, regardless of whether federal or state law is applied, the bankruptcy court could infer consent.

The district court also held that the use of an opt-out mechanism was effective to obtain a consensual release, except as applied to Class 5 and Class 8, both of which received no consideration and were deemed to reject the plan. The district court considered whether the circumstances justified the inference that silence is acceptance, finding there was no basis to infer that non-responding holders intended—on top of being wiped out—to surrender additional potential claims via third-party releases. The U.S. Trustee’s appeal and the debtors’ cross-appeal are currently pending in the Fifth Circuit

18. District Court Remands Cash Collateral Dispute, Holds Bankruptcy Courts May Only Assess Whether Creditor Has Colorable Claim to Property Interest Under § 363

In re First Brands Group, LLC, No. H-26-73, 2026 WL 253634 (S.D. Tex. Jan. 31, 2026)

First Brands Group, LLC, a supplier of aftermarket automotive parts, filed for bankruptcy in September 2025 with approximately \$11.5 billion in financing obligations and about \$12 million in its bank accounts. Evolution Credit Partners asserted a first-lien security interest on approximately \$60.5 million of First Brands’s receivables. First Brands disputed Evolution’s claim, arguing its forensic expert found the claim did not match valid invoices. The dispute arose when First Brands sought permission to draw on a segregated Factored Receivables Account holding between \$105.9 and \$109 million. The bankruptcy court authorized a \$60 million draw, and Evolution appealed, arguing the remaining funds underprotected its lien by approximately \$20 million.

The district court held that under § 363(e), bankruptcy courts may inquire into the validity of an asserted property interest only to determine whether the creditor has a prima facie or “colorable claim” to that interest. A broader inquiry would bypass Rule 7001(b)’s requirement that lien validity be challenged through an adversary proceeding. The bankruptcy court had expressed doubt about whether Evolution would prevail but had reserved ruling on the validity issue; this was insufficient.

On adequate protection, the Court found Evolution’s interest was likely not adequately protected at the time of appeal because the account did not contain enough to cover the \$60.5 million claim. However, additional receivables had since flowed in, and the debtors represented the account now held over \$67 million with approximately \$230 million in outstanding pre-petition receivables potentially flowing in, creating genuine factual disputes.

The Court remanded for further proceedings. On remand, the parties may litigate whether Evolution has a first-priority security interest and whether it is adequately protected by receivables flowing into the estate. The Court instructed that if Evolution is found adequately protected, the bankruptcy court must state specifically what funds or property constitute adequate protection. The Court acknowledged the record was “too infirm to support a more definitive ruling.”

19. District Court Dismisses SmileDirectClub Appeal for Lack of Jurisdiction, Holding Trustee’s Retention Order is Interlocutory and Not Immediately Appealable

Cluster Holdco, LLC v. Byman (SmileDirect), 2026 WL 150306 (S.D. Tex. Jan. 20, 2026) (Rosenthal, J.)

SmileDirectClub, Inc. and its affiliates filed for chapter 11 and obtained financing under which Cluster Holdco LLC, the appellants, served as DIP loan agent. The case later converted to chapter 7, and a trustee was appointed in January 2024. The bankruptcy court authorized the chapter 7 trustee to retain a law firm to assist with prosecuting specified insider claims. In August 2024, the trustee filed (i) an application to retain the law firm as special litigation counsel under Section 327(e) and (ii) a separate motion for litigation financing. The bankruptcy court denied the retention application without prejudice and denied the litigation financing motion with prejudice because the relief sought was contrary to the DIP financing order.

After the trustee filed a second application to retain the same law firm in December 2024, Cluster Holdco objected to the law firm’s retention on several grounds, namely that: the law firm and the trustee untimely disclosed information required by Section 327 and Rule 2014, the law firm performed work prior to receiving court approval, the law firm’s work strayed beyond the specified special purpose for its retention, and that the retention order allowed the law firm to prosecute some claims assigned to the appellants. Following litigation, the bankruptcy court ultimately approved the retention application.

On appeal, the district court focused on the threshold issue of whether the judge’s retention order, and his denial of the appellants’ motion to reconsider that order, are appealable final orders. The district court found that, under Fifth Circuit precedent, retention orders are interlocutory and are not generally considered final and appealable. The district court also found that the collateral-order doctrine, which allows for immediate appealability, did not apply because the retention order did not meet the requirements, as it was not completely separate from the merits and was effectively reviewable on appeal from a final judgement. Additionally, the district court found that the issues raised do not justify granting leave to appeal because it would not materially advance

the termination of litigation. The court granted the trustee's motion to dismiss the appeal because the court lacked jurisdiction over the appeal for these reasons.

20. Liability Management Transaction Did Not Breach Bond Indentures; Transaction Unwinding Is Not an Available Remedy

Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd., 2025 WL 3514358 (S.D. Tex. Dec. 8, 2025) (Crane, J.)

Wesco filed for chapter 11 and, on the petition date, commenced an adversary proceeding seeking a declaration that a 2022 transaction by which the company incurred \$250 million in new superpriority notes and released the liens securing existing notes due 2024 and 2026 did not breach the relevant note indentures. A group of minority holders counterclaimed.

The transaction at issue involved several steps: First, Wesco and the majority group amended the existing indentures for the 2024 notes and the 2026 notes to permit the issuance of additional notes due 2026, secured by existing collateral. This only required majority approval. Second, the majority group invested \$250 million in exchange for the new notes. Third, Wesco released liens securing the existing 2024 notes and 2026 notes, subordinating them to the new secured notes. This required two-thirds approval, which Wesco obtained from the majority group, including its minutes-old additional \$250m in 2026 notes. The net effect was to permit the majority group to exchange existing notes into priming notes, while stripping the liens securing the existing debt.

Following a lengthy trial, the bankruptcy court issued a report and recommendation (not an order, as the minority group's contract claims were not core) finding that the transaction was consistent with the 2024 notes indenture (because the majority group held more than two-thirds of the outstanding notes at the time of the first step), but violated the 2026 notes indenture (because the majority group held less than two-thirds of the outstanding notes). The bankruptcy court considered the transaction not multiple, independent transactions, but rather "a row of dominos" – once one fell, the rest would necessarily follow. The issuance of the new notes led to the stripping of the liens, and the majority group did not have the supermajority necessary to amend the indenture to allow that. As a remedy, the bankruptcy court recommended reinstatement of the liens securing the 2026 notes and allowance of the majority group's new \$250 million investment as an unsecured claim. The bankruptcy court confirmed Wesco's plan, on the express understanding that it was subject to revision in the event the report and recommendation were rejected in whole or in part.

The district court declined to follow the report and recommendations and, on de novo review, held that the 2022 transactions did not breach either indenture. The court reasoned that the plain language of the 2026 indenture required only majority consent to authorize the issuance of additional notes and required two-thirds consent only for the later lien-release step, for which the requisite consent was in fact obtained after the additional notes were issued. The court rejected efforts to recharacterize the sequential steps as a single improper combined maneuver on the theory that the earlier steps "had the effect" of releasing collateral, emphasizing the need to follow the contract's chronological mechanics and ordinary meaning. It further noted that, unlike the syndicated loan agreement at issue in *Serta*, the 2026 indenture did not contain a unanimous-consent pro rata "sacred right," and it declined to imply one in a document negotiated by

sophisticated parties. The court also observed that even if a breach had occurred, the normal remedy would be money damages against the breaching party (Wesco), and it rejected the bankruptcy court's proposed unwinding remedy as unsupported and inequitable because it would penalize nonbreaching investors who provided new money.

21. Exclusive Backstop Opportunity Offered to Subset of Same Class Without Market Test Constitutes Unequal Treatment in Violation of § 1123(a)(4); Plan Confirmation Reversed and Remanded

In re ConvergeOne Holdings, Inc., No. 4:24-cv-02001 (S.D. Tex. Sept. 25, 2025) (Hanen, J.)

ConvergeOne Holdings, Inc. and its affiliated debtors filed a prepackaged chapter 11 plan that treated first lien claims with take-back debt and rights to purchase equity in a \$245 million equity rights offering. The equity rights offering was backstopped by a group of majority lenders holding approximately 81% of the prepetition first lien claims. These first lien lenders received various forms of consideration for providing the backstop, including a premium paid in 10% of the post-emergence equity, subject to dilution, and a direct subscription right to purchase equity at a discount to plan value. A minority group of first lien lenders that was excluded from the backstop objected to confirmation, arguing that the plan violated section 1123(a)(4) of the Bankruptcy Code because it provided for disparate treatment on account of identical claims. The bankruptcy court overruled the objection and confirmed the plan, finding that the backstop was necessary and its terms were reasonable, based on evidence from the debtors' investment banker on market comparables. The minority lenders appealed.

The district court reversed, holding that the plan violated section 1123(a)(4) of the Bankruptcy Code. Relying on *LaSalle* and the Fifth Circuit's *Serta* decision, the court found the exclusive backstop and equity-purchase opportunity was a material benefit "on account of" the majority lenders' claims, yielding roughly 30-31% higher recoveries than those available to other holders of first-lien claims. The opportunity was exclusive from inception, restricted to the majority group, and with confirmation occurring within weeks of the filing, any supposed chance for minority lenders to propose an alternative was illusory. The court rejected the debtors' argument that the opportunity was market tested through precedent transaction analysis, noting the inability for the debtors to shop for alternatives under the prepetition restructuring support agreement and the debtors' own banker's testimony that a genuine market test requires real competitive exposure. Applying *Serta*'s function-and-effect analysis, the court concluded the disparity far exceeded "approximate equality," and observed that the violation was even clearer than in *Serta* because minority lenders were excluded from the backstop from the outset with no pretense of equal access.

Bankruptcy Court for the Southern District of Texas

22. Debtor's Failure to Give Actual Notice Preserved Injured Patron's Claim, but Discharged and Enjoined His Family's Claims

In re Lois Bus. Development Corp., 2026 WL 898513 (Bankr. S.D. Tex. April 1, 2026) (Isgur, J.)

The bankruptcy court addressed whether the personal injury claims of James Otis and his family (the “Otis Claimants”) against the debtors, Lois Business Development Corporation, were discharged or enjoined by the confirmed chapter 11 plan given that the Otis Claimants did not receive actual notice of the bankruptcy.

Prior to the chapter 11 cases, Mr. Otis asserted claims against the debtors on account of alleged injuries sustained at a movie theater owned by the debtors. And the debtors were aware of Mr. Otis’s injuries—Mr. Otis reported the incident and provided his contact information to the theater employees and management, and the incident was entered into the theater’s third-party claims system, identifying Mr. Otis as the claimant and including his phone number and a description of the incident. Mr. Otis also emailed the email address provided by theater employees seeking compensation for his medical expenses, but never received a response.

Once in chapter 11, the debtors failed to serve Mr. Otis with the bar date notice despite utilizing a third-party claims system (which contained Mr. Otis’ claim information) to serve potential creditors. Mr. Otis did not file a claim by the deadline. After the plan was effective, Mr. Otis filed a complaint against the debtors in California state court and also included his wife and children as plaintiffs with claims of negligent infliction of emotional distress and loss of consortium.

The Otis Claimants argued that they were known creditors who should have received actual notice of the bankruptcy and that, because they did not, they were not subject to discharge/the plan injunction. After the state-court lawsuit was referred to the bankruptcy court, the bankruptcy court concluded that Mr. Otis’s claims were not discharged, but his wife and children’s claims were.

In so holding, the bankruptcy court found that Mr. Otis was a known creditor because the debtors had specific information about his claim, including his contact information and the nature of his injury, and the Debtors failed to provide Mr. Otis with actual notice. In contrast, Mr. Otis’s wife and children were unknown creditors because there was no evidence that the debtors knew or should have known about their claims, and thus constructive notice by publication was sufficient.

23. Court Holds Partnership’s Unrecorded Equitable Interest in Oil and Gas Properties Is Avoidable Under § 544(a)(3) Notwithstanding § 541(d), Because Avoidance Powers Operate Through Independent § 541(a)(3) Channel

In re Alpine Summit Energy Partners, Inc., No. 23-90739, 2026 WL 823740 (Bankr. S.D. Tex. 2026) (Isgur, J.)

The plaintiffs were oil and gas investors in a Texas partnership formed to derive economic benefits from oil and gas interests owned by HB2 Origination, LLC (“HB2”). The partnership’s business arrangement was structured through a General Partnership Agreement and a Nominee Agreement, under which HB2 held legal title to a 16.3446% interest in wells and related properties (the “Subject Properties”) as nominee for the partnership. No assignment of the Subject Properties to the partnership was ever recorded in real property records. HB2 and its affiliates filed for Chapter 11 protection in 2023. The GUC Trustee moved for summary judgment on whether the Subject Properties and related proceeds constituted property of the bankruptcy estate.

The Court first addressed whether the Nominee Agreement created a trust relationship. The Court found a genuine issue of material fact as to whether the Nominee Agreement created an express trust, given that it stated HB2 “holds legal title” to the Subject Properties “for the benefit of the Partnership” and imposed on HB2 contractual obligations consistent with those of a trustee. However, the partnership’s resulting trust, purchase money resulting trust, and constructive trust theories all failed as a matter of law. The resulting trust claim failed because legal title never changed hands, and the constructive trust claim failed for lack of evidence of fraud or breach of a fiduciary relationship.

The Court then addressed the interaction between §§ 541(d) and 544(a)(3). The partnership argued that § 541(d) prevented the trustee from using strong-arm avoidance powers to recover an equitable interest that was never part of HB2’s estate. The Court rejected this argument, holding that the 1984 amendments to § 541(d) deliberately limited its scope to property entering the estate under subsections (a)(1) and (a)(2)—not subsection (a)(3), which provides an independent channel for property recovered through the trustee’s avoidance powers under § 544. Because the Nominee Agreement was never recorded and no facts in the record charged the GUC Trustee with constructive or inquiry notice of the partnership’s alleged interest, any equitable interest the partnership may have held in the Subject Properties was avoidable under § 544(a)(3) as a matter of law. Accordingly, the Subject Properties and their derivative proceeds were property of the estate.

24. A Non-State Entity Under Federal Law Can Nonetheless Invoke State-Law Sovereign Immunity as A Liability Defense in a Bankruptcy Adversary Proceeding.

Phillips v. Electric Reliability Council of Texas, Inc. (ERCOT), No. 21-31070, 2026 WL 693219, (Bankr. S.D. Tex. Mar. 11, 2026) (Isgur, J.)

This adversary proceeding stems from Winter Storm Uri in February 2021, which rendered Entrust Energy, Inc. insolvent. The Trustee of the Entrust Liquidating Trust brought claims against ERCOT. By this stage of the litigation, the sole remaining claim was one for gross negligence under Texas law. On December 11, 2025, the Court had denied ERCOT’s request to abstain, dismissed the Trustee’s takings claim, and sua sponte converted ERCOT’s Rule 12(b)(6) motion to dismiss the gross negligence claim into a motion for summary judgment, after which the parties submitted supplemental briefing.

The dispositive question was whether ERCOT is immune from liability on the gross negligence claim under Texas state law. The Trustee argued that ERCOT could not claim immunity because the Fifth Circuit had already held (in *In re Entrust Energy Inc.*, 101 F.4th 369 (5th Cir. 2024)) that ERCOT is not entitled to sovereign immunity under the Eleventh Amendment. The Court found that this argument conflated two distinct concepts: (1) constitutional sovereign immunity from suit in federal court, and (2) state-law immunity from liability under Texas law.

The Court traced the distinction between these two immunity doctrines in detail:

Constitutional sovereign immunity protects only a state or arm of the state from suit in federal court. The Fifth Circuit determined, as a matter of federal law, that ERCOT is not a state

or arm of the State of Texas, meaning the Eleventh Amendment does not deprive the bankruptcy court of jurisdiction.

State-law sovereign immunity is a separate doctrine, inherent in Texas statehood, comprising both immunity from suit and immunity from liability. The Texas Supreme Court held in *CPS Energy v. ERCOT*, 671 S.W.3d 605, 628 (Tex. 2023), that ERCOT “enjoys sovereign immunity as an arm of the state” under Texas law.

The Court emphasized that the existence of federal bankruptcy jurisdiction under 28 U.S.C. § 1334 does not control whether state-law sovereign immunity precludes liability. Under Fifth Circuit precedent, an entity can be subject to suit in federal court while still retaining its immunity from liability as a defense under state law. When adjudicating state-law claims, bankruptcy courts apply state law unless an overriding bankruptcy policy requires otherwise, under the *Butner* principle. The Court found no such overriding policy here.

The Court granted summary judgment in favor of ERCOT. Because ERCOT is entitled to state-law sovereign immunity from liability under substantive Texas law, and the Texas Legislature’s limited waiver of sovereign does not extend to gross negligence claims, the Trustee’s claim failed as a matter of law. A final take-nothing judgment was entered in ERCOT’s favor.

25. Chapter 15 Recognition Denied in Full: § 109(a) Post-Petition Retainer and Unproven Fraudulent Transfer Claims Cannot Establish U.S. Property; Recognition Denied Where Petitioners Fail to Prove Hong Kong COMI or Establishment as of Petition Date

In re Siu-Fung Ceramics Holdings Ltd., 2026 WL 382424 (Bankr. S.D. Tex. Feb. 10, 2026) (Pérez, J.)

Foreign representatives, including Hong Kong-appointed liquidators and trustees, sought chapter 15 recognition of winding-up proceedings involving multiple Siu-Fung Group entities pending in Hong Kong since 2000 and for Siu-Fung Seigfried Lee’s 2001 Hong Kong personal bankruptcy. After a ten-day trial, the foreign representatives narrowed their request to recognition of Lee’s 2001 bankruptcy and the Siu-Fung Group liquidation proceedings. The court denied recognition as to both.

On the corporate liquidation proceedings, the court held that section 109(a) of the Bankruptcy Code applies as a debtor-eligibility prerequisite to chapter 15 recognition and that, although the Siu-Fung Group proceedings otherwise qualified for recognition and constituted foreign main proceedings, the petition failed because the foreign representatives did not establish that the Siu-Fung Group debtors had a U.S. domicile, place of business, or property when the chapter 15 petition was filed. Specifically, the court held that a post-petition U.S. counsel retainer paid roughly nine months after filing could not satisfy the present-tense requirement under section 109, and the asserted “Potential Claims” against Mr. Lee and others, based on decades-old alleged fraudulent transfers, were too speculative and undeveloped to qualify as U.S. “property” under section 109(a), particularly in contrast to cases where lawsuits had already been filed or the U.S.-asset nexus was concrete and well developed.

On the personal bankruptcy, the court denied foreign main recognition due to Mr. Lee’s consistent presence in the United States since 2017, including U.S. driver’s licenses, utility bills, tax filings, employment authorization and a recent marriage in the United States, rebutting any presumption that Hong Kong remained his COMI. The court also denied foreign nonmain recognition based on lack of evidence that Mr. Lee was actively controlling the Hong Kong company Lion Legend as of the petition date. The court declined to draw a spoliation inference from his transfer of Lion Legend’s accounting records (finding his prior insider-dealing liability a plausible innocent explanation) and concluded the foreign representatives had not satisfied the “rather high” standard for establishing a Hong Kong presence as of the petition date.

26. Summary Judgment Granted on Guaranty Claim; Challenges to Signatory Capacity, Prior TRO, and Law of the Case Are Unavailing

In re ENKB-Monticello LLC, 2026 WL 363028 (Bankr. S.D. Tex. Feb. 7, 2026) (Pérez, J.)

The adversary proceeding arose out of a joint-venture and financing structure in which BSD Houston LLC (“BSD”) made an approximately \$6 million preferred-equity investment through a convertible note tied to LLC operating agreements, and obtained a guaranty from Dr. Fercan Kalkan and an affiliated entity, KCL, securing repayment upon a “Material Default.” After alleged defaults and ensuing state-court litigation, BSD assigned its rights, including the guaranty, to Ranch Knot Realty LLC (“RKR”). Following bankruptcy filings by entities associated with Dr. Kalkan, the state-court action was removed, and RKR moved for summary judgment on its breach-of-guaranty claim.

The court granted summary judgment for RKR, holding that the undisputed evidence established the existence of the guaranty and RKR’s ownership by assignment, the occurrence of “Material Defaults” that triggered the guaranteed obligations (which defendants effectively conceded by admitting they were “currently liable” under the guaranty), and defendants’ failure to pay after demand. The court rejected defendants’ purported factual disputes—including challenges to capacity to sign, the effect of a prior TRO, disagreements over the amount owed, and law-of-the-case arguments—as either unsupported by competent summary-judgment evidence or legally immaterial. In particular, the TRO post-dated the operative agreements and did not apply to the relevant parties or transactions, and the prior state-court summary-judgment proceedings (which did not yet have a summary judgment decision) did not preclude the court from adjudicating the motion after removal under the law of the case doctrine.

27. Court Treats “Receivables Purchase” Deals as Plausible Usurious Loans and Lets Trustee’s Fraudulent Transfer Claims Proceed

In re Anadrill Directional Services Inc. v. Capybara Capital, 2026 WL 305023 (Bankr. S.D. Tex. Feb. 4, 2026) (Rodriguez, J.)

The chapter 7 trustee brought complaints to recover alleged fraudulent transfers based on state law usury claims against multiple defendants, including Capybara Capital (“Capybara”), which were consolidated into a single proceeding. The bankruptcy court determined whether the trustee plausibly alleged that the agreements were for loans or future receivables. The trustee argued that each defendant gave debtor Anadrill Directional Services (“Anadrill”) a loan that carried a usurious interest rate, above the legal threshold for usury under both New York and

Florida law, and that the loans should be rendered void because defendants did not provide reasonably equivalent value to Anadrill in exchange for Anadrill's loan payments and violated usury laws as well as RICO. Cappybara argued that the respective agreements were for sales of future receivables, not usurious loans, and filed a motion to dismiss.

Applying state law, the bankruptcy court found that the trustee alleged that the agreements were plausibly loans rather than sales of future receivables. The court found that, if the agreements were for usurious loans, it was plausible that the obligations and transfers made pursuant to the agreements are not for fair value and are harmful to the estate. Therefore, construing the allegations in the trustee's favor, the bankruptcy court found that the Trustee plausibly pled the fraudulent obligation claim, fraudulent transfer claim, and recovery of the transferred funds claim, and the court denied those three motions to dismiss. The court granted the motion to dismiss for the alleged RICO violation because the trustee failed to plead a plausible claim for relief under RICO.

28. Court Denies Summary Judgment on § 546(e) Safe Harbor Defense, Finding Disputed Facts on Whether Spinoff Transfers Were for Benefit of Financial Institutions

In re Loyalty Ventures, Inc., No. 23-90111, 2026 WL 801210 (Bankr. S.D. Tex. Jan. 22, 2026) (Lopez, J.)

This case arises from a 2021 corporate spinoff by Alliance Data Systems Corporation ("ADS"), now Bread Financial Holdings, Inc. ADS spun off its LoyaltyOne business segment, causing Loyalty Ventures, Inc. ("LVI") to enter into a credit agreement for \$675 million in term loans and a \$150 million revolving facility. LVI transferred \$750 million in loan proceeds to ADS affiliates, which ADS used to pay down its own debt to Wells Fargo and certain term loan lenders. After the spinoff, the LoyaltyOne business deteriorated significantly and LVI filed for bankruptcy in March 2023.

The Trustee sought to avoid the \$750 million in transfers as actual and constructive fraudulent transfers under §§ 544 and 548, as well as Texas and Bermuda law. Defendants moved for partial summary judgment, arguing § 546(e)'s safe harbor barred the constructive fraud and state-law claims because the transfers were "settlement payments" or made "in connection with a securities contract" and "for the benefit of" financial institutions.

The Court denied summary judgment on two grounds. First, genuine disputes existed regarding whether the transfers were made "for the benefit of" Wells Fargo and the term loan lenders. The transaction documents did not specifically identify any third-party creditors as payees, and whether ADS was contractually required to pay the defendants or whether the spinoff was for ADS's own benefit remained disputed.

Second, applying *Merit Management Group, LP v. FTI Consulting, Inc.*, the Court held the § 546(e) inquiry must focus on the transfers the Trustee seeks to avoid, from LVI to ADILC and from Rhombus to ADI Crown Helix. The Court rejected defendants' argument to look past the immediate transfers to the ultimate distribution, calling it "exactly what the Supreme Court in *Merit Management* said courts should not do." None of the entities involved in the challenged

transfers were “financial institutions.” The Court emphasized its ruling did not resolve the merits of the fraudulent transfer claims, only that they must proceed to trial.

29. Court Denies Intradistrict Venue Transfer, Finds Filing Was Not Bad Faith Forum Shopping

In re Redfish Property Holdings LLC, No. 25-80614, 2026 WL 159550 (Bankr. S.D. Tex. 2026) (Pérez, J.)

Redfish Property Holdings LLC, a Texas LLC that rents out properties across Brazoria, Chambers, Galveston, and Harris Counties, filed a Chapter 11 petition in the Galveston Division of the Southern District of Texas. U.S. Bank, a secured creditor, moved to transfer venue to the Houston Division, arguing that the debtor’s principal place of business was in Harris County, that the debtor had previously filed two Chapter 11 cases in the Houston Division, and that the debtor was engaging in bad faith forum shopping. The debtor had listed a Houston address as its principal place of business, and its sole manager testified that he split his time between a residential home in Clear Lake and addresses in Galveston.

The Court first held that venue was proper in the Galveston Division. Although the debtor’s principal place of business was in Houston, 28 U.S.C. § 1408(1) permits filing either where the debtor has its principal place of business or its principal assets. The Court interpreted “principal assets” as the debtor’s most valuable assets, reasoning that the purpose of Chapter 11 proceedings is preserving value for all stakeholders. Because 53% to 54.6% of the value of the debtor’s real estate portfolio was located in counties embraced by the Galveston Division, the debtor’s principal assets were in Galveston.

The Court further held that transfer to Houston was not warranted. The Court noted that because this was an intradistrict transfer, typical public interest factors such as court congestion, local interest, or choice of law were irrelevant. While the Court acknowledged the debtor’s two prior filings in the Houston Division, it found those cases were uneventful and dismissed on the debtor’s own accord, and that U.S. Bank offered no authority that unsuccessful prior proceedings in a proper venue bar a debtor from filing in another proper venue. The Court denied the motion to transfer.

30. Where The Debtor’s Contractual Rights to Possess Property Have Been Terminated Prepetition, The Property Does Not Become Property of The Estate Under § 541, And the Automatic Stay Does Not Bar the Property Owner from Recovering It.

In re Orb Energy Co., No. 25-80363, 2025 WL 3635773, (Bankr. S.D. Tex. Dec. 15, 2025) (Perez, J.)

This memorandum opinion addresses Bitmain Technologies Georgia Limited’s motion to confirm the inapplicability of the automatic stay under § 362 to its property in the debtor’s possession. The court granted Bitmain’s motion in full.

Orb Energy Co. (“Orb”), a Delaware corporation, was formed by Jamieson Zaniewski for the purpose of serving as a Bitcoin mining host for Bitmain, a Georgia corporation headquartered in Beijing. As host, Orb was responsible for procuring property, building a data center in Van

Vleck, Texas, and providing electricity and infrastructure for Bitmain’s mining servers. In exchange, Bitmain would pay Orb’s hosting expenses plus a premium.

The parties initially executed a Term Sheet in April 2024, followed by two more formal agreements in June 2024: the Hosting Sale Agreement (“HAS”) and the Hosting Services Agreement (“Services Agreement”). Under the HSA, Bitmain was to pay Orb a “Deposit” of over \$700,000 once the data center passed inspection, and Orb would receive title to the hydro cooling containers at the end of a three-year hosting sale period, in part as compensation for discounted hosting services. All agreements provided that Bitmain owned the mining servers, that Orb waived any applicable liens, and that Orb was expressly prohibited from “self-mining”—though that term was left undefined.

The hydro cooling containers were delivered in September 2024, and the mining servers arrived in late November 2024 after the data center passed Bitmain’s inspection. However, Bitmain never paid the Deposit, despite acknowledging it was forthcoming in WeChat communications. Upon setting up the servers, Orb directed the hash rate to a “test pool” and routed mined Bitcoin to a wallet it controlled. Bitmain deemed this self-mining and sent a notice of breach on December 12, 2024. Additional notices followed in March and April 2025, culminating in an April 3, 2025 “Notice of Withdrawal” in which Bitmain stated it was exercising its right to withdraw all of its property.

Prepetition state court litigation ensued in Matagorda County, Texas, resulting in a TRO (April 8, 2025) and a temporary injunction (May 6, 2025) that permitted Orb to retain possession and continue mining for 60 days to cover operating expenses. On July 16, 2025, Bitmain sent a “Reaffirmation of Contract Termination” letter. Orb filed its Chapter 11 petition on August 5, 2025—the day the temporary injunction expired—and the next day moved to assume the HSA under § 365.

The court determined the HSA was the only operative agreement. The HSA’s merger clause superseded the Term Sheet. The Services Agreement, by its own terms, had not yet taken effect because its effective date was triggered by the conclusion of the HSA’s Hosting Sale Period, which had not occurred as of the petition date.

Although “self-mining” was undefined, the court found the term unambiguous when read in context with the HSA as a whole under Texas contract interpretation principles. The prohibition, read alongside sections 5.3 and 5.4 of Schedule B, made clear that “self-mining” meant Orb retaining Bitcoin mined by Bitmain’s servers rather than directing it to Bitmain. Zaniwski’s own testimony established that Orb directed the hash rate to a test pool and routed the proceeds to an Orb-controlled wallet, constituting self-mining and a breach of the HSA beginning in late November or early December 2024.

The court acknowledged that Bitmain’s December 2024, March 2025, and early April 2025 notices did not explicitly use the word “terminate” as required by the HSA. Nonetheless, applying the doctrine of substantial compliance, the court held that Bitmain’s April 3, 2025 “Notice of Withdrawal”—announcing its intent to remove all equipment from the data center—effectively terminated the HSA. The court reasoned that performance of the HSA would be impossible

without the servers, and Bitmain’s intent to end the relationship was clear. The court also noted that Bitmain’s July 16, 2025 “Reaffirmation of Contract Termination” was a response to Orb’s “gotcha” tactics in contesting whether the contract had ever been formally terminated.

The court found that the Deposit obligation was not conditioned on Orb issuing an invoice (the HSA’s invoicing provisions applied to Hosting Fees, not the Deposit), and construed the ambiguity against Bitmain as drafter. The court accepted that Bitmain breached the HSA by not paying the Deposit. However, the court held that Orb could not rely on Bitmain’s prior breach to excuse its own self-mining while simultaneously treating the HSA as continuing. Under Texas law, a non-breaching party that elects to treat a contract as continuing after the other side’s breach must itself continue to perform. The court noted that Orb’s proper remedies were to cease performance and sue for damages, continue performing and sue for damages, or seek equitable relief—not to unilaterally mine Bitcoin with Bitmain’s servers for its own benefit.

Orb argued Bitmain could not terminate during the pendency of the temporary injunction. The court rejected this, noting the HSA was terminated on April 3, 2025—before the TRO (April 8) and TI (May 6)—and that those orders merely preserved the status quo, which by then no longer included a contractual relationship.

The court held that the HSA was terminated prepetition and that the automatic stay under § 362 does not apply to Bitmain’s hydro cooling containers, mining servers, or Bitcoin in Orb’s possession. Because the contracts were terminated, Orb’s motion to assume under § 365 was denied as moot.

31. Court Refuses to Abstain, Dismisses Trustee’s Takings Claim, and Converts Gross Negligence Motion to Dismiss to a Motion for Summary Judgment

In re Entrust Energy, Inc., 2025 WL 3558739 (Bankr. S.D. Tex. Dec. 11, 2025) (Isgur, J.)

Entrust Energy (“Entrust”), an energy company, was rendered insolvent by the events of Winter Storm Uri. Entrust was party to a standard form agreement with ERCOT. After receiving a \$300 million electricity bill from ERCOT during the winter storm, Entrust’s financial backer terminated its agreements, resulting in Entrust’s inability to meet its payment obligations and its subsequent chapter 11 bankruptcy filing. Following confirmation of Entrust’s plan of liquidation, the Entrust Liquidating Trust initiated an adversary proceeding against ERCOT, alleging twelve causes of action including the two relevant here— (1) ERCOT’s transition of Entrust’s customers to a provider of last resort (as required under Texas state law if a utility fails to meet its obligations to ERCOT) constituted a Fifth Amendment taking and (2) ERCOT was grossly negligent by failing to take adequate steps to prepare for Winter Storm Uri despite its knowledge that extreme weather was likely. In response, ERCOT argued that the bankruptcy court lacked jurisdiction over the matter and should abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or alternatively under 28 U.S.C. § 1334(c)(1), and moved to dismiss the Trustee’s claims under Rule 12(b)(6). The bankruptcy court declined to abstain, which ERCOT appealed to the Fifth Circuit. The Fifth Circuit held that the bankruptcy court abused its discretion by not abstaining on the takings claim and remanded with instructions to dismiss four of the then six remaining claims and stay

adjudication of the takings claim and gross negligence claim pending the resolution of state proceedings relevant to ERCOT's actions during the winter storm.

The court terminated its abatement, and the trustee filed an amended complaint with the takings clause and gross negligence claims. ERCOT moved again for abstention and dismissal. The bankruptcy court declined to abstain because of its obligation to exercise the jurisdiction given to it and because of a mandate from the Fifth Circuit in this matter to stay adjudication until state proceedings regarding ERCOT's actions during the storm concluded (which occurred when the Texas Supreme Court rendered its decision during the previous year). The bankruptcy court also found that ERCOT's request to dismiss on grounds that the Trustee failed to exhaust administrative remedies, which ERCOT argued deprived the bankruptcy court of jurisdiction, lacked merit. The bankruptcy court stated that Congress has not codified the doctrine of exhaustion of administrative remedies as a jurisdictional bar in this context and noted that, while the existence of a state law administrative scheme may make abstention prudent, state law cannot override an act of Congress and deprive a federal court of jurisdiction.

After the bankruptcy court concluded that it had jurisdiction, the bankruptcy court ruled in favor of ERCOT and dismissed the Trustee's takings claim, concluding that no property was taken because ERCOT did not appropriate Entrust's contracts for public use nor did ERCOT acquire the contracts/the right to enforce them given ERCOT's contract with Entrust terminated when Entrust failed to meet its obligation. On the gross negligence claim, the bankruptcy court converted ERCOT's motion to dismiss to a motion for summary judgment and provided the parties an opportunity to brief the issue.

32. Court Finds D&O Insurer Wrongfully Refused to Consent to Reasonable Within-Limits Settlement Demand but Lacks Authority to Compel Acceptance Under Texas Law

In re Mining Project Wind Down Holdings Inc., No. 22-90273, 2025 WL 3522403 (Bankr. S.D. Tex. Dec. 8, 2025) (Isgur, J.)

Compute North Holdings, Inc., a Bitcoin mining and crypto data center company, filed for Chapter 11 in September 2022. The Mining Project Wind Down Litigation Trust was established under the confirmed plan. Tribolet Advisors, the Plan Administrator, discovered that 62 crypto-mining containers, the estate's primary remaining assets, had been damaged beyond normal wear and tear. Tribolet commenced an adversary proceeding against directors and officers for wrongful acts relating to failure to maintain the containers (the "Container Claims"). Compute North maintained three D&O insurance policies, including a post-petition policy issued by Relm with a \$5 million limit (the "Policy at Issue"). After successive settlement demands, Tribolet sought an order compelling Relm to fund a \$4.65 million within-limits settlement.

The Court rejected Relm's defense that the Policy covered only post-petition wrongful acts. Applying the "eight corners rule" under Texas law, the Court found the policy's plain language extended coverage to claims for wrongful acts committed before September 22, 2023, and the adversary complaint alleged only pre-petition wrongful acts. Relm was obligated to provide defense and indemnity coverage.

The Court found the \$4.65 million demand reasonable. Tribolet advanced three independent valuation approaches, each producing damages around \$4 million: projected versus actual container sale recovery shortfall, per-container repair costs, and new container replacement costs. The Court gave little weight to Relm’s alternative figure of \$1.485 million. The Court also found continued litigation would consume a substantial portion, if not all, of the Policy’s remaining funds; defense counsel estimated costs in the “millions of dollars” through trial.

Despite finding the demand reasonable and Relm’s refusal wrongful, the Court denied the motion to compel. Under Texas law—applying the *XL Specialty* and *Stowers* doctrines—an insurer’s liability for refusing a reasonable within-limits demand arises only retrospectively, post-settlement or post-judgment. Because neither had occurred, the Court could not prospectively compel acceptance. The Court cautioned, however, that Relm faces “limitless potential liability” if it fails to pay.

33. Actual Notice of Bankruptcy Months Before Bar Date Defeats Due Process and Excusable Neglect Arguments for Late-Filed Claim

In re Zachry Holdings, Inc., 2025 WL 3272295 (Bankr. S.D. Tex. Nov. 24, 2025) (Isgur, J.)

Encina Development Group (“Encina”) sought to have its late-filed proof of claim deemed timely in Zachry’s chapter 11 case. Encina’s claim arose from pending Texas state-court litigation in which Zachry had sued Encina and Encina had counterclaimed. The debtors filed a suggestion of bankruptcy in the state court and scheduled their claims against Encina (but not the counterclaim). The debtors neglected to serve Encina with the claims bar date order, but ultimately served Encina after the bar date passed. The confirmed plan provided that late-filed claims would be disallowed.

The court denied Encina’s motion to file a proof of claim after the bar date and disallowed Encina’s claim. The court denied relief on due process grounds, holding that due process is satisfied when notice is reasonably calculated to apprise parties of their rights, and that Encina had actual knowledge of the bankruptcy fifteen weeks before the bar date, yet waited twenty-seven weeks after learning of the bankruptcy to file its proof of claim. Encina had sufficient opportunity to protect its interests even though it did not learn of the specific bar date until after it had passed. The court also declined to extend the deadline under Local Rule 3003-1(c)(4) or Bankruptcy Rule 9006(b)(1), reasoning that Encina’s actual notice of the bankruptcy cases for months meant that commencement notice was not “insufficient.” The court concluded that Encina’s delay was not excusable neglect under the factors articulated by the Supreme Court in *Pioneer*. In particular, the delay was substantial and Encina failed to explain its inaction after receiving actual notice of the case, even though the debtors acknowledged little or no prejudice from the late filing.

34. Court Grants Motion to Enforce Settlement Agreement in Nondischargeability Action, Finding Parties Agreed to All Essential Terms via Email Exchange

In re Wahl, No. 24-35395, 2025 WL 3164728 (Bankr. S.D. Tex. 2025) (Pérez, J.)

Erich Wahl Jr., a former co-owner and officer of several nursing facility entities, filed a voluntary Chapter 7 petition. GCM Capital LLC (“GCM”) filed an adversary proceeding against the debtor for nondischargeability of a debt of at least \$348,964.63. The parties subsequently

engaged in settlement negotiations. GCM sent a formal settlement offer on June 3, 2025, to which the debtor's counsel responded that "most of the agreement is acceptable subject to minor nits" and countered the payment amount. After a series of email exchanges, on June 25, 2025, GCM accepted the debtor's proposed payment terms of \$1,750 per month for thirty-six months, in addition to a \$150,000 nondischargeable consent judgment. Debtor's counsel wrote that "Mr. Wahl accepts the proposed settlement." GCM later sought to withdraw from the settlement, alleging it had discovered new information showing the debtor possessed undisclosed funds. The debtor moved to enforce the settlement agreement.

Applying Texas contract law, the Court held that a binding settlement agreement had been formed. The Court found that the June 25th email exchange demonstrated both an offer by GCM and an acceptance by Mr. Wahl, with agreement on all essential terms: namely, the \$150,000 consent judgment amount, the \$1,750 monthly payment terms, and the release of GCM's claims against the debtor. The Court rejected GCM's argument that the debtor had not unequivocally accepted the cooperation provisions contained in the original settlement proposal. The Court reasoned that after the debtor's counsel stated the agreement was acceptable "subject to minor nits," GCM's counsel responded with "assuming all the appropriate language on cooperation and information/depositions, etc. is acceptable" and then proceeded to counter only on payment terms. The debtor never objected to or contested the cooperation provisions, and ultimately accepted GCM's settlement proposal in full. The Court also rejected GCM's argument that the agreement was subject to court approval under Rule 9019, finding that rule inapplicable because this Chapter 7 case did not have a trustee or debtor in possession asserting the settlement. The Court granted the debtor's motion to enforce the settlement agreement.

35. Plan Releases Enforced, Barring Plaintiffs' Suits Against Parent Company After Court Holds the Alleged Claims Were Indirect, Estate-Owned Causes of Action

In re Wellpath SF Holdco, LLC, 2025 WL 3165423 (Bankr. S.D. Tex. Nov. 12, 2025) (Pérez, J.)

The estates of several creditors and putative creditors (the "Colorado Plaintiffs") and putative creditor Russell Fincham each filed lawsuits pre-petition against chapter 11 debtor, Wellpath SF Holdco, LLC ("Wellpath") and its parent company H.I.G. Capital, LLC ("HIG"), alleging constitutional violations and negligence at Wellpath's detention facilities that resulted in the deaths and/or injuries of these individuals at different detention facilities across the country. The lawsuits were subject to the automatic stay following the chapter 11 filing. In the chapter 11 cases, the bankruptcy court approved a settlement agreement with HIG, which released HIG and its affiliates from any and all claims by the debtors' estates including Wellpath, except for certain carved out directors' and officers' liability claims. That same day, the bankruptcy court confirmed a plan of reorganization that provided for the release of all indirect, derivative claims against certain released parties, including HIG and its affiliates. Following the plan's confirmation, the Colorado Plaintiffs amended their complaints to remove indirect liability claims, agreeing that such claims were property of the debtors' estate, while Fincham's complaint remained based on indirect liability against HIG.

HIG then filed a motion to enforce the settlement and release order, seeking to enforce the settlement and release agreements by enjoining the Colorado Plaintiffs and Mr. Fincham from continuing their lawsuits against HIG and arguing that the claims alleged in their complaints were indirect liability claims released under the orders. The bankruptcy court agreed, granting the

motion and finding that the Colorado Plaintiffs’ and Fincham’s claims were based on theories of indirect liability under *United States v. Bestfoods*, 524 U.S. 51 (1998) because they did not sufficiently allege HIG’s direct control over the detention facilities and concluding that these claims were property of the debtors’ estates and were released under the settlement orders under the standard articulated in *In re Emoral Inc.*, 740 F.3d 875, 879 (3d Cir. 2014), thus enjoining the plaintiffs from pursuing their lawsuits against HIG. In so doing, the bankruptcy court reasoned that the claims were property of the estate because they existed before the commencement of the bankruptcy case, Wellpath could have asserted the claims on its behalf, and the claims were general claims based on theories of liability available to all creditors.

36. Forum-Selection Clause Compels Transfer of Contract Dispute to Nebraska, But Bankruptcy Court Retains Exclusive Jurisdiction Over Administrative Priority Issues

In re Zachry Holdings, Inc., 2025 WL 3056951 (Bankr. S.D. Tex. Oct. 31, 2025) (Isgur, J.)

On September 21, 2021, Zachry Industrial, Inc. and Omaha Public Power District (“OPPD”) entered into an engineer, procure and construct contract for two generating stations and associated substations in the Omaha area, with a Nebraska choice-of-law clause and a forum-selection clause designating Nebraska state and federal courts as the exclusive fora. Zachry filed chapter 11 in May 2024, and in August 2024 the parties amended the contract to extend completion deadlines and to modify the liquidated damages provision. The court approved Zachry’s assumption of the amended contract in September 2024. Following project delays, OPPD issued a notice of anticipatory breach in December 2024 and began invoicing liquidated damages in January 2025. Zachry filed an adversary proceeding on February 5, 2025 seeking a declaration of no breach and unenforceability of the liquidated damages clause, or alternatively that any OPPD claim lacked administrative priority. OPPD moved to dismiss, to withdraw the reference and to transfer venue, and separately filed an administrative expense application. The central venue issue was whether the forum-selection clause required transfer of the adversary proceeding to the District of Nebraska under 28 U.S.C. § 1412, despite Zachry’s argument that the dispute was a matter that should remain in the bankruptcy court.

The court retained jurisdiction over any determination of claim priority, but transferred all other issues to the District of Nebraska. It held the adversary proceeding was core—the contract was amended and assumed postpetition and OPPD’s administrative claim arose from alleged breaches of that assumed Contract—but found that core status was not dispositive because valid forum-selection clauses are presumptively enforceable absent fraud, overreaching or unreasonableness, none of which Zachry alleged. Treating the clause as valid, the court disregarded Zachry’s private-interest arguments as waived and applied the *Atlantic Marine* public-interest factors, finding court congestion neutral, local interest favoring Nebraska, and law familiarity neutral. It rejected Zachry’s reliance on a generalized bankruptcy-policy preference for keeping core matters in the bankruptcy court, and explained that claim priority is an extracontractual issue within the bankruptcy court’s exclusive jurisdiction under 28 U.S.C. § 1334(a) that a forum-selection clause cannot displace.

37. Automatic Stay Cannot Block D&O Insurer from Advancing Defense Costs to Former Officers Where Chapter 7 Trustee Fails to Establish Estate’s Interest in Policy Proceeds

In re Mountain Express Oil Company, 674 B.R. 747 (Bankr. S.D. Tex. Oct. 29, 2025) (Rodriguez, J.)

Mountain Express Oil Company and its affiliated entities’ chapter 11 cases were converted to chapter 7. The debtors’ two former co-chief executive officers filed a motion for relief from the automatic stay to allow an insurer to advance or reimburse defense costs and fees under management and entity liability insurance policies. In support of the motion, the former officers argued that: (1) the estate had no interest in the proceeds of the policies such that the automatic stay did not apply to the proceeds, and (2) even if the estate had a property interest in the proceeds, cause existed to lift the stay under § 362(d)(1). The chapter 7 trustee objected to the motion, arguing that (i) the policies and their proceeds were property of the estate because the debtors were the insured parties are entitled to coverage under the policies and (ii) no cause existed to lift the stay because doing so would diminish the estate’s interest in the proceeds.

The bankruptcy court noted that, while the policies themselves were property of the estate, the estate’s interest in the proceeds was a fact specific question. After evaluating the requirements under the policies, the court determined that the estate did not have a property interest in the policy proceeds, finding that (i) the trustee did not satisfy the policy’s notice requirements for Side C coverage, and (ii) Side A coverage applied solely to the individual directors and officers, not the estate. The court also concluded that the estate did not have an interest in the policy proceeds, even if such proceeds would be distributed to the estate, because the trustee failed to show that the debtors had a covered claim that entitled them to coverage under the policies. Finally, the court concluded that the automatic stay did not apply to prevent the insurer from evaluating coverage and applying the proceeds towards the movants’ defense costs because the estate had no demonstrated property interest in the proceeds.

38. Patent Infringement Claims Disallowed at Zero After Claimant Forfeits Right to Present Evidence and Cannot Rebut Noninfringement Showing

In re Rhodium Encore LLC, 2025 WL 3017436 (Bankr. S.D. Tex. Oct. 28, 2025) (Pérez, J.)

Rhodium Encore LLC and its affiliates filed chapter 11 in August 2024. Midas Green Technologies LLC filed seven proofs of claim totaling about \$12.3 million, alleging infringement of its immersion-cooling patent in connection with Rhodium’s former industrial-scale Bitcoin mining operations in Rockdale, Texas and Temple, Texas. The patent dispute had been litigated prepetition in the Western District of Texas, where the district court indicated that it was “going to grant” Rhodium’s noninfringement summary judgment motion, but never issued a written order. In the bankruptcy case, Rhodium objected to Midas Green’s claims and the court set an evidentiary hearing. Midas Green failed to timely file its witness and exhibit lists, and the court barred it from presenting evidence, although it was allowed to cross-examine Rhodium’s witnesses.

The court sustained Rhodium’s omnibus objection and, alternatively, estimated Midas Green’s contingent and unliquidated claims at \$0. Applying the bankruptcy claims-burden framework, the court held that while Midas Green’s proofs of claim were *prima facie* valid,

Rhodium rebutted that presumption with evidence that its systems lacked multiple limitations required for literal infringement, including a secondary circulation facility, a control facility tied to dielectric-fluid temperature, “appliance slots,” and substantially uniform upward dispensing through each slot. Once the presumption was rebutted, the burden shifted to Midas Green to prove infringement by a preponderance, but it offered no evidence, so the objection had to be sustained. In the alternative, because the claims were contingent and unliquidated, further liquidation would unduly delay the case, and Midas Green submitted no admissible evidence of infringement or damages, the court estimated the claims at zero.

39. The Interaction Of §§ 502(e), 506(d), 507(d), and 509 in the Surety Bond Context.

In re Hornblower Consulting, LLC, No. 24-90155, 2025 WL 2738231, (Bankr. S.D. Tex. Sept. 25, 2025) (Isgur, J.)

This memorandum opinion by Judge Marvin Isgur addresses a motion for summary judgment filed by Hornblower Consulting, LLC and its debtor affiliates, objecting to proofs of claim filed by Argonaut Insurance Company in Hornblower's chapter 11 case. The claims arise from surety bonds Argonaut issued on behalf of various Hornblower entities under Federal Maritime Commission regulations, with an aggregate penal sum of approximately \$51.98 million.

Hornblower operated cruise, ferry, and maritime services internationally. Two of the surety bonds at issue—totaling \$39 million—were acquired by affiliates American Queen Steamboat Operating Company, LLC and Victory Operating Company, LLC (collectively “AQV”) in connection with FMC regulations enacted in response to COVID-19, which entitled cruise passengers to refunds of prepaid fares upon nonperformance of transportation. Hornblower cancelled all AQV cruises prior to filing for chapter 11 on February 21, 2024, and subsequently directed passengers to file claims against Argonaut under the FMC surety bonds and FMC regulations.

