

American Bankruptcy Institute

Subchapter V Task Force

Written Statement of

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Good afternoon members of the ABI Subchapter V Task Force. My name is David Mawhinney. I have served as a subchapter V trustee in Region One since 2020. I have been appointed as a subchapter V trustee in 13 cases. Ten have resulted in consensually confirmed plans, 1 de-designated to standard chapter 11, and 2 ended with dismissal. My individual debtors have included an accountant, a contractor, a cab driver/landlord, and a jeweler. My corporate debtors include a video game designer that pivoted to SAAS, an industrial printer, a pie maker, a rock splitter, an historic hotel, and an electronic equipment manufacturer.

I have worked with attorneys around the country to collaborate on consensual plans of reorganization. I have review financial records, raised feasibility issues, redlined plans, kept my UST informed on weekly developments in my cases, earned the trust of creditors, and offered debtor's counsel strategic and procedural support. The parties hope I can resolve their disagreements. The court relies on me to keep it informed, especially if a case is not going to make it. Being a Subchapter V trustee is a privilege. It is a great job.

Small businesses are the nodes in our economy that connect local communities to regional and national hubs. Each node in the system; every debtor and creditor; every producer and consumer, is connected through a myriad of interlocking balance sheets. During good times, growth speeds through these nodes, spreading prosperity throughout the economy. But just as quickly, during times of distress these same nodes transmit financial pain to their neighbors.

Subchapter V has given the bankruptcy courts and restructuring professionals the tools to repair these nodes, to stem the contagion, cauterize the losses, and preserve going concern values. When a business survives, employees retain jobs, vendors maintain trade partners, lenders restore performing loans, landlords have occupied properties, municipalities realize tax revenues, and communities thrive.

Last year, I wrote about a subchapter V case for the American Bar Association's Judges Journal. A copy of my article is appended to this statement. Ernst Mesidor is a Haitian immigrant who arrived in the United States in the 1980s. I was appointed as trustee in his case. He drove a cab for a living and used the money he earned to purchase residential real estate in the Massachusetts cities of Methuen and Lawrence and became a landlord. In the last decade, ride sharing decimated his taxi business. He had borrowed against his taxi medallion, which was worth much less in a world of Uber and Lift. Bankruptcy couldn't reverse the creative destruction riding sharing had wrought on the taxi industry. But Subchapter V prevented the losses from flowing to Ernst's real estate. It allowed him to save portion of his wealth. I called my story about Ernst "Saving the Stakeholders" and ended with the following:

Societies that support liberal policies like private property rights and capital markets must be accepted as legitimate and fair by a critical mass of stakeholders if they are to keep those policies. It is no coincidence that as wealth has become increasingly concentrated, more people are questioning the legitimacy of our institutions. There is a saying in bankruptcy: Equality is equity. The social good bankruptcy delivers is preserving something for the greatest number of

stakeholders. Subchapter V helps small business owners hold onto what they have. It is a bulwark against financialization, preserving individual wealth and keeping it diffuse across society. Ultimately, this increases the number of stakeholders and strengthens the legitimacy of our institutions. A strong liberal society depends on lots of individuals with a vested stake.

A large part of the success of subchapter V can be attributed to the elimination of the absolute priority rule and the ability to confirm a case without an impaired accepting class. In standard chapter 11, these constraints inevitably lead to a change in ownership and concludes with a wind-down of “Old Co.” But there is not always a buyer for every business. Acquisition cannot (perhaps should not) be the only answer for a small business in distress. And just because a debtor is not an attractive acquisition target does not mean that it should not be saved.

A small business’s going concern value should be measured in the jobs it provides, the customers it serves, and the products and services it buys, rather than the passive income it might generate for an investor group. The value of a small business is its very real, tangible presence in a particular community. Subchapter V recognizes that small businesses should be allowed to pay their creditors over time, rather than liquidating.

Another important facet of subchapter V is the possibility of a three-year payment plan.¹ Without access to capital markets, small businesses that get “sick” can expire very quickly. They also do not tolerate prolonged and invasive workouts very well. Judge Beth Hanan of the Eastern District of Wisconsin touched on this eloquently when explaining her reasons for refusing a creditor’s request to extend a subchapter V plan to five years:

Congress's recognition that small businesses typically have shorter life-spans than large businesses suggests that a plan term of three years is more reasonable, generally speaking (or as a default), than a five-year term, absent unusual circumstances. And Congress's concern for not only small business owners, but small business employees, customers, and others who rely on such businesses,

¹ Court can extend plans to 5 years for cause and Debtors can and do propose even longer plans, to achieve a consensual confirmation.

reflects an intent to balance the shorter life-span planning of small businesses and timely cost-effective benefits to debtors, against the benefits to creditors.