On May 2, 2024, Argonaut filed proofs of claim against twelve Hornblower affiliates asserting two theories: (1) contractual and common law indemnity claims, partially secured by collateral under a General Indemnity Agreement and a Collateral Security Agreement, and (2) subrogation claims based on payments Argonaut made or might make to AQV passengers. As of July 18, 2025, Argonaut had received about 5,037 passenger claims, paid approximately \$20.2 million on 2,046 of them, and had roughly 911 claims still pending.

Hornblower’s Chapter 11 Plan of Reorganization was confirmed on June 7, 2024, with the Confirmation Order classifying Argonaut’s subrogation claims as Class 5 general unsecured claims not entitled to § 507 priority. Argonaut appealed solely on the priority issue and was denied a stay pending appeal.

The court granted Hornblower’s motion for summary judgment in part and denied it in part, addressing three issues.

First, the court applied § 502(e)(1)(C), which requires disallowance of a reimbursement or contribution claim where the entity also asserts a right of subrogation under § 509. Because Argonaut’s subrogation rights under § 509(a) arise only upon actual payment to the assured creditor, Argonaut held subrogation rights only with respect to the 2,046 AQV passenger claims it

had already paid. For those paid claims, the court held that Argonaut could not simultaneously assert both indemnification and subrogation; reading §§ 502(e) and 509 together, the subrogation claim is allowed and the corresponding indemnification claim is disallowed. The court noted that Argonaut had the right to elect either remedy upon payment, but having asserted both, the statute mandates disallowance of the indemnification claim.

As for unpaid passenger claims, Argonaut's purported subrogation rights remained contingent and were disallowed under § 502(e)(1)(B), consistent with the statute's purpose of preventing the estate from being burdened by claims that "have not come to fruition." The disallowance was without prejudice; Argonaut may seek reconsideration under § 502(j) as circumstances change.

Second, the court held that § 507(d) strips Argonaut of any priority the AQV passengers may have enjoyed under § 507(a)(7) (consumer deposit claims). Although § 1129(a)(9)(B) requires full payment of § 507(a)(7) deposit claims, § 507(d) expressly provides that a subrogee is "not subrogated to the right of the holder of such claim to priority." Argonaut's subrogation claims therefore carry no priority status.

Finally, Argonaut argued that its subrogation claims were secured by collateral under the Collateral Security Agreement. The court disagreed, drawing a clear distinction between indemnification rights (which are contractual and secured by the Collateral Security Agreement) and subrogation rights (which arise under § 509 and stand the subrogee in the shoes of the subrogor). Because the AQV passengers held only unsecured refund claims, Argonaut's subrogation claims were likewise unsecured—a subrogee cannot obtain greater rights than its subrogor.

The court acknowledged that § 506(d)(1) preserves the lien securing Argonaut's indemnification claims notwithstanding their disallowance under § 502(e), but held that § 506 cannot be used to "attach the preserved lien onto a different type of claim, such as a subrogation claim." Moreover, the Confirmation Order—which Argonaut did not appeal on this issue—already classified the subrogation claims as unsecured.

40. Future Equity Agreements Create Contingent Claims, Not Mere Equity Interests, in Bankruptcy

In re Rhodium Encore LLC, 675 B.R. 502 (Bankr. S.D. Tex. Aug. 30, 2025) (Pérez, J.)

After Rhodium Encore LLC and affiliates filed chapter 11, multiple investors filed proofs of claim based on "simple agreements for future equity" ("SAFE") with Rhodium Enterprises through which Rhodium raised equity capital. Under the SAFE Agreements the holders would receive equity upon an equity financing or IPO. The debtors filed an omnibus objection arguing that the SAFE holders' approximately \$70.8 million in asserted amounts were contingent equity interests rather than "claims," and sought disallowance. The SAFEs were governed by Delaware law. A major claimant, Celsius, argued that the SAFEs created contingent rights to payment (cash-out amounts) upon specified Liquidity and Dissolution Events, and contended that a recent transaction and/or liquidation would trigger those rights, presenting a bankruptcy-law issue of first impression.

The court overruled the debtors’ objection and held that the SAFEs created contingent claims rather than mere equity interests. The court reasoned that the SAFEs’ plain language provided that upon a Liquidity Event or Dissolution Event the investor is entitled to receive proceeds “due and payable,” at least equal to the Purchase Amount or Cash-Out Amount, which falls within the Bankruptcy Code’s broad definition of a contingent “claim.” It interpreted the “Liquidation Priority” provision to give effect to the specific priority clauses over the general statement that the SAFE was “intended to operate like standard Common Stock,” and declined to consider extrinsic evidence because the agreements were unambiguous and fully integrated under Delaware law. The court also concluded that “a reasonable third party examining this SAFE Agreement would conclude that the investors have a contingent claim when entering into it.” The court further held that section 510(b) of the Bankruptcy Code did not apply because the claimants sought to enforce contractual payment rights rather than seek rescission or damages arising from a securities transaction. It finally noted that plan confirmation would produce a liquidation and therefore a triggering event regardless.

41. Chapter 15 Recognition Denied Because Liquidator’s Minimal Malta Activity Fails to Establish COMI or Establishment at Petition Date

In re Geden Holdings, Ltd., 674 B.R. 732 (Bankr. S.D. Tex. 2025) (Pérez, J.)

Geden Holdings, Ltd., a Maltese-registered shipping holding company, has been in a Maltese winding-up proceeding since 2017. In 2023 a new liquidator and foreign representative, Dr. Balzan, was appointed and in April 2025 he filed a chapter 15 petition seeking recognition of the Maltese proceeding. Advantage Award Shipping, LLC objected. After hearings with testimony and documentary evidence, the court took under advisement whether the Maltese case qualified as a foreign main proceeding (based on COMI) or foreign nonmain proceeding (based on an “establishment”), subject to section 1506’s narrow public-policy exception.

The court denied recognition, holding that the Maltese case was neither a foreign main nor foreign nonmain proceeding. On COMI, the court declined to apply the section 1516(c) registered-office presumption because of the substantial dispute and complex history, and instead focused on the petition date facts, finding that the liquidator’s activities in Malta did not amount to the “material effort” needed to establish COMI because he had not performed basic liquidation functions such as identifying assets and creditors, securing records, convening creditor meetings, paying taxes or pursuing meaningful non-U.S. discovery. For nonmain recognition, the court held there was no petition-date “establishment” in Malta—no place of operations or non-transitory economic activity with a local market effect—so recognition as a foreign nonmain proceeding was also unavailable.

42. Known Creditors Cannot Be Bound by Third-Party Releases Without Actual Notice— Constructive Notice Is Never Sufficient for Consensual Releases Under a Chapter 11 Plan

In re Tehum Care Services, Inc., 672 B.R. 108 (Bankr. S.D. Tex. Aug. 7, 2025) (Lopez, C.)

The bankruptcy court confirmed Tehum’s chapter 11 plan, which incorporated a \$50 million settlement to resolve estate causes of action against YesCare and certain of its affiliates (collectively, the “YesCare Parties”) arising from a “Texas two-step” divisional merger in exchange for releases. The plan, among other things, established a personal injury and/or wrongful

death trust and provided for consensual third-party releases between (among others) YesCare and personal injury and/or wrongful death (“PI/WD”) claimants. The court had previously approved the voting and solicitation procedures, which required that solicitation packages and/or opt-out forms be sent to claim holders. PI/WD claimants were classified in Classes 6-8 of the plan and were entitled to receive a ballot and an opt-out release form. Those who did not opt out were considered consenting claimants, and consenting claimants’ claims were channeled to the PI/WD trust on the plan’s effective date and released claims against the YesCare Parties. Claimants who opted out of the third-party releases did not participate in the settlement and were allowed to pursue recovery against third-parties including the YesCare Parties on theories of successor liability.

YesCare sought an order enjoining certain parties from continuing to litigate in federal and state courts against YesCare Parties, identifying over one hundred parties who should have received and did not submit an opt-out release form. However, the bankruptcy court found that the PI/WD claimants were not all served the same solicitation and opt-out materials: some parties received a ballot and an opt-out release form, others received plan related materials without an opt-out form, and others did not receive any plan-related materials.

The court held that (i) the parties not served with an opt-out release form were not bound by the consensual third-party release under the plan, and (ii) parties that were served an opt-out release form and failed to return an opt-out were bound by the consensual third-party releases and enjoined from pursuing causes of action against the YesCare Parties. The court rejected YesCare Parties’ argument that publication notice or notice through docket entries was sufficient. The court noted that there can never be constructive notice of a consensual release between third-parties under a chapter 11 plan, including court-approved publication notice. Because the parties were known creditors, they were constitutionally entitled to actual notice before their litigation claims could be released under the plan.

43. Court Abstains Under Burford on Breach of Contract Claim, Dismisses Unjust Enrichment and Equitable Subordination, Allows Preference Action to Proceed

In re Griddy Energy LLC, No. 21-30923, 2025 WL 1521719 (Bankr. S.D. Tex. May 28, 2025) (Isgur, J.)

Russell F. Nelms, the plan administrator of Griddy Energy LLC, sued the Electric Reliability Council of Texas (“ERCOT”) for damages arising from Winter Storm Uri. Griddy was a Retail Electric Provider that purchased electricity from ERCOT and provided customers access at wholesale prices. During the February 2021 storm, the Public Utilities Commission directed ERCOT to set the market price to \$9,000 per-megawatt-hour, up from the normal \$20 to \$30 range. When customers failed to pay the inflated invoices, ERCOT issued a notice of material breach for approximately \$5.7 million in collateral calls and settlement invoices. Griddy argued force majeure; ERCOT nonetheless terminated Griddy as a Market Participant and initiated a mass customer transition. Griddy filed for Chapter 11 in March 2021.

The plan administrator asserted six causes of action including preference avoidance, breach of contract, equitable subordination, and unjust enrichment. The Court addressed whether Burford abstention required it to refrain from hearing the claims. The central issue was whether ERCOT wrongfully exercised its discretion in terminating Griddy, which required adjudication of

ERCOT's discretionary actions under its protocols, part of the state's pervasive regulatory scheme overseen by the Public Utilities Commission.

For breach of contract and unjust enrichment, all five Burford factors favored abstention. The breach claim was stayed pending state proceedings on the force majeure issue; the unjust enrichment claim was dismissed. The Court noted the Supreme Court of Texas's holding in CPS Energy that the PUC has exclusive jurisdiction over Market Participant claims against ERCOT. The preference action and disallowance claims proceeded, as no Burford factors favored abstention. On the preference claim, the Court rejected ERCOT's earmark defense, finding ERCOT had no control over Griddy's bank account and no express agreement that customer payments would satisfy collateral calls.

The Court dismissed the equitable subordination claim, finding that ERCOT exercised its prescribed remedies under the Protocols and the allegations did not establish bad faith or inequitable conduct. The Court applied the Fifth Circuit's three-prong test and found none of the recognized situations (misuse of fiduciary position, control of the debtor, or fraud) were adequately pleaded.

44. Reorganized Debtor Cannot Use Its Own Chapter 11 Plan to Escape Indemnification Obligations It Expressly Assumed

In re Sandridge Energy, 2025 WL 1490539 (Bankr. S.D. Tex. May 23, 2025) (Isgur, J.)

SandRidge Energy, Inc. ("SandRidge"), an oil and gas exploration and production company, moved to reopen its case to enforce its chapter 11 plan. Prior to filing bankruptcy, SandRidge and three of its officers were named as defendants in two federal securities class action lawsuits. These lawsuits were stayed upon SandRidge's bankruptcy filing and resumed post-confirmation against the individual officers and against SandRidge as a nominal defendant, ultimately resulting in a \$17 million settlement with the former officers. The settlement amount was paid from proceeds of D&O insurance policies.

The insurers subsequently sued SandRidge and asserted a subrogation claim, seeking to recover the settlement amount based on the officers' indemnification rights against SandRidge. SandRidge sought to reopen the case and enforce the plan, specifically for an order directing the insurers to dismiss their subrogation claim with prejudice. SandRidge argued that its indemnity obligations to the two officers were discharged in its chapter 11 plan.

The bankruptcy court found that, because SandRidge's D&O policies and indemnity obligations (except for those specifically not assumed in the plan) were assumed without modification in its plan, they were executory contracts and not discharged. The bankruptcy court overruled SandRidge's defenses that the indemnification obligations were canceled, released, terminated, or discharged by the plan. Citing the Fifth Circuit's decision in *In re National Gypsum Co.*, 208 F.3d 498 (5th Cir. 2000), the court held that once the indemnification obligations were assumed through the plan, they became SandRidge's post-confirmation obligations. Therefore, the insurers' subrogation claim did not violate the plan. Because the insurers' subrogation claim did not violate the plan or the confirmation order, the court found that SandRidge failed to demonstrate the compelling circumstances necessary to reopen the bankruptcy case.

45. *Talc* Chapter 11 Not Filed in Bad Faith Where § 524(g) Trust Offers Genuine Benefit to Claimants; Dismissal Denied Under Unusual Circumstances Exception

In re BMI Oldco Inc., 671 B.R. 215 (Bankr. S.D. Tex. 2025) (Isgur, J.)

BMI, a talc miner and seller, and its subsidiary filed chapter 11 in October 2023 to resolve hundreds of talc-related personal-injury suits claiming asbestos exposure. The U.S. Trustee appointed an unsecured creditors' committee and a future claimants' representative. After a fourteen-month mediation, the official committee, certain talc claimants and the U.S. Trustee moved to dismiss the chapter 11 cases, or terminate exclusivity in the alternative, arguing that the case was a bad-faith litigation tactic, the debtors could not confirm a plan, and the cases are causing continuing losses. BMI proposed a plan featuring a section 524(g) talc personal injury trust funded primarily by its parent and affiliates (including a publicly announced \$215 million reserve), with a fallback non-section 524(g) plan if the 75% voting threshold for talc claimants was not met.

The court denied dismissal and held the exclusivity dispute in abeyance pending a district court determination (see below), finding that the movants failed to establish "cause" under section 1112(b). It concluded BMI had a valid bankruptcy purpose—resolving present and future talc and asbestos liabilities through a section 524(g) trust—and was not acting solely to benefit its parent, because the trust structure offered material potential benefits to current and future claimants even if the parent also received protections for its funding. The court acknowledged troubling evidence of "unfair litigation tactics," including a special committee's inaction and lack of independence in pursuing potential affiliate claims, but found "unusual circumstances" under section 1112(b)(2)(B) based on the court-ordered mediation and subsequent corrective measures, such as the parent's stated willingness to let BMI pursue claims and reconstituting the special committee with independent members. It deemed plan-confirmability challenges premature given post-mediation progress, and it rejected dismissal for "substantial or continuing loss," finding any such losses were offset by estate causes of action and the parent's funding commitment and "dismissal will almost surely deny any prospect of recovery for future talc-claimants."

46. Bankruptcy Court Recommends Withdrawal of Reference to Bankruptcy Proceedings for District Court to Try Common Threshold Question of Whether Talc Causes Asbestos-Related Disease

In re BMI Oldco Inc., 2025 WL 1446214 (Bankr. S.D. Tex. May 14, 2025) (Isgur, J.)

In the same BMI talc chapter 11 cases, the court *sua sponte* recommended partial withdrawal of the district court's reference to the bankruptcy case and asked the district court to decide, by trial or otherwise, whether BMI's talc contained sufficient asbestos to cause mesothelioma or other asbestos-related disease, abating the chapter 11 case and related adversary proceedings in the meantime. BMI had filed chapter 11 to resolve roughly 800 talc personal-injury suits across 22 states and proposed a two-track plan with a section 524(g) trust funded by a parent contribution and a fallback non-section 524(g) trust option.

The court reasoned that the "presence of asbestos" issue is a fundamental, common threshold question that affects claim valuation, plan feasibility (including good faith under section 1129(a)(3)), the necessity of a future claims representative, and the protection of future claimants, and that under 28 U.S.C. § 157(b)(5) personal-injury and wrongful-death claims must be tried in the district court. It concluded the asbestos-presence question was a real and substantial dispute,

given the parties' repeated allegations and denials throughout the case, and rejected objections that there was no Article III case or controversy.

47. Opt-Out Third-Party Releases Are Consensual Under Fifth Circuit Law, and Post-Purdue Challenges to Such Releases Are Unlikely to Succeed on the Merits

In re Container Store Group, Inc., 2025 WL 4226766 (Bankr. S.D. Tex. April 7, 2025) (Pérez, J.)

The Container Store Group, Inc. and certain of its affiliates ("Container Store"), a national specialty retailer, filed a prepackaged plan backed by prepetition lenders holding over 90% of the outstanding term loan principal. The U.S. Trustee objected to the plan's third-party releases, injunction, and gatekeeping provisions, which the Court overruled and confirmed the plan. After the effective date, the U.S. Trustee filed a notice of appeal and an emergency motion for stay pending appeal.

The bankruptcy court denied the request to stay the confirmation order, applying the four-factor stay framework articulated by *In re First South Savings Ass'n*, 820 F.2d 700, 704 (5th Cir. 1987). First, the court found that the U.S. Trustee was unlikely to succeed on the merits, reasoning that opt-out releases are consensual under the established Fifth Circuit precedent and the Supreme Court's decision in *Purdue* was limited to non-consensual releases. The Court also rejected the argument that state contract law should govern consent, holding that federal bankruptcy law controls post-petition. Additionally, the Court found that the injunction and gatekeeping provisions were permissible under *Highland Capital I*, which recognized the bankruptcy court's longstanding gatekeeping function. Second, on irreparable injury, the Court held that the potential application of equitable mootness on appeal does not constitute irreparable harm and noted that the U.S. Trustee has no economic interest at stake, with no economic stakeholder having objected to the plan. Third, on substantial harm to other parties, the Court credited testimony from the debtors' chief restructuring officer that a stay would undermine already-consummated transactions and create needless confusion, given that the reorganized debtors were operating under new ownership and new exit financing. Fourth, on public interest, the Court found the strong interest in finality of substantially consummated reorganizations weighed decisively against a stay.

As an independent ground, the Court found the motion moot because the plan had already been confirmed, gone effective, and was substantially consummated before the U.S. Trustee filed its stay motion.

48. Prepackaged Talc Plan Denied Confirmation and Case Dismissed Due to Fatally Defective Solicitation, Impermissible Nonconsensual Third-Party Releases, and Overbroad Channeling Injunction

In re Red River Talc, 670 B.R. 251 (Bankr. S.D. Tex. 2025) (Lopez, J.)

Red River Talc LLC, a Texas LLC created through a Texas divisional merger to resolve Johnson & Johnson's talc liabilities, sought approval of a disclosure statement and confirmation of a prepackaged chapter 11 plan. The plan sought to resolve more than 90,000 ovarian and other gynecological cancer claims, as well as future claims, through a channeling injunction and a trust funded with \$9 billion. The U.S. Trustee, a coalition of plaintiffs' firms and insurers objected and moved to dismiss the chapter 11 cases. After a two-week trial, the court held the plan could not

be confirmed because the prepetition vote could not be certified due to serious solicitation and voting defects, the plan contained impermissible nonconsensual third-party releases, and the proposed section 524(g) channeling injunction improperly extended to claims against hundreds of retailers and a former J&J related company.

The bankruptcy court refused to confirm the plan and dismissed the case for “cause” under section 1112(b). The court found pervasive voting problems, including misuse of “Option B” master ballots without proper powers of attorney, improper reliance on engagement letters and negative notice, unreasonably short voting windows for thousands of claimants, and further tabulation and superseding-ballot defects that made it impossible to certify the 75% section 524(g) threshold. On releases, the court held the plan’s nonconsensual third-party releases for “hundreds of non-debtor third parties related to J&J” violated *Harrington v. Purdue Pharma*, 603 U.S. 204 (2024) and Fifth Circuit law, and could not be salvaged under section 105 or the All Writs Act. On the section 524(g) injunction, the court ruled the plan improperly sought to channel non-derivative, independent claims against retailers and the former J&J related company based solely on indemnity relationships, rendering the plan not feasible. In dismissing, the court stressed the cumulative impact of the rushed and irregular prepetition solicitation, the plan’s unconfirmability after *Purdue*, the purely settlement-driven nature of the case with no operating business to preserve, and the absence of a realistic path to confirm a new plan while keeping tort litigation stayed.

49. Bankruptcy Court Sanctions Attorney for AI-Generated Hallucinations in Court Filing: Violations of Bankruptcy Rule 9011 and S.D. Tex. General Order 2025-4
In re Kheir, 674 B.R. 631 (Bankr. S.D. Tex. 2025) (Rodriguez, C.J.)

When an attorney in the Southern District of Texas Bankruptcy Court included A.I. hallucinations in a filing that included both entirely fake cases and misrepresentations of propositions in existing cases, the Court found that he had violated Bankruptcy Rule 9011 and S.D. Tex. General Order 2025-4 (which deals specifically with papers submitted to the court using A.I.). Judge Rodriguez sanctioned the attorney by requiring him to pay the other parties’ attorneys’ fees, obtain 6 hours of CLE credit on the use of generative AI, and referred him to the State Bar.

50. Chapter 13 Debtor’s Entitlement to Texas Tools of Trade Exemption for Part-Time Landscaping Equipment Despite Temporary Non-Use
In re Hughes, No. 25-31870 (Bankr. S.D. Tex. June 27, 2025) (Isgur, J.)

The Court held that under Texas law, a Chapter 13 debtor was permitted to claim a \$15,000 tools of trade exemption for landscaping equipment that the debtor used in his part-time profession as a landscaper. The Court, applying the “use test” found that the equipment was necessary for the debtor’s part-time business, and that the equipment was used with sufficient regularity. Although the debtor had not used his equipment or operated his landscaping business in the past six months, he had not abandoned his trade but rather took time off to care for his ill spouse and provided credible testimony that he intends to resume his business once he recovered from surgery.

ETHICS JEOPARDY

Southern District of Texas Bankruptcy Bench Bar Conference
April 28, 2026
Corpus Christi, Texas

Charles A. Beckham, Jr., Haynes and Boone, LLP
Joshua W. Wolfshohl, Porter Hedges LLP
Imaan Patel, Haynes and Boone, LLP

ETHICS JEOPARDY

VENUE	ARTIFICIAL INTELLIGENCE	DEBTORS	CREDITOR COMMITTEES	THE SCANDAL	CORPUS CHRISTI
\$200	\$200	\$200	\$200	\$200	\$200
\$400	\$400	\$400	\$400	\$400	\$400
\$600	\$600	\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800	\$800	\$800
\$1000	\$1000	\$1000	\$1000	\$1000	\$1000

CATEGORY 1 · \$400

This is the case that started the venue wars.

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WHAT IS *CORCO*.

- March 2, 1978: *Commonwealth Oil Refining Co. (Corco)* files Chapter 11 in San Antonio, and the government of Puerto Rico objected to venue.
- Bankruptcy Court ruled that San Antonio was the proper venue, and the Fifth Circuit affirmed the Bankruptcy Court.

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CATEGORY 1 · \$600

This is the role of the lawyer when
choosing the venue to file a case.

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WHAT IS AN ADVOCATE.

- *In re Google, L.L.C.*, No. 25-40788 (5th Cir. Apr. 7, 2026) (“It is no well-kept secret that litigation involves strategy, and a plaintiff’s choice of venue involves strategic thinking.”).

CATEGORY 1 · \$800

The judge who declined to transfer
venue in *Multi-Color Corporation*.

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Who is Judge Michael B. Kaplan, United States Bankruptcy Court for the District of New Jersey.

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CATEGORY 1 - \$1000

The basis for venue in SDTX in Barretts Minerals.

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What is Barretts Minerals, Inc.'s Bay City, Texas facility.

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CATEGORY 2 · \$400

The steps to take if you realize that
opposing counsel has cited
hallucinated case law.

Hint: *Elizondo v. City of Laredo*, No. 5:25-cv-50,
2025 WL 2071072, at *3 (S.D. Tex. July 23, 2025)

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What is notify opposing counsel and the court as soon as possible.

Elizondo v. City of Laredo, No. 5:25-cv-50, 2025 WL 2071072, at *3 (S.D. Tex. July 23, 2025) (“[T]he Court expects all parties to assist in maintaining the integrity of the judicial process by alerting the Court to such errors.”).

CATEGORY 3 · \$600

The existence of this fact does not *per se* disqualify a chapter 11 debtors' counsel from employment under Section 327(a) so long as disclosure requirements as met under Rule 2014.

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What is DIP counsel's representation of a creditor of a debtor.

- ACTUAL VS. POTENTIAL CONFLICTS
- PRACTICE TIP: REGARDLESS OF WHETHER YOU THINK IT IS AN ACTUAL CONFLICT, POTENTIAL CONFLICT, ETC. – MUST DISCLOSE AND LET PARTIES/COURT WEIGH IN.
 - Scope of disclosure is *broader* than the question of disqualification.
 - Professional must include “connections.”

CATEGORY 3 · \$1000

Implementation of an “Ethical Wall”
may prevent this otherwise
disqualifying conflict for DIP’s
counsel.

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What is imputed disqualification of a single attorney in a firm to the entire firm.

- WHAT IS THE PROPER “SCREENING” PROCESS?
 - If “material adversity,” can implement an “ethical wall?” – 3 factor test
 - Is there “material adversity?”

CATEGORY 4 · \$200

In large multi-debtor chapter 11 cases, this approach is deemed sufficient (in most courts) to ensure a single unsecured creditors committee can represent the interests of unsecured creditors of all debtors.

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What is applying a “case-by-case” approach in analyzing numerous factors.

- **FACTORS INCLUDE, BUT ARE NOT LIMITED TO THE FOLLOWING:**
 - Ability of committee to function
 - Nature of the case
 - Standing and desires of the various constituencies
 - Ability for creditors to participate without official committee
 - Motivation of the movants

CATEGORY 4 · \$600

This measure should be taken when a committee member cannot separate its own self interest from the interest of unsecured creditors as a whole.

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What is recusal or withdrawal from the committee.

- WHO MAKES THIS DECISION?
- DO UCC MEMBERS SELF REGULATE?
- IS UCC COUNSEL RESPONSIBLE FOR THIS?
- WHAT RISES TO THE LEVEL OF WITHDRAWAL V. RECUSAL?
- IS RECUSAL FROM VOTING ENOUGH WHEN UCC IS PROVIDED WITH OTHERWISE CONFIDENTIAL INFORMATION THAT MIGHT PROVIDE INDIVIDUAL UCC MEMBER WITH UNFAIR ADVANTAGE?

[Home](#)

• NEIMAN MARCUS

[BACK TO PANEL](#)

CATEGORY 5 · \$600

Too soon...

[Home](#)

[⏮ BACK TO PANEL](#)

CATEGORY 6 · \$200

The birthplace of Whataburger.

[Home](#)

[⏮ BACK TO PANEL](#)

What is Corpus Christi.

[Home](#)

[⏪ BACK TO PANEL](#)

CATEGORY 6 · \$800

Location of the statute of Selena in
Corpus Christi.

[Home](#)

[⏪ BACK TO PANEL](#)

Where is on the waterfront.

[Home](#)

[← BACK TO PANEL](#)

WINNER!

The image features a vibrant background with a blue-to-pink gradient. The top half is a deep blue sky filled with numerous small white stars and several larger, multi-pointed starburst patterns in white and pink. The bottom half transitions into a bright pink and orange horizon line. Below this line, the floor is depicted with a white wireframe grid of intersecting lines, creating a sense of depth and perspective.

Understanding Property Taxes in Consumer Bankruptcy Cases

Tara L. Grundemeier, Capital Partner, Linebarger Goggan Blair & Sampson, LLP

Jeannie L. Andresen, Income Partner, Linebarger Goggan Blair & Sampson, LLP

**THREE THINGS IN
LIFE ARE CERTAIN**

**DEATH, TAXES, AND
PEOPLE GETTING OFFENDED
BY EVERYTHING**

imgflip.com

PROPERTY TAX LIENS

Automatic Statutory Lien

- Texas Tax Code § 32.01
- (a) On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.
- (b) A tax lien on inventory, furniture, equipment and other personal property is a lien in solido and attaches to inventory, furniture, equipment, and other personal property that the property owner owns on January 1 of the year the lien attaches or that the property owner subsequently acquires.
- (d) The lien under this section is perfected on attachment and...perfection requires no further action by the taxing unit.

PROPERTY TAX LIENS

Priming Statutory Lien

- Texas Tax Code § 32.05
- [A] tax lien provided by this chapter takes priority over the claims of any creditor of a person whose property is encumbered by the lien and over the claim of any holder of a lien on property encumbered by the tax lien, whether or not the debt or lien existed before the attachment of the tax lien.

STATUTORY PENALTY & INTEREST

- Texas Tax Code § 33.01
- (a) A delinquent tax incurs a penalty of six percent of the amount of the tax for the first calendar month it is delinquent plus one percent for each additional month or portion of a month the tax remains unpaid prior to July 1 of the year in which it becomes delinquent. However, a tax delinquent on July 1 incurs a total penalty of twelve percent of the amount of the delinquent tax without regard to the number of months the tax has been delinquent. A delinquent tax continues to incur the penalty provided by this subsection as long as the tax remains unpaid, regardless of whether a judgment for the delinquent tax has been rendered.
- c) A delinquent tax accrues interest at a rate of one percent for each month or portion of a month the tax remains unpaid. Interest payable under this section is to compensate the taxing unit for revenue lost because of the delinquency. A delinquent tax continues to accrue interest under this subsection as long as the tax remains unpaid, regardless of whether a judgment for the delinquent tax has been rendered.

PROPERTY TAX LIENS

Secured Claim in Bankruptcy

- 11 U.S.C. § 506(a)
 - “The creditor holds a secured claim to the extent of the value of such creditor’s interest in the Estate’s interest in such property and....an unsecured claim to the extent that the value of such creditor’s interest....is less than the amount of such allowed claim.”
- 11 U.S.C. § 506(b)
 - “To the extent that an allowed secured claim is secured by property the value by which...is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.”

CURRENT YEAR TAXES

- Taxes for the year in which the bankruptcy case is filed are considered pre-petition debts and therefore those taxes will need to be treated in the Plan, regardless of whether the taxes are escrowed.
- *See Midland Cent. Appraisal Dist. v. Midland Indus. Serv. Corp. (In re Midland Indus. Serv. Corp.)*, 35 F.3d 164 (5th Cir. 1994).

What about Postpetition Taxes?

S.D. Tex. Uniform Plan

11. Maintenance of Taxes and Insurance. The Debtor(s) must pay all ad valorem property taxes on property that is retained under this Plan, with payment made in accordance with applicable non-bankruptcy law not later than the last date on which such taxes may be paid without penalty. The Debtor(s) must maintain insurance on all property that serves to secure a claim and that is retained under this Plan, in amounts not less than as required by any underlying loan documents. This Paragraph 11 does not apply to the extent that taxes and insurance are escrowed. Any holder of a secured claim may request proof of compliance in writing, and the Debtor(s) must promptly provide proof of compliance with this Paragraph. If the Debtor(s) fail to provide such proof within 14 days of receipt of a written request, the holder of the debt secured by a lien on the property may purchase such insurance or pay such taxes in accordance with its rights under applicable non-bankruptcy law.

23. Presence or Absence of a Proof of Claim.

G. No creditor, before or after completion of the Plan, shall be allowed to collect any payments, costs, fees, or expenses, from the Debtor(s), the estate, or their property, that are not provided for in this Plan, unless such amounts first became payable after the completion of all payments under the Plan. This paragraph 23(G) does not limit the imposition of post-petition ad valorem taxes, or any payments, costs, fees, or expenses relating to post-petition ad valorem taxes.

What about Postpetition Taxes?

Reserve Disbursements

REQUEST FOR RESERVE DISBURSEMENT



The Debtor(s) submit this Request for Reserve Disbursement to the Chapter 13 Trustee for payment within 45 days from the date of the request. If the balance on hand in applicable reserve is sufficient to satisfy Line 2 at the time of actual disbursement, Trustee is authorized to pay the amount due as reflected on attached statements.

1	Disbursement is requested from (check only one): ☒ Ad valorem tax reserve ☐ Homeowner's Association fee reserve ☐ Federal income taxes ☐ Other		✓ ____
2	Amount due as reflected on attached statements		\$1,373.75
3	Balance on hand in applicable reserve account per trustee's website as of date of this notice		\$1,165.67
4	Requested payment by Trustee (lesser of line 2 and line 3)		\$1,165.67
5	Name of payee	Annette Ramirez Tax Assessor-Collector	
6	Payee's address	PO Box 4622	
7	Payee City, State, ZIP	Houston, TX 77210-4622	
8	Payee account number for debtor	-0047	

Attached are invoices, tax statements or other documents evidencing the Debtor(s)' obligation to pay the amounts reflected in line 1 of the preceding table.

*If there is an inconsistency with the amount in Line 2 and the statement amount, Trustee

What about
Postpetition
Taxes?

Reserve
Disbursements

Case [REDACTED] Document 179 Filed in TXSB on 11/24/25 Page 3 of 3

ANNETTE RAMIREZ
TAX ASSESSOR-COLLECTOR & VOTER REGISTRAR
P.O. BOX 3547
HOUSTON, TEXAS 77253-3547
TEL: 713-274-8000

HARRIS COUNTY
TEXAS

2025 Property Tax Statement
Web Statement

Statement Date: November 21, 2025

Account Number
[REDACTED]-0047

* 0 7 6 2 1 1 0 0 2 0 0 4 7 *

Taxing Jurisdiction	Exemptions	Taxable Value	Rate per \$100	Taxes
Houston ISD	137,306	0	0.878300	\$0.00
Harris County	27,461	109,845	0.380960	\$418.47
Harris County Flood Control Dist	27,461	109,845	0.049660	\$54.55
Port of Houston Authority	27,461	109,845	0.005900	\$6.48
Harris County Hospital District	27,461	109,845	0.187610	\$206.08
Harris County Dept. of Education	27,461	109,845	0.004798	\$5.27
Houston City College	23,342	113,964	0.098802	\$112.60
City of Houston	27,461	109,845	0.519190	\$570.30

Page: 1 of 1

Total 2025 Taxes Due By January 31, 2026:	\$1,373.75
Payments Applied To 2025 Taxes	\$0.00
Total Current Taxes Due (Including Penalties)	\$1,373.75
Prior Year(s) Delinquent Taxes Due (If Any)	2018 - 2024 \$973.29
Total Amount Due For January 2026	\$2,347.04

Penalties for Paying Late	Rate	Current Taxes	Delinquent Taxes	Total
By February 28, 2026	7%	\$1,469.91	\$978.74	\$2,448.65
By March 31, 2026	9%	\$1,497.38	\$984.09	\$2,481.47
By April 30, 2026	11%	\$1,524.86	\$989.52	\$2,514.38
By May 31, 2026	13%	\$1,552.34	\$994.88	\$2,547.22
By June 30, 2026	15%	\$1,579.81	\$1,000.27	\$2,580.08

Tax Bill Increase (Decrease) from 2020 to 2025: Appraised Value 61%, Taxable Value 57%, Tax Rate -11%, Tax Bill 1%.

PLEASE CUT AT THE DOTTED LINE AND RETURN THIS PORTION WITH YOUR PAYMENT.

Property Description
[REDACTED]

Appraised Values

Land - Market Value	112,883
Impr - Market Value	48,832
Total Market Value	161,715
Less Capped Mkt Value	24,409
Appraised Value	137,306

Exemptions/Deferrals

CAP, HOMESTEAD
Delinquent Taxes Exist

What about Postpetition Taxes?

Reserve Disbursements

Case [REDACTED] Document 179 Filed in TXSB on 11/24/25 Page 3 of 3

ANNETTE RAMIREZ
TAX ASSESSOR-COLLECTOR & VOTER REGISTRAR
P.O. BOX 3547
HOUSTON, TEXAS 77253-3547
TEL: 713-274-8000

HARRIS COUNTY
TEXAS

2025 Property Tax Statement
Web Statement

Statement Date: November 21, 2025

Account Number
[REDACTED]-0047

* 0 7 6 2 1 1 0 0 2 0 0 4 7 *

Taxing Jurisdiction	Exemptions	Taxable Value	Rate per \$100	Taxes
Houston ISD	137,306	0	0.878300	\$0.00
Harris County	27,461	109,845	0.380960	\$418.47
Harris County Flood Control Dist	27,461	109,845	0.049660	\$54.55
Port of Houston Authority	27,461	109,845	0.005900	\$6.48
Harris County Hospital District	27,461	109,845	0.187610	\$206.08
Harris County Dept. of Education	27,461	109,845	0.004798	\$5.27
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City of Houston	27,461	109,845	0.519190	\$570.30

Page: 1 of 1

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By May 31, 2026	13%	\$1,552.34	\$994.88	\$2,547.22
By June 30, 2026	15%	\$1,579.81	\$1,000.27	\$2,580.08

Tax Bill Increase (Decrease) from 2020 to 2025: Appraised Value 61%, Taxable Value 57%, Tax Rate -11%, Tax Bill 1%.

PLEASE CUT AT THE DOTTED LINE AND RETURN THIS PORTION WITH YOUR PAYMENT.

TAX REFUNDS

Generally

- Most Common Reasons for a Refund
- Overpayment – Refund is sent back to Trustee's office if the case is still active
- Overassessment – Refund is sent to property owner of record
- Duplicate Payment – Refund is sent "...to the person who erred in making the payment." Tex. Tax Code § 31.111.

TAX REFUNDS

Mortgage Escrow

- Escrow Agreements
- Typically contained in mortgage docs (i.e. Deed of Trust)
- Taxing Authorities are not a party to these mortgage agreements.
- Does not shift tax liability away from Debtor/Property Owner

TAX REFUNDS

Notice of Mortgage Payment Changes

- Notice of Mortgage Payment Changes
- Any error in escrow payments by a mortgage company is done by the mortgage company, not the Taxing Authority.

SURRENDERING PROPERTY

- Tax Liens are First in Priority (Tex. Tax Code 32.05)
- No action taken until Plan surrendering property is Confirmed.
- Then Taxing Authorities will proceed In-Rem against the property under applicable nonbankruptcy law.
- Real Property will go thru the state law process (Tax Suit).
- Personal Property will also go thru the state law process (Tax Warrant)

How to Read a Property Tax Statement

Current Taxes

ANNETTE RAMIREZ
TAX ASSESSOR-COLLECTOR
P.O. BOX 3547
HOUSTON, TEXAS 77253-3547



MISTER DEBTOR → Owner Name

1111 MAIN STREET → Mailing Address
KATY, TX 77449 (not property address)

2026 EST: \$229.91

2025 Property Tax Statement

Statement Date: April 15, 2026
Printed By: LBBWENDT

Account Number

0051

Property Situs

Taxing Jurisdiction	Exemptions	Taxable Value	Rate per \$100	Taxes
Lone Star College System	18,861	216,900	0.106000	\$229.91

Page: 1 of 1

Total 2025 Taxes Due By January 31, 2026

Payments Applied To 2025 Taxes

Total Current Taxes Due (Including Penalties)

Prior Year(s) Delinquent Taxes Due (If Any)

Total Amount Due For April 2026

Penalties for Paying Late	Rate	Current Taxes	Delinquent Taxes	Total
By April 30, 2026	11%	\$0.00	\$0.00	\$0.00
By May 31, 2026	13%	\$0.00	\$0.00	\$0.00
By June 30, 2026	15%	\$0.00	\$0.00	\$0.00
By July 31, 2026	18%	\$0.00	\$0.00	\$0.00
By August 31, 2026	19%	\$0.00	\$0.00	\$0.00

Property Description	
1111 MAIN STREET 77449 TR 51 LOT 1 BLK 9 SEC 1 R/P	
Acreage:	.1136
Appraised Values	
Land - Market Value	47,273
Impr - Market Value	188,488
Total Market Value	235,761
Less Capped Mkt Value	0
Appraised Value	235,761
Exemptions/Deferrals	
HOMESTEAD	

NOTES: Keep for your records

Tax Bill Increase (Decrease) from 2020 to 2025 : Appraised Value 43%, Taxable Value 36%, Tax Rate 0%, Tax Bill 41%.

Detach at the perforation and return this coupon with your payment. Keep top part for your records.

How to Read a Property Tax Statement

Delinquent Taxes

DELINQUENT TAX STATEMENT SUMMARY



ANNETTE RAMIREZ
HARRIS COUNTY TAX ASSESSOR-COLLECTOR
1001 PRESTON, SUITE 100
HOUSTON, TEXAS 77002

2026 Est. Taxes: \$318.68
Total Taxes: \$1,111.13

Certified Owner: MISTER DEBTOR
1111 MAIN STREET
KATY, TX 77449

Print Date: 04/23/2026
Printed By: LBBWENDT

Legal Description: LT 22 BLK 1
WOODCREEK SEC 1

2025 Value: \$300.637
Account: [REDACTED] 0022

Legal Acres: .2049
Parcel Address: 1111 MAIN STREET

As of Date: 04/23/2026

Year	Tax Units	Base Tax Due	IF PAID BY END OF MONTH APRIL 2026		IF PAID BY END OF MONTH MAY 2026		IF PAID BY END OF MONTH JUNE 2026	
			Penalties & Interest	Total	Penalties & Interest	Total	Penalties & Interest	Total
2024	45	\$289.96	\$151.94	\$441.90	\$155.42	\$445.38	\$158.90	\$448.86
2025	45	\$318.68	\$31.87	\$350.55	\$35.05	\$353.73	\$38.24	\$356.92
TOTAL AMOUNT DUE:		\$608.64	\$183.81	\$792.45	\$190.47	\$799.11	\$197.14	\$805.78

Tax Unit Codes:
45 Lone Star College System

IF YOU ARE 65 YEARS OF AGE OR OLDER OR ARE DISABLED AND THE PROPERTY DESCRIBED IN THIS DOCUMENT IS YOUR RESIDENCE HOMESTEAD, YOU SHOULD CONTACT THE APPRAISAL DISTRICT REGARDING ANY ENTITLEMENT YOU MAY HAVE TO A POSTPONEMENT IN THE PAYMENT OF THESE TAXES.

IF THE PROPERTY DESCRIBED IN THIS DOCUMENT IS YOUR RESIDENCE HOMESTEAD, YOU SHOULD CONTACT THE HARRIS COUNTY TAX ASSESSOR-COLLECTOR'S OFFICE REGARDING A RIGHT YOU MAY HAVE TO ENTER INTO AN INSTALLMENT AGREEMENT DIRECTLY WITH THE HARRIS COUNTY TAX ASSESSOR-COLLECTOR'S OFFICE FOR THE PAYMENT OF THESE TAXES.

Partial Statement: Other Years and Tax Units may be due

THE TAXES ON THIS PROPERTY ARE DELINQUENT. THE PROPERTY IS SUBJECT

How to Read a Property Tax Statement

Different Tax Units
may be collected
by different firms

Fill in this information to identify the case:

Debtor 1 **MISTER DEBTOR**

Debtor 2
(Spouse, if filing)

United States Bankruptcy Court for the: **Southern District of TX**

Case number **26-31111** - Chapter 13

Official Form 410 Proof of Claim

04/25

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both 18 U. S. C §§ 152, 157 and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>Harris County LGBS Clients</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	☒ No ☐ Yes From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? LINEBARGER GOGGAN BLAIR & SAMPSON, LLP PO BOX 3064 HOUSTON, TX 77253-3064 (713) 844-3400 houston_bankruptcy@lgbs.com	Where should payments to the creditor be sent? (If different) HARRIS COUNTY TAX OFFICE / LGBS HARRIS COUNTY LGBS CLIENTS PO BOX 4576 HOUSTON, TX 77210-4576

How to Read a Property Tax Statement

Different Tax Units may be collected by different firms

number you use to identify the debtor?	☒ Yes Last 4 digits of the debtor's account or any number you use to identify the debtor: _____ SEE ATTACHED EXHIBITS
7. How much is the claim?	<u>\$ 680.81</u> Does this amount include interest or other charges? ☐ No ☒ Yes Attach statement itemizing interest, fees, expenses or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. AD VALOREM TAXES
9. Is all or part of the claim secured?	☐ No ☒ Yes The claim is secured by a lien on property. Nature of property: ☒ Real Estate. If claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim</i> Attachment (Official Form 410-A) with this Proof of Claim. ☐ Motor Vehicle ☐ Other. Describe: SEE ATTACHED EXHIBITS Basis for perfection: <u>Secured by Tax Lien §§ 32.01 and 32.05 of the Texas Property Tax Code. Secured claim to extent of collateral value. Unsecured Priority claim [11 U.S.C. 507 (a)(8)] to extent of any shortfall in collateral value and for personal liability.</u> Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ <u>SEE ATTACHED EXHIBITS</u> Amount of the claim that is secured: \$ <u>680.81</u> Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ <u>680.81</u> Annual Interest Rate (when case was filed) <u>12%</u> ☒ Fixed ☐ Variable

How to Read a Property Tax Statement

Different Tax Units may be collected by different firms

ANNETTE RAMIREZ
TAX ASSESSOR-COLLECTOR
P.O. BOX 3547
HOUSTON, TEXAS 77253-3547



MISTER DEBTOR
1111 MAIN STREET
KATY, TX 77449

2025 Property Tax Statement

Statement Date: April 14, 2026
Printed By: LBBWENDT

Account Number

0051

2026 EST: \$680.81

Taxing Jurisdiction	Exemptions	Taxable Value	Rate per \$100	Taxes
Lone Star College System	27,574	317,105	0.106000	\$336.13
Emergency Serv Dist #46-E.M.S./Fire	0	344,679	0.100000	\$344.68

Page: 1 of 1

Total 2025 Taxes Due By January 31, 2026

Payments Applied To 2025 Taxes

Total Current Taxes Due (Including Penalties)

Prior Year(s) Delinquent Taxes Due (If Any)

Total Amount Due For April 2026

Penalties for Paying Late	Rate	Current Taxes	Delinquent Taxes	Total
By April 30, 2026	11%	\$0.00	\$0.00	\$0.00
By May 31, 2026	13%	\$0.00	\$0.00	\$0.00
By June 30, 2026	15%	\$0.00	\$0.00	\$0.00
By July 31, 2026	18%	\$0.00	\$0.00	\$0.00
By August 31, 2026	19%	\$0.00	\$0.00	\$0.00

Property Description
1111 MAIN STREET 77449 TR 51 LOT 1 BLK 9 SEC 1 R/P

Appraised Values

Land - Market Value	56,656
Impr - Market Value	288,023
Total Market Value	344,679
Less Capped Mkt Value	0
Appraised Value	344,679

Exemptions/Deferrals

HOMESTEAD

NOTES: Keep for your records

Tax Bill Increase (Decrease) from 2020 to 2025 : Appraised Value 44%, Taxable Value 44%, Tax Rate 3%, Tax Bill 46%.

How to Read a Property Tax Statement

Different Tax Units may be collected by different firms

Fill in this information to identify the case:

Debtor 1 Mister Debtor

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: Southern District of Texas

Case number 26-11111

Official Form 410

Proof of Claim

04/22

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>Harris County, et al.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	☒ No ☐ Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)
	Office of the Harris County Attorney Name _____ P.O. Box 2848 Number Street Houston TX 77252 City State ZIP Code Contact phone 346-286-8899 Contact email taxbankruptcy.cao@harriscountytexas.gov	Harris County Tax Office Name _____ P.O. Box 2848 Number Street Houston TX 77252 City State ZIP Code Contact phone 346-286-8899 Contact email taxbankruptcy.cao@harriscountytexas.gov

How to Read a Property Tax Statement

Different Tax Units
may be collected
by different firms

Part 2: Give Information About the Claim as of the Date the Case Was Filed	
6. Do you have any number you use to identify the debtor?	☐ No ☒ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
SEE ATTACHED STATEMENT(S)	
7. How much is the claim?	\$ <u>2,425.50</u> Does this amount include interest or other charges? ☐ No ☒ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. Ad Valorem Taxes
9. Is all or part of the claim secured?	☐ No ☒ Yes. The claim is secured by a lien on property. Nature of property: ☒ Real estate. If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . ☐ Motor vehicle ☐ Other. Describe: _____ Basis for perfection: <u>Texas Property Tax Code §§ 32.01 and 32.05</u> Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ <u>2,425.50</u> Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ <u>2,425.50</u> *Any unsecured portion of this claim is entitled to priority. 11 U.S.C. Sec. 507(a)(8)

How to Read a Property Tax Statement

Different Tax Units may be collected by different firms

Account No: [REDACTED]-0016 Parcel Address: [REDACTED]
As of Date: 08/28/2024 APPR. DIST#: [REDACTED] Statement Date: 09/06/2024 Printed By: CAJFALCON
2023 Value: \$435,320

Year	Appraised Value	Tax Units	Base Tax Due	Penalties & Interest	Collection Fees	Total
2023	\$435,320	40	\$325.39	\$42.30	\$0.00	\$367.69
	\$435,320	41	\$28.87	\$3.75	\$0.00	\$32.62
	\$435,320	42	\$5.34	\$0.69	\$0.00	\$6.03
	\$435,320	43	\$133.31	\$17.33	\$0.00	\$150.64
	\$435,320	44	\$4.46	\$0.58	\$0.00	\$5.04
Subtotals for 2023:			\$497.37	\$64.65	\$0.00	\$562.02
TOTAL AMOUNT DUE:			\$497.37	\$64.65	\$0.00	\$562.02

Tax Unit Codes:

40 Harris County 41 Harris County Flood Control Dist 42 Port of Houston Authority 43 Harris County Hospital District
44 Harris County Dept. of Education

IF YOU ARE 65 YEARS OF AGE OR OLDER OR ARE DISABLED AND THE PROPERTY DESCRIBED IN THIS DOCUMENT IS YOUR RESIDENCE HOMESTEAD, YOU SHOULD CONTACT THE APPRAISAL DISTRICT REGARDING ANY ENTITLEMENT YOU MAY HAVE TO A POSTPONEMENT IN THE PAYMENT OF THESE TAXES.