In this case, a three-year term achieves that balance, by recognizing that this small business that provides outpatient health care for urgent needs, has deferred partial salary payments to its insiders, has deferred some healthcare equipment payments, and has committed to paying at least its projected disposable income. Imposing a plan term of five years would tip that balance potentially unevenly toward creditors, because it would further defer repayments and full salary restoration to key staff. Moreover, deferring full repayment of the x-ray equipment charges potentially jeopardizes availability of that equipment. It also would mean keeping a lower-than-desirable ceiling on employee rewards for an additional 24 months, potentially jeopardizing employee retention. Forcing the debtor to assume such risks is not in the interest of the debtor's customers/patients. While at first blush the simple math of an extended plan term might seem to generate a higher payment to unsecured creditors, the inherent risks to the small business debtor of that extension could defeat the unsecured creditors' desire for greater recovery. The three-year term here is fair and equitable, as it properly balances the risks and rewards for both the debtor and its creditors. In these circumstances, the Court declines to fix a longer plan period.²

I believe that the key to subchapter V's success in confirming consensual plans quickly is the clear and bold choices Congress made on the issues of owner control, creditor consent, and plan term limits. If everyone knows what is possible, reasonable minds will compromise.

So where do we go from here? I have identified three changes that would improve outcomes for all stakeholders in subchapter V.

First, Congress should increase the debt cap for subchapter V eligibility to \$10 million and make it permanent. This is necessary to fully capture the group of "underserved" business debtors who struggle to succeed in chapter 11. A 2018 study published in the American Bankruptcy Institute *Journal* of 76,845 chapter 11 cases filed during fiscal years 2008-2017 (pre SBRA), concluded that only about 25% of the debtors with assets or liabilities less than \$10 million were

² *In re Urgent Care Physicians, Ltd.*, No. 21-24000-BEH, 2021 WL 6090985, at *10–11 (Bankr. E.D. Wis. Dec. 20, 2021).

able to confirm a plan in standard chapter 11.³ Contrast those figures with the October 2021 study⁴ by Judge Michelle Harner and others that found more than 50% of the 465 reported cases had confirmed a plan within 6 months of filing under subchapter V. Without the current debt cap, one third of the debtors in Judge Harner’s study would not have been eligible for subchapter V relief. They would have resorted to a crude patchwork of forbearances, accommodations, and austerity pledges.⁵ Further borrowing is often inevitable, increasing the likelihood that the business will end up in receivership, chapter 7, or some other wind-down process. Many subchapter V creditors are trade vendors or landlords who would prefer to retain a paying customer and tenant than have it go out of business.⁶

Second, Congress should amend sections 523 and 1192 of the Bankruptcy Code to clarify that the debts of non-individuals in subchapter V are not subject to the nondischargeability provisions of section 523. Led by the Fourth Circuit’s decision in *Cantwell-Cleary Co. v. Cleary Packaging, LLC*, 35 F.4th 509 (4th Cir. 2022), several federal courts have concluded that the Bankruptcy Code allows creditors of non-individual debtors to sue to have their debts excepted from the subchapter V discharge. I do not believe the drafters of the Small Business Reorganization Act intended to make such a drastic change to corporate chapter 11. The time and

³ Ed Flynn, “Chapter 11 Is for Individuals and Small Business?,” XXXVII *ABI Journal* 12, 102-03, December 2018.

⁴ “Subchapter V By The Numbers,” Hon. Michelle M. Harner, Emily Lamasa, and Kimberly Goodwin-Maigetter, “Subchapter V Cases by the Numbers,” XL *ABI Journal* 12, 59, October 2021.

⁵ Receiverships and assignments for the benefit of creditors are other alternatives, but critically, these options require the business to cede control to another person. It is also impossible to bind a contractual counterparty or lessor in these proceedings without their consent.

⁶ Employees are creditors, too. According to the Small Business Administration, small businesses employ 47 of US employees. When businesses reorganize rather than liquidate or relocate, people keep their jobs.

cost of dealing with this kind of litigation would seriously undermine the most straightforward reorganization. Exposing corporate debtors to non-dischargeability actions alters the balance of power that subchapter V achieves by eliminating the absolute priority rule and the impaired accepting class. If courts conclude that they must allow nondischargeability actions to proceed because of the statutory language, Congress must fix it.