Partial Statement: Other Years and Tax Units may be due

Totals By Tax Unit

Totals By Tax Unit					
Tax Units		Base Tax Due	Penalties & Interest	Collection Fees	Total
40		\$325.39	\$42.30	\$0.00	\$367.69
41		\$28.87	\$3.75	\$0.00	\$32.62
42		\$5.34	\$0.69	\$0.00	\$6.03
43		\$133.31	\$17.33	\$0.00	\$150.64
44		\$4.46	\$0.58	\$0.00	\$5.04
CW Total 40 - 44		\$497.37	\$64.65	\$0.00	\$562.02
TOTAL AMOUNT DUE:		\$497.37	\$64.65	\$0.00	\$562.02

2024 Estimates = \$1,863.48
Total = \$2,425.50

Tax Assessor-
Collector
(aka Tax Office)
≠
Appraisal
District

- The calculation of a property owner's ad valorem tax liability begins with an appraisal of the value of the owner's personal property by the appraisal district for the county in which the subject property is located. Tex. Tax Code § 6.01 *et seq.* "One of the [Texas] Legislature's primary purposes in enacting the Property Tax Code was to establish a system that yields fair and uniform valuations across the taxing units." *Jim Wells County vs. El Paso Production Oil and Gas Company*, 189 S.W.3d 861, 871 (Tex. App. Hous. [1st Dist.], 2006, pet. denied). "To accomplish this purpose, the Legislature abolished the appraisal authority of the taxing units, established a centralized appraisal district for every county, and charged the appraisal districts with the exclusive responsibility 'for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district.'" *Id* (emphasis added) (quoting Tex. Tax Code § 6.01).

Tax Assessor-
Collector
(aka Tax Office)

≠

Appraisal
District

- Statutory Functions of the Tax Office

- Calculate the taxes based upon the appraised value as set by the appraisal district
- Issues arising under the Texas Tax Code regarding penalties and interest
- Refunds

- Statutory Functions of the Appraisal District

- Determination of property values
- Deny or grant exemptions
- Determination of value protests
- Address changes must be filed with this body
- Creation or deletion of accounts from the appraisal/tax rolls

Questions?



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**Southern District of Texas
Bankruptcy Bench Bar Conference
April 28, 2026
Corpus Christi Texas**

Collateral Damage

**The impact of Bankruptcy on Co-Signers, Co-Debtors and Third Party
Liability in Subchapter V and Chapter 13**

by

Vicky Fealy

Mitch Buchman

Eduardo V. Rodriguez, Chief U.S. Bankruptcy Judge (Moderator)

Topics to be covered

1. §1301 Chapter 13 Co-Debtor Stay
2. Motion for relief from stay: Elements that need to be proven and burden of proof
3. Obtaining a co-debtor stay in a case other than chapter 13. Can it be done? If so how?
4. Ethical considerations for a Debtor's attorney defending the co-debtor stay for the non-filing spouse (or third party guarantor).

The Stay, the Co-Debtor Stay and the Differences—You did know there were differences, right?? Right??

- Differences
- The automatic stay of *11 U.S.C. §362(a)* applies in all bankruptcy cases under each title (7, 11, 12, 13). The co-debtor stay of *11 U.S.C. §1301* applies only to chapter 13 cases.
- The automatic stay of *11 U.S.C. §362(a)* protects the debtor, the debtor's property, and property of the estate. The co-debtor stay of *11 U.S.C. §1301* applies only to the co-debtor.
- The automatic stay of *11 U.S.C. §362* has some very specific limitations for repeat filers. See *11 U.S.C. §362(c)(3)&(c)(4)*. Under those provisions, the automatic stay may terminate automatically after 30 days if its is not extended, or the automatic stay may not take effect at all if it is not imposed by the court. *11 U.S.C. §1301* has no similar provisions. Even if the automatic stay terminates or is not in effect pursuant to either *11 U.S.C. §362(c)(3) &(c)(4)*, the co-debtor stay takes effect immediately upon the filing of the bankruptcy and is not subject to those sections of *§362*.
- *** Care must be taken with regard to this anomaly. A debtor may be considered to be acting “not in good faith”, but the co-debtor stay has no similar provisions.
- *** You must also be “on-guard” for the plan injunction. The automatic stay and the co-debtor stay may terminate, but if you allow the plan to be confirmed the plan injunction will take effect.
- The automatic stay of *11 U.S.C. §362* terminates by operation of law as to exempt property when the discharge is entered. See *11 U.S.C. §362(c)(2)(C)*. There is no similar provision in section *§1301*.
- In chapter 13 cases, the drafters of the bankruptcy code included a specific co-debtor stay that applies only in chapter 13 bankruptcies.

Relief from the Co-Debtor Stay

11 U.S.C. §1301(c)

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

- (1)** as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;
- (2)** the plan filed by the debtor proposes not to pay such claim; or
- (3)** such creditor's interest would be irreparably harmed by continuation of such stay.

Mandatory Relief: A co-debtor is not protected if the chapter 13 plan does not pay the claim in full. In such circumstances, the creditor must be granted relief from the co-debtor stay *In re Pardue*, 143 B.R. 434 (E.D. Tex. 1992).

It is a generally accepted principal of construction that loans that were used for “business purposes” are not subject to the co-debtor stay of §1301. *In re Demaree*, . 27 B.R. 1 (D. Oregon 1982). However, care must be taken when deciding the “purpose of the loan. For example, condominium association fees are considered consumer debts (*In re Highland*, 199 B.R. 125 (Bankr.. D. N.D. 1996); attorney’s fees incurred in a divorcee are considered a consumer debt *Patti v. Fred Ehlich, P.C.*, 304 B.R. 182) E.D. PA 2003); Federal Income tax liability is not considered a consumer debt *In re Westberry*, 215 F. 2d 589 (6th Cir. 2000).

If the co-debtor, rather than the debtor, received the benefit from the loan, the co-debtor stay should not protect the co-debtor. *In re Santana* , 480 B.R. 222 (Bkrptcy D. Puerto Rico 2012).

Burdens of Proof

- In a Section 362(d) motion for relief from stay who has the burden of proof?
- In a motion for relief from stay under Rule 1301 who has the burden of proof?

Discharge of debt?

Does the entry of a discharge order also discharge the non-filing spouse from liability?

How can you (or can you) enjoin creditors as to any co-debtor in Subchapter V or any Chapter 11?

- No co-debtor stay in Chapter 11
- Pre confirmation possibilities?
 - Motion to Extend Stay?
 - Or 105 Motion?
- Ordinarily, there is no co-debtor stay within the sections of the bankruptcy code with regard to Chapter 11 or Subchapter V bankruptcy cases. *Lynch v. Johns-Manville Sales Corporation*, 710 F. 2d 1194 (6th Cir. 1983). In many instances, the principal shareholders of the corporate debtor are also be personal guarantors of the corporate debt. Creditors may therefore pursue judgments against the guarantors who are non-debtors in the pending bankruptcy case.
- Exceptions.
 - The automatic stay can extend to non-debtor co-defendants when there is a contractual relationship between the debtor and the non debtors such that judgment against one would affect a judgment against the other, *A.H. Robins Company v. Piccinin*, 788 F. 2d 994 (4th Cir. 1986). There is support in the 5th circuit for this theory. See *Arnold v. Garlock, Inc.*, 278 F. 3d 426 (5th Cir. 2001)..
 - However, the majority of the 5th circuit opinions do not favor extending the stay to protect non-debtor entities. See *In re Zale Corp.*, 62 F. 3d 746 (5th Cir. 1995); non-debtor exculpation clause in confirmed plan was not enforceable, *NexPoint Advisors, LP v. Highland Capital Mgmt., LP*, 48 F. 4th 419 (5th Cir. 2022); refused to endorse provision in foreign plan that included discharge provisions for non-debtors; *In re Vitro S.A.B de CV*, 701 F 3d 1031 (5th Cir. 2012)

Procedures for seeking relief:

Despite the reluctance of the 5th circuit to provide protections to non-debtors, the process to seek such relief is best sought through an adversary proceeding be filed seeking injunctive relief to protect the non-debtors pursuant to 11 U.S.C. §105 not an attempt to Extend the Stay typically. The relief sought should be specific and temporary. Avoid seeking permanent relief. In re Seatco; 257 B.R. 469, (Bankr N.D. Tex. 2001). The argument should seek to establish the harm to the debtor if the creditor proceeds against the guarantors during the reorganization process. Be prepared to plead and prove the negative impact on the reorganization process if the non-debtor is not protected.
In re Zale 5th Circuit

From a creditor's perspective, take care to carefully review the plan injunction in any proposed plan.

Factors Courts Consider

- Identity of interests
- Direct Impact on Estate
- Necessity to reorganization v. liquidation
- Traditional Injunction Factors

Southern District Cases Regarding §105 injunctions Pre Confirmation for Third Party Protections

Divine Right, LLC Case No. 15-70405

McDermott International, Inc Case No. 19-30336

In re Sanchez Energy Corp Case No. 19-34508

In re CC Entertainment, Inc. Case No. 20-33163

In re Neiman Marcus Group LTD LLC Case No. 20-32519

MMA Law Firm Case No. 24-31596

Taylor Case No. 25-34526

You can include plan language that (i) temporarily enjoins actions against non-debtors and/or (ii) provides a limited, consensual release/discharge

---But be careful

Cases

Zales
In re CJ Holding
Epstein v. The Container Store Group
In re Highland Management
Serta
Purdue
Red River

Narrow, time-limited injunction—105(a)

- Tied to **plan performance**
- Supported by **specific findings**:
 - identity of interests
 - immediate harm to estate
 - necessity to feasibility

Consensual release/discharge

- no longer non-consensual
- Consensual requires opt out language

Channeling Injunction (maybe)

Instead of wiping claims out, you:

- Channel claims to a fund or plan distribution
- Preserve value while protecting the reorganizing structure

Subchapter V Considerations---

- Owner/operator dependence (suit vs. principal = suit vs. debtor)
- No committee oversight → need structured protection
- Fast confirmation timeline → litigation disruption is acute
- Plan feasibility under § 1191 hinges on protecting key individuals

KEY THINGS TO REMEMBER

- **Put specific findings in confirmation order:**
 - identity of interests
 - necessity to feasibility
 - consideration provided
 - creditor consent mechanics
- **Clear notice language (bold, conspicuous)**
- **Ballot opt-out box**
- **Defined, narrow party list** (no “affiliates, agents, assigns” catch-all)

Ethical Considerations for Representing both Corporate Debtor and Principal(s)

- Texas Professional Ethics Committee Opinions
 - Opinion 645 (2014)
 - Opinion 480
- Texas Rules of Professional Responsibility R.106 Potential Conflicts

The Texas Rules of Professional Responsibility R 1.06 prohibits an attorney from representing parties with adverse interests. The 5th circuit requires strict compliance with the “disinterestedness” requirement for counsel set forth in 11 U.S.C. §327. *In re West Delta Oil Company, Inc.*, 432 F. 2d 347 (2005). The standards require strict adherence to the concept that the attorney should be free of the slightest conflict of interest that may impair their impartiality and detached judgment. *In re Oscar Palacios*, 2016 WL 361569 (Bankr. S.D. Texas 2016).

- Bankruptcy Rules-stricter 327(a) disinterestedness
- 5th Circuit
- Corporate + Shareholder can = competing duties
- Heightened in bankruptcy

◆◆ ASKED AND ANSWERED ◆◆

TRUSTEE WISH LIST

What Trustees Ask For, and What
Counsel Should Already Have Answered.



MODERATOR

Honorable Eduardo Rodriguez
Chief Bankruptcy Judge

PANELISTS

Tiffany Castro,
Standing Chapter 13 Trustee

Yvonne Valdez,
Standing Chapter 13 Trustee

Do we wish all
debtors made their
plan payment
through TFS?



GUARANTEED FUNDS



Chapter 13 Trustees can only disburse funds when the monies received have cleared and cannot be reversed.



TFSbillpay.com payments are not considered **made** (even if the funds have been withdrawn from the Debtor's bank account) until they arrive at the Trustee's office (usually 7 days). Once received, these funds are guaranteed and available for immediate disbursement.



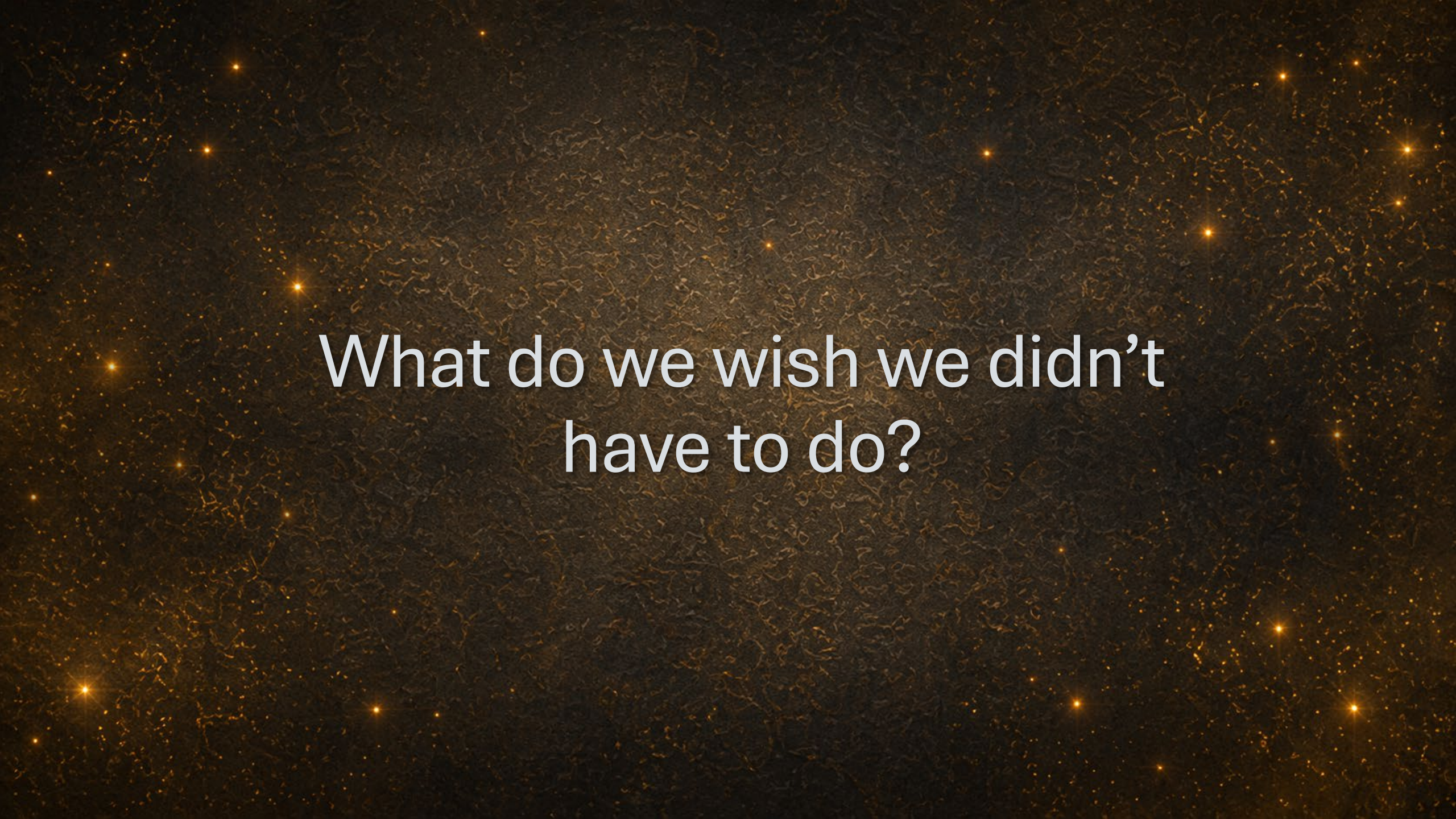
Trustees hold payments received by check, e-pay, etc. because they can be reversed (by non-funding or intentional recall). Holds can range from 5- 60 days depending on the type of receipt.



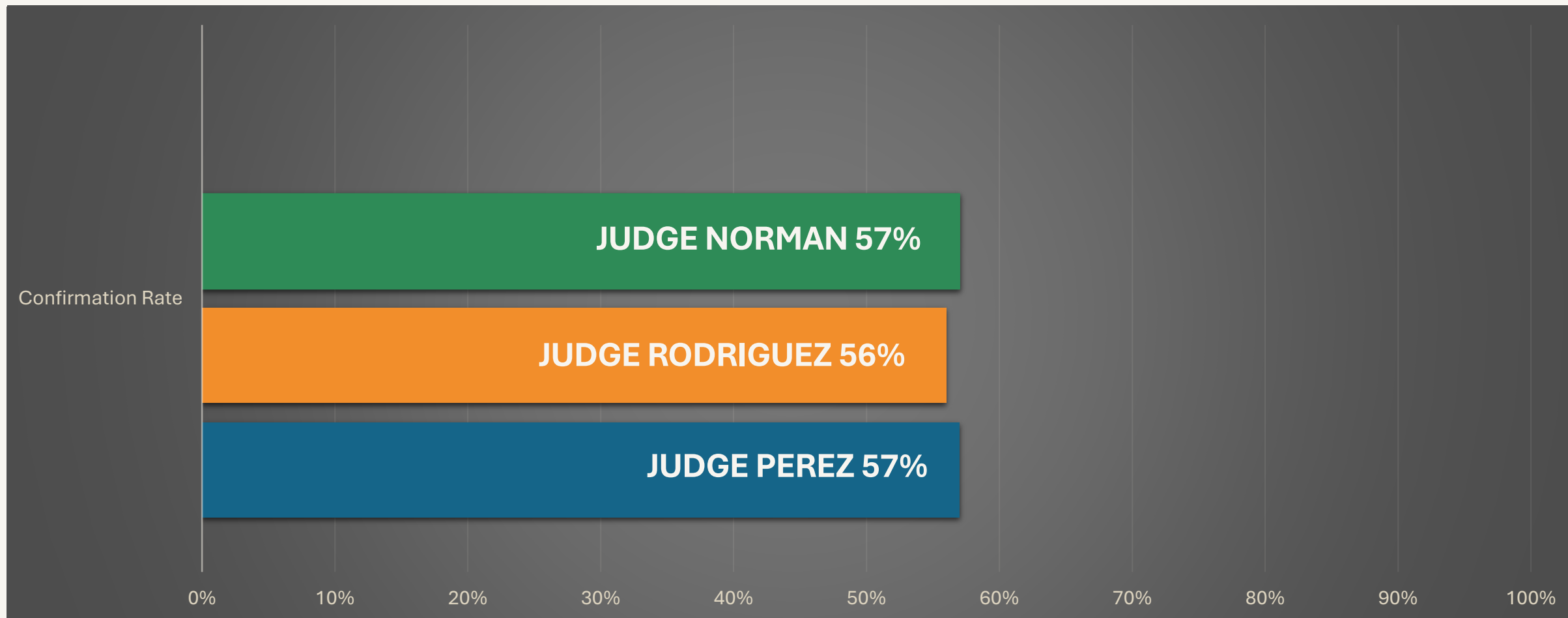
Remember, if Trustee cannot disburse funds because they are not yet good funds, interest may be accumulating at a higher rate than anticipated in the plan. This may render the plan deficient.



Would we want to go back to
Court in person?



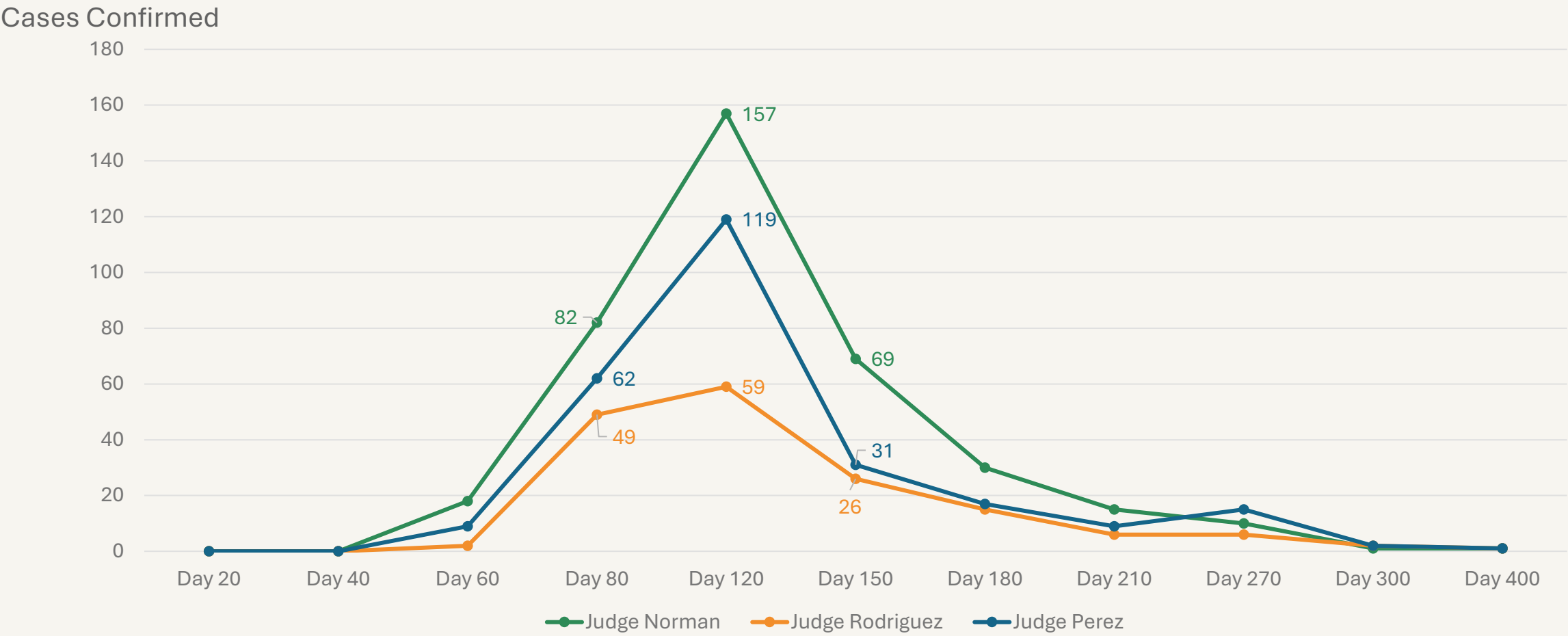
What do we wish we didn't
have to do?



*Based on cases assigned to Tiffany Castro in 2025

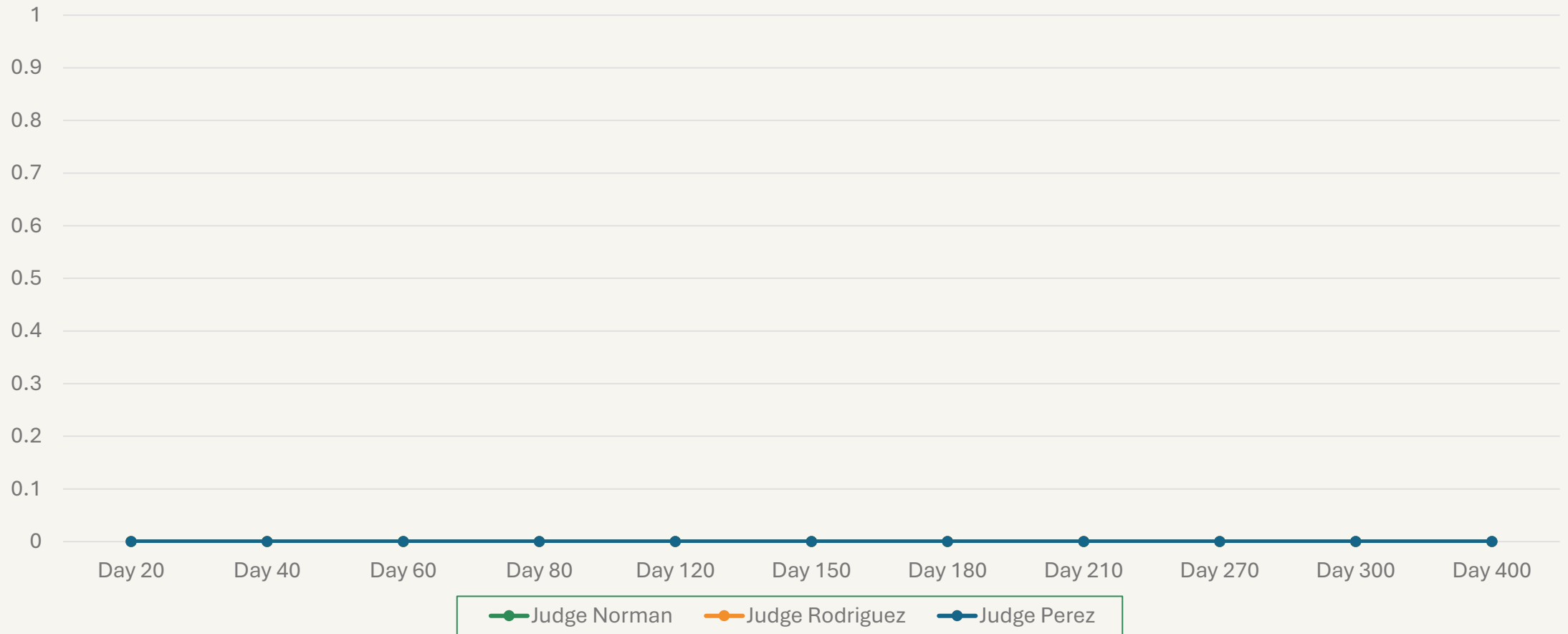
CONFIRMATION RATE BY JUDGE (EXCLUDING PRO SE CASES)

CASES CONFIRMED BY JUDGE BASED ON NUMBER OF DAYS FROM FILING



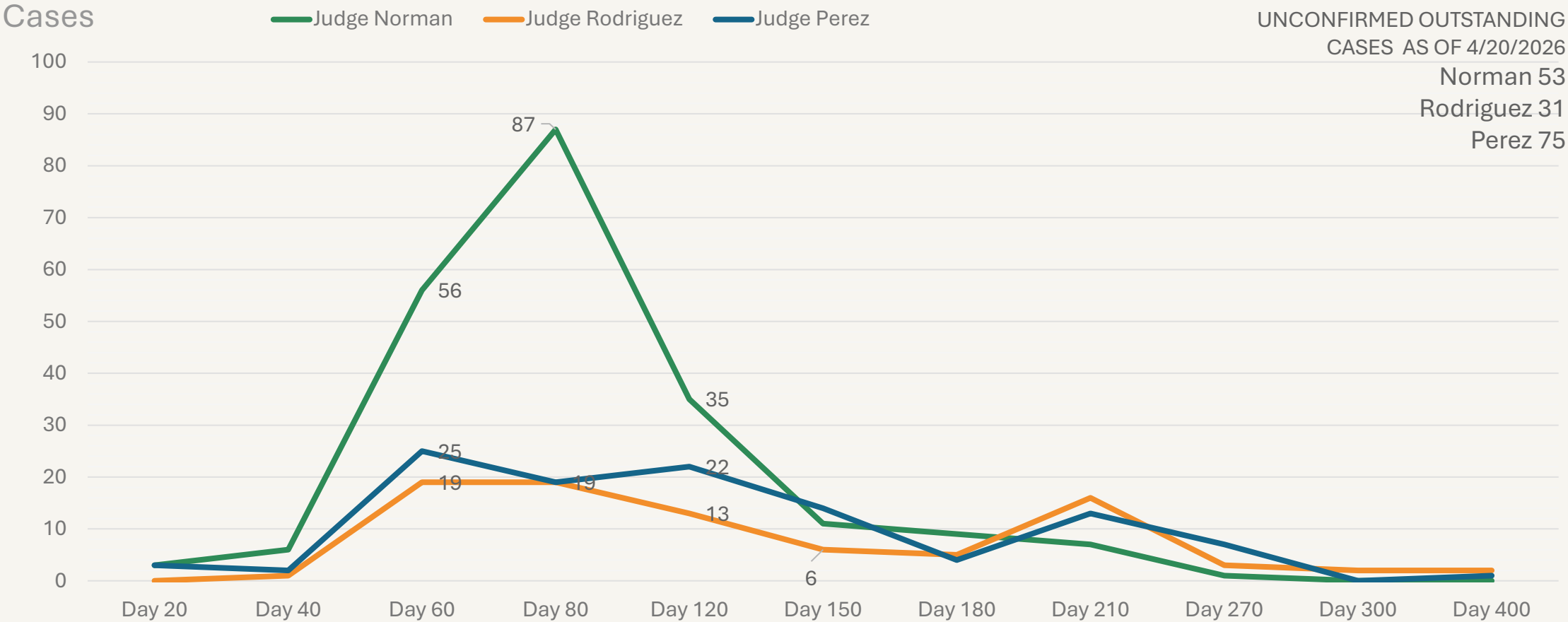
*Based on cases assigned to Tiffany Castro in 2025

PRO SE CASES CONFIRMED



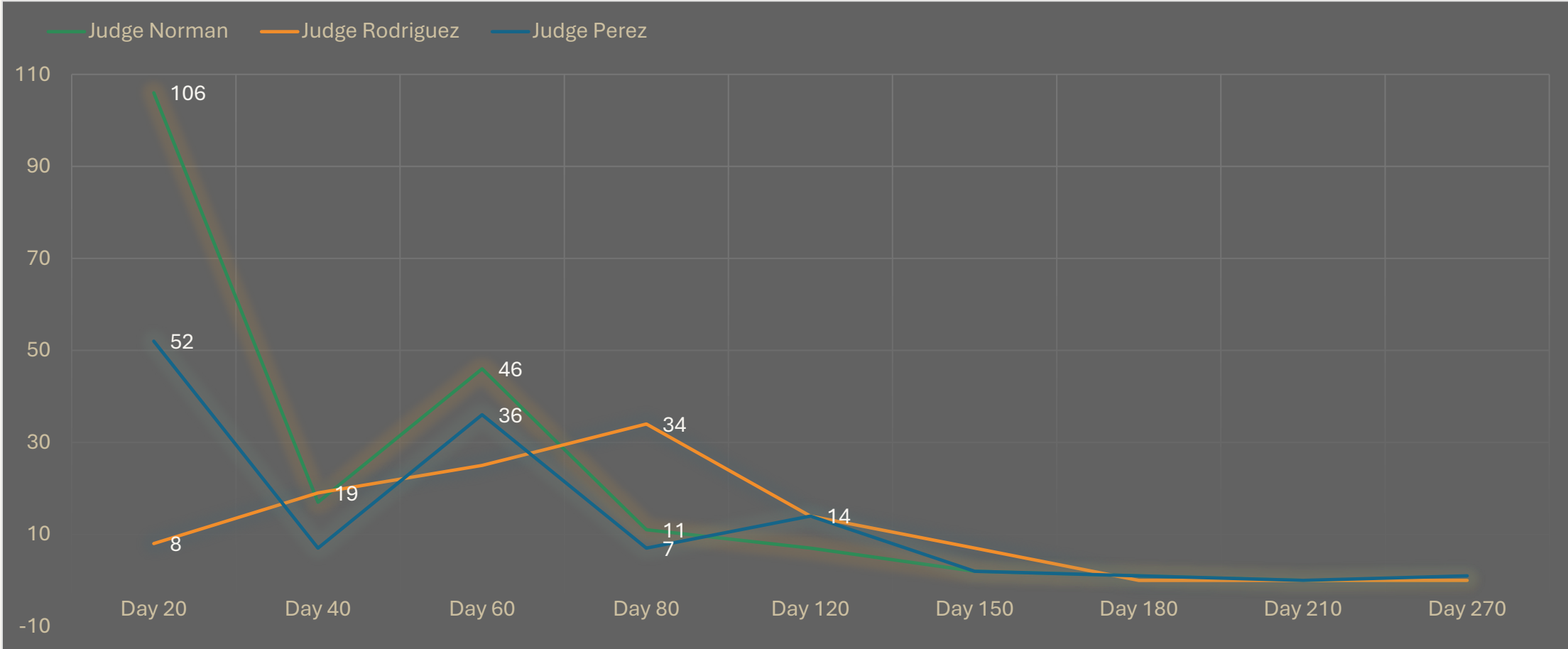
*Based on 407 pro se cases assigned to Tiffany Castro in 2025

CASES DISMISSED BY NUMBER OF DAYS FROM FILING (EXCLUDING PRO SE)



*Based on cases assigned to Tiffany Castro in 2025

PRO SE CASES DISMISSED BY NUMBER OF DAYS FROM FILING

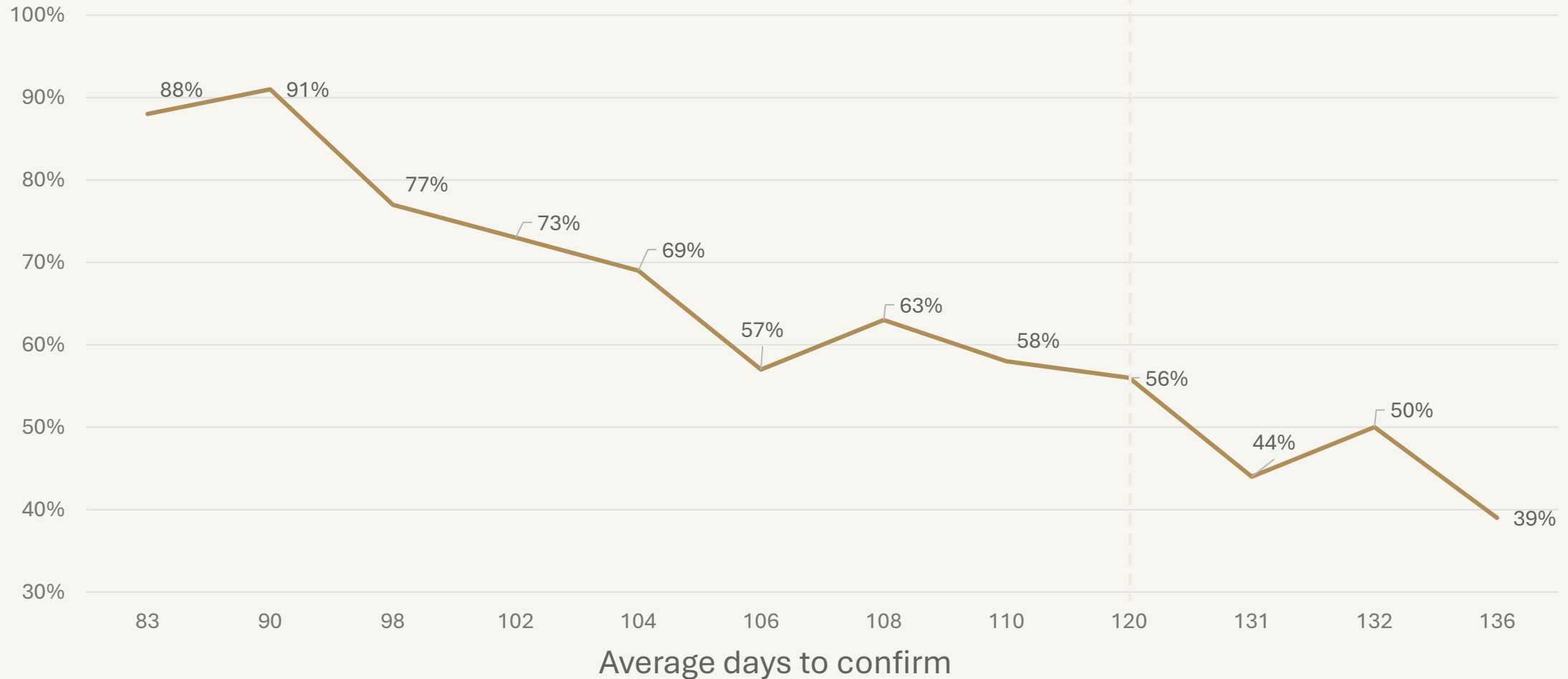


*Based on cases assigned to Tiffany Castro in 2025

ATTORNEY RATE OF CONFIRMATION

(ATTORNEYS WITH 20+ CONFIRMED CASES)

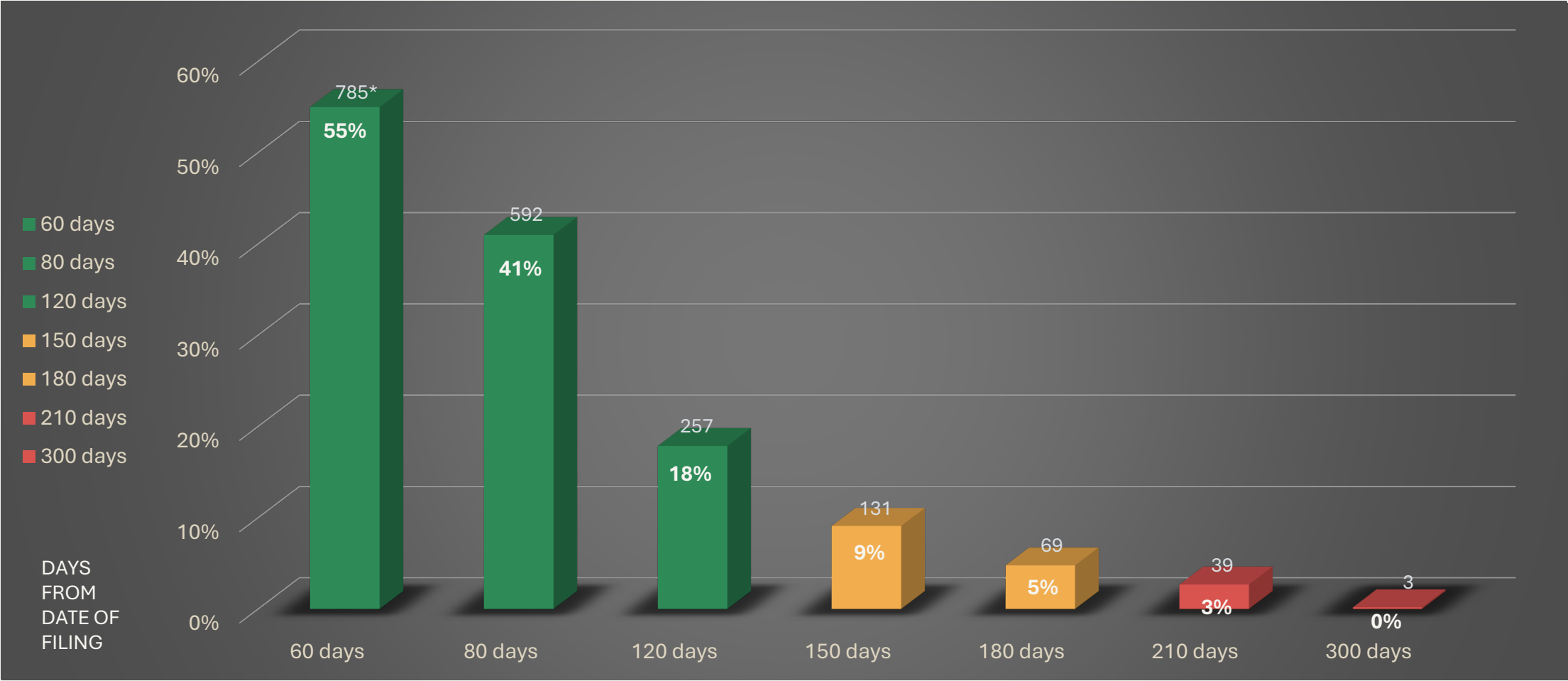
Confirmation Rate



*Based on cases assigned to Tiffany Castro in 2025

RATE OF CASES TO BE CONFIRMED BY AGE OF CASE

(EXCLUDING PRO SE CASES)



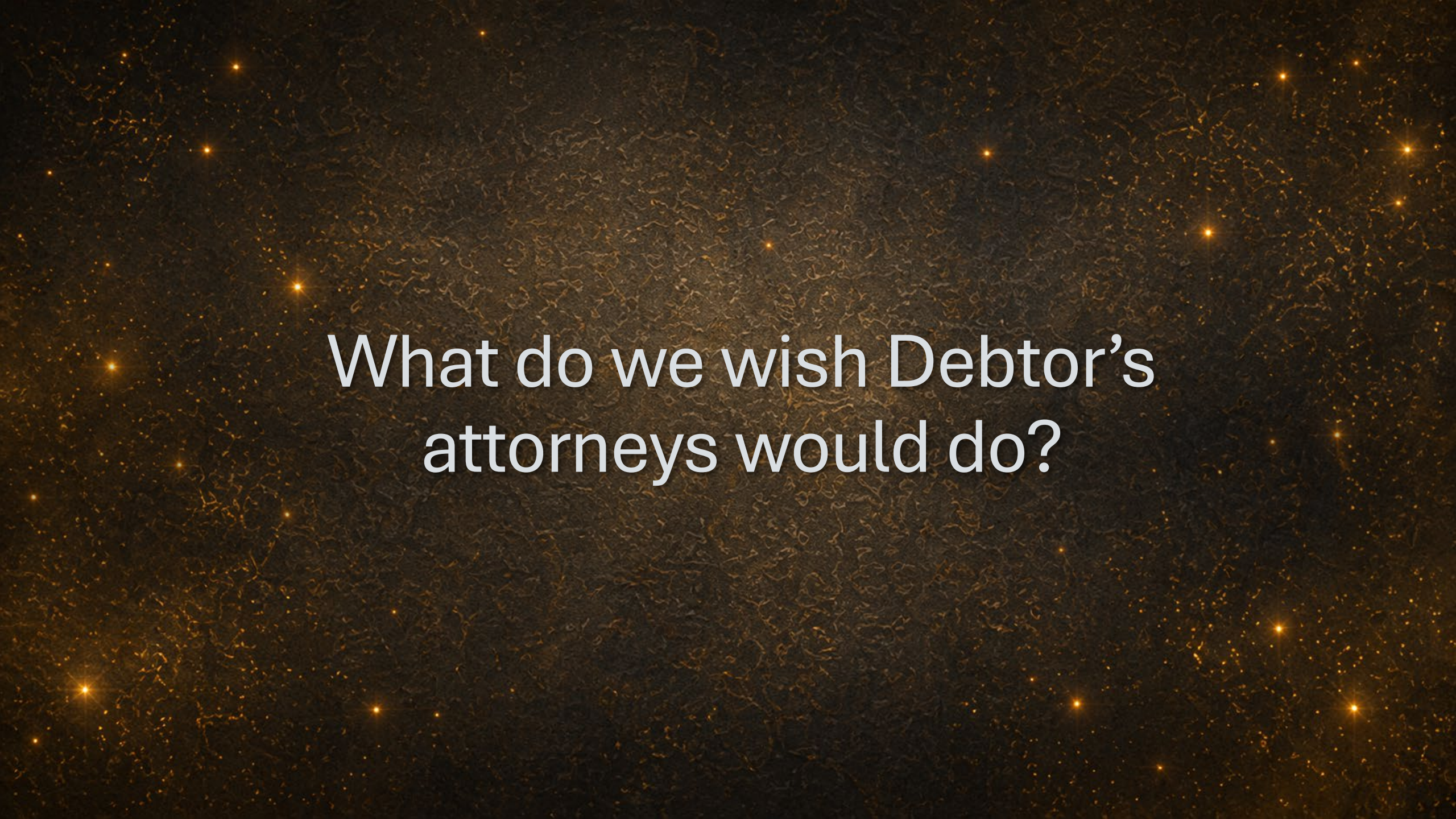
*Based on cases confirmed on or after that day out of 1437 non pro se cases assigned to Tiffany Castro in 2025



What deadlines
do we want
enforced?



Do we wish
we had more
evidentiary
hearings?



What do we wish Debtor's
attorneys would do?

BARELY YOURS:

Property Interests
That Become
Bankruptcy Estate
Assets



AGENDA

1. Bare Legal Title
2. Real Property
3. Wrap Around Mortgage
4. Bank Accounts
5. Vehicles
6. Q&A

11 U.S.C. §541

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) **All interests of the debtor and the debtor's spouse in community property** as of the commencement of the case that is –

(A) **under the sole, equal, or joint management and control of the debtor**; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable...

...(d) **Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest**, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, **becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property**, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. §1306

(a) Property of the estate includes, in addition to the property specified in section 541 of this title —

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first; and

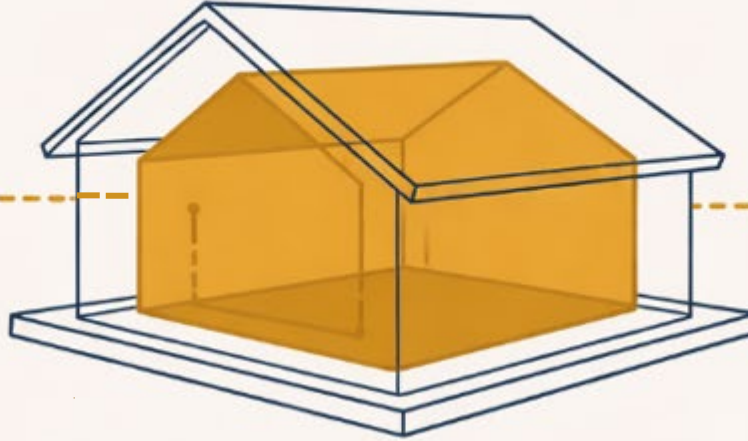
(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.



Elderly Parents

Equitable
Interest
(Possession &
Contribution)



Title (Deed)

DEBTOR
Adult Child



FACT PATTERN:

Elderly parents close their business to help raise grandchildren. Unable to qualify for a mortgage the adult child co-signs the loan and is placed on the general warranty deed. The parents move in, make all the mortgage payments, pay taxes and maintain the property. The child never lives there.

BANKRUPTCY:

The adult child's business fails, resulting in a bankruptcy filing.

Does the chapter of bankruptcy matter?

What if it was an outright purchase by the Debtor?

ESTATE PROPERTY:

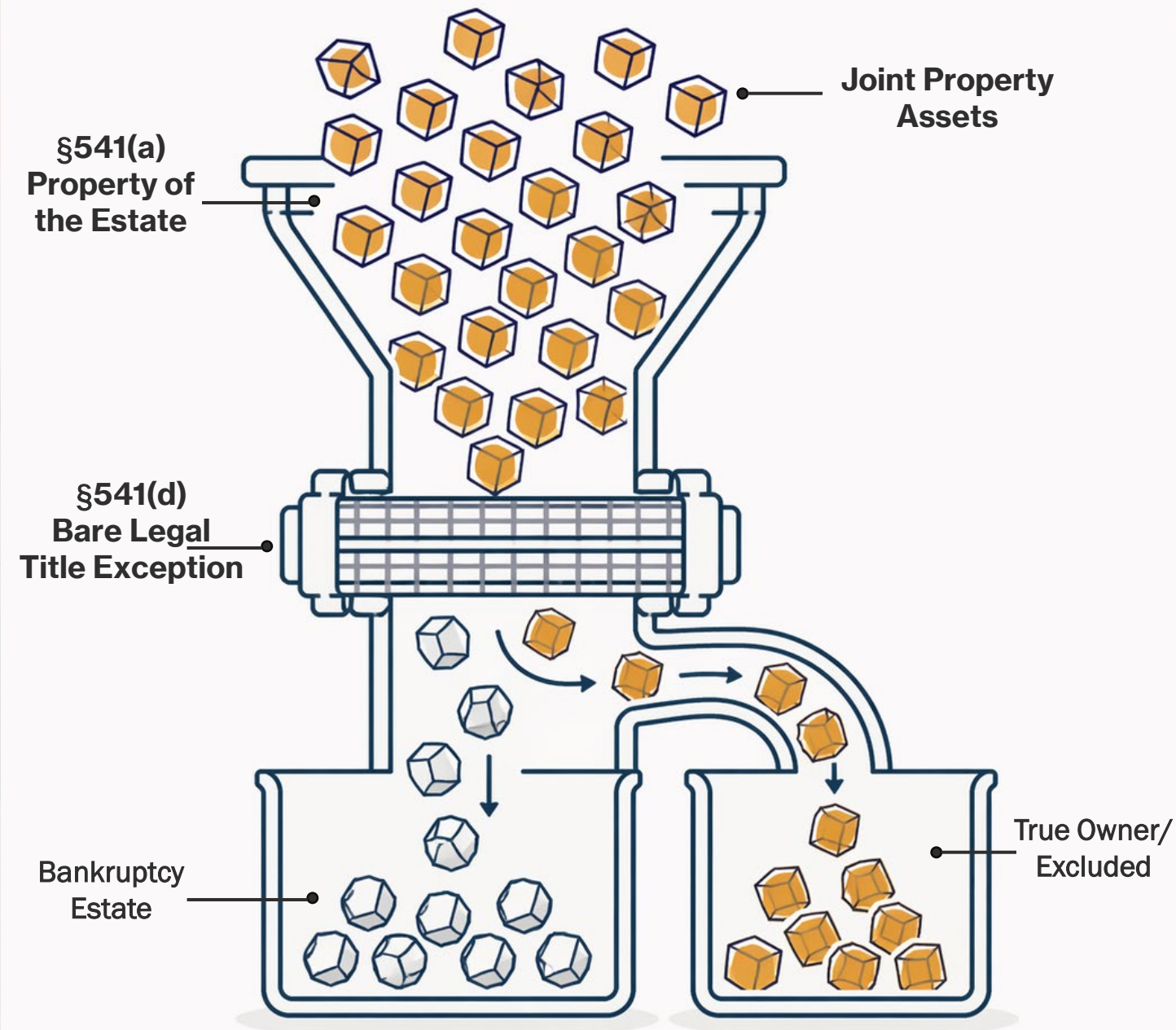
Debtor-child's name is on the deed.

Can the trustee move to sell the home?

What if the payments were made from money debtor paid parents for childcare?

What evidence does the debtor/parents need?

FILTERING THE BANKRUPTCY ESTATE



Legal Title: The Paper Record

Defined by records, signatures, deeds, notes and titles.

Under §541:
Enters the estate, but provide no value

Equitable Title: The True Core

Defined by financial contribution, intent, control and maintenance.

Under §541:
Excluded entirely from bankruptcy estate

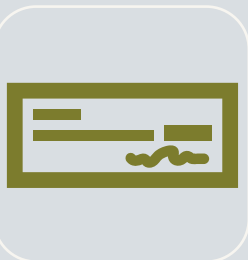
Asset Evidentiary Checklist



Who Funded it? Trace the exact origin of the purchase money, down payment, and ongoing loan (Bhai, Trammell)



Who Controls it? Document who possesses the keys, makes the decisions and exercises exclusive use of the asset (Eagleton).



Who Maintains It? Prove who pays the insurance, property taxes, maintenance costs, and utility bills (Pratz, Rubio).



Who Receives the Statements? Show whose address is on file for bank statements, tax appraisals, and official correspondence (Eagleton).

Official Form 106A/B

Schedule A/B: Property

12/15

In each category, separately list and describe items. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. Do you own or have any legal or equitable interest in any residence, building, land, or similar property?

- ☐ No. Go to Part 2.
☒ Yes. Where is the property?

1.1. 12345 Debt End Drive
Street address, if available, or other description

Corpus Christi TX 78336
City State ZIP Code

Nueces
County

What is the property? Check all that apply.

- ☒ Single-family home
☐ Duplex or multi-unit building
☐ Condominium or cooperative
☐ Manufactured or mobile home
☐ Land
☐ Investment property
☐ Timeshare
☐ Other _____

Who has an interest in the property? Check one.

- ☐ Debtor 1 only
☐ Debtor 2 only
☐ Debtor 1 and Debtor 2 only
☒ At least one of the debtors and another

Other information you wish to add about this item, such as local property identification number: _____

Do not deduct secured claims or exemptions. Put the amount of any secured claims on Schedule D: Creditors Who Have Claims Secured by Property.

Current value of the entire property? \$ 306,450
Current value of the portion you own? \$ 0.00

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

Bare Legal Title

☐ Check if this is community property (see instructions)

If you own or have more than one, list here:

SCHEDULE A & TREATMENT IN THE PLAN

Debtor should disclose legal title in schedules, SOFA, and plan (if applicable).

Check the exemptions. Sometimes it is easier to exempt equitable value than to litigate property of the estate.

Debtor should disclose equitable title if someone else holds legal title for property they own or are purchasing.

CONSTRUCTIVE TRUST

An equitable remedy imposed by a court to prevent unjust enrichment.

Generally, requires a showing of fraud, breach of fiduciary duty or bad faith. Traces back only to the original property/asset acquired through fraud.

If state law does not recognize the trust or fraud cannot be proven, the estate captures both legal and equitable title.

Unconscionable act by the title holder

RESULTING TRUST

A property right that arises by operation of law at the moment of a transaction.

Does not require fraud. Based entirely on the intent of the parties and financial contribution at the time of acquisition.

Creates an immediate equitable interest that exists prior to the bankruptcy petition, defeating the Trustee's strong-arm powers.

Consideration paid by someone other than the title holder.

ELEMENTS OF A RESULTING TRUST



- **Pre-Transaction** – Intent and Consideration. There must be an agreement that the party funding the purchase will hold beneficial interest. The beneficiary must provide the consideration or become legally bound to repay the money advanced.



- **Time of Purchase** – The trust must result at the very time the deed is taken and legal title vests. No oral agreement made after title vests can create a resulting trust.



- **Operation of Law** – The trust arises automatically out the transaction itself. The debtor holds bare legal title as security interest or in trust for the true owner.

TEXAS FAMILY PRESUMPTION OF GIFT

- When parents pay the purchase price but place the title in their child's name, **the law presumes the payment was a gift, not a trust.**
- Overcoming the presumption requires **clear and convincing evidence**
- Debtor must prove that, at the very time the transaction occurred, the payor intended to retain a beneficial interest in the property rather than give it away.



11 U.S.C. § 544

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, **the rights and powers of**, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by ...

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, **whether or not such a purchaser exists.**

TRUSTEE ACTS AS A BONA FIDE PURCHASER

Trustee may avoid unrecorded equitable interests to maximize the estate for creditors.

The strong-arm powers serve to marshal a debtor's assets belonging to third parties. If state law establishes that the debtor never held equitable title prior to the petition date, §541(d) overrides §544(a)(3). A properly formed state-law trust does not come into the estate.

EQUITABLE TITLE AND THE BANKRUPTCY ESTATE

- Disclose Debtor's interest in equitable title
- Are payments coming out of the estate? To a family member or third party? The same family listed in the real property records as the owner of Debtor's current address?
- Why are you paying for this house?
 - Reverse mortgages (inherited property but not probated yet)
- What was the agreement? Do you get to keep it after it is paid off?
- Mortgage company doesn't know a case was filed without notice.
 - Make sure to give the mortgage company ACTUAL notice, especially when stopping foreclosure
- Can a Debtor pay for a mortgage that is not in their name through a chapter 13 plan?



Buyer



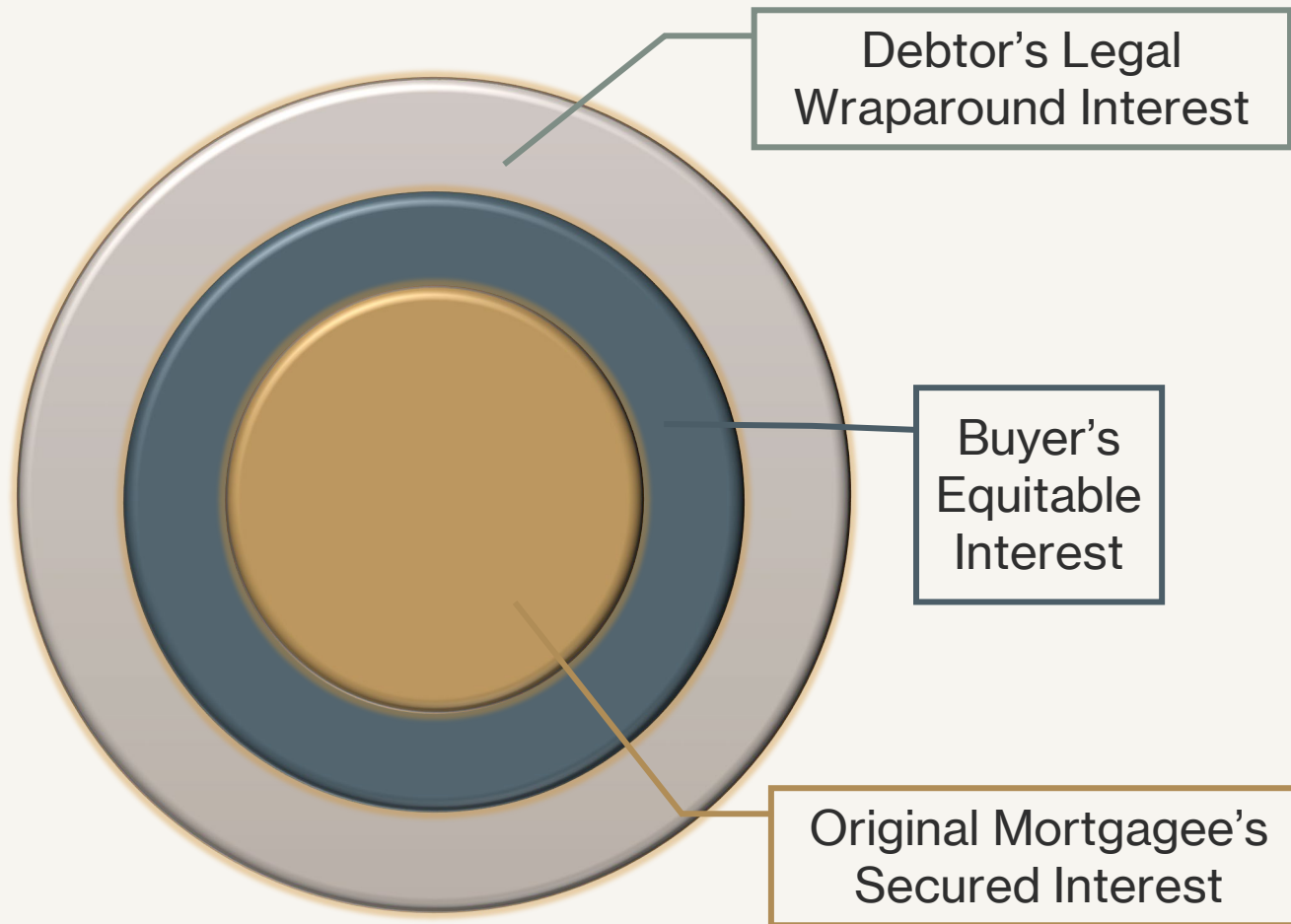
Seller



WRAPAROUND MORTGAGE

A wraparound mortgage is a financing arrangement where the seller of a property extends a loan to a buyer that “wraps around” an already existing mortgage on that property. Instead of the original mortgage being paid off at the time of the sale, it remains in place, and the new loan encompasses both the outstanding balance of that original debt plus the seller’s remaining equity.

WRAPAROUND MORTGAGE



The Structure: Debtor sells property to a buyer using a note that “wraps” around a pre-existing first lien. Debtor holds legal title to the wrap agreement but owes the original lender.

The Bankruptcy Estate's Share: Under Chapter 7, the property enters the estate only to the extent of debtor's legal title in the wraparound agreement.

The Excluded Core: The equitable interest held by the original mortgagee, and the equitable rights of the ultimate buyer, do NOT enter the bankruptcy estate. The Trustee can not liquidate the underlying property out from under the true equitable owners.

TEXAS FINANCIAL CODE – SUB CH. D

§ 159.152 MONEY HELD IN TRUST

A person who collects or **receives a payment from a wrap borrower** under the terms of a wrap mortgage loan **holds the money in trust** for the benefit of the borrower.

§ 159.151 FIDUCIARY DUTY

A person who collects or receives a payment from a wrap borrower under the terms of or in connection with a wrap mortgage loan **owes a fiduciary duty to the wrap borrower** to use the payment to satisfy the obligations of the obligee under each debt described by Section 159.001(7)(A)(ii) and the payment of taxes and insurance for which the wrap lender has received any payments from the wrap borrower.

§ 159.202 WRAP BORROWER'S RIGHT TO DEDUCT

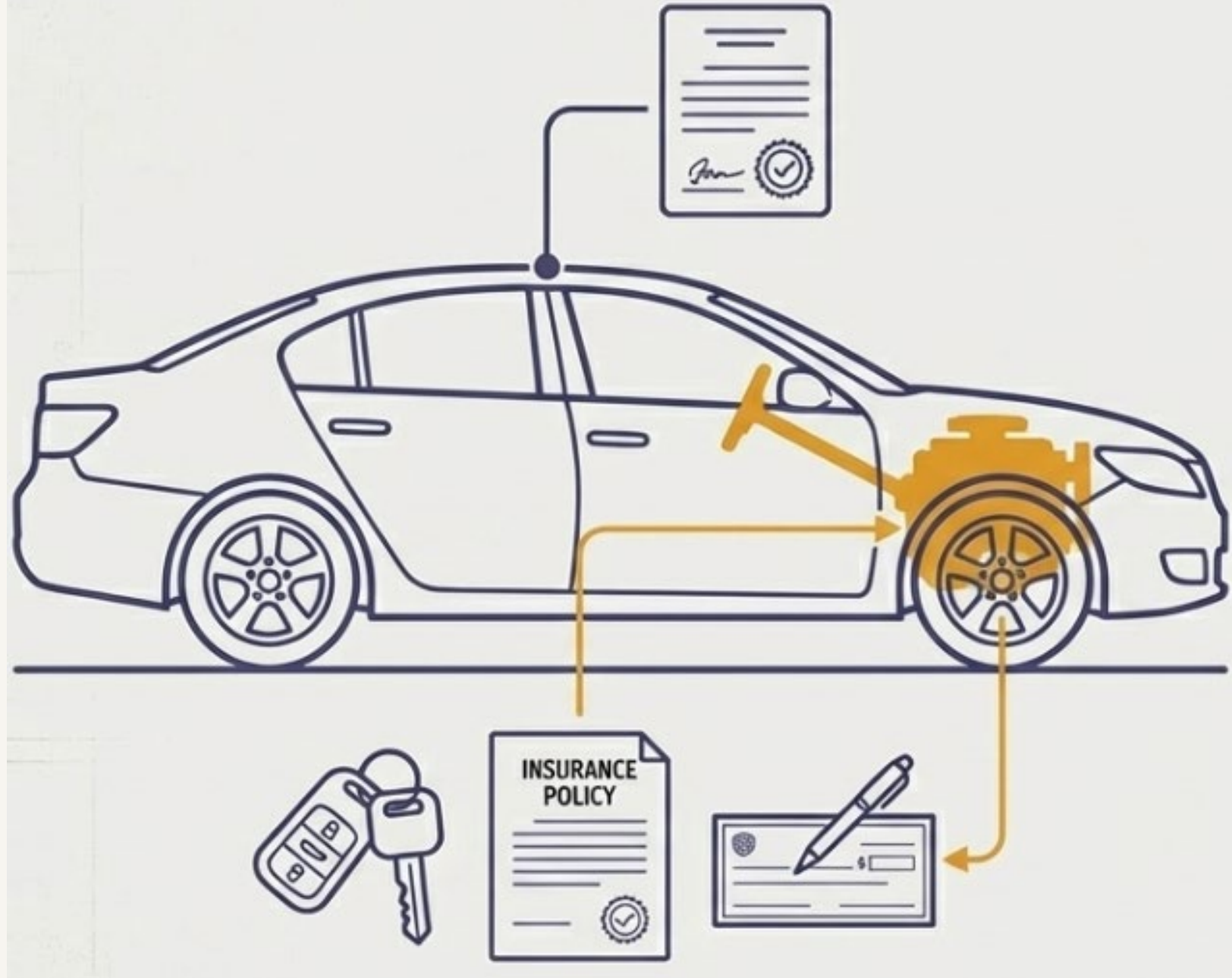
The wrap borrower, **without taking judicial action**, may deduct from any amount owed to the wrap lender under the terms of the wrap mortgage loan:

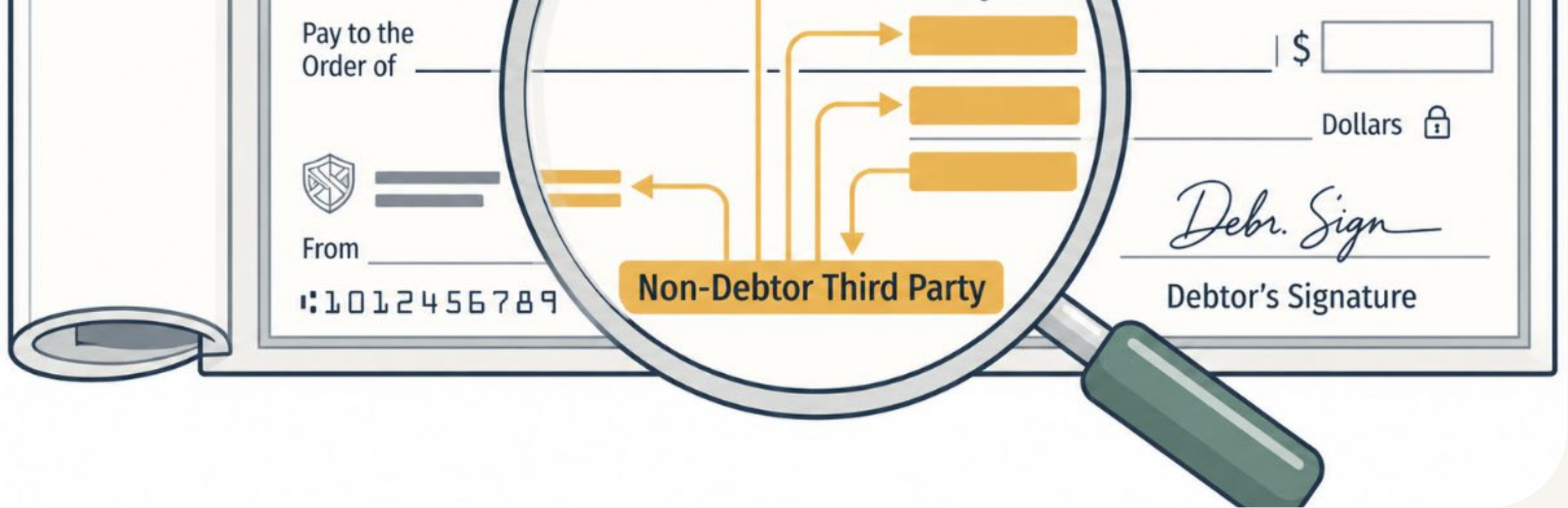
- (1) the amount of any payment made by the wrap borrower to an obligee of a debt described by Section 159.001(7)(A)(ii) to cure a default by the wrap lender caused by the lender's failure to make payments for which the lender is responsible under the terms of the wrap mortgage loan; or
- (2) any other amount for which the wrap lender is liable to the wrap borrower under the terms of the wrap mortgage loan.

Added in 2021, effective Jan 1, 2022

KEYS TO EQUITY

- Start with the recorded title. Whose name is on the original title? Have any transfers occurred close to filing?
- A vehicle that is **not** in the debtor's name can be brought **into** the estate if the debtor is found to be the **equitable owner**. If debtors personally paid for and maintained a vehicle titled to a non-debtor corporation, their equitable interest brings that vehicle into the bankruptcy estate.





JOINT BANK ACCOUNTS

- A debtor's name appears on a joint account or possess a signatory authority in case of emergencies.
- Ownership can often be demonstrated by actual net contributions and control of the funds in the account.
- Look at the bank account statements, trace the funds, are any charges for the benefit of the debtor or debtor's estate

PRACTICAL CONSIDERATIONS

- Identify Issues Up Front
- Make sure to ask clients relevant questions at the outset and include sufficient questions in intake forms to identify potential issues
- Do pertinent research of your own before filing, including real property searches and a review of the credit report(s)

DISCLOSE, DISCLOSE, DISCLOSE

- Regardless of the Chapter you file under, it is better to list all potential assets with a notation about potential title issues
- Include any potentially relevant documents in your upload of 341 Documents
- Do not wait for an adversary proceeding.

PRACTICE TIPS



State laws vary. Texas resulting trust elements are not necessarily the same as Louisiana's.



Read the documents. Does the deed require the debtor to live on property for a period of time? Did the debtor sign any documents that would contradict the creation of a resulting trust?



Does the debtor exercise control over the property? Do they live there?

THANK YOU

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CASE LAW SUMMARIES

Special thank you to the legal interns of
Tiffany Castro, Chapter 13 Trustee
for the case law summaries.

Clarissa Vasquez
Uniqua Smith
and Seja Haque

REAL PROPERTY

- Weisbart v. Momphard (In re Munro), Case Nos. 10-43542, 11-4187, 2013 Bankr. LEXIS 50 (Bankr. E.D. Tex. Jan. 7, 2013) Debtor helped her father co-sign a loan to buy out other interests in his home after his divorce. For estate planning purposes, the debtor was added to a general warranty deed as a joint tenant with a right of survivorship. The debtor and her father intended that she would only take bare legal title to the property upon the execution of the deed and that she would hold her legal interest in the property exclusively for the father's benefit. When the debtor got married, her husband quitclaimed his interest in the property to the debtor and her father without any exchange of consideration. The husband and the debtor never made any mortgage, tax, utility, or maintenance payments towards the property, except for three irregular payments the debtor made for the father when he could not make the payment on his own. The court concluded that the parties' agreements and intentions supported the imposition of a resulting trust in favor of the father, which required the debtor – and the trustee as the administrator of the bankruptcy estate – to hold the property for the benefit of the father. Therefore, the estate could not derive any benefit from the sale of the property, as all the value of the property was attributed to the father as the beneficial owner.
- Cage v. Kang (In re Hojoon Kang), Nos. 11-36325, 12-03233, 2013 Bankr. LEXIS 844 (Bankr. S.D. Tex. Mar. 6, 2013) Chapter 7 trustee sought, through strong-arm powers, to avoid one of the debtor's parents' equitable interest in a house for which the debtors took out a loan, made a down payment, and had a warranty deed. The parents lived on the property and made monthly payments due under the promissory note. Other than taking out the loan, the debtors provided no monetary assistance with respect to the home. The court held that a resulting trust in favor of the parents arose at the time the property was initially conveyed to the debtors and therefore, the trustee could not use strong-arm powers to allow the bankruptcy estate to benefit from property that the debtor never owned except in title.
- In re Tex. Standard Oil Co., No. 08-34031-H4-11, 2008 Bankr. LEXIS 3576 (Bankr. S.D. Tex. Nov. 12, 2008) Debtor, an oil company, filed Chapter 11 bankruptcy, and asked the court for permission to assign its interests in an oil and gas lease to a partnership (LP). The debtor's creditors filed an objection to the debtor's motion. Before the debtor declared bankruptcy in June 2008, it entered into a Nominee Agreement and bid on an oil and gas lease the U.S. Government offered, under the understanding that it would transfer its interest in the lease to an LP if it was the successful bidder. The debtor was awarded the lease, but it did not transfer its interest before it declared bankruptcy, and when it asked the court for permission to transfer the lease without compensation, several creditors objected. The court denied the debtor's request. The Nominee Agreement was not a valid contract under Texas law because it was not supported by adequate consideration, there was no merit to the LP's claim that equity required the court to establish a resulting trust or a constructive trust and order the transfer, and the debtor's proposal to transfer its interest in the lease without receiving compensation was not in the best interests of the bankruptcy estate. The debtor's interest in the lease was property of its bankruptcy estate under 11 U.S.C.S. § 541, and the court expected the debtor to obtain compensation for its interest in the lease and use the amount it obtained to help pay creditors' claims.

REAL PROPERTY

- Cohrs v. Scott, 161 Tex. 111, 338 S.W.2d 127 (1960) A wife claimed community funds had been used to buy an apartment building titled in a third party's name and sought to impose a purchase-money resulting trust. The Texas Supreme Court held no resulting trust was proven because a purchase-money resulting trust must arise at the time title passes, and the evidence was insufficient to show the community supplied the purchase money when the property was acquired. The case is useful for the rule that bare legal title may be held by one person for another's benefit, but only if the payor proves the consideration was furnished at the time of conveyance.
- Amador v. Berrospe, 961 S.W.2d 205 (Tex. App. 1996) A husband and wife purchased a house with community funds and titled it in the name of the wife and her father. When the father died his intestate share passed to his children, including the wife's brother. When the wife died, the husband acquired all ownership interest in the property except the brother's 1/8 interest. The husband brought an action to determine the respective ownership interests of the parties. The trial court entered judgment for the husband and divested the brother of his ownership interest. The brother sought review, and the court reversed and entered judgment for the brother, permitting him to retain his ownership interest. The court found that no purchase money resulting trust was created when the husband titled one-half of the property in the name of his wife's father, concluding that a presumption existed that the transaction amounted to a gift. The court determined that presumption was not overcome by the husband's manifestation of intent that the father not have a beneficial interest in the property. Moreover, the husband did not establish his right to ownership by adverse possession because he did not establish each and every element of that ownership by clear and convincing evidence.
- Rubio v. Rubio, No. 13-17-00682-CV, 2020 Tex. App. LEXIS 5397 (Tex. App. July 16, 2020) In a quiet title action, a former wife was entitled to judgement because she had acquired equitable title in the property that was part of a marital estate and awarded to her during a divorce. In the years leading up to the lawsuit, both parties represented to the appraisal district that they owned the disputed tract. The former wife also paid some of the taxes and utilities on the disputed tract. The court held that the equitable title was superior to subsequent legal title to the former husband by his family. Because the former wife had equitable title in the disputed tract before the divorce, it was properly included in the marital estate and awarded, even though neither party had legal title to it.
- Haynes v. Molina, No. 01-19-00917-CV, 2021 Tex. App. LEXIS 7564 (Tex. App. – Houston [1st Dist.] Sep. 14, 2021, pet. denied). A son, his wife, and his father filed suit after the son's home was damaged by an A/C company's faulty sizing and installation of an A/C system. The father had obtained a mortgage for the purchase of the house because the son's credit was inadequate at the time of purchase. However, the son provided the down payment and thereafter made monthly payments to the father for the principal and interest on the loan. The father promised to transfer the deed to the son once the final payment on the house was made. The father never took possession of the house. The son and his wife lived in the house, and the son paid all taxes, maintenance, and repairs. A few months after the final payment on the house was made, the father transferred the deed to the son. Among other defenses, the company claimed that the son lacked standing to sue because he did not own the house at the time the faulty system was installed. The trial court granted summary judgement for the company. On appeal, the court reversed and remanded, holding that the son had standing to sue because he was the beneficial owner by way of a purchase money resulting trust and had equitable interest in the house at all relevant times. However, the son's wife did not have standing to sue because she did not contribute to the down payment in any way nor did her name appear on any relevant version of the title.

REAL PROPERTY

- Graves v. Diehl, 958 S.W.2d 468 (Tex. App. 1997) Land contract buyers filed a nuisance action against neighboring landowners after the neighbors built an airplane landing strip on their property. The neighbors moved for summary judgment on the notion that, because the contract buyers resided on land for which they merely had a contract for deed, the contract buyers lacked sufficient standing to assert the nuisance claim because they did not yet hold the deed. The court reversed summary judgment for the neighbors and remanded the case for trial, reasoning that the contract for deed was either an equitable title or an equitable interest in the property, either of which was sufficient to pursue the claim.
- Chang v. Liu, No. 05-20-00977-CV, 2022 Tex. App. LEXIS 8638 (Tex. App. Nov. 23, 2022) A son purchased a residential property using his own funds and placed title in his mother's name. The son later executed a general warranty deed transferring the property to a third party. After the son's death, his estate asserted a purchase-money resulting trust. The court affirmed summary judgment for the estate, holding that because the son provided the purchase money and there was no evidence of donative intent, the property was subject to a purchase-money resulting trust, with the mother holding only legal title, and the son (and his estate) holding equitable or beneficial title.

REAL PROPERTY

- Cage v. GDH Int'l Inc., In re Great Gulfcan Energy Tex Inc., (488 B.R. 898): Chapter 7 trustee sought to liquidate some assets (real and personal) but a dispute arose as to whether the assets ever became part of the Debtor's estate. Court ultimately held that no real property title, legal or equitable, came into the estate (for complex reasons involving a state court order in LA). However, the case contains a very good discussion of the law surrounding equitable and legal title and the extent to which anything is eligible to come into the estate.
- Trafalgar Invest., Ltd v. Westminster Associates Ltd., (715 S.W. 2d 745): Good discussion on wrap around mortgage interests and rights of the parties.
- In re Diaz Tejada, (586 B.R. 831, WDTX Bankr. 2018): Trustee objected to lienholder's claim. Debtor held a wrap around mortgage on the property. Court overruled the Objection as the lender had a claim against property of the estate, even though the Debtor did not have privity of contract with the first lienholder.

PERSONAL PROPERTY - VEHICLES

- *In re Pratz*, No. 401-46653-DML-7, 2002 Bankr. LEXIS 1978 (Bankr. N.D. Tex. Jan. 17, 2002) Debtors claimed a vehicle of the debtors' wholly owned, non-debtor corporation as an exemption. A creditor challenged the exemption and sought to obtain a judgement against the debtor husband individually. The corporation itself was insolvent, so no value would have been added to the estate for the benefit of the creditor. The lack of economic interest in the exemption left the creditor without standing to object, but the court addressed the issue anyway. The court held that since the debtors produced checks, deposits, insurance statements, and records of insurance payments indicating that they personally paid for and maintained the vehicle, they were equitable owners of the vehicle. This brought the debtors' equitable interest in the vehicle into the bankruptcy estate and allowed it to be subject to exemption under 11 U.S.C. § 522 even though the corporation held legal title.
- *In re Hall*, 559 B.R. 463 (Bankr. S.D. Tex. 2016) Debtor claimed a vehicle ownership expense deduction on her means test for a vehicle titled solely in the name of her non-filing spouse. The issue was whether the debtor had an ownership interest in the vehicle, given the community property presumption. The court held the presumption is rebuttable and depends on the character of the property at acquisition. The evidence showed the vehicle was acquired with the non-filing spouse's separate funds and remained under the spouse's ownership. The court held the non-filing spouse held both legal and equitable title, and the debtor had no ownership interest in the vehicle and could not claim the ownership expense deduction.
- *In re Trammell*, 399 B.R. 177 (Bankr. N.D. Tex. 2007) A creditor asserted that a vehicle titled in the name of the non-filing spouse was property of the debtor's bankruptcy estate as it was acquired during marriage and therefore presumed to be community property. The court held that record and legal title are not dispositive under 11 U.S.C. § 541, and instead examined who paid for and controlled the vehicle. The evidence showed the non-filing spouse purchased, maintained, and exercised control over the vehicle. The court found the spouse held both legal and equitable title, and the debtor held no equitable interest. Accordingly, the vehicle was not property of the estate.

PERSONAL PROPERTY - ACCOUNTS

- *In re Eagleton*, No. 04-44085-DML-7, 2004 Bankr. LEXIS 1001 (Bankr. N.D. Tex. July 22, 2004) Debtor was listed as a signatory and account owner on her mother's account with a credit union in case of an emergency. Later, the credit union moved for relief from an automatic stay, wanting to foreclose on its lien on the account, based on the debtor's defaulted loan with the credit union. The credit union argued that ownership rights to the account were transferred to the debtor when she allegedly executed the joint account papers. However, there was no proof that debtor ever signed the account application, and the credit union could not produce the original signed application. The court held that, because the mother and the debtor never intended to share ownership of the account, never received any bank statements, and never had any control over the funds or the account, the debtor only had legal title to the account and no equitable title. Therefore, the debtor's interest in the account was zero, and the credit union could not foreclose the lien on the account.
- *Smith v. Suarez (In re IFS Fin. Corp.)*, 417 B.R. 419 (Bankr. S.D. Tex. 2009) Plaintiff bankruptcy trustee brought an adversary proceeding against defendant transferees of funds from a bankruptcy debtor seeking to avoid the transfers as fraudulent under Tex. Bus. & Com. Code Ann. § 24.005(a)(1) and alleging that the transfers were made with the actual intent to hinder, delay, or defraud the debtor's creditors. Debtor was a holding company for income-producing subsidiaries which were largely funded by investors and, after the subsidiaries were no longer viable, debtor used new investor funds to pay the transferees who were prior investors from an account which was in the name of a foreign bank. The court held that most of the transfers to the transferees were avoidable as fraudulent transfers. The funds in the account were an interest of the debtor in property since the debtor used the account as its general fund, approved all transfers to and from the account, and controlled the account to such an extent that debtor was the true owner of the account, notwithstanding legal title in a shell entity. Further, it was apparent that debtor was engaged in a fraudulent scheme, and the existence of the pervasive fraudulent scheme was sufficient to establish debtor's fraudulent intent with respect to transfers made in furtherance of the scheme. Also, while debtor received reasonably equivalent value for the transfers in the form of reduced liability, most of the transferees lacked good faith based on their knowledge of, or participation in, the fraudulent scheme.
- *Sommers v. Katy Steel Co. (In re Contractor Tech., Ltd.)*, 343 B.R. 573 (Bankr. S.D. Tex. 2006) Plaintiff, bankruptcy trustee, brought adversary proceedings against defendant, subcontractors of a bankruptcy debtor, seeking turnover of alleged post-petition payments to the subcontractors under 11 U.S.C.S. § 549 where the subcontractors were issued checks pre-petition by the debtor but the checks were cashed post-petition. The subcontractors asserted that the transfers from the debtor occurred pre-petition when the checks were issued, but the trustee argued that the transfer occurred post-petition when the checks were honored by the debtor's bank. The subcontractors also contended that a state statutory trust was applicable to the amounts due to the subcontractors and thus the trust funds were not property of the estate. The bankruptcy court held that the trustee was entitled to recover the amounts paid to the subcontractors as post-petition transfers of property of the estate. The issuance of the checks and the honoring of the checks were separate events and, regardless of whether transfers occurred when the checks were issued, transfers occurred under 11 U.S.C.S. § 549 when the checks were cashed. Further, regardless of whether there was a trust impressed on the funds at issue, the estate obtained legal title to the money on the petition date since the money was in the debtor's bank account. Thus, the estate was entitled to the proceeds of the checks held by the subcontractors, but the subcontractors were free to assert their beneficial interests in the alleged trust funds in future proceedings. The trustee's motion for summary judgment was granted.

PERSONAL PROPERTY ACCOUNTS

- *In re Bhai*, 2025 WL 1617378 (Bankr. N.D. Tex. June 6, 2025) A Chapter 7 Trustee sought to avoid transfers made from a joint family bank account, arguing with the debtor's name on the account established by his ownership of the funds. The court held that under Texas law, appearing on a bank account, even as a signatory, confers nothing more than bare legal title, which is insufficient to establish true ownership in the funds. A joint account belongs to parties in proportion to their actual contributions, and signatory authority alone does not establish authority against other claimants. Because the debtor made no contributions to the account, and all funds originated from his son's fraud on a third-party lender, the court held the debtor had neither legal nor equitable title to the transferred funds.
- *In re Fresh Approach, Inc.*, 51 B.R. 412 (Bankr. N.D. Tex. 1985) A produce supplier sold perishable agricultural commodities to debtor on credit, with invoices going unpaid. The supplier perfected its interest under the trust provisions of the Perishable Agricultural Commodities Act (PACA) approximately sixty days before the debtor filed Chapter 11 bankruptcy. The debtor argued the trust assets should remain available for reorganization that the supplier's perfection of its interest constituted a voidable preference. The court held that under PACA, the produce related inventory and proceeds were impressed with a statutory trust upon delivery, meaning debtor never held more than bare legal title to those assets. Because the debtor held no beneficial interest in the trust assets, no transfer capable of constituting a preference had occurred. The trust assets were therefore not property of the estate; the supplier was entitled to immediate payment rather than being required to await a plan of reorganization. The supplier was not required to conduct any specific tracing of assets, as the burden of identifying any assets not subject to the trust was on the debtor.
- *In re Essential Financial Education, Inc.*, 629 B.R. 401 (Bankr. N.D. Tex. 2021) Chapter 7 Trustee sought to avoid transfers made from escrow proceeds of the debtor's asset sale to its franchisors, which argued the funds were fully encumbered by its security interest and thus not property of the estate. The court held that while the debtor held legal title to the sale proceeds, bare legal title is insufficient to establish an interest in property for fraudulent transfer purposes. The debtor must also hold an equitable interest. The franchisor never perfected any security interest, used a generic collateral description, and never filed a financing statement. Therefore, the franchisor held no valid lien, and the debtor retained both legal and equitable title to the transferred funds. The funds were estate property subject to avoidance.
- *Rodney Tow Ch 7 Tr. v. Exxon Mobil Corp. (In re ATP Oil & Gas Corp.)*, 553 B.R. 577 (Bankr. S.D. Tex. 2016) Chapter 7 Trustee sought to avoid a prepetition payment to Exxon as a preferential transfer under 11 U.S.C.S. § 547. Exxon argued the funds were not property of the estate because debtor held them in a constructive trust for Exxon, meaning debtor had only bare legal title under 11 U.S.C.S. § 541(d). The court rejected that argument, holding that state law controls whether a constructive trust exists, and Louisiana does not recognize constructive trusts. As no constructive trust could arise, debtor held both legal and equitable interest in the funds, making them property of the estate and subject to avoidance.



HBA – Bankruptcy Bench Bar Merchant Cash Advance Issues

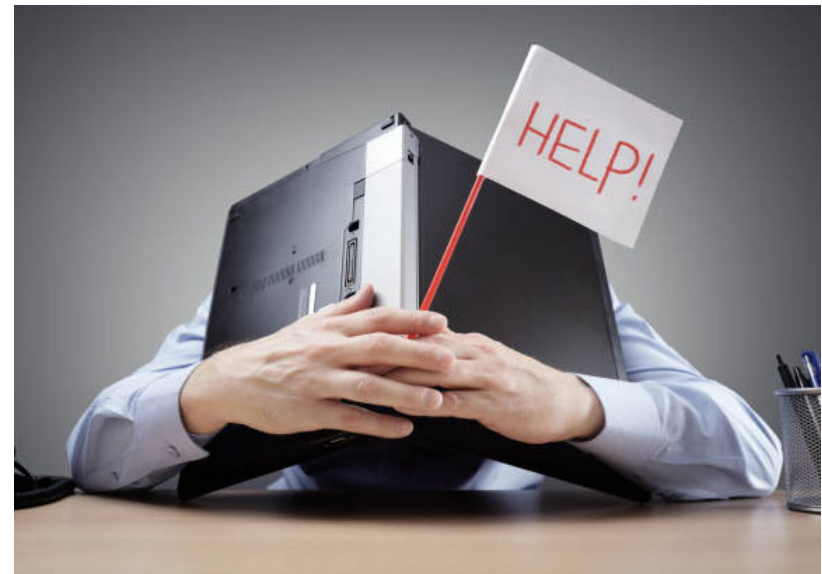
Lenders in the Crosshairs: Traps for Trustees and Debtors

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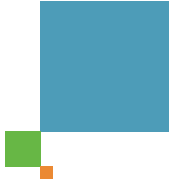
A Typical Hypothetical Becoming all-too Common

- A small business is looking to file a chapter 11 case.
- Business had been strong until a recent snag where they found themselves short on – and very much in need of – cash.
- The debtor took out what looks like a loan with a company called Blue Briar Capital, who is sweeping the bank account on a daily basis for payments.





- The business does not have the cash flow to keep up with the payments and account sweeps, and they need to file bankruptcy.
- UCC search of the business reveals Blue Briar Capital has filed a UCC-1 financing statement for all assets along with 6 others.



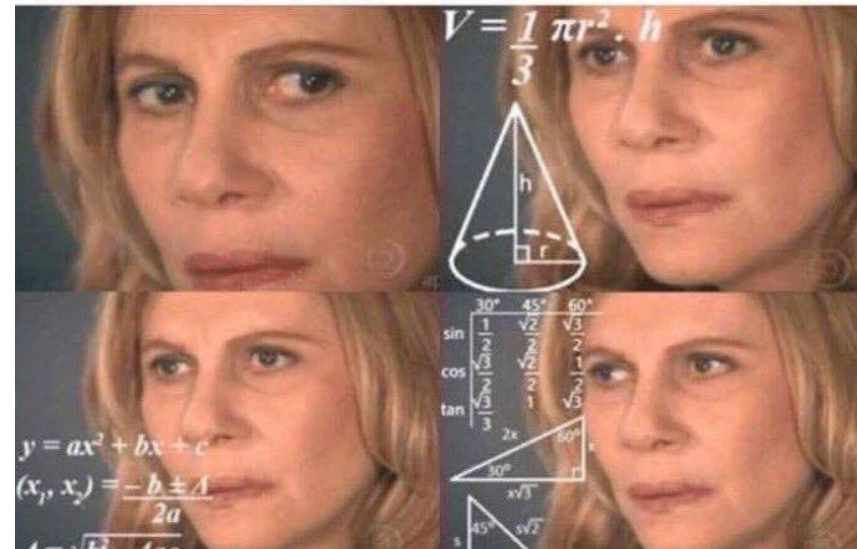
- A Chapter 5/11 gets filed
- During cash collateral proceedings...
- You go ahead and file the chapter 11 case and list Blue Briar Capital as a secured creditor.
- You file a motion to use cash collateral, but then...

- A dispute arises:
 - The “cash collateral” isn’t cash collateral at all.
 - The cash isn’t even property of the estate.
 - The transaction that Blue Briar Capital entered into with the debtor was a disguised, usurious (unsecured) loan and not a sale of the debtor’s future accounts receivable.





- Can you buy something that doesn't exist yet?
- What is the nature of the MCA's property interest in the Debtor's "future receivables" or "future receipts"?
- Recourse (NY vs. TX)
 - UCC 9.109(e)
 - TX Finance Code Chp 306
 - Starving Students vs. Express Working Capital
 - Karrody vs. Miller



Historical Background



- The Merchant Cash Advance (“MCA”) industry was born from the FinTech boom and is a sector within the broader alternative financial services market that specializes in providing short-term financing solutions to businesses. Typically, businesses that seek this type of financing need capital immediately to cover cash flow shortages or short-term expenses.
- Commonly in MCA transactions, a funder provides a small business with a lump sum of money in exchange for a percentage of the business’s future generated accounts receivable. The amount received by the funder in return is usually in excess of 100% when calculated as an APR.
- Unfortunately, the MCA tries to classify these deals as the purchase of “future receivables” and, therefore, not a loan. If it is not a loan, it is not governed by usury, and if there is no usury, the MCA funder is free to charge the small business whatever it so desires. This legal nuance is what permits an MCA from receiving what ordinarily would be deemed usurious interest, thereby allowing for the absurd and astronomical amounts of money required to be repaid by a small business to an MCA funder.
- The tides are changing.
- New Legislation (TX HB 700, 2025)
 - TX Finance Code Chp 398

What's the Problem?



- Example MCA agreement (see next slide)
- The MCA industry is designed to target and prey upon small businesses that need cash but can't get it, which is a common occurrence during economic downturns. Through heavy spending and a massive focus on solicitation and marketing, MCA providers repeatedly call business owners offering “deals” for business financing that are highly tempting but more often than not are usurious – creating a deeper hole the business can't dig out of.
- Most MCA customers already have a senior, secured lender or factor.

MCA Agreement Example – Summary of Terms

STANDARD MERCHANT CASH ADVANCE AGREEMENT

This is an Agreement dated _____ by and between _____, inclusive of its successors and assigns, and each merchant listed below ("Merchant").

Merchant's Legal Name: _____

D/B/A: _____

Fed ID #: _____

Type of Entity: ☒ Corporation ☐ Limited Liability Company ☐ Partnership ☐ Sole Proprietorship

Business Address: _____ City: _____ State: _____ Zip: _____

Contact Address: _____ City: _____ State: _____ Zip: _____

E-mail Address: _____ Phone Number: _____

Purchase Price <i>This is the amount being paid to Merchant(s) for the Receivables Purchased Amount (defined below). This amount may be paid in installments if there is an Addendum stating that it will be paid in installments.</i>	\$ 465,000.00
Receivables Purchased Amount <i>This is the amount of Receivables (defined in Section 1 below) being sold. This amount may be sold in installments if there is an Addendum stating that it will be sold in installments.</i>	\$ 674,250.00
Specified Percentage <i>This is the percentage of Receivables (defined below) to be delivered until the Receivables Purchased Amount is paid in full.</i>	7 %
Net Funds Provided <i>This is the net amount being paid to or on behalf of Merchant(s) after deduction of applicable fees listed in Section 2 below. This amount may be paid in installments if there is an Addendum stating that it will be paid in installments.</i>	\$ 441,750.00
Net Amount to Be Received Directly by Merchant(s) <i>This is the net amount being received directly by Merchant(s) after deduction of applicable fees listed in Section 2 below and the payment of any part of the Purchase Price elsewhere pursuant to any Addendum to this Agreement. This amount may be paid in installments if there is an Addendum stating that it will be paid in installments. If any deduction is being made from the Purchase Price to pay off another obligation by Merchant(s), then the Net Amount to be Received Directly by Merchant(s) is subject to change based on any change in the amount of the other obligation(s) to be paid off.</i>	\$ 308,625.00
Initial Estimated Payment <i>This is the initial amount of periodic payments collected from Merchant(s) as an approximation of no more than the Specified Percentage of the Receivables and is subject to reconciliation as set forth in Section 4 below.</i>	\$ 31,000.00 per WEEK

MCA Agreement Example

STANDARD MERCHANT CASH ADVANCE AGREEMENT

TERMS AND CONDITIONS

1. Sale of Future Receipts. Merchant(s) hereby sell, assign, and transfer to (making the absolute owner) in consideration of the funds provided ("Purchase Price") specified above, all of each Merchant's future accounts, contract rights, and other obligations arising from or relating to the payment of monies from each Merchant's customers and/or other third party payors (the "Receivables", defined as all payments made by cash, check, credit or debit card, electronic transfer, or other form of monetary payment in the ordinary course of each merchant's business), for the payment of each Merchant's sale of goods or services until the amount specified above (the "Receivables Purchased Amount") has been delivered by Merchant(s) to . Each Merchant hereby acknowledges that until the Receivables Purchased Amount has been received in full by , each Merchant's Receivables, up to the balance of the Receivables Purchased Amount, are the property of and not the property of any Merchant. Each Merchant agrees that it is a fiduciary for and that each Merchant will hold Receivables in trust for in its capacity as a fiduciary for . The Receivables Purchased Amount shall be paid to by each Merchant irrevocably authorizing only one depositing account acceptable to (the "Account") to remit the percentage specified above (the "Specified Percentage") of each Merchant's settlement amounts due from each transaction, until such time as receives payment in full of the Receivables Purchased Amount. Each Merchant hereby authorizes to ACH debit the specified remittances and any applicable fees listed in Section 2 from the Account on a daily basis as of the next business day after the date of this Agreement and will provide with all required access codes and monthly bank statements. Each Merchant understands that it will be held responsible for any fees resulting from a rejected ACH attempt or an Event of Default (see Section 2). is not responsible for any overdrafts or rejected transactions that may result from 's ACH debiting the Specified Percentage amounts under the terms of this Agreement. Each Merchant acknowledges and agrees that until the amount of the Receivables collected by exceeds the amount of the Purchase Price, will be permitted not treat any amount collected under this Agreement as profit for taxation and accounting purposes.

3. Estimated Payments. Instead of debiting the Specified Percentage of Merchant's Receivables, may instead debit \$ 31,000.00 ("Estimated Payment") from the Account every WEEK . The Estimated Payment is intended to be an approximation of no more than the Specified Percentage, subject to reconciliation.

5. Merchant Deposit Agreement. Merchant(s) shall appoint a bank acceptable to , to obtain electronic fund transfer services and/or "ACH" payments. Merchant(s) shall provide and/or its authorized agent with all of the information, authorizations, and passwords necessary to verify each Merchant's Receivables. Merchant(s) shall authorize and/or its agent(s) to deduct the amounts owed to for the Receivables as specified herein from settlement amounts which would otherwise be due to each Merchant and to pay such amounts to by permitting to withdraw the Specified Percentage by ACH debiting of the account. The authorization shall be irrevocable as to each Merchant absent 's written consent until the Receivables Purchased Amount has been paid in full or the Merchant becomes bankrupt or goes out of business without any prior default under this Agreement.



MCA Agreement Example

STANDARD MERCHANT CASH ADVANCE AGREEMENT

27. **Stacking.** Each Merchant represents, warrants, and covenants that it will not enter into with any party other than any arrangement, agreement, or commitment that relates to or involves the Receivables, whether in the form of a purchase of, a loan against, collateral against, or the sale or purchase of credits against Receivables without the prior written consent of .

29. **Security Interest: All Assets.**

34. **Choice of Law - New York**

Negative Pledge Warning Notice



- A negative pledge provision protects the lender by prohibiting the borrower from granting a lien or a security interest to another creditor which would:
 - Reduce the amount of security or collateral available to the lender.
 - Give the other creditor priority on the borrower's assets or properties if a bankruptcy of the borrower occurs.
- Negative pledges are contractual constructs widely used in many financings – from simple mortgage loans to complex, large-scale real estate financing transactions – and, as a result, are often taken as a market standard inclusion in finance documents.
- A negative pledge clause also limits the likelihood that a particular assets will be pledged more than once, preventing conflict over which lending institution has the right to the asset if the borrower defaults.

UCC – 1 Financing Statement with Tortious Interference Example

UCC FINANCING STATEMENT FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT SUBMITTER (optional) Jason M. Medley 713-352-6032				
B. E-MAIL CONTACT AT SUBMITTER (optional) jmedley@spencerfane.com				
C. SEND ACKNOWLEDGMENT TO: (Name and Address) Spencer Fane, LLP Attn: Jason M. Medley 3040 Post Oak Boulevard, Suite 1400 Houston, Texas 77056				
SEE BELOW FOR SECURED PARTY CONTACT INFORMATION			THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY	

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME				
OR 1b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S) INITIAL(S)	SUFFIX
1c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY

2. DEBTOR'S NAME: Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME				
OR 2b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S) INITIAL(S)	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY

3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME				
OR 3b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S) INITIAL(S)	SUFFIX
3c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY

4. COLLATERAL: This financing statement covers the following collateral:

This filing covers: All now owned or hereafter acquired assets of Debtor, wherever located, and all proceeds thereof. NOTICE: Pursuant to an agreement with Secured Party, Debtor has agreed not to grant a security interest in its assets, including the Collateral or any future commercial tort claim. Therefore, any third party's acceptance of a security interest in the Collateral will constitute the tortious interference with Secured Party's rights. In the event any third party is granted a security interest in Debtor's assets in violation of this negative pledge agreement, Secured Party asserts a claim to any proceeds thereof.

Tortious Interference



- Tortious interference is a common law tort allowing a claim for damages against a defendant who wrongfully interferes with the plaintiff's contractual or business relationships.
- Four elements a plaintiff must establish in order to state a prima facie cause of action for tortious interference with an existing contract:
 1. Existence of a valid contractual relationship or business expectancy;
 2. Knowledge of the contractual relationship or expectancy by the defendant;
 3. Intentional interference inducing or causing a breach or termination of the contractual relationship or expectancy; and
 4. Resultant damage to the party whose contractual relationship or expectancy has been disrupted.

What's Next?



- Tortious interference lawsuit(s) and “class action” reclassification as a disguised usurious loan.
- The MCA industry is evolving, with potential regulatory shifts among several states legislatures, which will hopefully alleviate the practice of predatory loans issued by MCAs.
- Anticipated regulatory focus from state and federal authorities aims to bring transparency and fair practices, addressing concerns related to usury laws and deceptive practices. Now, new rules are being made to separate MCAs from regular loans, aiming to make things clearer and fairer. States like New York, California, Utah, and Virginia have made new laws to help and protect people using MCAs.
- New York is on the cusp, as it passed SB 5740 in 2021, with the bill enacted in mid-2022. In addition, California has similar legislation on its books. SB 5740 requires MCA funders to disclose certain information about MCA terms to potential borrowers.
- But... throws the baby out with the bath water; misdirected anger is dangerous.
- Beware the pendulum swing.

Recent MCA Cases



- Federal Trade Commission, Plaintiff v. Jonathan Braun, Defendant
 - The Federal Trade Commission (“FTC”) sued defendant, Jonathan Braun (“Braun”) for violating Section 5 (a) of the Federal Trade Commission Act (“FTC Act”). A jury found that Braun knowingly deceived multiple small business regarding the amount of funding his company would provide and collect from them, this deception led to a judgment of \$3,421,067 to compensate the affected small business. The court issued a summary judgment decision and permanent injunction against Braun, including a lifetime ban from the merchant cash advance and debt collection industries. The findings of fact, conclusions of law, and final judgment was filed on February 6, 2024. Please find the Final Judgment document via this link:
https://www.ftc.gov/system/files/ftc_gov/pdf/217-finaljudgment.pdf

Recent MCA Cases



- Crystal Springs Capital, Inc v. Big Thicket Coin, LLC et al
 - On appeal, Big Thicket Coin, Big Thicket Coin & Bullion, LLC, Gold Pro, LLC, and Big Thicket Group, LLC (collectively, the “Big Thicket defendants”) presented evidence that the agreement with Crystal Springs Capital, Inc. (the “plaintiff”) constituted a criminally usurious loan. The Big Thicket defendants established that the terms in the agreement were those of a loan, pursuant to which repayment was absolute, rather than a purchase of future receipts, and repayment was contingent upon Big Thicket defendants’ actual sales. Further, the plaintiff did not dispute the fact that the agreement was effected an annual interest rate exceeding the criminally usurious threshold. Crystal Springs Capital, Inc. v. Big Thicket Coin, LLC 2023 NY Slip was decided on October 11, 2023. Please find the appeal via this link: <https://law.justia.com/cases/newyorlc/appellate-division-second-department/2023/2022-00579.html>

Recent MCA Cases



- The State of New Jersey v. Yellowstone Capital LLC et al
 - The Attorney General of New Jersey announced a \$27.4 million settlement with a private equity firm, its parent company, and six other associated companies (collectively, “Respondents”) related to the violation of the New Jersey Consumer Fraud Act (“CFA”). The Respondents, like many merchant cash advances (“MCA(s)”), have targeted small businesses to enter into lending agreements disguised to purchase future receivables. Under the order, the Respondents are enjoined from engaging in any practices that might violate the CFA, and the Respondents are required to pay all outstanding balances and any other associated fees. Please find the court order via this link:
<https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20NJ%20AG%20Consent%20Order%20to%20Yellowstone%20Capital%2023.01.03.pdf>

Recent MCA Cases



- The State of New York v. Richmond Companies and People of the State of New York v. Yellowstone Capital LLC et al
 - On June 10, 2020, Attorney General, Letitia James, filed a lawsuit against three major New York City based companies, Capital Group, Ram Capital Funding, and Viceroy Capital Funding (collectively, the “Richmond Companies”). The Richmond Companies exploited small businesses through fraudulent loans with extremely high interest rates disguised as merchant cash advance purchase and sale agreements. The Richmond Companies collected these loans over short repayment terms (e.g. 60 days), and the annual interest rates of the loans regularly exceeded 200 percent, and many times exceeded 1,000 percent. Interest rates exceeding 1,000 percent are clearly in violation of New York State’s usury laws (which dictate that annual interest rates cannot exceed 16 percent). Please find the Affirmation in Support of the Verified Petition document via this link: https://ag.ny.gov/sites/default/files/affirmation_of_john_p_figura.pdf. Additionally, on March 5, 2024, New York Attorney General, Letitia James, filed a lawsuit against 30 companies and individuals for allegedly exploiting small business through fraudulent merchant cash advances. The companies and individuals include Yellowstone Capital and its founder David Glass, Delta Bridge Funding, and several others who have issued merchant cash advances disguised as loans. The office of the Attorney General sought \$1.4 billion in interest and fraudulent fees, including a court order that will stop any further illegal activity committed by the companies. The Attorney General alleged that Yellowstone Capital and others subjected the small businesses to predatory loans. Please find the lawsuit via this link: <https://ag.ny.gov/sites/default/files/2024-03/nyag-v-yellowstone-et-al.pdf>.

Recent MCA Cases



- In re Anadrill Directional Services
 - On January 28, 2026, Chief Bankruptcy Judge Rodriguez rendered the attached decision in *In re Anadrill Directional Services*, 2026 WL 234908 (S.D. Tex Bankr. Jan. 28, 2026). In the decision, the Court denied an MCA company's motion to dismiss fraudulent conveyance claims premised upon the allegation that the MCA was an unenforceable criminally usurious loan under applicable New York law. The Court performed a true-sale analysis to conclude that, as alleged, the agreement did not transfer sufficient risk of loss to the MCA company and provided ample means of recovery even if the merchant filed for bankruptcy thereby rendering the repayment obligation absolute, just like a loan. Perhaps equally interestingly, the Court also found that the sheer economics of the deal (merchant to repay \$1,016,000 despite receiving only \$650,145.28) supported fraudulent transfer claims because the merchant did not receive reasonable equivalent value.

Recent MCA Cases



- J.P.R. Mechanical
 - As many of you may be aware, in *J.P.R. Mechanical v. Radium2 Cap. LLC (In re J.P.R. Mechanical)*, 2025 Bankr. LEXIS 1319 (S.D.N.Y. Bankr. May 30, 2025), the United States Bankruptcy Court for the Southern District of New York granted a Trustee's motion for summary judgment, finding that the MCA agreements at issue were unenforceable, criminally usury loans and voidable transfers. The MCA company filed and appeal to the District Court, but that appeal was recently dismissed for lack of prosecution pursuant to the attached order.



True Sale Case Law

TRUE SALE CASE LAW

True Sale Boils Down to:

1. Intent of the Parties
 - a. Loan or Sale Nomenclature
 - b. Titles; Form
2. Recourse
 - a. Full Recourse
 - b. Limited Recourse
 - c. Texas and Louisiana – There is an exception to everything, except for some things
3. *Dryden and Majors Furniture* Factors:
 - a. Whether the buyer has a right of recourse against the seller
 - b. Whether the seller continues to service the accounts and comingles receipts with its operating funds
 - c. Whether there was an independent investigation by the buyer of the account debtor
 - d. Whether the seller has a right to excess collections
 - e. Whether the seller retains an option to repurchase accounts
 - f. Whether the buyer can unilaterally alter the pricing terms
 - g. Whether the seller has the absolute power to alter or compromise the terms of the underlying asset
 - h. The language of the agreement and the conduct of the parties

True Sale Case Law

Table of Cases

- *In re Candy Lane Corp.*, 38 B.R. 571 (Bankr. S.D.N.Y. 1984) (citing *Cross v. A.G.V. Assocs., Inc.*, 340 F.2d 42 (2d Cir. 1964), *cert. denied*, 381 U.S. 913 (1965)).
- *A.B. Lewis Co. v. National Inv. Corp.*, 421 S.W.2d 723 (Tex. Civ. App. 1967).
- *Fox v. Peck Iron & Metal Co.*, 25 B.R. 674 (Bankr. S.D. Cal. 1982).
- *In re Hurricane Elkhorn Coal Corp. II*, 19 B.R. 609 (Bankr. W.D. Ky. 1982), modified on other grounds, 32 B.R. 737 (W.D. Ky. 1983).
- *See Butner v. United States*, 440 U.S. 48 (1979).
- *Barnhill v. Johnson*, 112 S. Ct. 1386 (1992).
- *In re Contractors Equip. Supply Co.*, 861 F.2d 241 (9th Cir. 1988).
- *In re National Equipment & Mold Corp.*, 64 B.R. 239 (Bankr. N.D. Ohio 1986).
- *In re Mortgage Funding, Inc.*, 48 B.R. 152 (Bankr. D. Nev. 1985).
- *In re Armando Gerstel, Inc.*, 65 B.R. 602 (Bankr. S.D. Fla. 1986).
- *Major's Furniture Mart, Inc. v. Castle Credit Corp. Inc.*, 602 F.2d 538 (3rd Cir. 1979).
- *In re Evergreen Valley Resort, Inc.*, 23 B.R. 659 (Bankr. D. Me. 1982).
- *In re The Woodson Co.*, 813 F.2d 266 (9th Cir. 1987).
- *In re Joseph Kanner Hat Co., Inc.*, 482 F.2d 937, 940 (2d Cir. 1973).
- *People v. Service Inst., Inc.*, 101 Misc.2d 549, 550 N.Y.S.2d 325, 326 (N.Y. Sup. Ct. 1979).
- *In re O.P.M. Leasing Services, Inc.*, 30 B.R. 642 (Bankr. S.D.N.Y. 1983).
- *In re Golden Plan of California, Inc.*, 829 F.2d 705 (9th Cir. 1987).
- *In re Carolina Utils. Supply Co.*, 118 B.R. 412 (Bankr. D.S.C. 1990).
- *Grossman v. Butcher*, 1992 WL 158422, Slip Op. at 7 (Ohio Ct. App. June 30, 1992).
- *In re Executive Growth Invs., Inc.*, 40 B.R. 417 (Bankr. C.D. Cal. 1984).
- *In re National Equip. & Mold Corp.*, 64 B.R. 239 (Bankr. N.D. Ohio 1986).



True Sale Case Law

- *In re Brevill Bresler & Schulman Asset Management Corp.*, 67 B.R. 557 (D.N.J. 1986).
- *In re Kassuba*, 562 F.2d 511 (7th Cir. 1977).
- *cf. In re Lemons & Assocs., Inc.*, 67 B.R. at 209.
- *Indian Lake Estates Inc. v. Special Invs., Inc.*, 154 So.2d 883 (Fla. Dist. Ct. App.), *cert. denied*, 161 So.2d 219 (1963).
- *In re Lendvest Mortgage, Inc.* 119 B.R. 199 (9th Cir. BAP 1990).
- *In re Nixon Mach. Co.*, 6 B.R. 847 (Bankr. E.D. Tenn. 1980).
- *In re Hurricane Elkhorn Coal Corp.*, 19 B.R. 609 (Bankr. W.D. Ky. 1982).
- *In re ATP Oil & Gas Corp.*, 2014 WL 61408 (Bankr. S.D. Tex. 2014).
- *In re Olde Prairie Block Owner, LLC*, 464 B.R. 337 (Bankr. N.D. Ill. 2011).
- *Blackford v. Commercial Credit Corp.*, 263 F.2d 97 (5th Cir.), *cert. denied*, 361 U.S. 825 (1959).
- *Abeloff v. Ohio Finance Co.*, 313 Mich. 568 N.W.2d 856 (Sup. Ct. Mich. 1946).
- *Union Planters Nat'l Bank v. United States*, 426 F.2d 115 (6th Cir.), *cert. denied*, 400 U.S. 827 (1970).
- *In re S.O.A.W. Enterprises, Inc.*, 32 B.R. 279 (Bankr. W.D. Tex. 1983).
- *Carter v. Four Seasons Funding Corp.*, 351 Ark. 637, 97 S.W.3d 387 (2003).
- *Lake Hiwassee Dev. Co. v. Pioneer Bank*, 535 S.W.2d 323 (Sup. Ct. Tenn. 1976).
- *Angeles Real Estate Co. v. Kerxton*, 737 F.2d 416 (4th Cir. 1984).
- *Coast Finance Corp. v. Ira F. Powers Furniture Co.*, 209 P. 614 (Or. 1922).
- *Goldstein v. Madison Nat'l Bank*, 89 B.R. 274 (D.C. Cir. 1988).
- *Lyon v. Ty-Wood*, 239 A.2d 819 (Pa. Super Ct. 1968).
- *General Motors Acceptance Corp. v. Mid-West Chevrolet Co.*, 66 F.2d 1, 8(10th Cir. 1933).
- Steven L. Schwarcz, *The Parts Are Greater Than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and Open the Capital Markets to Middle-Market Companies*, 1993 Colum. Bus. L. Rev. 139.



True Sale Case Law

- *In re Commercial Loan Corp.*, 316 B.R. 690, 700 (Bankr. N.D. Ill. 2004).
- *Granite Partners, L.P. v. Bear, Stearns & Co., Inc.*, 17 F. Supp. 2d 275 (S.D.N.Y. 1998).
- *Endico Potatoes, Inc. v. CIT Group/Factoring Inc.*, 67 F.3d 1063 (2d Cir. 1995).
- *In re Dryden Advisory Grp., LLC*, 534 B.R. 612 (Bankr. M.D. Pa. 2015).
- *Financial Services, Inc. v. Kulman*, 278 F. Supp 471 (W.D. Va 1968).
- *American Factoring Low*, p. 313;
- *In re Delta Mills, Inc.*, No. 06-11144 (Bankr. D. Del) (October 13, 2006).
- *In re Cog Busters, Inc.*, No. 02-41596-JBR (Bankr. D. Mass.. May 1, 2002).
- *In re Sideshow Creative, Inc.*, No. 05 B 10011 (ALG) (Bankr. S.D.N.Y. Jan 3, 2005).
- *Berger v. State Dep't of Revenue*, 910 P.2d 581, 586 (Alaska 1996).
- *Nebraska Dep't of Revenue v. Lowenstein*, 115 S.Ct. 557 (1994).
- *Rexnord, Inc. v. U.S.*, 940 F.2d 1094 (7th Cir. 1991).
- *Admiral Ins. Co. v. Brinkcraft Dev., Ltd.*, 921 F.2d 591 (5th Cir. 1991).
- *Jett Racing & Sales, Inc. v. Transamerica Commercial Fin. Corp.*, 892 F. Supp, 161 (S.D. Tex. 1995).
- *Saturn Capital Corp. v. Dorsey*, No. 0104-00626-CV, 2006 WL 1767602 (Tex. App. June 29, 2006).
- *Bradi v W. Pub. Co.*, No A14-89-00694-CV, 1991 WL 230182 (tex. App. Oct. 31, 1991).
- *Walker v. Assocs. Fin. Servs. Corp.*, 588 S.W. 2d 20 (Tex. Civ. App. 1979).
- *Mostek Corp. v. Chemetron Corp.*, 642 S.W.2d 20 (Tex. App. 1982).
- *In re Kitchen Bros. Mfg. Co.*, No 13-01710-Npo, 2016 WL 3699341 (Bankr. S.D. Miss. July 5, 2016).
- *Herssein Law Grp. V. Reed Elsevier, Inc.*, No. 13-23010-CIV, 2014 WL 11370411 (S.D. Fla. March 5, 2014).
- *In re Kemper*, 263 B.R. 773 (Bankr. E.D. Tex. 2001).



True Sale Case Law

- *Superfos Investments Ltd. FirstMiss Fertilizer, Inc.*, 809 F. Supp. 450 (S.D. Miss. 1992).
- *In re McDaniel*, 127 B.R. 132 (Bankr. N.D. Tex. 1991).
- *Seeman vs. Philadelphia Warehouse*, 274 W.S. 403 (1927).
- *BNY Fin. Corp. v. Fitwel Dress Co.*, No. Civ.A.95-4785A, 6 Mass. L. Rep. 373 (Mass. Sup. Ct., Jan. 15, 1997).

Additional Case Law



- In re Heart Heating & Cooling. LLC, 2024 Bankr. LEXIS 689 (Bankr. D. Colo. March 21, 2024).
 - The debtor filed a subchapter V case and identified a large amount of debt attributable to eight MCA transactions as “contingent” and/or “unliquidated”. The characterization of the transactions mattered for purposes of the debtor’s subchapter V eligibility, though notably the debtor had stipulated the transactions were loans. The debtor argued it did not owe anything on account of the loans, however, but did not specifically articulate any basis upon which to challenge the amounts owed (i.e., based on a usury defense), and disputed debts still count towards the debt limit. The court found that the MCA transactions, having been stipulated to as loans by the debtor, were liquidated, non-contingent debts, and thus counted towards (and pushed the debtor over) the subchapter V debt limit.

Additional Case Law



- People v. Richmond Capital Group LLC, 195 N.Y.S.3d 637 (N.Y. Sup. Ct. Sept. 15, 2023)
 - Special proceeding brought by the New York Attorney General against various MCA lenders (collectively defined as the “Predatory Lenders” in the court’s opinion). The proceeding was brought pursuant to New York Executive Law, which allows for injunctive relief, restitution, and damages where a person or business engages in repeated or persistent fraud or illegality. The court reviewed 140 sample MCA agreements from the Predatory Lenders, determined them to be loans instead of true sales, and that such loans were usurious. The court found the Predatory Lenders had committed fraud and thus the MCAs were void, and that the loans were procedurally and substantively unconscionable and were thus void.

Additional Case Law



- CapCall, LLC v. Foster (In re Shoot the Moon, LLC), 635 B.R. 797 (Bankr. D. Montana 2021)
 - The debtor was comprised of nineteen restaurant entities which, immediately prior to filing bankruptcy, had been nineteen separate entities, many of which had entered into MCAs with CapCall. There were 18 MCAs with CapCall in total, all of which shared the same hallmark MCA features: CapCall gave the entities immediate cash on closing, in exchange CapCall received a portion of future receivables generated through operations, and the amounts promised by the entities substantially exceed the amount of cash CapCall paid. Even though the MCAs were with multiple entities, the manager of the entities directed a significant portion of the payments to CapCall come out of a bank account of a separate entity not party to any of the MCAs that didn't operate any of the restaurants generating the revenue. The CapCall representative knew this, and didn't express concern, so long as there was an account that would clear the payments. The transactions were on form documents, no negotiations beyond basic economics, and emails between the Shoot the Moon manager and the CapCall rep often referred to the transactions as loans or notes and on at least one occasion there was negotiation as to the “term” of a transaction.

Additional Case Law



- CapCall, LLC v. Foster (In re Shoot the Moon, LLC), 635 B.R. 797 (Bankr. D. Montana 2021) (con't)
 - The debtor entities were merged into one single entity and filed a chapter 11 case in which a chapter 11 trustee was appointed. The trustee sold substantially all the assets of the business, and lenders senior to CapCall were only partially paid, leaving them with deficiency claims. CapCall didn't object to the sales or a stipulation regarding distribution to certain of the senior lenders. The trustee moved for turnover of funds held by the debtor's former credit card processing company that hadn't been transferred to the debtor's accounts before the petition date, and CapCall and the trustee stipulated to segregate the funds pending resolution of the parties' dispute. CapCall filed a proof of claim for conversion of receivables that CapCall said it owned, stating its claim was unsecured and that it held no security interest in property of the debtor.
 - CapCall filed an adversary proceeding seeking a declaration that it owned the money in the segregated account and a judgment against the trustee for conversion of postpetition receipts. The trustee asserted counterclaims seeking declaratory relief about which state's law applied to the transaction (New York or Montana), and that the transactions were disguised loans and not sales. The trustee also sought unencumbered title to the segregated account, avoidance and recovery of preference payments, and remedies stemming from CapCall's alleged usurious interest rates.

Additional Case Law



- CapCall, LLC v. Foster (In re Shoot the Moon, LLC), 635 B.R. 797 (Bankr. D. Montana 2021) (con't)
 - The court looked at various factors and determined that the transaction was a disguised loan. Factors considered were: (1) whether the buyer has a right of recourse against the seller; (2) whether the seller continues to service the accounts and commingles receipts with its operating funds; (3) whether there was an independent investigation by the buyer of the account debtor; (4) whether the seller has a right to excess collections; (5) whether the seller retains an option to repurchase accounts; (6) whether the buyer can unilaterally alter the pricing terms; (7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and (8) the language of the agreement and the conduct of the parties.
 - The court then applied Montana choice of law analysis to determine that Montana law, not New York, applied, despite the choice of law provisions in the MCAs. Montana has a usury statute that prohibits interest over 15% and the penalty is “forfeiture of a sum double the amount of interest” charged and an express remedy for the borrower or its successor to recover “a sum double the amount of interest paid.” The trustee used an expert witness to perform a detailed analysis of the relevant transactions to come up with an effective rate of interest that CapCall charged and the applicable penalty under Montana law. That statutory penalty was \$1,216,685.
 - The trustee also succeeded on the preference claim for transfers totaling \$1,129,071 (“subject to a reduction on a dollar-for-dollar basis equal to any imputed interest included within the preferential payments, but only to the extent CapCall actually satisfies in full its liability to the Trustee under the Montana usury statute”).

Additional Case Law



- CapCall, LLC v. Foster (In re Shoot the Moon, LLC), 635 B.R. 797 (Bankr. D. Montana 2021) (**con't**)
 - Montana also has a reciprocal fee statute which makes unilateral fee provisions bilateral regarding “any action on the contract” and entitles the prevailing party to recover reasonable attorney's fees, so the trustee also recovered attorney fees.

Additional Case Law



- In re Brooks, 619 B.R. 669 (Bankr. C.D. Ill. 2020).
 - The debtors entered into a transaction where they sold “future receipts, accounts, contract rights and other obligations arising from or relating to the payment of moneys” from their customers. They were to pay \$236,250 to the MCA company over the course of one year in exchange for \$175,000 paid to them by the MCA company. They designated a bank account as the account for payments to be drawn from, but they also had a loan with the subject bank which was secured by, among other property, the same bank accounts. Eventually a stop payment was issued on the bank account, payments to the MCA company ceased, and the MCA company got a judgment against the debtors. Their chapter 11 filing followed, and they listed the MCA company as an unsecured creditor. The debtors filed a motion for post-petition financing almost a year into their case, which is the first time the MCA company raised the issue of ownership of the debtors' future payables. An agreed order was entered, but the debtors later filed an adversary proceeding to determine the MCA company's interest, as well as the banks', in the future receivables.
 - The MCA company alleged that the bank impliedly authorized the sale of its collateral (the receivables), and thus lost its secured status. The evidence did not support this argument though, and the court found the bank still held a valid security interest in the debtors' receivables. The MCA company also requested that the court equitably subordinate the bank's interest in the receivables, but this argument likewise failed due to lack of evidence of any collusion or insider status between the bank and debtors.

Additional Case Law



- GMI Group, Inc. v. Unique Funding Solutions, LLC (In re GMI Group, Inc.), 606 B.R. 467 (N.D. Ga. 2019).
 - The debtor sold \$111,750 of its future receipts in exchange for \$75,000. The debtor initiated an adversary proceeding and asserted various claims, including one under New York's usury laws. The MCA company argued only loans could be subject to usury laws and took the position that it was a true sale. The bankruptcy court found that the transaction was a loan and that it was usurious, even though it noted that New York law (which applied pursuant to the terms of the agreement) strongly disfavors a finding of usury. In determining that the transaction was a loan, the bankruptcy court looked specifically at whether the transaction guaranteed full repayment, which the bankruptcy court found it did. The court also found the MCA company's loan was criminally usurious under New York law and directed the debtor to submit additional briefing regarding the appropriate remedy for a criminally usurious loan.

Additional Case Law



- Womack v. Capital Stock, LLC, 2019 WL 4142740 (S.D.N.Y Aug. 30, 2019).
 - Plaintiffs asserted a usurious contract claim against the MCA company, and the court noted that it must determine the true nature of the transaction, looking at its "true character ... rather than its title." The court noted the three factors to consider when determining whether the transaction was a loan or a true sale: (1) whether there is a reconciliation provision; (2) whether the agreement has an indefinite term; and (3) whether the plaintiff has any recourse should the merchant declare bankruptcy. The court also focused on allocation of risk, stating the primary indicia of a loan are the debtor's absolute obligation to repay the principal sum without risk to the creditor of the debtor's business failure, and that MCA transactions cannot be considered loans where the MCA funders' purchase price was placed at hazard and they had no absolute right of repayment if the businesses failed. The court found that in the transaction at issue the MCA company bore the risk and there was no absolute payment obligation, and thus was not a loan.
 - Interesting, the court stated "At least twenty-eight other recent decisions by State and Federal courts in New York found that similar MCA transactions were not loans subject to New York's usury laws." The court noted that while the law was harsh, it was an issue for the legislature, rather than the courts, to remedy.

Additional Case Law



- In re R&J Pizza Corp., Case No. 14-43066, 2014 WL 12973408 (Bankr. E.D.N.Y. Oct. 14, 2014).
 - The MCA party filed a motion for an order prohibiting the use of non-estate property (purchased accounts) by the debtor. The court found that the purchase agreements represented a true sale of receivables, and that the accounts did not constitute property of the debtor or its estate. The court prohibited the debtor from using a percentage of future credit card receivables until the MCA party was paid in full. The court noted that case law focused on the "economics" of the transaction, and which party bears the risk of non-collection from the account debtor when determining whether a transaction is a true sale or secured transaction. The court focused on the fact that the purchase agreement consistently used "purchase" and "sale" and "buyer" and "seller" as defined terms and that the UCC-1 described the transaction as a purchase and sale. The purchase agreement also did not provide for any recourse against the debtor for non-collection, the MCA party could not alter the price terms of the purchase, and the transaction included only a limited personal guaranty.

Additional Case Law



- *Clever Ideas, Inc. v. 999 Restaurant Corp.*, No. 0602303/2006, 2007 WL 3234747 (N.Y. Sup. Ct. Oct. 12, 2007).
 - A restaurant entered an “advance meal sales” agreement, pursuant to which it was advanced \$22,000 in exchange for a portion of its future credit card receipts. Under the agreement it was required to repay \$44,000. A second agreement was entered into where the restaurant was advanced \$213,000 and was required to repay \$319,000. The MCA sued the restaurant to enforce the agreement and argued that the Illinois law, a state with no usury statutes, applied based on the choice of law provision. The court rejected that position and declined to give effect to the choice of law provision in the agreement, opting to apply New York law which the court said had the most reasonable relationship to the agreements. The court characterized the transaction as a loan and allowed the restaurant to assert the usury defense.

Bassel v. Durand-Day

and the Evolving Landscape of Student Loan Discharge

Moderator:
Chief Judge Eduardo V. Rodriguez

Panelists:
Alan Borden (Resolve Law Group)
Sarah N. Garcia (Weston Legal)
Marcos D. Oliva (Oliva Law)



Presentation Overview:

Part 1: Ch 13 Student Loan Treatment

Part 2: Federal Student Loan Discharge

Part 3: Private Student Loan Discharge

Part 1: Ch 13 Student Loan Treatment

Analyzing Matter of Durand-Day, 134 F. 4th 846 - Court of Appeals, 5th Circuit 2025

§ 1325(b)(1)(A):

“(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—”

(A) 100% Plan Threshold

“the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or”

(B) Disposable Income Commitment

“the plan provides that all of the debtor’s projected **disposable income** to be received in the applicable commitment period... will be applied to make payments to unsecured creditors under the plan.”

The "Best Interest of Creditors" test vs. the "Disposable Income" test in Chapter 13 confirmation.

Matter of Durand-Day, 134 F.4th 846 (5th Cir. 2025):

Legal Issue: What does “under the plan” mean?

Trustee Position

Requires Debtors to apply all disposable income towards all unsecured creditors, including student loans, before the Plan ends.

Debtors Position

Requires all claims be treated under the plan but not necessarily paid during the plan term if all claims will be fully satisfied.

Court Holding

“Given that § 1325(b)(1)(A)'s use of the phrase “under the plan” means by the end date of a Chapter 13 plan, the statute requires Debtors to pay in full all allowed, unsecured claims—including their student-loan obligations—within the life of the Plans.”

The Facts:

Victoria Durand-Day

22-40089 (NDTX)

TOTAL UNSECURED DEBT:

\$113,560.65

STUDENT LOAN PORTION:

\$54,195.00 (47.7%)

MONTHLY PAYMENT (60 MO):

Proposed (w/o SL): \$989.43

Mandated (w/ SL): \$1,892.68

PROFILE:

Above-median earner. Monthly DI: \$2,329.94.

Lavonda Evans

22-40625 (NDTX)

TOTAL UNSECURED DEBT:

\$106,402.00

STUDENT LOAN PORTION:

\$73,927.00 (69.5%)

MONTHLY PAYMENT (60 MO):

Proposed (w/o SL): \$541.25

Mandated (w/ SL): \$1,773.37

PROFILE:

Above-median earner. Monthly DI: \$1,726.07.

Both cases involve 100% Plan Terms (60 Months)

Aftermath:

Victoria Durand-Day

- **4/25/2025:** 5th Circuit Opinion
- **4/30/2025:** Notice of Voluntary Conversion to Chapter 7
- **9/4/2025:** Discharge

Lavonda Evans

- **8/19/2025:** Plan Modification
- 30.79% payout. \$1,024/mo.
DI = \$1,773/mo. No Objection.
- **4/2/2026:** Discharge

Above vs Below Median Debtors:

HIGH IMPACT SCENARIO

The 100% w/ Excess DI Debtor

Debtors who have 100% plans but possess **surplus** disposable income.

Contractual SL Pmt: \$100

Actual Disp. Income: \$1,200

Surplus after 100% GUC: \$500

Ch 13 SL Payment: \$600

The Penalty: Forced to accelerate SL making Ch 13 more expensive than paying direct.

LOW IMPACT SCENARIO

The low % plan Debtor

Below-median or low-income debtors already committing 100% of their DI.

Total Disp. Income: \$250

Contractual SL Pmt: \$100

Monthly Payment: \$250

The Result: Payment stays the same. Only the pro-rata split between student loans and other unsecured creditors changes.

Durand-Day math doesn't change the monthly burden.

Triggering the Trustee Objection

- **Withholding Surplus:** Attempting to pay "direct" student loans while keeping excess DI.

The Co-debtor Workaround: § 1322(b)(1)

*"...such plan may treat claims for a consumer debt of the debtor if an **individual is liable on such consumer debt with the debtor differently** than other unsecured claims;"*



Strategic Classification

Applicability:

Use for Parent PLUS loans or private loans with co-signers.

Safe Harbor:

The "different treatment" proviso overrides the "unfair discrimination" prohibition.



Bypassing Durand-Day

Direct Payment:

Separate classification allows paying the contractual IDR rate "direct."

No Acceleration:

Classified under (b)(1), the loan is removed from the "General Unsecured" pool and § 1325(b) math.

Path to Chapter 7:

Student loans as Non-Consumer Debt



Matter of Booth (5th Cir. 1988)

The "Profit Motive" Test:

"Accordingly, the test for determining whether a debt should be classified as a business debt... is whether it was incurred with an eye toward profit."



In re De Cuna (S.D. Tex. 2013)

SDTX Holding:

Student loans for direct educational expenses (tuition, fees, books) are non-consumer debts if intended to enhance future earning capacity.

The Distinction:

- Living expenses = Consumer Debt
- Direct Education = Non-consumer Debt

Subchapter V, Chapter 11 Highlights:



Debtor & Trustee Roles

- Small Business Debtors
- Trustee as Facilitator (Not Fiduciary)

Plan Flexibility & Requirements

- No § 1325(b) or Means Test
- Consensual Plans: No disposable income requirement (Silent Consent: *In re Hot'z Power Wash*)
- No § 1322(b)(1): Claims classification allowed if "substantially similar" (§ 1122)



RESOURCES

Free Forms:

<https://www.txs.uscourts.gov/content/chief-united-states-bankruptcy-judge-eduardo-v-rodriguez>

Primer by Judge Rodriguez included in materials

Part 2: Federal Student Loan Discharge

Administrative Review, Scholarly Research & The Role of the Court

Collections on Defaulted Federal Student Loans:

Wage Garnishment

Up to 15% of disposable pay.

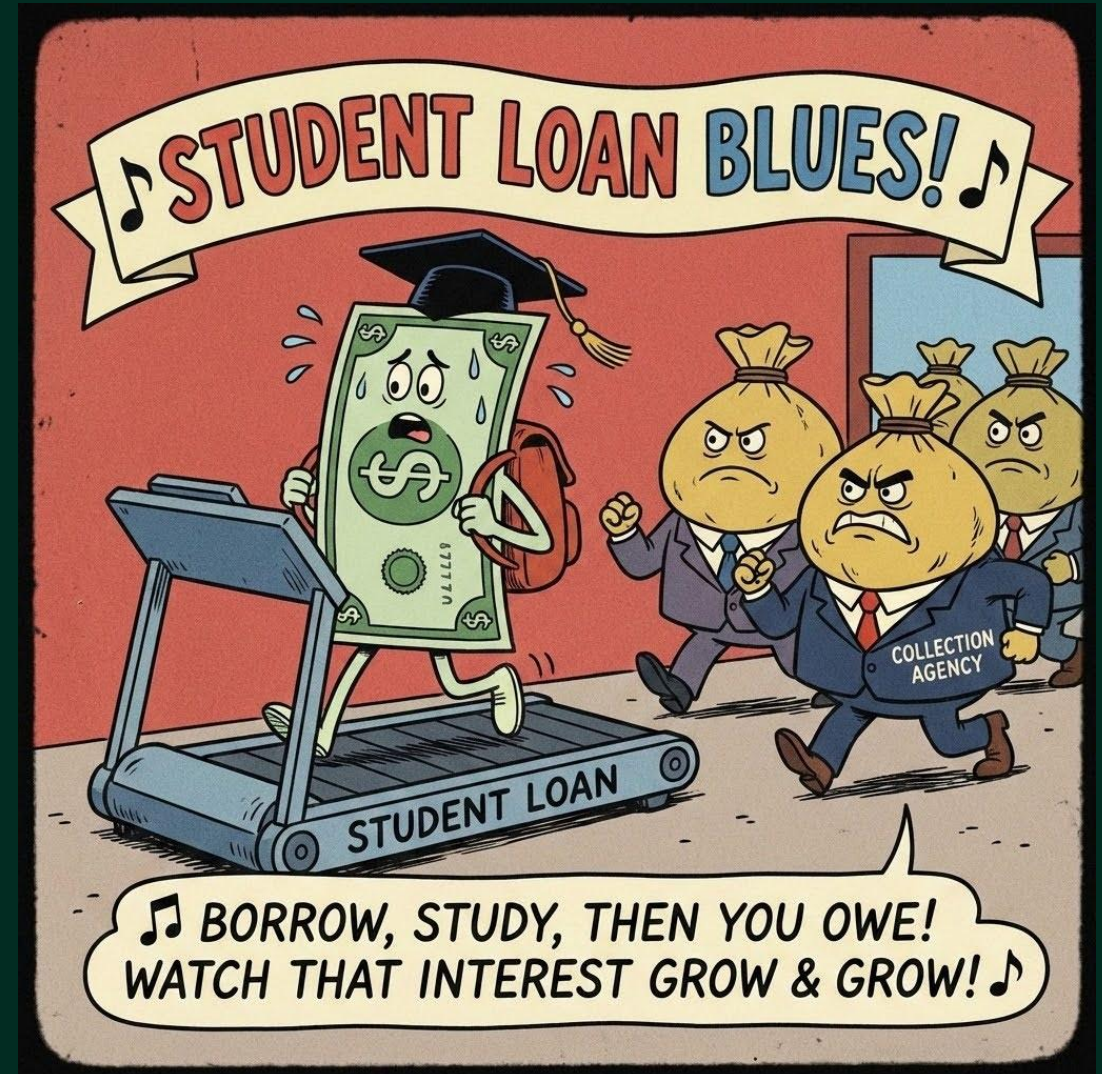
Treasury Offsets

Intercepted tax refunds and Social Security benefits.

Loss of Eligibility

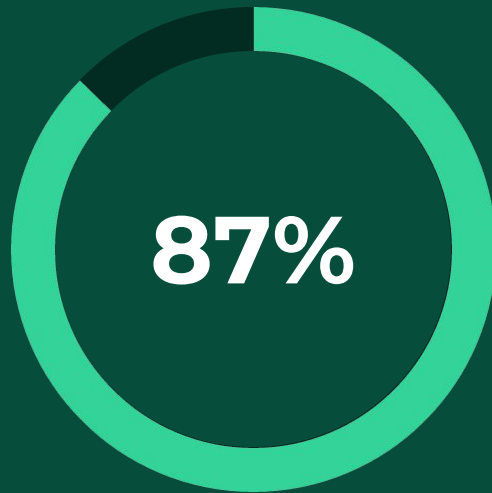
Ineligible for further federal student aid.

Status: The U.S. Department of Education resumed these actions on May 5, 2025.



2025 Empirical Data Highlights:

Success Rate



For those who challenge status post-2022 reform.

Participation Rate



Of eligible borrowers in bankruptcy proceedings.

Citation: Jason Iuliano, 99 Am. Bankr. L.J. 415 (2025).

Federal Student Loans: Roadmap

1. File Complaint

Initiate an Adversary Proceeding (AP) to determine "undue hardship".

2. Proper Service

Must serve the U.S. Attorney and Attorney General per Rule 7004(b)(4).

3. Attestation

Submit financial data based on standard IRS math and DOE guidance.

4. Joint Motion

Resolve the AP via a negotiated stipulation and agreed order.

Supplemental Materials & Guidance:

• Motion to Reopen Case • Sample Complaint • Joint Motion & Proposed Judgment • Service Instructions

Official DOJ Guidance: justice.gov/ust/student-loan-guidance

Federal Student Loans: Completing Summons

1. U.S. Attorney (SDTX)

Must serve the U.S. Attorney for the district where the action is brought.

Civil Process Clerk
United States Attorney's Office
1000 Louisiana, Suite 2300
Houston, Texas 77002

Method: Registered/Certified Mail or Personal Delivery.

2. Attorney General

A separate summons and complaint must be sent to the U.S. Attorney General.

U.S. Attorney General
U.S. Department of Justice
10th & Constitutional Ave, N.W.
Washington, D.C. 20530

Method: Registered or Certified Mail strictly required.

3. The Agency (DOE)

Must also serve the specific agency involved in the suit.

U.S. Dept. of Education
400 Maryland Ave., SW
Washington, DC 20202

Note: Service on the agency does not waive the requirement to serve the U.S. Attorney.

Provided in the Materials: DOJ's "Instructions for completing the Summons in a Civil Action."

Applying the *Brunner* Test:

Present Inability

Compared to IRS and local standards.

Future Inability

- Presumptions for age (65+)
- Disability
- Unemployed for 5 of last 10 years
- Failed to graduate
- Payment status > 10 years

Good Faith

Measured by IDR enrollment, deferments, and past payment efforts.

Proving the "Agreed Order:"

Burden of Proof

Debtor carries the ultimate burden even in settlement with the US Attorney.
Preponderance of the Evidence.

The Record

Facts from Attestation may be introduced into the record.

Judicial Finding

The Judge must make specific findings on the record to satisfy *Espinosa*.

SDTX Local Case Trends:

Successes

23-03103	Pro Se	24-03268	Alan Borden
23-05004	Pro Se	24-03274	David Stern
24-03034	Pro Se	25-03006	Alan Borden
24-03095	Pro se	25-03005	Alan Borden
24-03125	Pro se	25-03433	Pro Se

Rejection

25-03745:

Dismissed for improper issuance, service, and proof of summons.

Matter of McCoy, 810 F. App'x 315, 316 (5th Cir. 2020).

RULING

\$0 payment = no discharge.

Part 3: Private Student Loan Discharge

Textual Deep Dive: 11 U.S.C. § 523(a)(8)(B) and the IRC § 221 Audit

Federal vs Private:

FEDERAL LOANS

Servicer / Entity	Portfolio Type	Procurement	Interest Rates
DOE, Nelnet, EdFinancial	Federal Direct, FFELP	Financial Aid Office	Fixed / Statutory

PRIVATE LOANS

Servicer / Entity	Portfolio Type	Procurement	Interest Rates
Navient, Sallie Mae, SoFi	Private For-Profit	Direct	Market / Variable / High

HYBRID / MIXED

Servicer / Entity	Portfolio Type	Procurement	Interest Rates
AES, MOHELA	Hybrid	Mixed	Mixed

If a loan is on the **NSLDS file** it is **FEDERAL**

In re Crocker, 941 F.3d 206 (5th Cir. 2019):

Private for-profit student loans are **not** "educational benefits" under § 523(a)(8)(A)(ii).

IMPLICATION:

Private for-profit loans fall strictly under **subsection (B)**.

§ 523(a)(8):

“(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—

(A)

(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;”

Nested Definitions:

In re Quintanilla, 2020 Bankr. LEXIS 3254 (Bankr. M.D. Fla. Nov. 20, 2020)

1. Qualified Education Loan (QEL)

IRC § 221(d)(1)

- Qualified Higher Education Expenses
- Incurred by a taxpayer
- Within a reasonable period
- Who is in eligible student



2. Qualified Higher Education Expenses (QHEE)

IRC § 221(d)(2)

- Cost of Attendance (COA)
- Eligible Educational Institution (EEI)
- Reduced by various scholarships, grants and payments excluded from gross income.



3. Eligible Student

IRC § 221(d)(3)

- Enrolled in degree/credential program
- carrying at least 1/2 normal full-time work load.

4. Eligible Educational Institution (EEI)

26 U.S.C. § 25A(f)(2)

- Must be described in HEA § 481
- Eligible to participate in a Title IV Program.

26 U.S. Code § 221(d) Definitions:

(1) Qualified Education Loan

The term **“qualified education loan”** means any indebtedness incurred by the taxpayer **solely** to pay qualified higher education expenses...

On Behalf Of:

Incurred for the taxpayer, their spouse, or dependents.

Reasonable Period:

Paid or incurred within a reasonable window relative to the loan.

Eligible Student:

Attributable to education while the recipient was eligible.

Qualified Higher Education Expenses (“QHEE”):

Internal Revenue Code § 221(d)(2)

The term “**qualified higher education expenses**” means the cost of attendance at an eligible educational institution, *reduced by the sum of:*

(A)

Exclusions from Gross Income

Amounts excluded under section **127, 135, 529, or 530** by reason of such expenses.

(B)

Scholarships & Payments

The amount of any scholarship, allowance, or payment described in **section 25A(g)(2)**.

Defining "Cost of Attendance" (COA)

20 U.S.C. § 1087II (the HEA)

Tuition & Fees

Amounts normally assessed for the student's enrollment.

Equipment

Materials or supplies required for the course of study.

Books & Travel

Allowances for books, supplies, and transportation.

Miscellaneous

Reasonable allowances for personal expenses.

(A) Exclusions from Gross Income:

Section 127

Employer-Provided assistance up to \$5,250/yr excluded from gross income.

Section 135

U.S. Savings Bonds interest excluded if proceeds used for higher education.

Section 529

Qualified Tuition Programs. Distributions for expenses are tax-free.

Section 530

Coverdell ESAs. Trust distributions for education expenses are tax-exempt.

(B) Scholarship, Allowance, or Payment under § 25A(g)(2):

Pell Grants & Other Tax-Free Grants

This is the most common offset. If a student received a Pell Grant or a State/Institutional grant that was not taxable income, it falls here.

Veterans' Educational Assistance (GI Bill)

Any allowances received under Title 38 (Chapters 30, 31, 32, 34, or 35) or Title 10 (Chapter 1606).

Qualified Scholarships (§ 117)

Any scholarship used for tuition, fees, books, or required equipment that is excluded from the student's gross income.

The Formula:

Qualified Education Loan ("QEL") is a loan incurred solely to pay Qualified Higher Education Expenses ("QHEE").

Qualified Higher Education Expenses ("QHEE") are equal to Cost of Attendance ("COA") reduced by scholarships, grants and tax-free assistance.

$$\text{QEL} = \text{QHEE}$$

$$\text{QHEE} = \text{COA} - \text{Financial Assistance}$$

26 U.S. Code § 221 - Interest on education loans

(a) Allowance of Deduction

*"In the case of an individual, there shall be allowed as a deduction for the taxable year an amount equal to the interest paid by the taxpayer during the taxable year on any **qualified education loan**."*

Integrated Postsecondary Education Data System (IPEDS):

<https://nces.ed.gov/ipeds>

Institutional Data

Access official federal institutional data via *nces.ed.gov/ipeds/*.

Step 1

Look up institution and access the "Institutional Characteristics" section.

Step 2

Pull official COA (Tuition, Room, Board, Books) for the specific year of issuance.

(National Center for Education Statistics)

The National Student Loan Data System File (NSLDS):

<https://nsldsfa.ed.gov/login>

The Download

Debtor logs into StudentAid.gov and downloads the "My Aid Data" text file.

Verification

If missing from NSLDS, the loan is Category B (Private).

Finding Grants

Audit all Pell Grants and SEOG funds by year to calculate IRC offsets.

Example:

IPEDS: Cost of Attendance (COA)

\$15,000.00

NSLDS: Pell Grant (IRC § 25A(g)(2))

- \$5,000.00

NSLDS: SEOG Funds (IRC § 25A(g)(2))

- \$1,000.00

Qualified Higher Education Expense

\$9,000.00

SCHEDULE F: Private Loan Amount

\$12,000.00

Does the loan meet the definition of a QEL?

“any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses”

MATHS?



We don't need no stinking Maths!

Private Lender Arguments:

The "Purpose" Test

- Lenders argue the *stated purpose* at origination determines QEL.
- The QEL status is fixed the moment the Promissory Note is signed.

The Certification Shield

- Lenders obtain school and borrower certifications.
- Lenders claim "Average COA" (IPEDS) is irrelevant because COA is student-specific.
- "COA is what the school says it is." If the school certified the loan, the lender is legally protected.

Takeaways:

01. Strategy Shift

Review alternatives for Chapter 13 Debtors negatively affected by Durand-Day

02. Federal Discharge Success

High success rate for Federal Student Loan Discharges

03. Explore dischargeability of Private Loans

Evaluate and stress test §523(a)(8)(B)

INSTRUCTIONS FOR COMPLETING THE SUMMONS

- 1. A separate summons (Form 2005A) and complaint must be sent to each agency, officer or corporation involved in the suit. (Rule 4(i)(1) and (2)).**

- 2. For service on the United States, pursuant to Rule 4(i)(1)(A), complete the block under TO (name and address of defendant) with the following:**

**United States of America
c/o Alamdar S. Hamdani, U.S. Attorney
1000 LOUISIANA SUITE, 2300
Houston, Texas 77002**

- 3. For service on the Attorney General, complete the block under TO (name and address of defendant) with the following:**

**United States Attorney General
U.S. Department of Justice
10th & Constitutional Avenue, N.W. Washington, D.C. 20530**

- 4. For service on the officer, agency, or corporation involved in the suit, complete the block under TO with their appropriate name, address and serve a copy to the United States Attorney's Office.**

- 5. The United States has 60 days after receipt of service to file an answer to the complaint. Do not enter a specific date in this section. (Rule 12(a)).**

- 6. The original, or a true copy of the summons, bearing the signature of the U.S. District Clerk's office is acceptable. (Rule 4(a) and (b)).**

- 7. The Adversary Proceeding Number and the Clerk's dated file stamp should appear on both the summons and the complaint.**

- 8. All Process Servers must come to 1000 Louisiana, Suite 2300, Houston, Texas 77002 in order to effect personal service.**

- 9. Process Servers may be any person who is not a party to the lawsuit and who is at least 18 years old. (Rule 4(c)(2)).**

- 10. You may serve the summons and complaint by registered or certified mail. The envelope should be mailed to the following (Rule 4(i)):**

**Civil Process Clerk
United States Attorney's Office
1000 Louisiana, Suite 2300
Houston, Texas 77002**

- 11. Serve a copy of the summons and complaint by registered or certified mail to the Attorney General at the address listed in number 3 above.**

- 12. Serve a copy of the summons and complaint by registered or certified mail to the officer, agency, or corporation involved in the case at their appropriate address.**

**U.S. Department of Education
Office of General Counsel
400 Maryland Avenue SW, Room 6E353
Washington, D.C. 20202**

A PRIMER ON

THE SMALL BUSINESS REORGANIZATION ACT OF 2019

by:

Hon. Eduardo V. Rodriguez
Chief United States Bankruptcy Judge
Southern District of Texas, McAllen Division

NOTE: THIS MATERIAL DOES NOT CONSTITUTE THE OFFICIAL POSITION OF THE AUTHOR OR OF ANY COURT AND SHOULD NOT BE CONSTRUED AS AN INDICATION OF FUTURE RULINGS INVOLVING THE SMALL BUSINESS REORGANIZATION ACT OF 2019

I. INTRODUCTION

Effective February 19, 2020, the Small Business Reorganization Act of 2019 (“SBRA”) amends the definitions of “small business case” and “small business debtor” in subsections 101(51C) and (51D) of the Bankruptcy Code, respectively, and adds subchapter V (containing 15 sections) to Chapter 11. While the definition of a small business debtor under § 101(51D) has some conforming changes, the aggregate debt limit of \$3,024,725 does not change. More importantly, subchapter V only applies if the small business debtor *elects* to be governed by the provisions of subchapter V, which includes the appointment of a trustee. Thus, under the SBRA, a § 101(51D) “small business debtor” that files Chapter 11 has two options: (1) proceed as a subchapter V case by electing subchapter V, or (2) proceed as a BAPCPA “small business case” by not electing subchapter V.

But why would a debtor elect to proceed under subchapter V if the appointment of a trustee imposes a degree of oversight on the debtor? This paper attempts to answer that question. Additionally, this paper—although not exhaustive—will attempt to summarize and detail the specific provisions of subchapter V of the Bankruptcy Code in such a way as to introduce the reader to its practical application. As this paper will demonstrate, the new subchapter V is a hybrid of chapters 11, 12 and 13 of the United States Bankruptcy Code.

The principal features of subchapter V are set forth below; before we get to that however, I want to lay out what I see as the big 6:

- elimination of creditor sponsored plans
- elimination for the most part—of a creditors’ committee.
- elimination of the Absolute Priority Rule.
- ability of a Debtor to modify a non-purchase money security interest or mortgage in a residence used in connection with a Debtor’s business.
- confirmation of a Plan can be obtained without the support of any class of claims, so long as the plan meets certain requirements; and
- the serial filer no-automatic-stay provision of § 362(n) does not apply

II. GENERAL PROVISIONS

1. **The small business case:** Eligibility for a Subchapter V small business reorganization case is restricted to a “small business debtor” (statutorily defined in § 101(51D)) that “elects subchapter V of chapter 11 shall apply.” The SBRA also amends the pre-existing “small business case” definition in § 101(51C) as follows:

(51C) The term “small business case” means a case filed under chapter 11 of this title in which the debtor is a small business debtor [defined in § 101(51D)] *and has not elected that subchapter V of chapter 11 of this title shall apply.*

2. **The small business debtor:** The prior definition of “small business debtor” measured the “business” status of a debtor by simply asking whether that debtor is “engaged in commercial

or business activities,” which could mean anything, even something as simple as operating a lemonade stand. The definition now requires that at least 50% of the debt arose from commercial or business activities. Additionally, the SBRA excludes publicly traded corporations and amends the definition of “small business debtor” (now eligible for a subchapter V case) in § 101(51D) as follows:

(51D) The term “small business debtor”—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$3,024,725¹ (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

(B) does not include

(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$3,024,725.00² (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

(iii) any corporation that—

(I) is subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); and

(II) is an affiliate of a debtor.³

3. **Application of subchapter V:** Pursuant to The Bankruptcy Threshold Adjustment and Technical Corrections Act (“BTATCA”)⁴ Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of title 11 shall apply.⁵ BTATCA is set to sunset on June 20, 2024 at which time § 1181 will no longer state the definition of a debtor eligible to be a subchapter V debtor.

¹ See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

² See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

³ See H.R. Rep. No. 116-171, at 24-25 (2019) (reprinting 11 U.S.C.A. § 101(51D), marked to show H.R. 3311 revisions).

⁴ Bankruptcy Threshold Adjustment and Technical Corrections Act, §§ 2(a), (d), Pub. L. No. 117-151, 136 Stat. 1298 (June 21, 2022) (hereinafter “BTATCA”).

⁵ 11 U.S.C. § 103(i).

4. **Making An Election under Subchapter V:** A § 101(51C)⁶ “small business case” is the statutory trigger for mandatory application of the BAPCPA small business reorganization provisions which remain in place. Under the SBRA, however, a § 101(51D) “small business debtor” can *opt out* of the BAPCPA regime by electing for the case to proceed as a Subchapter V case.
- a. § 1182(1) defines “debtor” eligibility for subchapter V until June 20, 2024. Thereafter, a debtor must be a “small business debtor,” a term defined in § 101(51D) to be eligible for subchapter V. Except for the debt limit (\$3,024,725 under § 101(51D) and \$7.5 million under § 1182(1), eligibility for subchapter V is the same under both provisions.
 - b. Thus a “small business debtor” is not necessarily a debtor in a “small business case.” Rather, a “small business case” is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case.
5. **Objecting to eligibility:** Parties in interest may object to a debtor’s statement of whether it is a small business debtor or is eligible for subchapter V. Bankruptcy Rule 1020(b) requires an objection to a debtor’s statement of its small business status within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Courts are split on whether the Debtor or the objecting party has the burden of proof that the debtor is not eligible.
6. **No means test:** Subchapter V does not incorporate any portion of the means test under either § 1322(d), regarding the filing of the plan, or § 1325(b), regarding confirmation standards. As a result, small business sole proprietorship debtors may escape the means test altogether.⁷
7. **Small business reporting requirements:** Because the trigger for mandatory application of the 2005 BAPCPA small business provisions is a “small business case” (statutorily defined in amended § 101(51C) to exclude subchapter V cases), nearly all of those BAPCPA provisions (e.g., the serial filer no-automatic-stay provision of § 362(n)) will be inapplicable to a small business debtor who elects subchapter V. The only BAPCPA provisions that will also apply to all subchapter V debtors are the reporting and operational requirements set forth in §§ 308 and 1116, all of which are explicitly made applicable to subchapter V cases.
8. **No creditors’ committee:** No creditors’ committee will be appointed unless the court orders for cause.⁸ This applies to any small business debtor including those that elect to proceed under subchapter V.
9. **Debtor exclusivity:** 90 days is in, 300 day limit is out. The 90 day fast track makes sense in light of the elimination of creditor sponsored plans.⁹

⁶ (51C)The term “small business case” means a case filed under chapter 11 of this title in which the debt or is a small business debtor and has not elected that subchapter V of chapter 11 of this title shall apply. 11 U.S.C. § 101(51C)

⁷ Both §§ 1129(a) and (b) were eliminated in SBRA, specific to this section, § 1129(a)(15).

⁸ 11 U.S.C. § 1102(a)(3).

⁹ 11 U.S.C. § 1189(a).

10. Debtor’s counsel can have a pre-petition claim of \$10,000 or less and still be disinterested:

The disinterestedness requirement under § 327(a) is relaxed so that a professional is not disqualified for employment solely because the professional holds a pre-petition claim, as long as the claim is less than \$10,000.¹⁰

11. Time For Secured Creditor to Make § 1111(b) Election § 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.¹¹ If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.¹² Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.¹³

12. Adversary proceeding venue: Title 28 currently requires an action to be commenced in the district where the defendant resides, if the non-consumer debt sought to be recovered by the action against a non-insider does not exceed \$13,650.¹⁴ Subchapter V would increase this amount to \$25,000. It does not change the limit on consumer debts (\$20,450).¹⁵

III. DUTIES OF THE SUBCHAPTER V DEBTOR IN POSSESSION

13. Debtor in possession:¹⁶ The subchapter V Debtor in Possession (“DIP”) has all the rights and powers and shall perform all functions and duties of a chapter 11 trustee except the duties specified in paragraphs (2), (3), and (4) of § 1106.

14. Section 1116 duties: The DIP has the same duties as that of a small business case under § 1116 except that the requirement of appending to the petition the financial information required under § 1116(1) is excused.¹⁷ Section 1116 duties include:

- a. attending meetings scheduled by the court or the U.S. Trustee;
- b. timely filing all schedules and statements;

¹⁰ 11 U.S.C. § 1195. See also *In re Ozcelebi*, 631 B.R. 629 (Bankr. S.D. Tex. 2021).

¹¹ 11 U.S.C. § 1111(b).

¹² FED. R. BANKR. P. 3014.

¹³ INTERIM RULE 3017.

¹⁴ 28 U.S.C. § 1409(b).

¹⁵ Note: It is not clear whether 28 U.S.C. § 1409(b) applies to avoidance actions. The majority of courts hold that it does not, because it omits proceedings “arising under” Title 11 from those to which § 1409(b) expressly applies. See *Webster v. Republic Nat’l Distrib. Co. LLC (In re Tadich Grill of Washington D.C. LLC)*, 598 B.R. 65, 67 (Bankr. D.C. 2019) (holding that 28 U.S.C. § 1409(b) does not apply to a proceeding “arising under title 11.”). The minority view holds that the omission of proceedings “arising under” Title 11 was inadvertent, and that § 1409(b) should apply to such proceedings. See *NI Creditors’ Trust v. Crown Packaging Corp. (In re Nukote Int’l, Inc.)*, 457 B.R. 668, 684 (Bankr. M.D. Tenn. 2011) (applying 28 U.S.C. § 1409(b) to avoidance actions).

¹⁶ 11 U.S.C. § 1184.

¹⁷ 11 U.S.C. § 1187(b).

- c. filing post-petition financial and other reports required by the Bankruptcy Rules or local rules;
- d. the debtor's most recent balance sheet;
- e. statement of operations;
- f. cash-flow statement;
- g. federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.
- h. maintaining insurance appropriate for the debtor's business;
- i. timely filing tax returns and other required government filings;
- j. timely paying all taxes entitled to administrative expense priority; and
- k. allowing the U.S. Trustee or other designated representative, such as the appointed trustee, to inspect the debtor's business, books, and records at reasonable times.¹⁸

15. **Section 1106 duties:** A subchapter V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).¹⁹ Those duties include:

- a. to be accountable for all property received;
- b. to examine and object to proofs of claim if a purpose would be served;
- c. to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise;
- d. to file reports;
- e. to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee;
- f. to provide required notices with regard to domestic support obligations;
- g. to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.²⁰

16. **Section 308 duties:** § 308 requires a subchapter V debtor to file periodic reports which continue to apply in a non-subchapter V small business case that must contain information including:

- a. the debtor's profitability;
- b. reasonable approximations of the debtor's projected case receipts and cash disbursements;
- c. comparisons of actual case receipts and disbursements with projections in earlier reports;
- d. whether the debtor is in compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and

¹⁸ 11 U.S.C. § 1116.

¹⁹ 11 U.S.C. 1106.

²⁰ 11 U.S.C. 1106(a)(1).

- e. if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.²¹

17. **Mandatory status conference:** The court must hold a status conference not less than 60 days after the case is commenced. Additionally, the debtor, not later than 14 days before the date of the status conference, must file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual reorganization plan.²² A debtor's unexcused failure to file the report timely or to attend the status conference could be cause for dismissal or conversion of the case under § 1112(b) or denial of confirmation. "Cause" for dismissal includes unexcused failure to satisfy timely any filing or reporting requirement under the Bankruptcy Code, § 1112(b)(4)(F), and the failure to comply with an order of the court, § 1112(b)(4)(E).

IV. REMOVAL OF THE DEBTOR IN POSSESSION

18. **Removal for cause:** § 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.²³ "Cause" includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case."²⁴ Additionally, a court may, after notice and a hearing, remove a debtor from possession *sua sponte*. § 1185(a) also provides for removal of the debtor in possession "for failure to perform the obligations of the debtor" under a confirmed plan.²⁵ This provision is unique to subchapter V.

19. **Reinstatement:** § 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.²⁶

V. DUTIES OF THE SUBCHAPTER V TRUSTEE

20. **A subchapter V trustee shall be in every small business debtor case:** The U.S. Trustee ("UST") will appoint a trustee for every case under new subchapter V, either through one or more standing trustees in the region like chapter 13 cases, or on a case-by-case basis like chapter 7 cases.²⁷

21. **General role of the subchapter V trustee:** In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete

²¹ 11 U.S.C. § 308.

²² 11 U.S.C. § 1188.

²³ 11 U.S.C. § 1185(a).

²⁴ 11 U.S.C. § 1185(a).

²⁵ 11 U.S.C. § 1185(a).

²⁶ 11 U.S.C. § 1185(b).

²⁷ 11 U.S.C. § 1183(a).

and accurate financial reports.²⁸ Additionally, the subchapter V trustee will have a number of specific duties, including:

- a. accounting for the debtor's property;
- b. examining and objecting to claims;
- c. opposing debtor's discharge;
- d. furnishing information regarding estate and estate's administration to a party in interest;
- e. make a final report and file final account of administration of the estate;
- f. investigate the debtor, debtor's business, desirability of continuance of such business; and other material relevant to the case of the formulation of a plan, and file such reports as are necessary to the Court;
- g. appearing at an initial status conference;
- h. facilitating the development of a consensual plan;
- i. if the debtor ceases to be a debtor in possession, operate the business of the debtor;
- j. confirmation of a reorganization plan and its modification post-confirmation;
- k. sale of estate property; and
- l. supervising and controlling property and funds to be distributed under the plan (or actually making the distributions).²⁹

22. Expanded role of the subchapter V trustee: The court may impose the investigative duties that § 1106(a)(3) specifies for a chapter 11 trustee in a traditional case on the subchapter V trustee. Under §1183(b)(2), the court (for cause and on request of a party in interest, the subchapter V trustee, or the U.S. Trustee) may order that the subchapter V trustee perform certain duties of a chapter 11 trustee under § 1106(a). The specified duties are:

- a. to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3));
- b. to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)113); and
- c. to file postconfirmation reports as the court directs (§ 1106(a)(7)).³⁰

23. If the DIP is removed for cause, the subchapter V trustee steps in and takes charge: On request of a party in interest, and after notice and a hearing:

- a. the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor,

²⁸ The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee's role in the case. U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials> [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK].

²⁹ 11 U.S.C. § 1183(b).

³⁰ 11 U.S.C. § 1183(b)(2).

either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.³¹

- b. If the debtor ceases to be a debtor in possession, the standing trustee shall perform the duties specified in § 704(a)(8) (operate debtor’s business) and paragraphs (1), (2), and (6) of § 1106(a) (Duties of trustee and examiner) of this title.³²

24. The subchapter V trustee may make adequate protection payments to secured creditors prior to confirmation: As ordered by the court and after notice and a hearing.³³ Section 1194(a) states that the trustee shall retain any “payments and funds” received by the trustee until confirmation or denial of a plan.³⁴ If a plan is confirmed, §1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee.

25. The subchapter V trustee’s role in plan payments: Under §1194(b), the subchapter V trustee makes payments under a plan confirmed under the cramdown provisions of §1191(b), unless the plan or confirmation order provides otherwise.³⁵ If a consensual plan is confirmed under §1191(a), however, the subchapter V trustee’s service terminates under §1183(c) upon “substantial consummation,” and the debtor makes plan payments.³⁶

26. Reappointment of subchapter V trustee: §1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee’s duty under §1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.³⁷ §1183(c) permits reappointment of the trustee if necessary to perform the trustee’s duties under §1185(a).³⁸ §1185(a) provides for the removal of the debtor in possession, among other things, for “failure to perform the obligations of the debtor under a plan confirmed under this chapter.”³⁹

27. The subchapter V trustee is compensated similar to current Chapter 12 and 13 trustees: The debtor will be required to pay the trustee’s compensation, which will be calculated the same way as for a chapter 12 and 13 trustees.⁴⁰

28. Trustee’s affirmative preference defense analysis in all cases under the code: Revised § 547(b) of the Bankruptcy Code specifies an additional criterion that a trustee must address before commencing an action to recover an alleged preference. It requires the trustee to determine whether to exercise the authority to sue “based on reasonable due diligence in the

³¹ 11 U.S.C. § 1185.

³² 11 U.S.C. § 1183(b)(5).

³³ 11 U.S.C. § 1194(c).

³⁴ 11 U.S.A. § 1194(a).

³⁵ 11 U.S.A. §1194(b).

³⁶ 11 U.S.A. §1191(a).

³⁷ 11 U.S.C. §1183(c)(1).

³⁸ 11 U.S.C. §1183(c).

³⁹ 11 U.S.C. §1185(a).

⁴⁰ 11 U.S.C. § 326(b); 28 U.S.C. § 586(e).

circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c)."⁴¹

29. **No quarterly UST fees.:** UST quarterly fees have been eliminated in small business cases filed under this new chapter of the code.⁴²

VI. THE SUBCHAPTER V PLAN

30. **Time for filing of a Plan:** The debtor must file a plan within 90 days after filing the case.⁴³ The court can extend that deadline, but only for matters for which the debtor should not justly be held accountable.⁴⁴ Section 1121 is not incorporated into subchapter V thus the 300-day limit for filing a plan in a small business case does not apply.⁴⁵
31. **Only the DIP may file a plan:** Only the debtor can file a plan; competing plans are not allowed.⁴⁶
32. **Extension of the time to file:** The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.⁴⁷
33. **No disclosure statement:** No disclosure statement is required unless the Court orders otherwise.⁴⁸ If the court requires a disclosure statement, the existing disclosure requirements for small business cases in § 1125(f) will apply⁴⁹ which means that:
- a. the court may approve a disclosure statement submitted on standard forms;
 - b. the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;
 - c. votes may be solicited on a conditionally approved disclosure statement, and
 - d. the hearing on the disclosure statement may be combined with the hearing on confirmation.
34. **Contents of the subchapter V plan:**⁵⁰ The "adequate information" standard of § 1125(a) does not apply to subchapter V plan disclosures.⁵¹ The plan itself will provide the required disclosures.⁵² If the Court, therefore, determines that a plan's § 1190(1) disclosures are false, misleading or otherwise "inadequate," the Court could deny confirmation of the plan via §

⁴¹ 11 U.S.C. § 547.

⁴² 28 U.S.C. § 1930(a)(6)(A).

⁴³ 11 U.S.C. § 1189(b).

⁴⁴ *Id.* See also *In re Excellence 2000, Inc.* 636 B.R. 475 (Bankr. S.D. Tex. 2022).

⁴⁵ 11 U.S.C. § 1181(a).

⁴⁶ 11 U.S.C. § 1189.

⁴⁷ 11 U.S.C. § 1189(b); See also *In re Baker*, 625 B. R. 27 (Bankr. S.D. Tex. 2020).

⁴⁸ 11 U.S.C. § 1187.

⁴⁹ *Id.*

⁵⁰ Note: § 1123 remains in full force and effect. Only § 1123(a)(8) is specifically excluded from SBRA because § 1190(2) provides for payments to creditors to be made through the trustee.

⁵¹ 11 U.S.C. § 1181(b).

⁵² 11 U.S.C. § 1190(1).

1129(a)(3) “good faith” confirmation requisite. Subchapter V sets forth various requirements for the reorganization plan, including:

- a. a brief history of the debtor's business operations;
- b. a liquidation analysis and projections with respect to the debtor's ability to make payments under the proposed reorganization plan;
- c. projections with respect to the ability of the debtor to make payments under the proposed plan;
- d. a submission of all or such portion of the debtor's future earnings or other future income to the trustee, as is necessary for the execution of the plan; and;
- e. modification of the rights of a holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if:
 - i. the new value received in connection with the granting of the security interest was not used primarily to acquire the real property, but
 - ii. was used primarily in connection with the small business of the debtor.⁵³
- f. Section 1123(a)(8) which requires the Debtor to provide for the payment to creditors of earnings from personal services as is necessary for the plan does not apply to the subchapter V Debtor;⁵⁴
- g. Section 1123(c) which prohibits the sale of an individual debtor’s exempt assets without consent, does not apply to the subchapter V debtor either.⁵⁵ This is because only the Debtor may propose a plan under the subchapter V.

35. Requirements of §1190 for contents of subchapter V plan: § 1190 contains three provisions governing the content of a subchapter V plan:

- a. §1190(1)⁵⁶ requires information that would otherwise be included in a disclosure statement. The plan must include: (a) a brief history of the operations of the debtor; (b) a liquidation analysis; and (c) projections regarding the ability of the debtor to make payments under the proposed plan. under the proposed plan.
- b. §1190(2) requires the plan to provide for the submission of “all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” This rule applies in both individual and non-individual cases⁵⁷; and

⁵³ 11 U.S.C. § 1190. Compare §§ 1123(b)(5) and 1322(b)(2) prohibiting bifurcation of home mortgage. Chapter 12, however contains no similar provision because a farmer’s principal residence is often physically located upon land that is also used as a business asset, and such a debt secured by that property should be considered a business debt. That is the same concept here in subchapter V.

⁵⁴ 11 U.S.C. § 1181(a).

⁵⁵ *Id.*

⁵⁶ 11 U.S.C. § 1123(c).

⁵⁷ 11 U.S.C. § 1190(2).

- c. §1190(3) states that notwithstanding § 1123(b)(5), a plan may modify the rights of a claim secured only by a security interest in real property that is the debtor's principal residence.⁵⁸

36. **Conversion or dismissal:** Section 1112 was not excluded from subchapter V, therefore dismissal is not automatic, and the case may still be converted for cause.⁵⁹

VII. PLAN CONFIRMATION

37. **Confirmation of a subchapter V plan generally:** Whether consensual or cramdown confirmation occurs, confirmation in a subchapter V case requires satisfaction of all the applicable confirmation requirements of § 1129(a) and, in an individual case, compliance with the projected disposable income requirement of §1129(a)(15).

38. **Confirmation of the consensual plan pursuant to § 1191(a):** Confirmation of a consensual subchapter V plan under § 1191(a) is achieved according to the same standards for and with the same effect as confirmation of a chapter 11 plan proposed and confirmed under the current chapter 11 process. With only a couple of minor exceptions,⁶⁰ all of the provisions of §§ 1122, 1123, 1124, and 1126 regarding contents of the plan, classification, impairment, and voting are fully applicable to a subchapter V plan.

- a. To confirm a consensual plan, the debtor must satisfy all of the requirements of § 1129(a) (confirmation of a plan) including § 1129(a)(8) (acceptance by all impaired classes), compliance with § 1129(a)(10), (acceptance by at least one class of claims) but not the individual debtor requirements under § 1129(a)(15) (best efforts).⁶¹ If all the applicable requirements in § 1129(a) are met except for the paragraph (a)(15), §1191(a) requires the court to confirm the plan.
- b. Votes in a subchapter V are required to determine whether the plan will be consensual or subject to cramdown under §§ 1191(b) and 1129(b)(2)(A).

⁵⁸ 11 U.S.C. § 1190(3).

⁵⁹ 11 U.S.C. § 1112.

⁶⁰ See Pub. L. No. 116-54, § 2(a) (2019) (enacting 11 U.S.C.A. § 1181(a)). Section 1123(a)(8), which contemplates that an individual debtor's plan will provide for payment of post-petition earnings to creditors, is inapplicable in subchapter V because : (1) §§ 1190(2) & 1194(b) contemplate that the subchapter V trustee will make payments to creditors under a subchapter V cram-down plan, and (2) under § 1186(a), a subchapter V debtor's post-petition earnings are *not* property of the estate if a consensual plan is confirmed. Section 1123(c), which addresses plans filed by non-debtors, is also inapplicable in subchapter V because only the subchapter V debtor can file a plan.

⁶¹ 11 U.S.C. § 1191(a); With the exception of § 1129(a)(15), which is inapplicable in Subchapter V. See Pub. L. No. 116-54, § 2(a) (2019) (enacting 11 U.S.C.A. §§ 1181(a) & 1191(a), both of which make § 1129(a)(15) inapplicable in Subchapter V). That § 1129(a)(15) best-efforts provision, though, is really more in the nature of a special kind of cram-down requisite for individual Chapter 11 debtors, like the best-efforts provisions applicable in Chapters 12 and 13 and now subchapter V.

- c. All classes must accept the plan or be unimpaired. Additionally, § 1124⁶² still governs the determination of whether a claim is impaired and § 1126⁶³ still governs voting and determination of accepting classes.⁶⁴
- d. Administrative expenses allowed under § 507(a)(2) must be paid in full on the effective date of the plan.⁶⁵
- e. Special benefits for individual debtors. The benefits from a § 1191(a) consensual confirmation are significant for an individual subchapter V debtor when compared to consensual confirmation for an individual Chapter 11 debtor who does not qualify as a “small business debtor” or elect subchapter V. Even if every one of an individual chapter 11 debtor’s creditors votes to accept (and does not object to) the plan, § 1141(d)(5) provides that an individual debtor cannot receive a discharge until the debtor actually completes all plan payments (or enough payments to give all unsecured creditors full liquidation value, in the case of a hardship discharge). Moreover, all of that individual chapter 11 debtor’s post-petition earnings and any other non-exempt property acquired post-petition (and until the chapter 11 case is closed, dismissed, or converted) become property of the debtor’s bankruptcy estate under § 1115(a). Neither § 1141(d)(5) nor § 1115(a), however, are applicable in a subchapter V case.⁶⁶

39. 11 U.S.C. § 1191(a), Confirmation of a consensual plan, step by step:

- a. **Jurisdiction, Venue, and Constitutional Authority:** The Court has subject matter jurisdiction over the Case pursuant to 28 U.S.C. §§ 157 and 1334 and the General Order 2012-6 of the United States District Court for the Southern District of Texas. Venue is proper in this judicial district as of the Petition Date and remains proper under 28 U.S.C. §§ 1408 and 1409. Confirmation of the Plan and approval is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L). Accordingly, this Court concludes that the narrow limitation imposed by *Stern* does not prohibit this Court from entering a final order here.⁶⁷
- b. **Eligibility:** The Debtor must demonstrate that as of the Petition Date, it was and continues to be, eligible for relief under 11 U.S.C. §§ 109 and 1182, and the Debtor is the proper proponent of the Plan under 11 U.S.C. § 1189.

⁶² Impairment of claims or interests.

⁶³ Acceptance of plan.

⁶⁴ 11 U.S.C. § 1181(a) (not excluding §§ 1124 and 1126 from subchapter V).

⁶⁵ See 11 U.S.C.A. §§ 1191(a), 1129(a)(9)(A).

⁶⁶ 11 U.S.C. § 1181(a).

⁶⁷ See, e.g., *Badami v. Sears (In re AFY, Inc.)*, 461 B.R. 541, 547-48 (8th Cir. BAP 2012) (“Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional.”); see also *Tanguy v. West (In re Davis)*, No. 00-50129, 538 F. App’x 440, 443 (5th Cir. 2013) (“[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to ‘counterclaims by the estate against persons filing claims against the estate,’ *Stern* expressly provides that its limited holding applies only in that ‘one isolated respect’ We decline to extend *Stern*’s limited holding herein.”) (Citing *Stern*, 564 U.S. at 475, 503, 131 S.Ct. 2594).

- c. **Subchapter deadlines:** On ____ 20 __, the Debtor filed its Chapter 11 Subchapter V Status Conference Statement in accordance with 11 U.S.C. § 1188(c). On ____ 2024, the Court held a chapter 11 subchapter V status conference as required by 11 U.S.C. § 1188(a). The Debtor complied with 11 U.S.C. § 1189(b) by timely filing a proposed plan of reorganization within 90 days of the Petition Date. The Plan is dated and identifies the entity submitting it, thereby satisfying Bankruptcy Rule 3016(a).
- d. **Order Providing Notice of Confirmation Hearing and Establishing Key Deadlines:** On ____ 2024, the Court entered an Order setting a hearing on confirmation, which, among other things: (a) set the Confirmation Hearing for ____, 20__ at ____ .m. (Central Time); (b) set the deadline to object to the Plan on ____ 20 __; and (c) set the deadline for filing ballots accepting or rejecting the Plan on ____, 2024 (the “Confirmation Hearing Notice”).
- e. **Solicitation and Notice:** The Plan, Confirmation Hearing Notice, and ballots to the creditors who were entitled to vote on the Plan (collectively, the “Ballots”) were transmitted and served in compliance with 11 U.S.C. §§ 1125 and 1126. All parties required to be given notice of the bankruptcy, all deadlines in the Case, the Plan, and the Confirmation Hearing have been provided due, proper, timely, and adequate notice and had an opportunity to appear and be heard with respect thereto. No other or further notice is required.
- f. **Good faith solicitation:** Votes for acceptance and rejection of the Plan must be solicited in good faith and in compliance with 11 U.S.C. §§ 1125 and 1126, and Bankruptcy Rules 3017 and 3018.
- g. **Balloting:** Prior to the confirmation hearing, the Debtor must timely file the ballots accepting and rejecting the Plan. The procedures used to tabulate the ballots must be fair and conducted in accordance with 11 U.S.C. § 1126.
- h. **Subchapter V plan content:** The Plan must comply with 11 U.S.C. § 1190 by containing the following mandatory content: (i) a brief history of Debtor’s business operations; (ii) a liquidation analysis; (iii) projections with respect to the Debtor’s ability to make the payments under the Plan; and (iv) the submission of all or a portion of the subchapter V debtor’s post-petition income from future earnings to the supervision and control of the trustee as is necessary for the execution of the plan.
- i. **Burden of proof:** The Debtor, as proponent of the Plan, must meet its burden of proving the applicable elements of 11 U.S.C. §§ 1191 and 1129 by a preponderance of the evidence, which is the applicable evidentiary standard for confirmation of the Plan.
- j. **Classification of claims; unfair discrimination:** The plan must designate classes of claims, with some exceptions such as priority tax claims, and interests pursuant to 11 U.S.C. § 1123(a), and specify any class that is not impaired pursuant to 11 U.S.C. §

1123(b). Pursuant to 11 U.S.C. § 1122(a) claims or interests in a class must be “substantially similar.”

- k. **11 U.S.C. § 1129(a)(1), Plan compliance with the Bankruptcy Code:** The Plan must comply with all applicable provisions of the Bankruptcy Code, including the applicable provisions of 11 U.S.C. §§ 1122 and 1123(a)(1-8) addressing the classification of claims and interests.
- l. **11 U.S.C. 1129(a)(2): The Debtor’s Compliance with the Bankruptcy Code:** The Debtor must comply with all applicable provisions of the Bankruptcy Code as required by 11 U.S.C. 1129(a)(2), including 11 U.S.C. §§ 1122, 1123, 1125 and 1126. The Debtor must have solicited and tabulated votes on the Plan in good faith within the meaning of 11 U.S.C. § 1125(e) and other applicable provisions of the Bankruptcy Code. Moreover, the Plan must contain the disclosures required by 11 U.S.C. § 1190(1) and (2), thus satisfying the requirements of section 1129(a)(2).
- m. **11 U.S.C. § 1129(a)(3): Good faith:** The Debtor must propose the Plan in good faith and not by any means forbidden by law. In other words, when the case was filed, and the Plan was proposed, the Plan must have a legitimate and honest purpose of allowing the Debtor to reorganize and a reasonable chance of success.
- n. **11 U.S.C. 1129(a)(4): Payment of Professional Fees:** The Plan must provide that payments made or to be made by the Debtor for services or for costs and expenses in, or in connection with, the case, or in connection with the Plan and incident to the case, have been approved by, or are subject to the approval of, the Court as reasonable.
- o. **11 U.S.C. 1129(a)(5): Identity of officers and directors:** The proponent of the plan must disclose the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.
- p. **11 U.S.C. 1129(a)(6): Rate changes:** The Debtor must disclose whether is subject to the oversight of any regulatory commissions and whether the Plan provides for the change of any rate that is regulated by a governmental regulatory commission.
- q. **11 U.S.C. §1129(a)(7): Best interest of creditors:** The Plan must provide that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.

- r. **11 U.S.C. 1129(a)(8): Acceptance by impaired classes:** The Debtor must demonstrate that with respect to each class of claims or interests—such class has accepted the plan; or such class is not impaired under the plan.
 - s. **11 U.S.C. § 1129(a)(9): Payment in full of administrative and priority claims:** The Plan must provide for the treatment of Administrative Claims and Priority Tax Claims as is in accordance with the requirements of this section.
 - t. **11 U.S.C. § 1129(a)(10): Impaired accepting class:** The Debtor must demonstrate that at least one impaired class has accepted the Plan.
 - u. **11 U.S.C. § 1129(a)(11): Feasibility:** The Debtor must demonstrate that the Plan has “a reasonable assurance of commercial viability” and that the financial projections are reasonable and achievable, the Plan is feasible, and confirmation is not likely to be followed by the Reorganized Debtor liquidating or requiring further financial reorganization.
 - v. **11 U.S.C. § 1129(a)(12): UST fees:** Subchapter V debtors are expressly exempted from the payment of UST Fees.
 - w. **11 U.S.C. § 1129(a)(13): Continuation of retirement benefits:** The plan must provide for the continuation after its effective date of payment of all retiree benefits, if any.
 - x. **11 U.S.C. § 1129(a)(14): Domestic Support Obligation:** The Plan must provide that if the debtor is an individual and is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.
 - y. **11 U.S.C. § 1129(a)(15): Projected Disposable Income:** Pursuant to § 1181(a), § 1129(a)(15) does not apply in subchapter V.⁶⁸
 - z. **11 U.S.C. § 1129(a)(16): Transfers of property:** The Plan must provide that all transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.
40. **Introduction to confirmation of the non-consensual (“Cramdown”) plan pursuant to § 1191(b):** The Debtor may proceed to non-consensual confirmation if (i) the debtor is unable to obtain the acceptance of all impaired classes; (ii) plan satisfies § 1129(a) [other than (a)(8) (each class has accepted or is unimpaired), (a)(10) (at least one accepting impaired class has accepted the plan⁶⁹, and (a)(15) (individual debtor’s projected disposable income

⁶⁸ 11 U.S.C. §1181(a).

⁶⁹ § 1129(a)(10) is not applicable to a subchapter V cramdown plan. § 1129(a)(10) provides that if a plan impairs any creditor classes, then that plan can only be confirmed if at least one class of impaired claims has voted to accept the

requirement)]; (iii) the plan does not discriminate unfairly and (iv) the plan is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. Additionally, the absolute priority rule,⁷⁰ § 1129(b)(2)(B), is *eliminated* for cramdown, which will allow existing owners to retain their full ownership without giving any new value, but only if the plan provides for the debtor to distribute all of its projected disposable income over at least three years from the date the first payment is due under the plan (or property having a value of at least that amount).⁷¹ The absolute priority rule, instead, has been replaced with a “fair and equitable” requirement in order to protect dissenting unsecured classes similar to those requirements found in applicable chapters 12 and 13 and individual chapter 11 cases. § 1191(c) makes the § 1129(b)(2)(A) cramdown requirements applicable to secured claims, and paragraphs (2) (the commitment of disposable income) and (3) (a finding of feasibility) impose additional requirements.⁷² § 1191(c) does not state a “fair and equitable” rule specifically for unsecured claims. Instead, § 1191(c) imposes a projected disposable income requirement, requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made.⁷³ Key questions that the court must consider for confirmation are (a) how is projected disposable income determined and (b) how does the court determine whether the required period should be longer than three (3) years.

41. 11 U.S.C. § 1191(b): Confirmation of a non-consensual plan, step by step:

- a. **Jurisdiction, Venue, and Constitutional Authority:** The Court has subject matter jurisdiction over the Case pursuant to 28 U.S.C. §§ 157 and 1334 and the General Order 2012-6 of the United States District Court for the Southern District of Texas. Venue is proper in this judicial district as of the Petition Date and remains proper under 28 U.S.C. §§ 1408 and 1409. Confirmation of the Plan and approval is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L). Accordingly, this Court concludes that the narrow limitation imposed by *Stern* does not prohibit this Court from entering a final order here.⁷⁴

plan. Thus, a court can confirm a cramdown a plan even if all impaired classes have voted to reject the plan.⁶⁹ This is significant because § 1129(a)(10) oftentimes gives under-secured lenders the equivalent of a cram-down veto.

⁷⁰ 11 U.S.C. § 1181(a). Section 1129(b)(2)(B) is not applicable to the SBRA.

⁷¹ Removal of the absolute priority rule from the SBRA is probably the most significant departure from the typical chapter 11 case. Section 1129(b)(2)(B)(ii) provides that a dissenting class of unsecured creditors must be paid in full before any junior class can receive or retain any property under a confirmed plan. If the unsecured creditor class votes to reject the typical chapter 11 plan, equity holders cannot receive anything under the plan unless the dissenting class is paid in full. There are some exceptions to the absolute priority rule such as new value, but there are strict limitations that apply and a complete discussion of same is beyond this paper. Removing the absolute priority rule should motivate small business owners to continue managing the business while enjoying continued ownership of the company and paying creditors amounts that are feasible and based on debtor’s disposable income. See also *In re Lasalle*, 119 S. Ct. 1411 (S. Ct. 1991) (old equity holders are disqualified from participating in such a “new value” transaction by the terms of 11 U.S.C. § 1129(b)(2)(B)(ii), which in such circumstances bars a junior interest holder’s receipt of any property on account of his prior interest)

⁷² 11 U.S.C. § 1191(c)(1).

⁷³ 11 U.S.C. § 1191(c).

⁷⁴ See, e.g., *Badami v. Sears (In re AFY, Inc.)*, 461 B.R. 541, 547-48 (8th Cir. BAP 2012) (“Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional.”); see also *Tanguy v. West (In re Davis)*, No. 00-50129, 538 F. App’x 440, 443 (5th Cir. 2013) (“[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to ‘counterclaims by the estate against persons filing claims against

- b. **Eligibility:** The Debtor must demonstrate that as of the Petition Date, it was and continues to be, eligible for relief under 11 U.S.C. §§ 109 and 1182, and the Debtor is the proper proponent of the Plan under 11 U.S.C. § 1189.
- c. **Subchapter deadlines:** On ____ 2024, the Debtor filed its Chapter 11 Subchapter V Status Conference Statement in accordance with 11 U.S.C. § 1188(c). On ____ 2024, the Court held a chapter 11 subchapter V status conference as required by 11 U.S.C. § 1188(a). The Debtor complied with 11 U.S.C. § 1189(b) by timely filing a proposed plan of reorganization within 90 days of the Petition Date. The Plan is dated and identifies the entity submitting it, thereby satisfying Bankruptcy Rule 3016(a).
- d. **Order Providing Notice of Confirmation Hearing and Establishing Key Deadlines:** On ____ 20__, the Court entered an Order setting a hearing on confirmation, which, among other things: (a) set the Confirmation Hearing for ____, 20__ at ____ .m. (Central Time); (b) set the deadline to object to the Plan on ____ 20__; and (c) set the deadline for filing ballots accepting or rejecting the Plan on ____, 2024 (the “Confirmation Hearing Notice”).
- e. **Solicitation and Notice:** The Plan, Confirmation Hearing Notice, and ballots to the creditors who were entitled to vote on the Plan (collectively, the “Ballots”) were transmitted and served in compliance with 11 U.S.C. §§ 1125 and 1126. All parties required to be given notice of the bankruptcy, all deadlines in the Case, the Plan, and the Confirmation Hearing have been provided due, proper, timely, and adequate notice and had an opportunity to appear and be heard with respect thereto. No other or further notice is required.
- f. **Classification of claims or interests:** The plan must not discriminate unfairly. Valid legal and business justifications exist for separately classifying claims.⁷⁵ The plan must designate classes of claims, with some exceptions such as priority tax claims, and interests pursuant to 11 U.S.C. § 1123(a), and specify any class that is not impaired pursuant to 11 U.S.C. § 1123(b). Pursuant to 11 U.S.C. § 1122(a) claims or interests in a class must be “substantially similar.”
- g. **Fair and equitable and Projected Disposable Income:** In a non-Subchapter V Chapter 11 case, 11 U.S.C. § 1129(b)(1) requires that for the bankruptcy court to confirm a plan, the plan must be “fair and equitable” to classes that have not accepted the plan.⁷⁶ In situations where an unsecured class of creditors has not accepted the plan, a plan is not “fair and equitable” (and, thus, not confirmable) unless, among other requirements, the plan satisfies the “absolute priority rule.”⁷⁷ The absolute priority rule provides that if a plan

the estate,’ *Stern* expressly provides that its limited holding applies only in that ‘one isolated respect’ We decline to extend *Stern*’s limited holding herein.”) (Citing *Stern*, 564 U.S. at 475, 503, 131 S.Ct. 2594).

⁷⁵ 11 U.S.C. § 1122.

⁷⁶ 11 U.S.C.A. §§ 1129(a)(8), 1129(b)(1).

⁷⁷ 11 U.S.C.A. § 1129(b)(2)(B)(ii).

is to be crammed down over a dissenting class of unsecured creditors whose claims are not being paid in full, no class of claims or interests junior to the dissenting class may receive or retain any consideration. In other words, the debtor must pay all unsecured claims before realizing value for equity holders. One critical statutory change in the SBRA related to confirmation in Subchapter V cases is the replacing of the absolute priority rule with the “projected disposable income” requirement for confirming a cramdown plan under 11 U.S.C. § 1191(b) when a class of unsecured creditors objects to the plan. Accordingly, a cramdown plan must also satisfy the “fair and equitable” requirement of § 1191(b), also known as the “best efforts” test.

- h. **Fair & Equitable (Two Requirements – Projected Disposable Income and Feasibility)**: A non-consensual plan is “fair and equitable” if (1) it provides for all of the debtor’s projected disposable income to be used to pay creditors over a period of at least 3 years or such longer time not to exceed five years as the court may fix, to make payments under the plan⁷⁸ **or**, alternatively, to pay the value of that projected disposable income⁷⁹ and (2) Debtor must also demonstrate one of the two alternatives stated below as follows: (a) it will be able to make all plan payments **or** (a) there is a reasonable likelihood that debtor will be able to make all plan payments **AND** the Plan provided for appropriate remedies upon default, such as liquidation of non-exempt assets, to protect holders of claims or interests in the event payments are not made.⁸⁰ The requirement that a small business debtor must contribute its projected—*not* actual—disposable income for confirming a nonconsensual subchapter V plan is not an accident, but rather is an indispensable aspect of the broader SBRA framework that promotes the policy goals underpinning subchapter V. To confirm a cramdown plan, the debtor must demonstrate that the plan: (i) does not discriminate unfairly; and (ii) is fair and equitable as to each impaired, nonconsenting class.⁸¹ A plan is “fair and equitable” **IF** § 1129(b)(2)(A) is satisfied. As for secured creditors the plan must provide that:
- a. secured creditors must retain their liens and receive on account of their claims deferred cash payments totaling at least the allowed amount of their claims;
 - b. if the plan contemplates a sale, the plan must provide that the secured creditor’s liens attach to the proceeds of the sale; and
 - c. if the plan contemplates neither, then the plan must provide that the secured creditors receive the indubitable equivalent of their claims.⁸² **AND**
 - d. As for dissenting unsecured creditors, 11 U.S.C. § 1191(c) then provides that for purposes of § 1191(b), “the condition that a plan be fair and equitable with respect

⁷⁸ 11 U.S.C.A. § 1191(c)(2)(A).

⁷⁹ 11 U.S.C.A. § 1191(c)(2)(B).

⁸⁰ 11 U.S.C. § 1191(c)(3)(A), (B) (i), (ii).

⁸¹ 11 U.S.C. §§ 1181(a), 1191(b).

⁸² 11 U.S.C. § 1191(c)(1).

to each class of claims or interests” requires satisfying one of two requirements as of the effective date of the plan:

(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; **OR**

(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.⁸³

- i. **Projected Disposable Income defined or PDI:** PDI is not defined in the Bankruptcy Code. Section 1191(d) defines disposable income as the income that is received by the debtor and that is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor; or a domestic support obligation that first becomes payable after the date of the filing of the petition; or for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.⁸⁴
- ii. **Projected Disposable Income – How Satisfied:** Section 1191(d), does not require that a means test⁸⁵ application of income and expenditures similar to that of chapter 13 be applied in a subchapter V case. The test for determining what maintenance and support expenditures are “reasonably necessary to be expended” for “maintenance or support” in §1191(d)(1) in subchapter V cases is the court’s evaluation of the Debtor’s Schedules I and J. In other words, there is no distinction between what permissible expenses should be based on the Debtor’s income. So (a) what expenditures are allowed to be paid by the reorganized debtor for the “continuation, preservation, or operation of the business and (b) how does a debtor prove the reasonableness of making those payments at a contested confirmation hearing to meet its burden of proving that the plan is fair and equitable under § 1191(b) and, therefore, should be confirmed?²³
 - a. As for the first question, §1191(d) is intentionally broad allowing for a fact-specific inquiry and flexibility for the debtor to craft its post-confirmation budget. Additionally, the definitions of the terms used in § 1191(d) provide useful guidance on what expenses Congress intended to permit a debtor to pay before calculating its disposable income: “**Continuation**” means the “act or fact of continuing in or the prolongation of a state or activity”;⁸⁶ “**Preservation**” means the “act, process, or result of preserving something: such as ... the activity or process of keeping

⁸³ 11 U.S.C.A. § 1191(c)(2).

⁸⁴ 11 U.S.C. § 1191(d).

⁸⁵ See 11 U.S.C. § 1325(d).

⁸⁶ <https://www.merriam>

[webster.com/dictionary/continuation?utm_campaign=sd&utm_medium=serp&utm_source=jsonld](https://www.merriam-webster.com/dictionary/continuation?utm_campaign=sd&utm_medium=serp&utm_source=jsonld).

something valued alive, intact, or free from damage or decay”;⁸⁷ and “**Operation**” means the “performance of a practical work or of something involving the practical application of principles or processes.”⁸⁸

- i. Given the definitions above, the reorganized debtor is permitted to pay, before calculating disposable income, ordinary expenditures required to continue operations after confirmation, which include administrative expense claims required to be paid by the plan and Bankruptcy Code, secured debt, payroll, utilities, rent and other lease obligations, supply and inventory expenditures, taxes, and other ordinary obligations for continuing the business. In addition, the debtor may pay ordinary repair and maintenance expenses, as well as deferred maintenance costs, that are necessary to sustain operations and preserve the business and the value of the debtor's assets. The debtor also may include reasonable adjustments over the period of the plan payments, such as anticipated yearly increases to the cost of payroll and supplies, as well as reasonable changes to revenue, all of which are appropriate for the long-term continuation and operation of the business. Further, depending on the business's needs, the debtor should account for potential variations and cycles in revenue and expenses, as well as the seasonality of the business, if relevant, all of which are permitted under § 1191(d). Finally, the debtor also should consider building a reserve fund through its projections such that, for example, the debtor is not required to deplete all of its available cash as “disposable income” to pay creditors when the business will not operate on a positive cash flow basis for a future period and needs to draw on reserve cash in the interim period to continue the business.
- b. As for the second question—how a debtor establishes that it is committing projected disposable income under the plan—is related to the first question and overlaps with the debtor's obligation to satisfy other requirements of the Bankruptcy Code for confirmation, including § 1190(1)(C) (required contents of Subchapter V plan include projections showing debtor's ability to make payments under plan), § 1129(a)(11) (debtor must establish feasibility of plan), and § 1191(d)(3) (debtor must establish ability to make payments under plan for plan to be fair and equitable).⁸⁹ Specifically, the debtor should file with the plan cash flow projections for the period of disbursements proposed under the plan reflecting anticipated revenue and expenses, as well as projected disposable income during the period that the debtor proposes to contribute to unsecured creditors.⁹⁰ The cash

⁸⁷ <https://www.merriam-webster.com/dictionary/preservation>.

⁸⁸ <https://www.merriam-webster.com/dictionary/operation>.

⁸⁹ 11 U.S.C.A. §§ 1129(a)(11), 1190(1)(C), 1191(d)(3).

⁹⁰ In re Pearl Resources LLC, 622 B.R. 236, 246–47 (Bankr. S.D. Tex. 2020) (§ 1190(1)(C) satisfied where debtors' financial projections demonstrated that there was a reasonable likelihood that debtors will have projected disposable income sufficient to pay all allowed claims). Section 1190(1)(c)'s requirement to file “projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization” may be viewed more flexibly by

flow projections should be based on the historic performance of the business, (including monthly operating reports) with modifications for anticipated future events, including new debt service under the plan, administrative expense claims, any operational changes for the reorganized debtor, the proceeds of asset sales, and necessary expense adjustments. Thus, in preparing and evaluating the cash flow projections, § 1191(d) refers to expenses that are “not reasonably necessary to be expended”—not “absolutely necessary” or other language that would require the debtor to operate below optimum levels or otherwise restrict ordinary business expenses to establish that the plan is fair and equitable.⁹¹

- c. **Three Years of Disposable Income Payments Is the Minimum, But Courts May Extend the Payment Period.** Section 1191(c)(2) provides that the value of projected disposable income contributed by the small business debtor under the plan must include at least three years “or such longer period not to exceed 5 years as the court may fix[.]”⁹² If challenged, Courts must consider whether grounds exist to extend payments for a period beyond the three years.
- d. **Section 1191(c)(2)(B) Payment in full of Projected Disposable Income Payments on the Effective Date.** Whether three, four, or five years of projected disposable income is required, § 1191(c)(2)(B) provides the debtor the option in confirmed plans under § 1191(b) to contribute the value of the projected disposable income on the effective date of the plan, rather than through periodic payments over time.⁹³ Although cash-strapped debtors may struggle to make a lumpsum payment on the effective date, if the debtor is able to fund a plan under § 1191(c)(2)(B), the debtor would benefit from an earlier discharge and easier administration of payment ongoing obligations after confirmation.⁹⁴
- e. **“Projected” Disposable Income Does Not Mean “Actual” Disposable Income.**
 - i. **Consensual confirmation:** In the context of consensual plan confirmation under § 1191(a), unsecured creditors can negotiate for distributions based on actual performance (or other metrics or terms they find acceptable) such that the creditor body preserves some upside opportunity in the event the debtor outperforms its projections after the effective date. Hence the debtor must weigh the benefits of consensual confirmation under § 1191(a) (and potentially higher payments to creditors) against the cost, difficulty, and

the bankruptcy court if the debtor proposes to fund the plan in full on the effective date and the plan's implementation is not dependent on the debtor's post-confirmation performance.

⁹¹ 11 U.S.C. § 1191(d).

⁹² 11 U.S.C. § 1191(c)(2).

⁹³ 11 U.S.C. § 1191(c)(2)(B)

⁹⁴ . In *In re Lost Cajun Enterprises, LLC*, 634 B.R. 1063, 1068 (Bankr. D. Colo. 2021) the debtor proposed a plan with an equity contribution of \$89,000 from the debtor's sole member, equal to the three-year disposable income projections, to be paid to unsecured creditors on a pro rata basis on the effective date.⁵⁰ Over a creditor's objection, the court confirmed the plan as fair and equitable because the debtor was paying three years of disposable income to the objecting unsecured creditors in cash on the effective date of the plan.

probability of success in pursuing a contested confirmation process under § 1191(b). Such negotiations toward a consensual plan are what subchapter V intended, assisted by the Subchapter V trustee.

- ii. **Non-consensual confirmation:** In the context of a non-consensual plan, the question becomes whether the payments to an objecting class of general unsecured creditors be fixed as of the effective date based on forward-looking projected disposable income or should the amount that the debtor must contribute fluctuate based on the reorganized debtor's actual performance. The answer is simple, payments premised upon projected disposable income *must be fixed* if a plan is being confirmed under § 1191(b). § 1191(c)(2)(A) and (B) are alternatives—separated by “or”—and the provisions are not both required, as if separated by “and.” Additionally, the mandatory language of § 1191(b) provides that if all of the applicable requirements of § 1129(a) (other than § 1129(a)(8), (10), and (15)) are met, then the court “*shall* confirm the plan” if the “plan does not discriminate unfairly, and is fair and equitable ...”⁷¹ Finally, § 1191(c) then provides *when* a Subchapter V plan is fair and equitable, including if it provides for payments in the amount of projected disposable income (either over time or the value of such payments on the effective date). To hold otherwise effectively removes § 1191(c) from the confirmation calculus by making it merely a suggestion from which courts can depart, rather than the determinative confirmation test for a debtor to meet. In other words, if actual disposable income could be required in a nonconsensual plan, it would make confirmation under § 1191(c)(2)(B) impossible because no debtor could know the value of its “actual” income years into the future for purposes of determining the value of property it must contribute on the effective date.

iii. Projected disposable income requirement – How invoked & its effect on cases:

- a. Because there is no unsecured creditor voting in Chapter 12 (or Chapter 13), the best-efforts requirement (of both Chapter 12 and Chapter 13) is triggered “[i]f the trustee or the holder of an allowed unsecured claim objects to confirmation of the plan.”⁹⁵
- b. Likewise, in an individual-debtor Chapter 11 case, the Projected disposable income requirement of § 1129(a)(15) applies whenever any “holder of an allowed unsecured claim objects to the confirmation of the plan.”⁹⁶
- c. In subchapter V, however, the projected disposable income requirement applies only if a *class* of claims or interests, as a class, has not accepted the debtor’s plan by the requisite majority specified in § 1126(c) (2/3 in amount of claims

⁹⁵ 11 U.S.C. §§ 1225(b)(1), 1325(b)(1).

⁹⁶ 11 U.S.C. § 1129(a)(15).

and majority in number of creditors voting).⁹⁷ The threshold for invoking the projected disposable income requirement in subchapter V, therefore, is higher than in Chapter 12 (or Chapter 13 or individual-debtor Chapter 11 cases).

- d. Importantly, the subchapter V projected disposable income requirement is not restricted to cases in which an impaired unsecured class has rejected the plan. By the express terms of § 1191(b), projected disposable income requirement of § 1191(c)(2) applies “with respect to *each* class of claims or interests that is impaired under, and has not accepted, the plan.
 - e. Thus, while subchapter V removes substantial secured-creditor control (by making the § 1129(a)(10) at least one impaired class requirement and the § 1129(b)(2)(B) absolute priority rule inapplicable in subchapter V), the ability to always insist that the debtor make three to five years of Projected disposable income payments will nonetheless give secured creditors significant leverage in negotiating favorable subchapter V plan treatment.
- c. **Feasibility and default remedies:** Debtor must also demonstrate one of the two alternatives stated below as follows: (1) it will be able to make all plan payments **or** (2) there is a reasonable likelihood that debtor will be able to make all plan payments **AND** the Plan provided for appropriate remedies upon default, such as liquidation of non-exempt assets, to protect holders of claims or interests in the event payments are not made.⁹⁸
- i. **Special Benefits for Individual Debtors.**
 - a. In a non-subchapter V case, any single unsecured creditor can (by objection) invoke the § 1129(a)(15) projected disposable income requirement, whereas a class rejection is required to invoke the subchapter V best-efforts requirement;
 - b. unlike chapter 13, the three-to-five-year subchapter V projected disposable income requirement makes no distinctions whatsoever between above- and below-median-income debtors and thus is more generous to debtors in subchapter V as opposed to chapter 13;
 - c. the minimum projected disposable income requirement period under § 1129(a)(15) is always five years and is longer if the plan provides for any payments beyond five years. Under § 1129(a)(15), the projected disposable income requirement period is “the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.” Not true in Subchapter V.

⁹⁷ 11 U.S.C. § 1191(c)(2).

⁹⁸ 11 U.S.C. § 1191(c)(3)(A), (B) (i), (ii).

- i. **Administrative Expenses:** With respect to the payment of administrative expenses (e.g., the debtor's attorneys' fees), the plan may provide for their payment through the plan.⁹⁹
- j. **Expanded Property of The Estate:** If the subchapter V plan is confirmed under the § 1191(b) cram-down provision, then (like in Chapter 12¹⁰⁰, Chapter 13¹⁰¹, and individual-debtor Chapter 11¹⁰² cases) property of the estate includes those assets listed in § 541. However, if the debtor seeks confirmation of a cramdown small business plan, property of the estate also includes earnings and property acquired post-petition and post-confirmation, until the case is closed, dismissed, or converted.¹⁰³ The takeaway is:
 - i. Technically speaking, the debtor does not have to include post-petition earnings to fund a consensual plan. The reality is that most debtors will have to include those earnings in order to meet the feasibility requirement.
 - ii. Section 1186 (inclusion of post-petition earnings) is similar to that under § 1115 for individual chapter 11 debtors but differs because § 1115 applies to an individual case immediately upon filing, whereas § 1186 only applies if debtor failed to obtain a consensual plan under § 1191(a) and now seeks confirmation under the cramdown provisions of § 1191(b).
 - iii. Essentially § 1186 forces the debtor to contribute its post-petition earnings similar to “new value” to fund a non-consensual plan.
- k. **Good faith solicitation:** Votes for acceptance and rejection of the Plan must be solicited in good faith and in compliance with 11 U.S.C. §§ 1125 and 1126, Bankruptcy Rules 3017 and 3018.
- l. **Balloting:** Prior to the confirmation hearing, the Debtor must timely file the ballots accepting and rejecting the Plan. The procedures used to tabulate the ballots must be fair and conducted in accordance with 11 U.S.C. § 1126.
- m. **Subchapter deadlines:** On ___ 20___, the Debtor filed its Chapter 11 Subchapter V Status Conference Statement in accordance with 11 U.S.C. § 1188(c). On ___ 20___, the Court held a chapter 11 subchapter V status conference as required by 11 U.S.C. § 1188(a). The Debtor complied with 11 U.S.C. § 1189(b) by timely filing a proposed plan of reorganization within 90 days of the Petition Date. The Plan is dated and identifies the entity submitting it, thereby satisfying Bankruptcy Rule 3016(a).
- n. **Subchapter V plan content:** The Plan must comply with 11 U.S.C. § 1190 by containing the following mandatory content: (i) a brief history of Debtor’s business operations; (ii) a

⁹⁹ *Id.*

¹⁰⁰ 11 U.S.C. § 1207(a).

¹⁰¹ 11 U.S.C. § 1306(a).

¹⁰² 11 U.S.C. § 1115(a).

¹⁰³ 11 U.S.C. § 1186(a).

liquidation analysis; (iii) projections with respect to the Debtor's ability to make the payments under the Plan; and (iv) the submission of all or a portion of the subchapter V debtor's post-petition income from future earnings to the supervision and control of the trustee as is necessary for the execution of the plan.

- o. **Burden of proof:** The Debtor, as proponent of the Plan, must meet its burden of proving the applicable elements of 11 U.S.C. §§ 1191 and 1129 by a preponderance of the evidence, which is the applicable evidentiary standard for confirmation of the Plan.
- p. **11 U.S.C. § 1129(a)(1), Plan compliance with the Bankruptcy Code:** The Plan must comply with all applicable provisions of the Bankruptcy Code, including the applicable provisions of 11 U.S.C. §§ 1122 and 1123(a)(1-8) addressing the classification of claims and interests.
- q. **11 U.S.C. 1129(a)(2): The Debtor's Compliance with the Bankruptcy Code:** The Debtor must comply with all applicable provisions of the Bankruptcy Code as required by 11 U.S.C. 1129(a)(2), including 11 U.S.C. §§ 1122, 1123, 1125 and 1126. The Debtor must have solicited and tabulated votes on the Plan in good faith within the meaning of 11 U.S.C. § 1125(e) and other applicable provisions of the Bankruptcy Code. Moreover, the Plan must contain the disclosures required by 11 U.S.C. § 1190(1) and (2), thus satisfying the requirements of section 1129(a)(2).
- r. **11 U.S.C. § 1129(a)(3): Good faith:** The Debtor must propose the Plan in good faith and not by any means forbidden by law. In other words, when the case was filed, and the Plan was proposed, the Plan must have a legitimate and honest purpose of allowing the Debtor to reorganize and a reasonable chance of success.
- s. **11 U.S.C. 1129(a)(4): Payment of Professional Fees:** The Plan must provide that payments made or to be made by the Debtor for services or for costs and expenses in, or in connection with, the case, or in connection with the Plan and incident to the case, have been approved by, or are subject to the approval of, the Court as reasonable.
- t. **11 U.S.C. 1129(a)(5): Identity of officers and directors:** The proponent of the plan must disclose the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.
- u. **11 U.S.C. 1129(a)(6): Rate changes:** The Debtor must disclose whether is subject to the oversight of any regulatory commissions and whether the Plan provides for the change of any rate that is regulated by a governmental regulatory commission.

- v. **11 U.S.C. §1129(a)(7): Best interest of creditors:** The Plan must provide that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.
- w. **11 U.S.C. 1129(a)(8): Acceptance by impaired classes:** The Debtor must demonstrate that with respect to each class of claims or interests—such class has accepted the plan; or such class is not impaired under the plan. However, the Debtor is not required to satisfy the requirements of section 1129(a)(8) to obtain confirmation of the Plan under section 1191(b).
- x. **11 U.S.C. § 1129(a)(9): Payment in full of administrative and priority claims:** The Plan must provide for the treatment of Administrative Claims and Priority Tax Claims as is in accordance with the requirements of this section.
- y. **11 U.S.C. § 1129(a)(10): Impaired accepting class:** The Debtor must demonstrate that at least one impaired class has accepted the Plan. However, the Debtor is not required to satisfy the requirements of section 1129(a)(10) to obtain confirmation of the Plan under section 1191(b).
- z. **11 U.S.C. § 1129(a)(11): Feasibility:** The Debtor must demonstrate that the Plan has “a reasonable assurance of commercial viability” and that the financial projections are reasonable and achievable, the Plan is feasible, and confirmation is not likely to be followed by the Reorganized Debtor liquidating or requiring further financial reorganization.
- aa. **11 U.S.C. § 1129(a)(12): UST fees:** Subchapter V debtors are expressly exempted from the payment of UST Fees.
- bb. **11 U.S.C. § 1129(a)(13): Continuation of retirement benefits:** The plan must provide for the continuation after its effective date of payment of all retiree benefits, if any.
- cc. **11 U.S.C. § 1129(a)(14): Domestic Support Obligation:** The Plan must provide that if the debtor is an individual and is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.
- dd. **11 U.S.C. § 1129(a)(15): Projected Disposable Income:** Pursuant to § 1181(a), § 1129(a)(15) does not apply in subchapter V.¹⁰⁴ Instead, § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.

¹⁰⁴ 11 U.S.C. §1181(a).

- ee. **11 U.S.C. § 1129(a)(16): Transfers of property:** The Plan must provide that all transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

VIII. PLAN PAYMENTS

40. Pre-Confirmation payments to the trustee:

- a. Unlike Chapter 13 (in § 1326(a)(1)), subchapter V (like Chapter 12) does not require the debtor to begin making plan payments to the trustee prior to confirmation.
- b. Nonetheless, in § 1194(a) (which is similar to § 1226(a) and § 1326(a)(2)), subchapter V contemplates that the debtor can and may well begin making plan payments to the trustee prior to confirmation.

41. Payments received by the trustee are:

- a. to be retained until confirmation and upon confirmation;
 - i. distributed in accordance with the plan; however,
 - ii. if the plan is not confirmed, the payments shall be returned to the debtor after deducting payment of administrative expenses, under § 503(b), adequate protection payments and trustee's fees.¹⁰⁵

42. Payments in consensual plans:

- a. If a plan is confirmed under § 1191(a), the service of the trustee terminates when the plan has been substantially consummated and the debtor will make the remaining payments under the plan.¹⁰⁶
- b. To remove the trustee, the debtor must file with the court a notice of substantial consummation not later than fourteen days after the debtor's plan is substantially consummated.¹⁰⁷

43. Payments in non-consensual plans:

- a. If a plan is confirmed under § 1191(b) (Cramdown), and unless the plan or conformation order states otherwise, the trustee makes all the payments to creditors.¹⁰⁸

¹⁰⁵ 11 U.S.C. § 1194.

¹⁰⁶ 11 U.S.C. § 1183(c).

¹⁰⁷ *Id.* § 1183(c)(2).

¹⁰⁸ 11 U.S.C. § 1191(b).

- b. In a non-consensual plan in which the subchapter V trustee is making payments, the subchapter V trustee's services does not terminate upon substantial confirmation but continues until the subchapter V trustee completes all the required disbursements.¹⁰⁹

IX. PLAN MODIFICATION

44. **Introduction:** Postconfirmation modification under §1193 may occur regardless of whether the court has confirmed a consensual plan under §1191(a) or a cramdown plan under §1191(b). However, if the court confirmed a consensual plan, the rules applicable to modification are different from those of a non-consensual plan.¹¹⁰

- a. **Substantial consummation** occurs when: the “transfer of all or substantially all of the property proposed by the plan to be transferred” is transferred; the “assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan” or the “commencement of distribution under the plan.”¹¹¹

45. **Modification of a consensual plan:** Unlike §§ 1229 and 1329, § 1193 does not permit an unsecured creditor or trustee to file a plan modification.¹¹² Only the debtor may modify the plan any time before confirmation.¹¹³ The rules regarding modification of a confirmed consensual subchapter V plan follow the general and more restrictive chapter 11 model rules.

- a. If the plan has been confirmed under § 1191(a), the debtor may modify the plan at any time after confirmation but before substantial consummation of the plan.¹¹⁴
- b. A consensual plan can only be modified:
 - i. before substantial consummation thereof,
 - ii. if the court finds that “circumstances warrant the modification,” and
 - iii. the modified plan meets all of the criteria for a § 1191(a) consensual confirmation¹¹⁵ including acceptance by all impaired classes after affording creditors and interest holders an opportunity to change their votes.¹¹⁶

46. **Modification of a non-consensual plan:** Modification of a subchapter V non-consensual plan is similar to those applicable to post-confirmation modifications of chapters 12¹¹⁷ and 13¹¹⁸

¹⁰⁹ 11 U.S.C. § 1183(c)(1).

¹¹⁰ See 11 U.S.C. § 1193.

¹¹¹ 11 U.S.C. § 1101.

¹¹² 11 U.S.C. § 1193.

¹¹³ *Id.*

¹¹⁴ *Id.* § 1193(b).

¹¹⁵ *Id.*

¹¹⁶ 11 U.S.C. § 1193(d).

¹¹⁷ See 11 U.S.C. § 1229.

¹¹⁸ *Id.*

plans. However, unlike chapters 12 and 13, only the subchapter V debtor can propose post-confirmation modifications.

- a. If the plan is confirmed under § 1191(b), the debtor may only modify the plan at any time within 3 years, or such longer time not to exceed 5 years even after substantial consummation,¹¹⁹ if:
 - i. the court finds that “circumstances warrant the modification,” and
 - ii. the modified plan meets all the criteria for a § 1191(b) cram-down confirmation.¹²⁰

X. DISCHARGE

47. Discharge from a consensual plan: If a plan is confirmed under § 1191(a), all of the provisions of § 1141(d) apply, other than § 1141(d)(5) pertaining to individual chapter 11 cases. Therefore:

- a. discharge occurs (for both individual and non-individual debtors) upon the effective date of a consensual plan;¹²¹ with two exceptions:
 - i. in the case of an individual, § 1141(d)(2) provides that the discharge does not discharge any debt of the kind specified in § 523(a)
 - ii. § 1141(d)(6) provides that the discharge does not discharge an entity from any debt: (1) of the kind specified in § 523(a)(2)(A) or (B)⁵⁰⁴ that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 (the False Claims Act) or similar state laws (§ 1146(d)(6)(A)); or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid.¹²²
- b. property of the estate is immediately revested in the debtor as a reorganized debtor¹²³
- c. the requirement that all plan payments be completed before a discharge can be granted does not apply in a consensual subchapter V plan.
- d. A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.¹²⁴

48. Discharge from a non-consensual plan: If a plan is confirmed under § 1191(b) (Cramdown), § 1141(d) does not apply, except as provided in § 1192. Instead, the debtor receives a discharge under § 1192.¹²⁵

¹¹⁹ 11 U.S.C. § 1193(c).

¹²⁰ 11 U.S.C. § 1191(c).

¹²¹ 11 U.S.C. §§ 1191(a) and 1141(d)(1)(A)

¹²² 11 U.S.C. § 1141(d)(6)(B).

¹²³ 11 U.S.C. § 1141(b).

¹²⁴ 11 U.S.C. § 1141(d)(3).

¹²⁵ 11 U.S.C. § 1181(c).

- a. a discharge is not granted until the debtor (for both individual and non-individual debtors) completes all payments due within the first three years of the plan or for such period as the court may fix which is to not exceed five years;¹²⁶ with the following two exceptions:
 - i. long term debts upon which the last payment is due after the commitment period under the plan; and
 - ii. claims that are nondischargeable under § 523(a)¹²⁷

49. **Discharge of debtor in a liquidating plan:** § 1192 does not preclude a debtor from obtaining a discharge in a cramdown liquidating plan under subchapter V.¹²⁸ Nevertheless, § 1141(d)(3) is still applicable and would prohibit the debtor from obtaining a discharge in a cramdown liquidating plan under subchapter V.¹²⁹

50. **No super discharge:** As is the case for any individual Chapter 11 debtor¹³⁰, but unlike Chapter 12¹³¹ or Chapter 13¹³², an individual subchapter V debtor cannot discharge any nondischargeable debts “of the kind specified in section 523(a).” There is no super-discharge, therefore, available to individual debtors in subchapter V.

51. **No hardship discharge:** Unlike Chapters 12¹³³ and 13¹³⁴ (and individual-debtor Chapter 11¹³⁵ cases), there is no provision for a subchapter V hardship discharge in the event of only partial plan performance.

¹²⁶ 11 U.S.C. § 1192.

¹²⁷ 11 U.S.C. § 1192(1). Note: § 523(a) applies to both individual and corporate debtors, whereas in a typical chapter 11 case, § 523(a) only applied to individual debtors. Whereas under a typical chapter 11 case, and pursuant to § 1141(d)(6)(A), only certain types of debts were nondischargeable. Under the subchapter V, claims such as fraud, breach of fiduciary duty, and willful and malicious injury will be nondischargeable against a corporate debtor under § 523(a). Recall that the Absolute Priority Rule was eliminated in the Cramdown plan, thus it makes sense that incorporating § 523(a) types of causes of action is necessary to ensure that equity does not obtain a windfall at the expense of the unsecured class of creditors.

¹²⁸ 11 U.S.C. §§ 1181(a), 1141(d)(3). (After all payments are made in a cramdown plan, the debtor is entitled to a “discharge of all debts provided in § 1141(d)(1)(A)).

¹²⁹ 11 U.S.C. § 1181(a).

¹³⁰ See 11 U.S.C. § 523(a).

¹³¹ See 11 U.S.C. §§ 523(a)(1)(A)-(B), 1228(a)(2), 1228(c)(2), 1232(a) & (c).

¹³² Compare 11 U.S.C. § 523(a) with 11 U.S.C. § 1328(a).

¹³³ See 11 U.S.C. § 1228(b).

¹³⁴ See 11 U.S.C. § 1328(b).

¹³⁵ See 11 U.S.C. § 1141(d)(5)(B).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
_____ DIVISION

IN RE:	§	
[DEBTOR]	§	Case No.: _____
[DEBTOR],	§	
Debtors,	§	Chapter 7
[DEBTOR/PLAINTIFF],	§	
Plaintiff,	§	Adv No.: _____
v.	§	
	§	
United States of America, Department	§	COMPLAINT TO
of Education,	§	DISCHARGE STUDENT LOANS
Defendant.	§	

COMPLAINT TO DETERMINE DISCHARGEABILITY OF STUDENT LOANS

_____ (“Plaintiff”), by and through counsel brings the following complaint and alleges as follows:

I. NATURE OF CASE

1. This is an action to declare the Plaintiff(s)’ student loan debt to Defendant(s), the United States Department of Education (“US DOE”), dischargeable as an undue hardship under 11 U.S.C. § 523(a)(8).

II. JURISDICTION AND VENUE

2. On [DATE], Plaintiff filed a voluntary 7 bankruptcy proceeding, Case Number _____.
3. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157. This is an action to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(8), and as such, this is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The Plaintiff consents to the Bankruptcy Court’s entry of a final judgment on core and non-core claims.
4. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1409(a) because the Plaintiff

filed bankruptcy in the United States Bankruptcy Court Southern District of Texas, _____
Division.

5. This is an adversary proceeding pursuant to Fed. R. Bankr. P. 7001(6).
6. Defendant is a qualifying governmental institution in the business of making, insuring, and guaranteeing student loans. Defendant's mailing address is United States Department of Education, 400 Maryland Ave., SW, Washington, DC 20202.

III. LEGAL STANDARD

7. Pursuant to § 523(a)(8) of the Bankruptcy Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan "would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).
8. The most common framework for assessing undue hardship is the so-called *Brunner* test. *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor's financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396.

IV. PLAINTIFF'S UNDUE HARDSHIP

9. Prior to filing bankruptcy, in the course of Plaintiff's education, Plaintiff borrowed approximately _____ from Defendant(s) in order to finance Plaintiff's education. The current outstanding balance of the student loan(s) is _____.

10. A list of the loans with current balances is attached to the Complaint as Exhibit No. 1.

11. Plaintiff incurred the student loan(s) while attending _____ where Plaintiff was pursuing a _____ degree. No payments were due on these loans while Plaintiff was a full-time student.

12. Plaintiff completed his/her course of study on or about _____ [or if not completed, say so] and received a degree in _____.

13. Under the terms of the loans, Plaintiff was required to begin payments six months after enrollment in the school ended.

14. Under the U.S. Department of Education's Standard Repayment Plan, Plaintiff would be required to maintain monthly payments of _____ for _____ years in order to pay off the balance of the student loans.

15. Since repayment on the student loans began, the debtor has:

- a. Made approximately _____ payments on the loans, totaling approximately _____;
- b. Received _____ cumulative forbearances & deferments totaling _____ months;
- c. Applied for Income-Driven Repayment Plan.

16. Plaintiff is not currently employed. [UPDATE AS NEEDED]

17. Plaintiff's current monthly household income is _____. Plaintiff's current monthly household expenses, including payroll deductions, are _____.

18. Plaintiff is unable to make payments on his/her student loans. After deducting Plaintiff's reasonable and necessary expenses from his/her income, Plaintiff's discretionary income is insufficient to make student loan payments as required under the loan agreement.

19. Plaintiff's current state of affairs is likely to persist, and his/her financial circumstances are unlikely to materially improve, for a significant portion of the debt repayment period.

20. Plaintiff has made good faith efforts to repay the student loans at issue in this proceeding.

21. Based upon the foregoing facts and circumstances, Plaintiff cannot maintain a minimal standard of living if forced to repay the student loans.

WHEREFORE, Plaintiff respectfully requests this Court to enter a judgment finding that excepting his/her student loans from discharge would impose an undue hardship as provided in 11 USC §523(a)(8), declaring the student loans to be included in Plaintiff's discharge under §727(a)/1328(a), and for any other relief as the Court deems just and proper.

Respectfully Submitted,

[SIGNATURE BLOCK]

Exhibit 1

List of loans with current balances

Loan Type (Loan Holder/Service)	Principal Balance	Accrued Interest	Status

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
_____ DIVISION

IN RE:	§	
[DEBTOR]	§	Case No.: _____
[DEBTOR],	§	
Debtors,	§	Chapter 7
[DEBTOR/PLAINTIFF],	§	
Plaintiff,	§	Adv No.: _____
v.	§	
	§	
United States of America, Department	§	COMPLAINT TO
of Education,	§	DISCHARGE STUDENT LOANS
Defendant.	§	

**JOINT STIPULATION AND MOTION FOR JUDGMENT
DETERMINING DISCHARGEABILITY**

Plaintiff _____ and Defendant the United States of America, on behalf of the United States Department of Education (“DOE”), jointly move the Court for approval of their Stipulation that Plaintiff’s student loan debts that are the subject of this adversary proceeding are dischargeable under 11 U.S.C. § 523(a)(8), and jointly stipulate as follows:

BACKGROUND

1. Plaintiff filed a voluntary chapter 7 bankruptcy petition on [DATE]. *See* Bankr. Case No. _____. *See* ECF No. 1.
2. The Chapter 7 Trustee filed a Report of No Distribution in that case on [DATE], asserting that after a diligent inquiry into the financial affairs of the Plaintiff-Debtor and the location of the property belonging to the estate, there was no property available for distribution from the estate over and above that exempted by law. *See* Bankr. Case No. ___, ECF No. ____.
3. On [DATE], Plaintiff moved to reopen the Chapter 7 case for purposes of filing a student loan adversary proceeding. *See* Bankr. Case No. ___, ECF No. ____.

4. On [DATE], Plaintiff filed this adversary proceeding to determine whether the federal student loans owed to the DOE were dischargeable. ECF No. 1.
5. As of [DATE], the balance of the student loan debts was \$_____.
6. Plaintiff seeks a determination that all these student loans are dischargeable.

LEGAL STANDARD

Pursuant to 11 U.S.C. § 523(a)(8), student loans are excepted from discharge “unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents.” § 523(a)(8). To determine “undue hardship,” courts in the Fifth Circuit apply the three-pronged *Brunner* test. *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003) (citing *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)). All three prongs must be satisfied to establish undue hardship. *In re Little*, 607 B.R. 853, 858 (Bankr. N.D. Tex. 2019).

To satisfy the *Brunner* test, the debtor must show:

- (1) that the debtor cannot maintain, based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.

Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)). The debtor must prove the case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287 (1991)(holding that a preponderance of the evidence standard is appropriate when evaluating § 523(a) dischargeability exceptions). However, “the bankruptcy court must make an independent determination of undue hardship . . . even if the creditor fails to object or appear in the adversary proceeding.” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010).

STIPULATION OF UNDUE HARDSHIP

The United States Department of Education and Plaintiff agree that Plaintiff has satisfied the *Brunner* test and shown that excepting Plaintiff's federal student loan debts from discharge will impose an undue hardship on Plaintiff because:

1. Plaintiff cannot maintain, based on current income and expenses, a "minimal" standard of living for Plaintiff and Plaintiff's dependents if forced to repay the loans because [CURRENT EMPLOYMENT STATUS; AND INCOME VS EXPENSES];
2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans because [PROVIDE REASON]; and
3. Plaintiff has made good faith efforts to repay the loans.

The United States of America and Plaintiff thus jointly move the Court for a judgment determining that Plaintiff's Department of Education student loan debts are dischargeable under 11 U.S.C. § 523(a)(8).

CONCLUSION

Based on the foregoing, both parties respectfully request that the Court enter a judgment determining that Plaintiff's student loan debts listed above are discharged pursuant to 11 U.S.C. § 523(a)(8) and granting such other and further relief as the Court deems just and proper.

Dated: _____

Respectfully submitted,

[SIGNATURE BLOCK]

[SIGNATURE BLOCK]

Attorney for Plaintiff

Attorney for the United States Department of
Education

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
_____ DIVISION

IN RE:	§	
[DEBTOR]	§	Case No.: _____
[DEBTOR],	§	
Debtors,	§	Chapter 7
[DEBTOR/PLAINTIFF],	§	
Plaintiff,	§	Adv No.: _____
v.	§	
	§	
United States of America, Department	§	COMPLAINT TO
of Education,	§	DISCHARGE STUDENT LOANS
Defendant.	§	

JUDGMENT

(Relating to ECF No. __)

Having considered the Joint Stipulation and Motion for Judgment Determining Dischargeability filed by Plaintiff and Defendant United States Department of Education, the Court is of the opinion that the Motion should be granted because

1. Plaintiff cannot maintain, based on current income and expenses, a “minimal” standard of living for Plaintiff and Plaintiff’s dependents if forced to repay the loans because [CURRENT EMPLOYMENT STATUS; AND INCOME VS EXPENSES];
2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans because [PROVIDE REASON]; and
3. Plaintiff has made good faith efforts to repay the loans.

IT IS, THEREFORE, ORDERED that Plaintiff’s student loan debts to the Department of Education are not excepted from discharge under 11 U.S.C § 523(a)(8) because payment of the loans would impose an undue hardship on the debtor and the debtor’s dependents.

IT IS ORDERED that Plaintiff's student loan debts to the Department of Education are discharged under 11 U.S.C. § 727.

IT IS ORDERED that the Clerk of Court close the instant adversary proceeding.

This is a final appealable judgment. The bankruptcy court retains exclusive jurisdiction for interpretation and enforcement of this judgment.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
_____ DIVISION**

[DEBTOR]	§	Case No.: _____
[DEBTOR],	§	
Debtor(s).	§	Chapter

**DEBTOR(S)' MOTION TO REOPEN BANKRUPTCY IN ORDER TO FILE A
COMPLAINT TO DETERMINE WHETHER STUDENT LOANS ARE
DISCHARGEABLE**

COMES NOW _____ (“Debtor(s)”), and files this Debtor(s)’ Motion to Reopen Bankruptcy in Order to File a Complaint to Determine Whether Student Loans Are Dischargeable pursuant to U.S.C. § 523(a)(8) and Federal Rule of Bankruptcy Procedure 4007, and would show as follows:

1. On _____, Debtors filed chapter [7 OR 13] bankruptcy.
2. Debtor(s) fulfilled all requirements and received a discharge of debts on _____.
3. Now, debtor(s) wish to reopen their bankruptcy in order to file a complaint to determine dischargeability of student loans.
4. “A debtor or any creditor may file a complaint to determine whether a debt is dischargeable.” FRBP 4007(a).
5. This complaint can be filed “at any time.” FRBP 4007(b).
6. Furthermore, “[i]f a case is reopened to permit filing the complaint, no fee for reopening is required.” *Id.*

THEREFORE, Debtor(s) respectfully request that their chapter [7 OR 13] bankruptcy be reopened in order to file a complaint to determine whether a debt is dischargeable.

Signed:

[SIGNATURE BLOCK]

Certificate of Service

I hereby certify that on _____ a true and correct copy of the above motion was serviced via ECF notice to all parties in the case entitled such notice including those listed below and to the Debtors via email.

UNITED STATES TRUSTEE

CHAPTER 7 TRUSTEE

DEBTORS

[SIGNATURE]



Lone Star Restructurings: Navigating the Unique Rules, Procedures, and Practices in SDTX Bankruptcy

2026 Southern District of Texas Bankruptcy Bench Bar Conference | April 28, 2026

Presented by Megan Young-John, Partner at Porter Hedges LLP
Catherine Rankin, Associate at Hunton Andrews Kurth LLP
David Trausch, Associate at Haynes and Boone LLP

Local Rules



*Practice Tips Regarding General Order 2026-2 and the Bankruptcy Local
Rules for the Southern District of Texas*





General Order 2026-2

New Procedures Re: Storage and Management of Sealed Documents

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

ENTERED

April 17, 2026

Nathan Ochsner, Clerk of C

By Deputy Clerk

IN THE MATTER OF
ACCESS AND MANAGEMENT
OF SEALED DOCUMENTS

§
§
§
§
§

GENERAL ORDER NO. 2026-2

ORDER

A recent escalation in cyberattacks on the CM/ECF systems of federal courts requires the implementation of new procedures for the storage and management of sealed documents.

Effective as of the date of this order and until such time as the court orders otherwise,

1. **Electronic Access to Sealed Documents.** Sealed documents will continue to be filed in CM/ECF using the available sealed events but will no longer be accessible or viewable by electronic means.
2. **Service of Sealed Documents Filed in CM/ECF.** Because sealed documents filed in CM/ECF are no longer accessible or viewable electronically, service of those documents can no longer be accomplished through CM/ECF. Parties will have to serve sealed documents by other appropriate means as provided by the Federal Rules of Procedure. The court will serve sealed documents in paper by mail or other reliable electronic means as approved by the court.
3. **Highly Sensitive Documents (HSDs).** Sealed documents that are defined as HSDs will continue to be subject to the court's HSD procedures. [General Order No. 2021-7 In Re: Sealed Documents.](#)
4. **Questions about Sealed Document Procedures.** Any questions about the filing of and access to sealed documents should be directed to the clerk's office. A list of divisional office locations and contact information is attached.



General Order 2026-2 Cont'd

New Procedures Re: Storage and Management of Sealed Documents



Bankruptcy ▾ Adversary ▾ Query Reports ▾ Utilities ▾ Search Help Log Out

Sealed documents are no longer available in CM/ECF or via PACER. Users should not open the PDF file from this page to avoid being charged for viewing a placeholder file. Please contact the court directly to request access to the document.

To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser.

Case [REDACTED] Document [REDACTED]*SEALED* Filed in TXSB on [REDACTED] Page 1 of 1

Sealed documents are no longer available in CM/ECF or via PACER.

Please contact the court directly to request access to the document.

Reference for court use only

[https://\[REDACTED\]v1/file/txsb.248\[REDACTED\].87.pdf](https://[REDACTED]v1/file/txsb.248[REDACTED].87.pdf)



Local Rule 2004-1

- (a) The **purpose** of this rule is to **avoid a motion and court order** for a 2004 examination unless an objection is filed and to **encourage agreements** on an examination schedule.
- (b) A **written agreement** between the proponent, opposing counsel, and the person or entity to be examined of date, time, and place of a 2004 examination **is enforceable** by a motion to compel or for sanctions without necessity of court order or subpoena.
- (c) **Conferences** to arrange for an agreeable examination schedule **are required**. **Failure to confer is grounds for a motion to quash and sanctions.**
- (d) Not fewer than **14 days written notice** of a proposed examination must be given to the person or entity to be examined, its counsel, and to affected parties under BLR 9013-1(a). The notice must apprise the party of the scope of the examination and categories of documents to be produced. **The notice must be filed.**
- (e) If **no response is served**, the notice to conduct an examination under this rule is **deemed ordered**, without requiring the entry of an order.
- (f) If a **party to be examined** has objections, that party has the **burden to seek relief from the court** by filing a motion to quash or for a protective order. The motion must comply with BLR 9013-1. The entity to be examined and affected parties have **7 days to respond or object to the proposed examination.**
- (g) If anyone has been **unreasonable in seeking or resisting discovery** under FED. R. BANKR. P. 2004, the court **may impose sanctions.**



Local Rule 2004-1

Making Clear to Opposing Counsel Applicability of Local Rule 2004-1

- “I think if there are instances of improper behavior, I’m going to need someone to get on a stand and give evidence and put documents and e-mails and show me before I start sanctioning parties.”
...
- “I would note for the record, and the reason I’m not going too hard on the local rules is that **normally in our district, when people want to highlight the local rule, they normally file kind of a please be aware that . . . I’m serving you this pursuant to [the] local rule[.]**
...
- I’m not excusing it. The rules are what the rules are. But what I’m saying is I’m being a little flaky because **normally that stuff kind of gets flagged, in my experience.** Not everybody does it. There’s a form. There’s a national form. But **you just want to put people on notice about it.**
...
- [It] doesn’t have to be done that way, but it **safeguards.**”

❖ Case No. 24-90213 Doc. No. 6468, Audio of 4/13/26 Hr’g at 35:15-35; 42:37-43:31.



Local Rule 2004-1 Best Practices

PLEASE TAKE FURTHER NOTICE that Bankruptcy Local Rule 2004-1 provides, in pertinent part, as follows:

(d) Not fewer than 14 days written notice of a proposed examination must be given to the person or entity to be examined, its counsel, and to affected parties under [Bankruptcy Local Rule] 9013-1(a). The notice must apprise the party of the scope of the examination and categories of documents to be produced. The notice must be filed.

(e) If no response is served, the notice to conduct an examination under this rule is deemed ordered, without requiring the entry of an order.

(f) If a party to be examined has objections, that party has the burden to seek relief from the court by filing a motion to quash or for a protective order. The motion must comply with [Bankruptcy Local Rule] 9013-1. The entity to be examined and affected parties have 7 days to respond or object to the proposed examination.

Linqto (25-90186) Doc. No. 1748

Kal Freight (24-90614) Doc. No. 277:

PLEASE TAKE FURTHER NOTICE that, pursuant to Bankruptcy Local Rule 2004-1, any objections or responses to this Notice must be filed with the Court and served on the Committee's undersigned counsel within seven (7) days of the date hereof, otherwise this Notice shall be deemed ordered by the Court.



Local Rule 9013-1(i) Requesting Emergency Relief

Some judges allow self-calendaring of emergency motions through the judge's web page. If self-calendaring is not authorized, **requests for emergency hearings may be made in the pleading** requesting the relief. **No separate motion** requesting an emergency hearing **is required**. The emergency motion **must contain the word "Emergency" in the title** of the motion. **The motion must include a detailed statement why an emergency exists, and the date relief is needed to avoid the consequences of the emergency.** The motion seeking an emergency hearing **must be certified for its accuracy** by the party seeking the emergency relief or by its counsel.



Complex Case Procedures Requesting Emergency Relief

¶ 17: All motions seeking relief on **less than 21-days' notice** must be filed as “emergency” motions. An emergency motion **must contain the word “emergency” in the title** of the motion and must be filed using the CM/ECF code for an emergency motion.

¶ 18: Emergency motions **may be filed without a designated hearing date**. Alternatively, an emergency motion **may be calendared for hearing on a date obtained from the Court’s case manager**. For motions that seek emergency consideration, **the Court will determine at the scheduled hearing as an initial matter whether to allow emergency consideration**. Motions that require emergency consideration must state, just below the case caption and in lieu of the language required by any Local Bankruptcy Rule, the [complex language.]



Emergency Hearings Dos and Don'ts

Do

- ✓ Comply with BLR 9013-1(i) / Complex Case ¶¶ 17-18
- ✓ Lead with a clear, specific explanation of the nature of the emergency and timing concerns
- ✓ Keep motion focused and streamlined
- ✓ Plan ahead when possible
- ✓ Immediately notice hearing on all parties
- ✓ Avoid overusing emergency motions

Don't

- Create the emergency
- Delay filing the motion
- File lengthy, overly substantive emergency motions
- Expect automatic emergency consideration
- Overlook due process implications



Local Rule 3016-2

Can a Solicitation Procedures Motion Really be Granted Without a Hearing?

Local Rule 3016-2. Combined Disclosure Statement and Plan; Conditional Approval of Disclosure Statements; Combined Hearings on Final Approval of Disclosure Statements and Confirmation of Plans in Chapter 11 Cases.

A disclosure statement and plan may be combined into one document.

A plan proponent may file a motion requesting (i) conditional approval of a disclosure statement; (ii) approval of solicitation procedures and forms of ballots and notices; and (iii) the scheduling of a joint hearing to consider final approval of the adequacy of the disclosure statement and confirmation of a proposed plan. The motion may be granted without a hearing if the motion provides at least fourteen (14) days' notice to the United States Trustee, any statutory committee, the twenty (20) largest unsecured creditors and all parties who have requested service. Any objections to a request for conditional approval must be filed within fourteen (14) days. The failure to object to a request for conditional approval does not constitute a waiver of any objection to the final approval of a disclosure statement or confirmation of a proposed plan.

It's All In the Evidence



Evidence Based Takeaways from First Brands



Evidentiary Takeaways from First Brands/Evolution Appeal

Background

- First Brands is a supplier of aftermarket auto parts (brakes, filters, wipers, lights, pumps, towing solutions)
- Reports approximately \$11.5 billion in financing obligations and about \$12 million in the bank accounts as of the Petition Date
- About \$2.3 billion relates to accounts receivable factoring – this is where Evolution fits in. When First Brands files, Evolution asserts a first-lien security interest in approximately \$60.5 million worth of receivables.
- First Brands disputes this right claiming its forensic expert “uncovered that the \$60.5 million claim of unpaid factored receivables asserted by Evolution does not match to *any* valid invoices in First Brands’ records.”
- The Debtors are receiving payments from customers into a Factored Receivables Account for the factored invoices, performing a mapping exercise and filing periodic reports.



Evidentiary Takeaways from First Brands/Evolution Appeal Cont'd

Background

- First Brands asked the bankruptcy court permission to spend \$63 million from certain categories of receivables in the Factored Receivables Account.
- Evolution objects to the use of cash arguing that there is not enough left in the Factored Receivables Account to satisfy Evolution's interest if the \$63 million is used.
- At the time of litigating the motion, the Factored Receivables Account held somewhere between \$105.9 million and \$109 million.
- Ultimately, the Bankruptcy Court approved the use of up to \$60 million over Evolution's objection.
- Evolution filed an expedited appeal.

Evidentiary Takeaways from First Brands/Evolution Appeal Cont'd

- Arguments/Evidence with the Bankruptcy Court
- Arguments/State of Evidence with the District Court
- District Court Holding
- Evidentiary Takeaways

★ Bankruptcy Rule 8009 and Ruling on Motion to Strike

I Background

- Certain former directors and officers of First Brands filed a motion requesting authorization to use proceeds of D&O liability insurance policies
- Requesting an order confirming advancement of defense costs under the policies did not violate the automatic stay because the insurance proceeds are not estate property.
- After a hearing, the bankruptcy court granted in part and denied in part the motion. The D&Os appealed.
- On appeal, the issue is limited to the finding that: “Debtors have an interest in the proceeds of the ABC Policy, and that interest is property of the estate under section 541.”
- The UCC, as appellee, filed its Designation of Items to be Included in the Record on Appeal. The D&Os filed a motion to strike a large number of the designations.

★ Bankruptcy Rule 8009 and Ruling on Motion to Strike Cont'd

I Background

- Pursuant to Bankruptcy Rule 8009, the bankruptcy court is required to settle the differences about whether the “record accurately discloses what occurred in the bankruptcy court.”
- Judge Lopez cites *Balke v. Carmichael* for the conclusion that that the designated items must be “actually considered” by the bankruptcy court.
- After voluntary withdrawals, the bankruptcy court considered 53 designations and determined that only 1 was admitted or considered such that it should be included in the record on appeal.
- That one item was the Committee’s demonstrative slide-deck.

Bankruptcy Rule 8009 and Ruling on Motion to Strike Cont'd

Takeaways

- What is the court “actually considering”?
- Importance of Demonstratives – not admitted but considered
- Be absolutely clear on what you think the Court should consider.
- Be absolutely clear on what exhibits you are requesting admission.

Ever-Evolving Landscape of Third-Party Releases and Opt-Outs



Overview of Recent Developments in the Fifth Circuit





The Container Store Case Updates

- On February 12, 2026, Judge Rosenthal (SDTX District Court) issued a decision that *largely affirmed* SDTX Bankruptcy Court's approval of *Container Store debtors'* chapter 11 plan:
 - **Held** that federal law, not state contract law, governs whether claimants consented to third-party releases contained in a chapter 11 plan.
 - **Affirmed** use of opt-out procedures to create valid consent to third-party releases for *most classes* (more below)
 - **Reversed** Bankruptcy Court's finding that claimants receiving no recovery under the Plan, and are deemed to reject the Plan, consented to the releases by failing to opt out.
 - **Narrowed** gatekeeping provision in line with Fifth Circuit's *Highland Capital* decision; limiting to estate fiduciaries (debtors, UCC, and their respective members and officers).
- On April 10, 2026, UST appealed the District Court's decision to the U.S. Court of Appeals for the Fifth Circuit – continuing its challenge to the opt-out release structure.
- On April 22, 2026, Debtors cross-appealed the District Court's decision – challenging the ruling that the classes of claimants receiving no recovery under the plan did not consent to the third-party releases.

Third-Party Release Developments Following District Court's *Container Store* Opinion

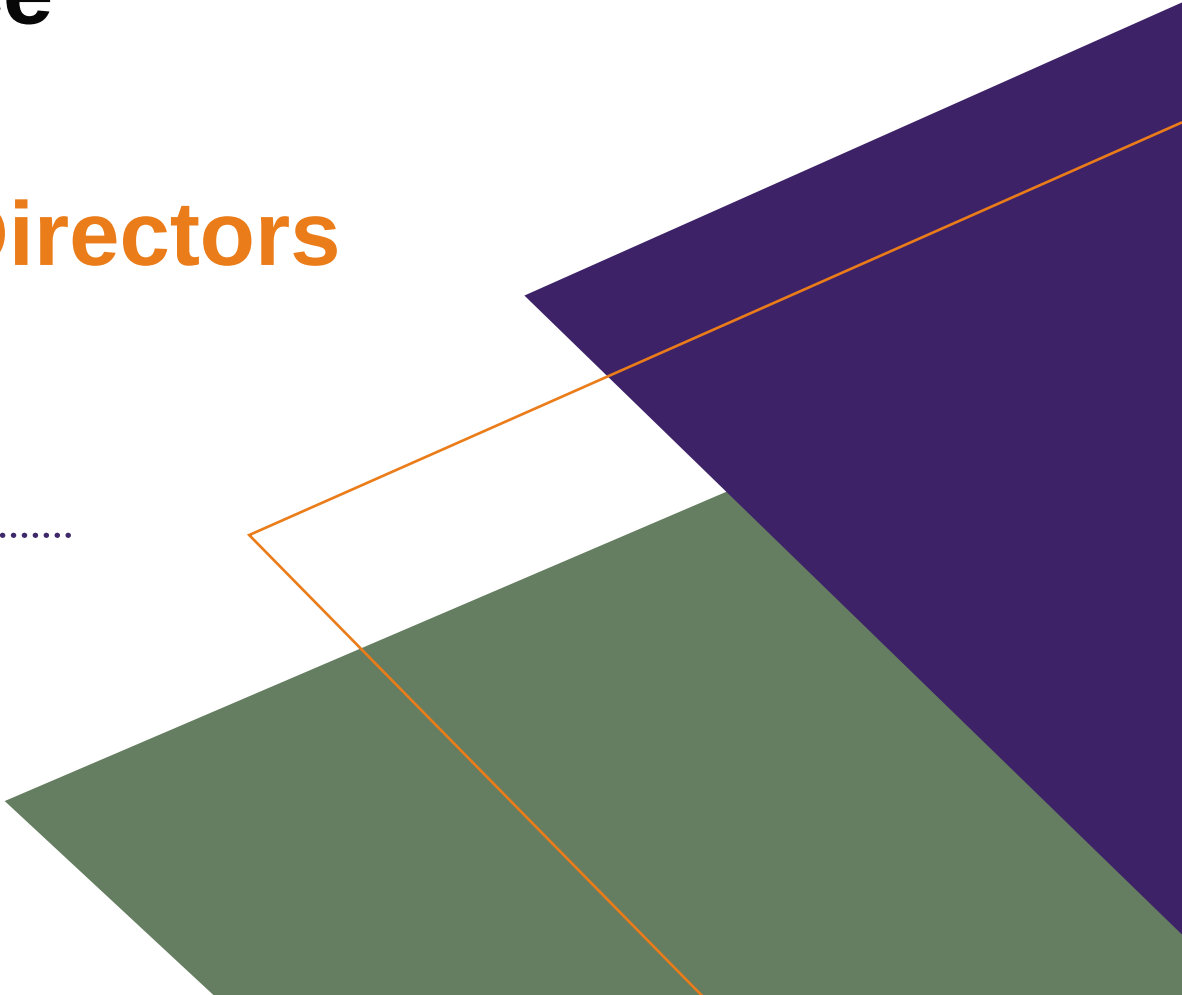
- *PosiGen Developer* (Case No. 25-90787): Debtors modified their chp 11 plan prior to confirmation hearing, removing third-party releases for non-voting classes not receiving a recovery. Judge Lopez overruled UST's objection that District Court's *Container Store* opinion stands for a wholesale prohibition on the opt-out mechanic for third-party releases – thereby upholding opt-out third-party releases for voting creditors receiving plan consideration.
- *Pine Gate Renewables* (Case No. 25-90699): Debtors modified confirmation order, following confirmation hearing and Judge Lopez's holdings, to:
 - Carve out non-voting classes not receiving a recovery under the chp 11 plan from the opt-out releases contained in the plan.
 - Narrow gatekeeping provision to exculpated parties (instead of applying more broadly to "Released Parties").
- SDTX debtors are increasingly falling in line with incorporating opt-in mechanic into chapter 11 plans and solicitation materials for non-voting classes of claimants not receiving a recovery under the plan.



SDTX Bankruptcy Bench Bar Conference

Independent Directors

April 28, 2026



Appointment of Independent Directors

Common Scenarios

- Need for director with restructuring expertise
- Lender or creditor group request
- Special committee investigation needed for insider transactions or other prepetition activities
- Intercompany conflicts

Selection of Independent Directors

Guidelines

- Plan sufficiently in advance of any chapter 11 process or other restructuring transaction
- Compile a list of potential candidates, review CVs and conduct interviews
- Focus on transparency and merits of candidates
- Encourage debate among existing board members
- Consider appointing multiple directors (discussion of special committees to follow)
- Keep in mind that combination of independence and expertise is the key value proposition

How is Independence Determined?

- No Bright Line Test in Bankruptcy
 - Bankruptcy Code does not set out a specific standard for director independence.
 - NYSE and Nasdaq independence guidelines are helpful reference points.
 - Under the NYSE, an “independent director” is one whom the board “affirmatively determines” has no “material relationship” with the company.
 - Under Nasdaq, it is one who has no relationship that would “interfere with the exercise of independent judgment” (Nasdaq Rule 5605(a)(2)).
 - Both exchanges apply “bright-line” disqualification tests (e.g., no employment within last 3 years, no compensation over \$120,000, no auditor relationships) as well as a subjective overall assessment. Stock ownership alone is not disqualifying under either exchange.

How is Independence Determined?

- Case Law Guidance

- Some states, such as Delaware, engage in a heavily fact-specific analysis, considering not only traditional economic conflicts but also relationships which may be perceived as bias producing.
- Courts have scrutinized personal relationships, co-ownership of unique assets, overlapping business ties, and shared philanthropic contributions. Diep v. Trimaran Pollo Partners, L.L.C., 280 A.3d 133, 152 (Del. 2022).
- The legal standard for independence is whether the director was adequately informed and exercised independent judgment. This has been upheld consistently in case law. See *In re Maxwell Techs., Inc. Derivative Litig.*, 2014 WL 2212155, at *6 (S.D. Cal. May 27, 2014); *In re Sabine Oil*, 555 B.R. at 189.

Fiduciary Duties

Overview

- Independent directors owe the same fiduciary duties as all board members.

Duty of care (to be informed and act with reasonable diligence)

Duty of loyalty (to act in good faith and in the best interests of the entity and its stakeholders)

- Counsel and other independent professionals (e.g., financial advisors) often guide independent directors in restructuring scenarios, ensuring proper process and documented decision-making.
- The business judgment rule will apply to decisions of independent directors who are truly independent and exercise their duties of care and loyalty.

Critiques

Are all independents truly independent?

- Some critics argue that bankruptcy directors exhibit “auditioning bias”—performing for future engagements. There are several counters to these arguments:
 - Repeat engagement is a hallmark of expertise.
 - Fiduciary duties, independent counsel, and active judicial oversight serve as structural checks.
 - Companies with independents may be more likely to end up insolvent and without recoveries available to unsecured creditors.
- The NYSE and Nasdaq independence standards do not treat prior professional relationships as per se disqualifying. The inquiry is whether the relationship would “interfere with the exercise of independent judgment” (Nasdaq Rule 5605(a)(2)) or create a “material relationship” (NYSE § 303A.02).

Special Committees

Overview

- A special committee is a sub-group of directors, advised by professionals, organized by a company's board to carry out a specific goal.
- In the restructuring setting, a special committee, among other things, typically reviews past transactions and/or current restructuring proposals to determine how the company should react to these events.
- A board can form a special committee by issuing a delegation; for example, the board can delegate certain powers and duties to a sub-board, and, to preserve the independence of the sub-board, such delegation is non-revocable.

Special Committees

Who comprises the special restructuring committee?

- Special committees often include independent directors.
- Special committees are advised by counsel and other advisors with no prior role in the conduct under review.

Special Committees

What does a special committee do?

- General Governance: A special committee can perform any task delegated to it by the board, including governance functions for debtors in possession.
- Considering Insider Transactions: The committee provides an independent analysis of insider proposals to buy the company, provide financing to the company, purchase assets from the company, or any other insider transaction.
- Investigating Claims Against Insiders: A special restructuring committee can review and analyze the strength of potential claims, including against insiders based on recent transactions with insiders, including significant divestments, distributions of dividends, or in cases where insiders participated in restructuring negotiations with the company's creditors. They often recommend whether releases should be granted.

Special Committees

Why do companies use special committees?

- Whether the special committee is formed to review a prepetition transaction or a postpetition transaction, the committee's independent review helps to protect the integrity of the transaction.
- Because of the special committee's independence and unbiased review, the transaction can enjoy the deference afforded to a corporate decision pursuant to the business judgment rule (instead of higher standard such as entire fairness).
- Special committees often evaluate releases of company claims as part of a restructuring transaction, including insiders (officers and directors) and private equity sponsors.
- Over time, the purpose and scope of special committees have expanded to often include a delegation of authority over all restructuring related transactions and expansive decision-making power over a chapter 11 proceeding.

Special Committees

Why do companies use special committees?

- One of the important uses of a special restructuring committee—reviewing a sale to an insider or potential legal claims against an insider—requires the court to apply higher standards of proof when the proposed transaction was negotiated by insiders against insiders.
- Using a special committee protects the company's access to the deferential business judgment legal standard.
- The potential uses of special committees are nearly endless:
 - For example, a special committee can be formed for the specific purpose of protecting a foreign board from potential liability under non-U.S. law.
 - A special committee could be used for the simple purpose of adding credibility and professionalism to a closely held small business, although this may come at significant cost.

Investigations by Independent Directors/Special Committees

Scope is critical

- Written scope that outlines the boundaries and expectations of the investigation
- Types of investigations
 - Investigation of estate claims against Directors & Officer
 - Investigation of intercompany/related party claim
 - Investigation of claims against third parties
- Determination of the timeline is important

Investigations by Independent Directors/Special Committees

Documentation of the Investigation

- Document Requests to Debtor, Related Parties and Third Parties
- Interviews
- Additional requests

Final Work Product

- Full written report
- PowerPoint presentation
- Oral presentation

Investigations by Independent Directors/Special Committees

Privilege

- Special committee holds its own privilege and controls when it is disclosed.
 - *United States Sec. & Exch. Comm'n v. Leibowitz*, 2025 WL 3763814, at *9 (S.D.N.Y. Dec. 30, 2025); *In re BCE West, L.P.*, 2000 WL 1239117, at *2 (S.D.N.Y. Aug. 31, 2000); *In re Vioxx Prods. Liability Litig.*, 2007 WL 854251, at *4 (E.D. La. Mar. 6, 2007) (finding that materials underlying a publicly-disclosed report from counsel to a special committee constituted protected attorney work product).
- Rationale for separate privilege is that special committees are typically formed because one or more directors has a conflict of interest or an interest adverse to the corporation and are tasked with mandates such as negotiating an interested transaction or conducting an internal investigation.
 - See, e.g., *In re CBS Corp. Stockholder Class Action & Derivative Litig.*, 2021 WL 268779, at *39 (Del. Ch. Jan. 27, 2021); *City of Tamarac Firefighters' Pension Tr. Fund v. Corvi*, 2019 WL 549938, at *2 (Del. Ch. Feb. 12, 2019).

Investigations by Independent Directors/Special Committees

Privilege

- Communications between a board and the independent committee (or its counsel) **may** be privileged.
 - *BCE West, L.P.*, 2000 WL 1239117, at *2; see also *In re Vioxx Prods. Liability Litig.*, 2007 WL 854251, at *4 (E.D. La. Mar. 6, 2007) (finding that materials underlying a publicly-disclosed report from counsel to a special committee constituted protected attorney work product)
 - *Ryan v. Gifford*, 2008 WL 43699 (Del. Ch. Jan. 2, 2008) (special committee waived its attorney-client privilege when it disclosed its detailed findings in a meeting attended by the full board of directors)
 - *In Re Rhodium Encore LLC and Air HP LLC*, No. 24-90448 (ARP) (Bankr. S.D. Tex.) (parties seeking discovery regarding a special committee's investigation into potential estate causes of action "get to discover all of the facts that [the special committee] relied on and their conclusions, but the legal analysis as to how they got from the facts to the conclusion, that generally is privileged.")

Investigations by Independent Directors/Special Committees

Testimony by Independent Directors

- Credibility is key
- Disclosure of the investigation
- Discussions with counsel
- Recommendation – timing in the process is important



Sunnova Case Study

All Aboard the Solar Coaster

April 2026

Panel Participants



Judge Alfredo Perez
Southern District of Texas

- Serving as a bankruptcy judge for SDTX since 2024
- Prior to his appointment, he practiced law for 40+ years, incl. 20+ as a Partner in Restructuring for Weil, Gotshal & Manges LLP. At Weil, he represented a wide range of stakeholders, including debtors, acquirers, secured creditors and committees in all aspects of restructurings
- He is a Fellow of the American College of Bankruptcy. He has been a member of various professional associations incl. ABA, ABI, IBA, INSOL, and TMA



Jason Cohen
Bracewell

- 19+ years advising debtors and senior/junior secured creditors in all phases of restructurings, including out-of-court and Ch. 11 bankruptcy cases with assets ranging from \$20M to \$1B+. Also advises parties on debt/equity financing and distressed sales
- Representations include Sunnova, Ascend Performance Materials, Vertex, and Echo Energy Partners
- He clerked for the Honorable Marvin Isgur of the US Bankruptcy Court for the SDTX



Margaret Reiney
Kirkland & Ellis

- 7+ years advising companies, sponsors, purchasers, and investors on capital structure and strategic solutions for companies across industries, both in and out of court.
- Representations include Sunnova, Northvolt, Learfield, Envision, West Marine, BlockFi, Altera, Seadrill, IPC, Ascena, Cirque du Soleil, and Windstream.
- She clerked for the Honorable Kevin Carey of the US Bankruptcy Court for Delaware



Ryan Omohundro
Alvarez & Marsal

- 20+ years advising distressed companies and creditors. Led restructuring of \$40B+ of debt, including Sunnova, Talen, Weatherford, Cox Oil & Gas, Superior, Arena Energy, Parker Drilling, FTSI, and Hi-Crush
- Co-Head of Restructuring & Turnaround for the Southern US
- Led complex turnarounds and restructurings focused on:
 - Liquidity & working capital optimization
 - Contingency planning & evaluating strategic alternatives



Jim Burbage
Willkie Farr & Gallagher

- 10+ years advising clients on all facets of Ch. 11 reorganizations, representing official committees, debtors, sponsors, asset purchasers and other sophisticated parties.
- His experience spans across industries including telecommunications, aviation, retail, energy, and technology
- Representations include UCCs for Sunnova, New Rite Aid, Azul Airlines, Spirit Airlines, Office Property Income Trust, Digital Media Solution, GOL Airlines, Vertex Energy



Sunnova Overview

Sunnova Overview

Founding & Development

- Founded in 2012 in Houston, Texas
- Initial public offering in 2019
- Developed into the third largest residential solar company in the United States
- Business driven by extensive dealer network (450 dealers serving customers across 50 states and territories)



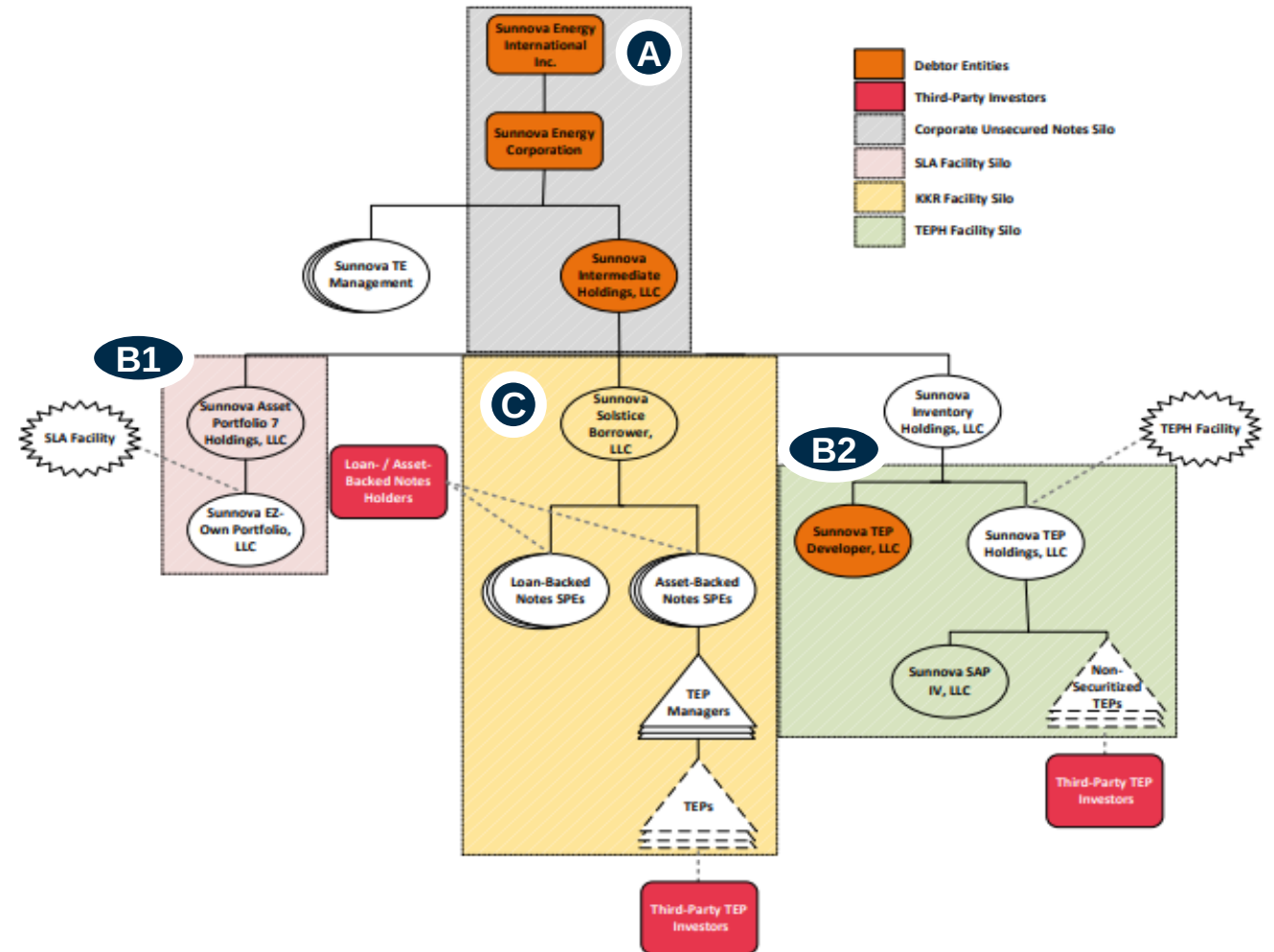
Market Presence

- Peak market cap of \$5.5B (NYSE), enterprise value of ~\$15B, \$840MM in revenue, and ~1,300 employees
- Over 440,000 customer relationships, installing one out of eight residential solar systems across the United States
- Partnerships with hundreds of dealers, channel partners, and independent contractors

Complex Organizational Structure

I thought this was just solar panels?

	Sunnova's Debt Silos	Legal Entities
A	Corporate Unsecured Notes Silo	3
	<u>Warehouse Debt</u>	
B1	SLA Facility Silo	~10
B2	TEPH Facility Silo	~45
C	KKR Facility Silo	~190
	Total	~250



Large Capital Structure

~\$9B (yes “B” as in “billion”) of funded debt

Segment	Key Stakeholders	Debt
A Corp. Debt	Sr. Unsecured Notes Convertible Notes	\$2B
B DevCo	TEPH / SLA Warehouses ~450 Dealers (\$ hundreds of millions in payables)	\$1.2B
C AssetCo	26 x ABS / Structured Debt KKR Facility	\$5.6B
ServiceCo	440,000+ customers	NA

4 of ~250 Entities Filed (TEP, SEC, SEI, SIH) in June 2025

2nd largest Ch. 11 of the year and is one of the largest renewable filings

When Advisors Arrived: Prepetition Negotiations

Never a dull moment: no money, defaults abound, multiple petitions, and how many First Days?

2025

Mar.

Apr.

May

Jun.

Challenged Deal Negotiations

Operational Challenges

Liquidity Crisis

- ~\$45MM cash when advisors arrived
- Access to ~\$1.7Bn warehouse facility frozen
- 7 open TEPs / systems stopped advancing

Management Turnover

- New CEO (March 10)
- New CFO (April 1)

Dealer Payables

- Hundreds of \$ millions in dealer payables
- Stopped performing services / won't advance systems

Grace Periods and Defaults

Corporate Debt

- **\$24MM of interest due April 1**
- Entered 30-day grace period (expired)
- Entered into forbearance (extended 4x)

Warehouse Debt

- SLA Amendment: \$170MM obligation / cease funding
- TEPH / SLA issue notice default
- Systems not being advanced

DIP Process

Plan of Reorg / Prearranged

- **Total new money of \$400MM**
- Repay dealers / restart tax equity warehouses
- Negotiate with a host of stakeholders

Pivot to "WholeCo" Sale

- No interest in funding \$400MM
- **90-day case (45-day sale process)**
- **\$100MM sizing**

Filing (twice)

- June 1: filing – take 1 (TEPD)
- June 8: filing – take 2 (no DIP)
- **~\$14MM of cash on hand**

High Level Case Timeline

All aboard the Solar Coaster...this was a wild ride

2025

Mar.

Apr.

May

Jun.

Jul.

Aug.

Sept.

Oct.

Nov.

Challenged Deal Negotiations

1

*Emergency Sales /
DIP Finalization*

2

Sale Process

3

Plan Confirmation

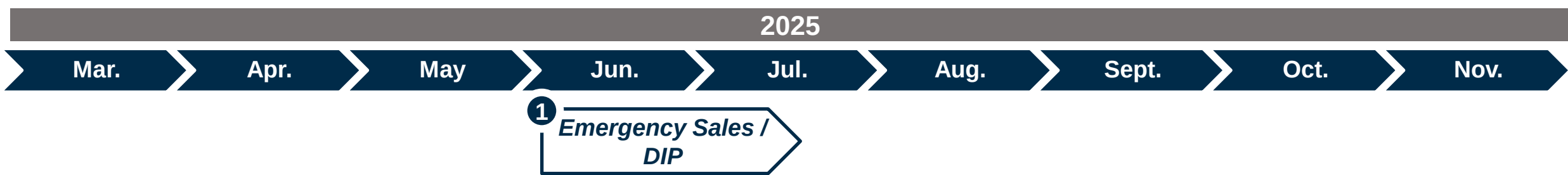
Increasing Stakeholder Coordination

The diverse stakeholder group coordinated post-filing and reached agreement on various complex, interrelated issues, ultimately leading to a consensual chapter 11 plan



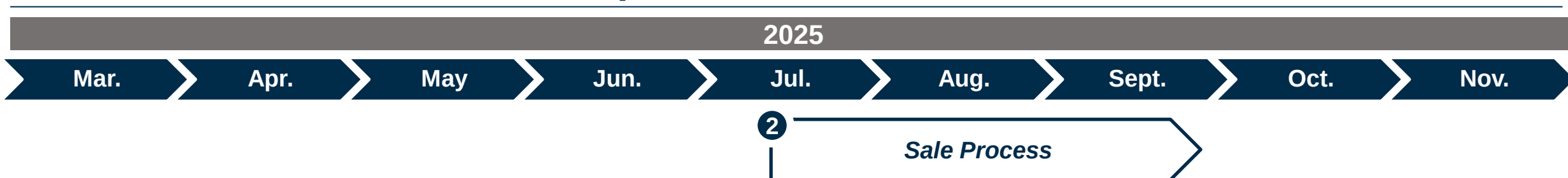
Key Elements of the Case

No DIP = Emergency Asset Sales...then a DIP



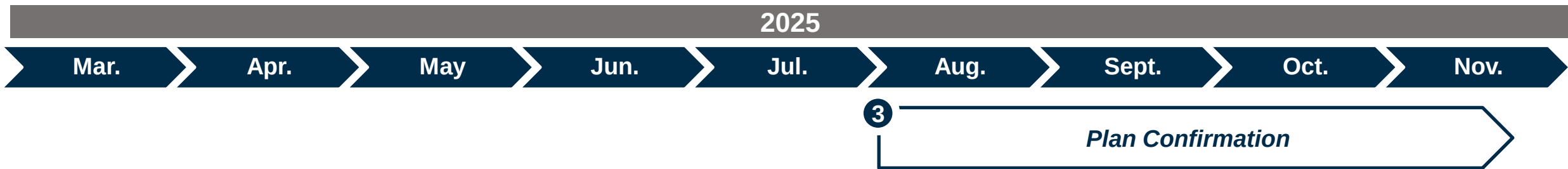
Key Party	Objectives / Perspective	Solution
Judge	• Ensure requested relief is in the best interest of estate • Ensure due process and timely noticing	✓ Testimony supporting DIP process / asset sales ✓ Forum for creditors to be heard ✓ Evaluate pleadings and enter orders
Debtors	• Secure sufficient capital to fund the restructuring process • Consummate value-maximizing transaction • Prevent operational disruption / protect jobs	✓ Market / negotiate best possible DIP ✓ Asset carve-outs ✓ Manage liquidity / vendor outreach ✓ Stakeholder communication
AHG / DIP Lenders	• Ensure controls in place around disbursements and liquidity • Progress diligence process expeditiously • Monitor and advance the sale process	✓ DIP budget / testing requirements ✓ Credit bidding rights / stalking horse designation ✓ Weekly DIP reporting
UCC	• Be convened as soon as practicable • Protect the challenge period • Evaluate prospective recoveries for unsecured creditors	✓ Get up to speed promptly ✓ Discovery / diligence / investigation ✓ Order and creditor trust negotiations

Competitive Sale Process



Key Party	Objectives / Perspective	Solution
Judge	• Monitor the sale to ensure a competitive, good faith process • Ensure compliance with the bidding procedures	✓ Review pleadings and adjudicate disputes ✓ Scrutinize sale-related orders / evaluate evidence
Debtors	• Establish and oversee a competitive process • Ensure no bidder is unfairly advantaged • Comply with bidding procedures • Maximize value for estate	✓ Robust marketing process prior to Auction ✓ Facilitate diligence requests from prospective buyers ✓ Adhere to bidding procedures ✓ Competitive / transparent auction
Buyers	• Acquire assets for as little as possible • Ensure repayment of DIP if not the winning bidder	✓ Competitive credit bid ✓ Establish minimum bid threshold / takeout ✓ Negotiate non-new money items
UCC	• Monitor the sale process to ensure compliance with the bidding procedures • Secure value for general unsecured creditors	✓ Negotiate transaction terms ✓ Discovery / diligence / investigation ✓ File pleadings, as needed

Let's Wrap it Up: Ensuring Solvency / Path to Orderly Winddown



Key Party	Objectives / Perspective	Solution
Judge	• Ensure ongoing compliance with the Bankruptcy Code • Ensure satisfaction of confirmation requirements • Provide stakeholders with due process • Adjudicate disputes	✓ Review pleadings, including objections ✓ Testimony, cross-examinations, and oral advocacy ✓ Resolve outstanding issues / objections
Debtors	• Develop a confirmable Plan • Close the WholeCo sale • Ensure administrative solvency and path to exit • Preserve a sufficient winddown budget	✓ Align Plan with UCC / Buyers / other stakeholders ✓ Negotiate / finalize sale documents ✓ Manage liquidity / size admin claims reserve ✓ Work with UCC on winddown / litigation trust needs ✓ Motion practice
UCC	• Investigate Debtor claims / causes of action • Maximize recovery for unsecured creditors • Monitor key Debtor workstreams	✓ Discovery / diligence ✓ Review definitive documents ✓ Negotiate with key constituencies ✓ Motion practice

Conclusion: Value Maximization

Teamwork makes the dreamwork: brink of admin insolvency to the land of value maximization

Preserved Value

Existing Stakeholders

- Retained hundreds of jobs
- Maintained service for hundreds of thousands of customers
- Provided a path for Dealer Recovery
- Preserved \$7Bn of structured finance

Incremental Value

Value Above DIP Funding

- **~\$100MM+ of incremental value:**
 - ~\$45MM+ in potential value from Warehouse Lender sale / settlements
 - ~\$26MM New Home Sales + \$ millions in future receivables
 - ~\$26MM WholeCo sale / settlements

Future Value

Creditor Trust

- Surplus of resources preserved for post-effective period
- Incremental assets available to monetize
- Path to pursue post-effective causes of action

The Rise of Strategic Chapter 11s: Distinguishing Reorganization from Litigation Tactics in Mass Torts

Judge Christopher Lopez
Jennifer Hardy
Matthew Linder
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April 28, 2026

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Agenda

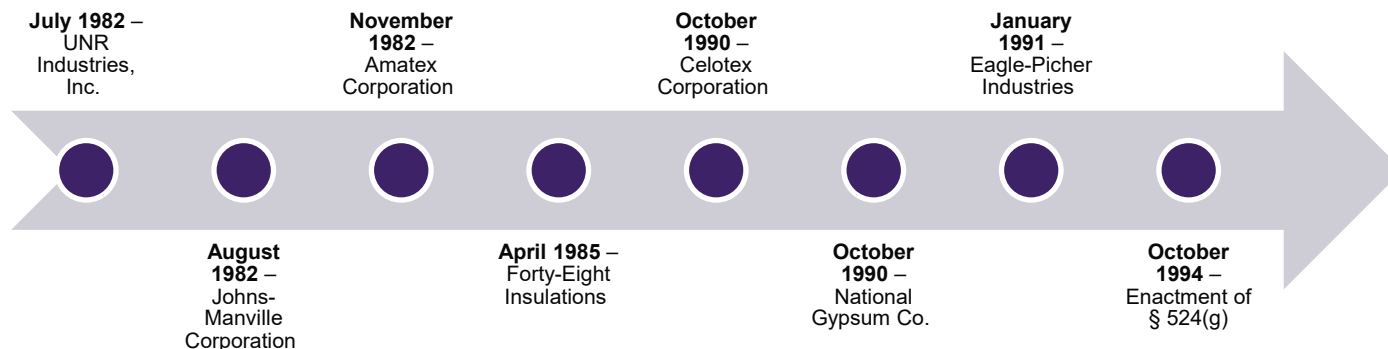
- I. The Rise of Mass Tort Bankruptcy Cases: Historical Overview**
- II. Typical Structure and Features of Mass Tort Chapter 11 Plans**
- III. Key Issues in Mass Tort Bankruptcy Cases**
- IV. Where are Mass Tort Bankruptcy Cases Headed?**
- V. Audience Q&A**

Asbestos and the Origins of Mass Tort Bankruptcy

Johns-Manville and UNR Industries Chapter 11 Filings. Solvent companies filed Chapter 11 to manage the overwhelming volume of present and future asbestos personal injury claims.

- The Johns-Manville bankruptcy established a model for addressing mass tort liabilities through Chapter 11 cases, which would eventually be codified by Congress in the Bankruptcy Code.

Enactment of Section 524(g). Congress codified the key features of the Manville model in § 524(g), which authorizes the creation of asbestos personal injury trusts with channeling injunctions that bind present and future claimants if certain statutory requirements are met, including the appointment of a future claims representative and supermajority creditor approval (at least 75% of current claimants voting in favor).



Expansion Beyond Asbestos

The Current Landscape of Mass Tort Bankruptcy Cases

Although the Johns-Manville model codified by §524(g) only applies to asbestos cases, courts have relied on bankruptcy courts' equitable powers under §105(a) of the Bankruptcy Code to expand the channeling injunction model outside the asbestos context.

Courts also rely on §1123(a)(6)'s broad plan confirmation authority, in combination with §1123(a)(5)'s requirement that plans provide adequate means for implementation, although this approach has been facing increasing scrutiny.

- ***Dow Corning (1995)***. Silicone breast implant bankruptcy.
- ***Roman Catholic Diocese Cases (2004–Present)***. Multiple dioceses used Chapter 11 to resolve clergy sexual abuse claims, including Portland (2004), Spokane (2004), San Diego (2007), and more recently Rochester (2019) and New York (2020).
- ***PG&E (2019)***. Pacific Gas & Electric filed Chapter 11 to address approximately \$30 billion in wildfire-related liabilities stemming from the 2017 and 2018 California wildfires. The case resulted in the creation of a \$13.5 billion Fire Victim Trust funded through stock and cash contributions.
- ***Imerys Talc (2019)***. Imerys Talc America filed Chapter 11 to address thousands of talc-related personal injury claims alleging that talc products caused cancer. The bankruptcy sought to resolve claims through a trust and channeling injunction framework similar to asbestos cases.
- ***Purdue Pharma (2019)***. Purdue Pharma filed Chapter 11 to resolve thousands of opioid-related claims.
- ***Boy Scouts of America (2020)***. BSA filed Chapter 11 to address approximately 82,000 sexual abuse claims. The case involved complex negotiations with local councils, chartered organizations, and insurers, ultimately resulting in an approximately \$2.46 billion settlement fund.
- ***Aearo Technologies (3M) (2022)***. 3M subsidiary filed Chapter 11 to address approximately 300,000 Combat Arms earplug claims—one of the largest mass torts in history.
- ***Kidde-Fenwal (2023)***. Carrier Global subsidiary filed Chapter 11 to address aqueous film-forming foam (AFFF) claims related to per- and polyfluoroalkyl substances (“PFAS”), commonly known as “forever chemicals.” This case represents an emerging category of mass tort bankruptcy involving environmental contamination claims.



The End of Divisive Merger Cases?

The Texas Two-Step restructuring strategy uses a state law divisive merger statute, to permit a single entity to transfer liability into an entity that then files for chapter 11.

Multiple cases have implemented the Texas Two-Step strategy, but the strategy is not without risk, specifically the risk of a costly, time-consuming, and litigious bankruptcy case.

- Bestwall LLC (Georgia-Pacific), Case No. 17-31795
- DBMP LLC (CertainTeed), Case No. 20-30080
- Aldrich Pump / Murray Boiler (Trane), Case No. 20-30608
- Bedmar, LLC, (National Resilience) Case No. 25-11027



“Until the propriety of the ‘Texas Two-Step’ and its use by solvent ‘non-distressed’ corporations is determined by the higher courts, no progress will be made in these bankruptcy cases. None has been made in *Bestwall*, which was filed six years ago. None has been made in *DBMP*, filed four years ago. And none has been made [*in Aldrich Pump / Murray Boiler*]. These cases are simply spinning round and about, to the growing frustration of all.” – Judge Whitley

Case Study: Johnson & Johnson

Background. Johnson & Johnson faced over 38,000 ovarian cancer lawsuits and more than 400 mesothelioma lawsuits by 2021, alleging that its talc-based baby powder products contained asbestos and caused cancer. The company employed the "Texas Two-Step."

Filing	Outcome
LTL Management LLC, Case No. 21-30589 (MBK) (Bankr. D.N.J. Oct. 14, 2021)	The Third Circuit reversed the Bankruptcy Court decision to deny the motions to dismiss the case and dismissed the Chapter 11 case in January 2023. The Third Circuit found the bankruptcy filing lacked good faith.
LTL Management LLC, Case No. 23-12825(MBK) (Bankr. D.N.J. Apr. 4, 2023)	Dismissed by the Third Circuit (July 2024) upon finding that the subsidiary was not in sufficient financial distress to justify bankruptcy protection.
Red River Talc LLC, Case No. 24-90505 (CML) (Bankr. S.D. Tex. Sept. 20, 2024)	Dismissed on March 31, 2025 by Judge Lopez based on procedural grounds including improper prepetition solicitation of votes.

Current Status.

- Johnson & Johnson declined to appeal 2025 dismissal and returned to the tort system.
- The company reversed \$7 billion of reserves previously set aside for bankruptcy resolution.

Mediation

Mediation in mass tort chapter 11 cases serves as a confidential and structured negotiation process to reach a global settlement for thousands of claims efficiently.

Mediation can address:

- aggregate claim values;
- trust funding amounts;
- third-party contribution amounts; and
- release and injunction scope.

Mediation also permits parties to avoid the uncertainty and high-costs of lengthy litigation and permits more control over the outcome.



Creation of a Trust with Channeling Injunction



Mass tort plaintiffs typically recover against a “resolution trust” rather than the debtor-company.

Resolution trusts are created and funded pursuant to a chapter 11 plan of reorganization. The plan will include a “channeling injunction” that directs mass tort plaintiffs’ claims to the resolution trust rather than the reorganized company.

A “channeling injunction” can be issued under one of two sections of the Bankruptcy Code, which apply in different circumstances and have different standards:

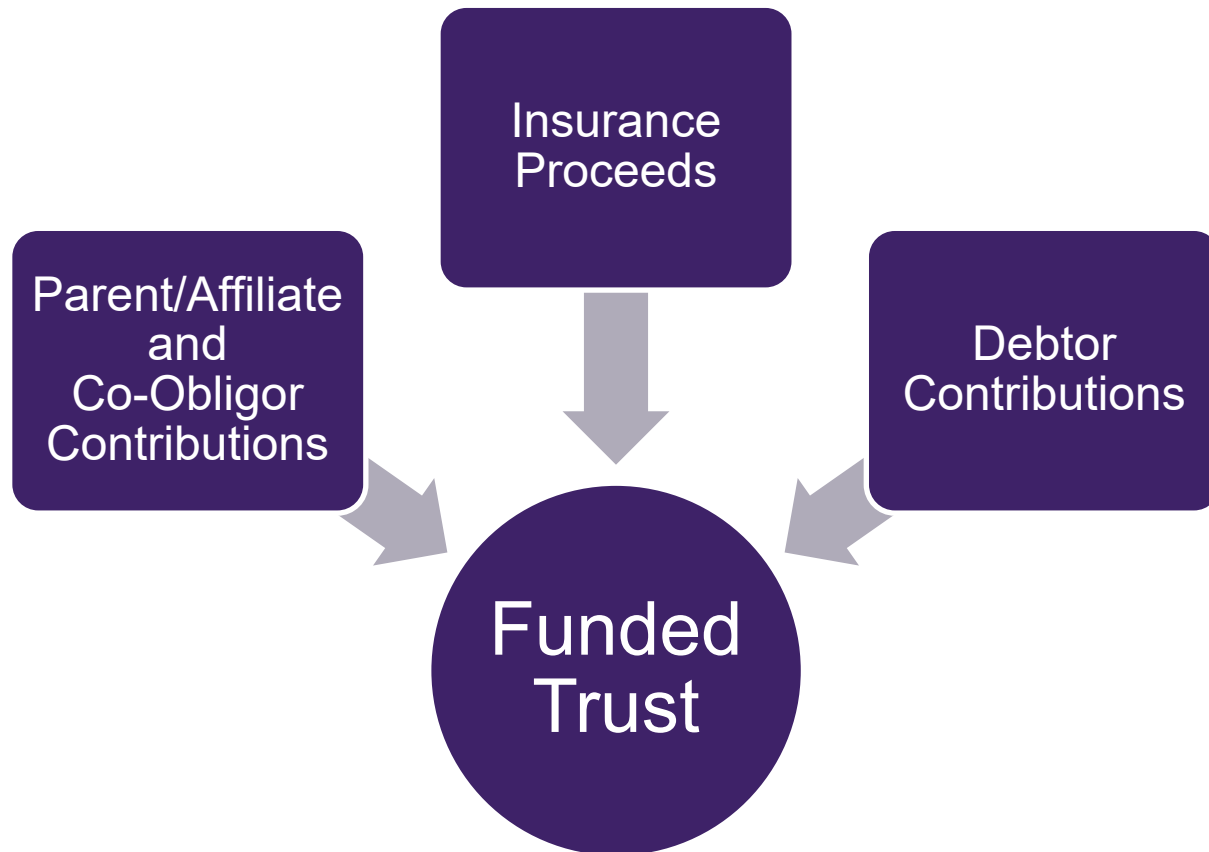
- Section 524(g) (Asbestos Claims)
- Section 105(a) (Non-Asbestos Claims)

Trust Distribution Procedures

Following plan confirmation, the resolution trusts typically establish formal procedures, known as “Trust Distribution Procedures” (TDPs), to govern the review and payment of claims. TDPs typically cover:

- Disease/Injury Categories and Scheduled Values: TDPs define compensable conditions and assign corresponding payment amounts based on disease severity.
- Claim Submission Requirements and Deadlines: Claimants must satisfy specific documentation and filing requirements within prescribed timeframes.
- Expedited and Individual Review Options: TDPs provide streamlined processing for claims meeting scheduled criteria, as well as individualized review for claims seeking values above the matrix.
- Audit and Anti-Fraud Mechanisms: Trusts employ verification procedures to ensure claim integrity and prevent abuse.

Funding the Trust





Third Party Releases

Generally speaking, the end goal of a company in chapter 11 is to confirm a chapter 11 plan of reorganization that provides a discharge of its debts. While the discharge does not affect the liabilities of third parties, Chapter 11 plans often contain releases for non-debtor third parties which *does* affect their future liabilities.

There are two types of third-party releases:

- Consensual Releases. Releases “consensually” granted by third parties through actions taken (or not taken) by the third parties in the bankruptcy case.
- Nonconsensual Releases. Releases granted notwithstanding whether a creditor in the bankruptcy has consented to releasing a third party.

In 2024, the Supreme Court in Harrington v. Purdue Pharma L.P. held that the Bankruptcy Code does not authorize nonconsensual releases. 603 U.S. 204 (2024).



Post-Harrington, debtors pursue opt-in and opt-out release mechanisms depending on jurisdiction in Chapter 11 plans as the Supreme Court did not conclusively determine what a “consensual release” entails.

Claims Estimation

Section 502(c) of the Bankruptcy Code

Section 502(c) of the Bankruptcy Code authorizes courts to estimate “contingent or unliquidated claims” when liquidation would “unduly delay case administration.” In mass tort bankruptcies, claims estimation is a critical component of the plan process, including voting.

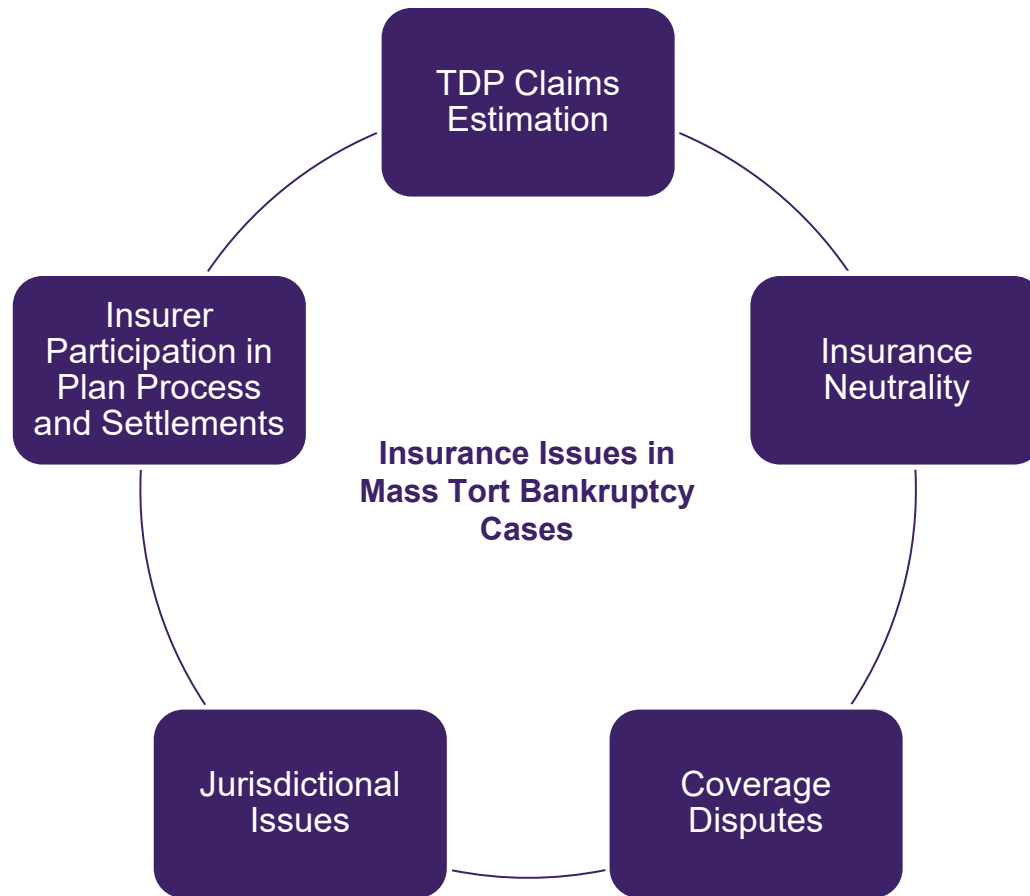
Estimation proceedings can provide for multiple objectives:

- Trust Funding
- Relative Recoveries
- Plan Feasibility

The Bankruptcy Code and Bankruptcy Rules do not specify how liabilities should be estimated and courts therefore are given significant flexibility in determining estimation methods.



Insurance Issues in Mass Tort Bankruptcy Cases



Proposed Legislative Reforms

The Ending Corporate Bankruptcy Abuse Act of 2024 (S. 4746)

- Bipartisan federal legislation to prohibit corporations from using the Texas Two-Step maneuver.
- The bill was referred to the Committee on the Judiciary in July 2024.

“(h) (1) For the purpose of subsection (b)(4)(Q), the court shall conclusively presume that a petition has been filed or that a case under this title that is continuing in subjective bad faith if the court determines that—

“(A) a purpose or effect of the filing or continuation is to—

“(i) gain a tactical litigation advantage;

“(ii) impose undue delay upon creditors; or

“(iii) cap the total amount of the liability of the debtor to 2 or more creditors holding protected claims (as defined in section 362(p)(1)) that the debtor or any affiliate has property of value sufficient to pay in full as those claims would come due;

“(B) during the 4-year period preceding the date of the filing of the petition, the debtor was the subject of, or was formed or organized in connection with, a divisional merger or similar transaction changing the corporate structure of and affecting the financial condition of the debtor or an affiliate;

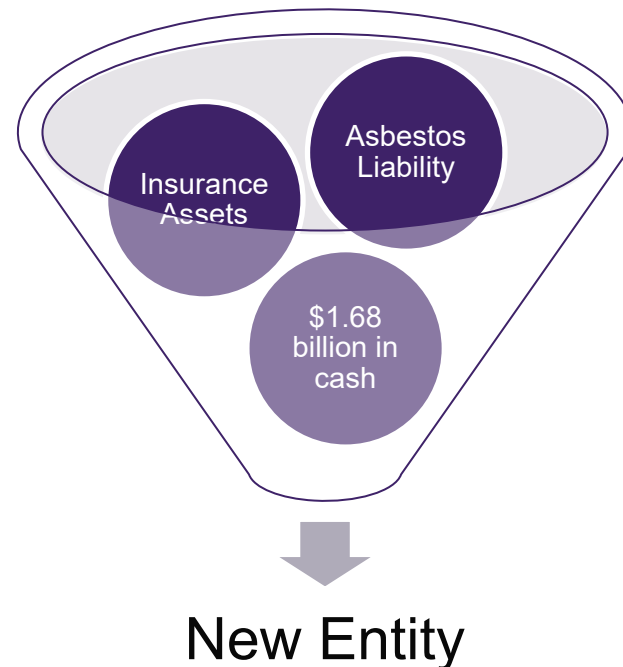
“(C) during the 4-year period preceding the date of the filing of the petition, the debtor engaged in a transfer of substantial assets to or for benefit of or incurred substantial obligations from or for the benefit of any insider or affiliate that, notwithstanding subsections (e) through (g) and (j) of section 546, is avoidable under section 544(b) or subsection (a)(1) or (e) of section 548; or

“(D) the debtor does not have a valid reorganizational purpose.

Private Market Solutions as Potential Alternative

Private Solutions to Asbestos Liability

Honeywell divested all of its legacy Bendix asbestos liabilities as well as some non-Bendix asbestos liabilities to Delticus, an institutionally backed liability acquisition platform. Honeywell and Delticus then contributed \$1.68 billion in cash and certain insurance proceeds to this new entity.





Questions?



David in a Court of Goliaths: Strategically Championing Small Creditors in Mega-Bankruptcies

*8th Semi-Annual 2026 Southern District of Texas
Bankruptcy Bench Bar Conference*

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The Small Creditor Problem: What the System Gets Right and What It Doesn't

Complex cases generate extraordinary value. But for the small creditor with a single claim, the megacase presents unique procedural and economic challenges worth examining.

The Challenges

- Omnibus claim procedures
- Assumption/rejection notices
- Setoff waivers in plans
- Notice & mailing costs
- NOA filing strategy
- Rule 2019 statements
- Divergent creditor interests

What Works Well

- Committee professional leverage
- Institutional infrastructure
- Bench engagement in SDTX

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Omnibus Claim Procedures



- Monitoring omnibus objections in a large bankruptcy case is cost-prohibitive for a single creditor with a small claim
- Proposed orders contain dense, single-spaced exhibits that must be reviewed line by line
- Nothing in the process is unique to the individual creditor's claim. Creditors must put in effort to monitor their own rights
- Deadlines to respond can pass before counsel even identifies the issue



Discussion: *How can the process be improved to flag individual claims within omnibus motions? Should claims agents provide creditor-specific alerts?*

Slide 3

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2 Assumption & Rejection Notices



- Notices of potential assumption or rejection of contracts and leases also arrive as omnibus filings
- A single creditor must comb through voluminous schedules to locate whether their contract or lease has been listed
- After identification, cure amounts may be disputed, process to dispute cure amounts may not be clear cut, and the burden falls on the creditor to object within tight deadlines
- Same cost-prohibitive monitoring problem as omnibus claim objections



Discussion: Are there ways to streamline cure-amount notices so individual creditors don't miss critical deadlines?

3 Setoff Waivers in Plans



- Plans of reorganization may include blanket Section 553 setoff waivers buried in dense plan language
- These waivers are unilateral: the debtor retains setoff rights while stripping them from creditors
- Small creditors rarely have the resources to identify and challenge these provisions before confirmation



Discussion: *Should courts require separate disclosure of setoff waivers?*

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Notice Costs & the NOA Decision



- Claims and noticing agents charge substantial fees and are paid from the estate, reducing distributions to creditors (especially unsecured creditors)
- The same document is often delivered via overnight mail, regular mail, ECF, and is publicly available on the claim's agent website, increasing the cost per document for no added benefit
- Mail notices frequently arrive after the hearing has already taken place and creditors are ultimately responsible for monitoring the case, regardless of notice
- Small creditors bear disproportionate cost impact relative to their claim size



Discussion: Should courts limit duplicative mailing methods? Is there a claim-size threshold below which electronic-only notice should be the default? How are counsel advising clients on the NOA decision in low-value representations?

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Notice Costs & the NOA Decision (cont.)



The Strategic Question for Single Creditors

Filing an NOA

- Ensures receipt of all pleadings via ECF
- Signals active representation to debtor and court
- Creates a baseline for service requirements and inclusion on service list
- Cost: CM/ECF registration, docket monitoring time

Not Filing an NOA

- Avoids triggering a flood of ECF notifications which may not be relevant to your claim
- Reduces overhead on low-value or passive claims
- Relies on standard notice procedures and claims agent mailings
- Risk: may miss key deadlines without direct ECF service

6 Rule 2019 Statements



- If you represent multiple creditors in the same case, must you file a Rule 2019 statement?
- Rule 2019 applies to committees and ad hoc groups that act in concert but what about a single law firm with independent client representations?
- Requiring Rule 2019 disclosure of the nature and amount of each client's claim can raise confidentiality and strategic concerns



Discussion: Firms may aggregate multiple small creditor representations in the same mega-case present a real 2019 question: Are those firms acting "in concert" under the rule? What's the practical enforcement risk?



What Works

*Complex cases can bring real benefits
for the attentive small creditor*

Practical Strategies for Small Creditor Counsel



Leverage Informal Resolution

Debtor's counsel has strong incentives to resolve small-dollar disputes without court involvement. A well-timed demand letter identifying a legitimate claim dispute is often more effective than motion practice.



Coordinate with Committee Counsel Early

Organizing before the committee's positions harden matters. Early alignment can amplify a small creditor's position at no cost and shape committee strategy before it's locked in.



Object Strategically to First Day Motions

The leverage window is narrow. First day orders, cash collateral terms, and DIP covenants set the case trajectory. Small creditor counsel who engage at the outset have more influence than those who appear at confirmation.



Identify your Upside

Map the likely distribution timeline and plan structure early. Reach out to Debtor's counsel early in the case to see where the case is going so that your client avoids overinvesting in a claim with limited recovery upside.



Get your Day in Court

Judges in the Southern District will let you put on your case, and that threat will often serve you well in negotiations with Debtor's counsel.



Know Your § 503(b)(9) Rights

For trade vendors, 20-day administrative claims provide priority recovery with minimal procedural burden. This is frequently overlooked and underutilized in mega-cases where the vendor assumes it's a general unsecured creditor.

What's Working Well?



Bench Engagement

Judges in this district have shown meaningful willingness to question whether adequate notice has been provided and to surface small creditor concerns sua sponte at hearings.



Informal Dispute Resolution

The increasing willingness of debtors and committees to resolve small-dollar disputes without motion practice has materially improved outcomes. However, this is uneven and depends heavily on debtor's counsel and their way of prosecuting a chapter 11 case. The question is whether that norm should be formalized in any way.



Discussion: *Is SDTX doing enough structurally for small creditors, or are the improvements largely dependent on judicial personality and debtor's counsel culture? What rule or procedural change would move the needle?*



Questions & Discussion

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