Third, Congress should add a co-debtor stay for individuals (not corporates) who have guaranteed the debt of the subchapter V debtor and allow the individual guaranty to be restructured and ultimately discharged as part of the confirmed plan. Personal guarantees are very common in small business lending. I have many corporate guarantees secured by a mortgage on the owner's home in my subchapter V cases. The creditors understand that the business is the real and only source of revenue. Although they have the hypothetical leverage of the guaranty, they seldom pull that lever because they recognize that throwing the owner out of their home will create chaos and disruption that will ultimately harm the business. Moreover, putting the owner in personal bankruptcy may be unnecessary if they are otherwise solvent. I believe that a co-debtor stay – perhaps invoked at the option of the guarantor and with additional disclosure requirements – would standardize how guarantees are dealt with in subchapter V. This would help debtors with pre-bankruptcy planning and lead to efficient and comprehensive resolutions.

* * *

Many in our profession are asking where all the cases have gone in the last 10 years. The timing and breadth of the next downturn is a frequent topic at bankruptcy conferences. While I don't have the answers, I see a correlation between the erosion of the political middle ground and "missing" bankruptcy cases. Whether it is policies on the political left providing fiscal support or

policies on the right expanding the financialization of our economy⁷ the consequences of those political choices have perhaps made filing bankruptcy impossible or irrelevant for many debtors. We need look no further than the COVID-19 pandemic to understand this. Despite initial predictions, that historic economic shock failed to produce a tsunami of bankruptcies. Politics filled the void with fiscal aid and intervention in the markets.

Frank Borman, NASA astronaut and former chairman of Eastern Airlines, said “capitalism without bankruptcy is like Christianity without hell.” While this analogy downplays the “fresh start” reorganization gives to debtors, the broader point is well taken: sooner or later, there must be a reckoning. I believe that the bankruptcy system is vital to our economy because it allows for orderly reckonings. Regardless of what the politics or the left and right may deliver, bankruptcy relief remains the best tool we have to truly repair and restore the nodes in our economy. I appreciate the efforts of the ABI Subchapter V Task Force to promote subchapter V and advocate for ideas to improve it.

⁷ One could find the “missing” bankruptcy cases of the last decade by reviewing M&A activity, which has thrived thanks to cheap credit and an abundance of cash in the financial system.

Saving the Stakeholders

By David A. Mawhinney



Ernst Mesidor



Ernst Mesidor came to Miami, Florida, from Haiti in 1985. Only 24 years old, he was already dreaming of a better life for his future children and younger siblings. He was the first of nine children, raised on a farm where his family grew beans, corn, and bananas, among other staples. He had a little English from school. Like most immigrants, the immersive experience of living in America was an unrelenting teacher, and his English improved from daily use. He found work as a shoemaker, sending his savings back home, where it contributed to his siblings' education. Ernst could not spare the time to acquire higher education for himself, however. He had to take the work that was immediately before him. This predicament left him with few opportunities to increase his earning power and lift himself out of poverty.

Operating a taxi service was one such opportunity: a venture that offered both autonomy and economic growth. The starting capital was a vehicle and an operating license (termed a "medallion"). Ernst moved his young family to Massachusetts in 1993. Within two years, he had purchased a

hackney license and incorporated "On Y Va Taxi." He was officially in business.

Like most cabbies, Ernst financed the purchase of his medallion, borrowing against the future earnings of his taxi business. This was a relatively low-risk investment because, like other asset classes, taxi medallions had historically increased in value. Although he had sacrificed formal education, Ernst had no reason to doubt that his medallion could eventually be worth close to a million dollars. When he was ready, he could sell the medallion and retire in comfort.

By his account, the 1990s were halcyon days for taxis. The money was very good. In addition to supporting himself and his family members in Haiti, Ernst began to realize the American dream: He earned more than he needed to survive. In the early 2000s, he began investing On Y Va's earnings in real estate, acquiring three mixed residential properties in the Massachusetts cities of Methuen and Lawrence.

Ernst turned 50 in 2011. Two and a half decades of hard work were paying off as he entered his golden years. He had

established a profitable real estate venture, backstopped by On Y Va's reliable income. Along the way, he welcomed a son and daughter who were enjoying the start in life that Ernst did not have. Many of his siblings who he had supported followed him to the United States and leveraged their education into middle-class jobs. When I interviewed him for this article, Ernst told me, "If your brother or child don't go higher than you, there is no progress." I imagine him at the beginning of the 2010s satisfied that his life's labors had generated considerable progress for his loved ones.

Creative Destruction

We lauded ridesharing companies as "disruptive" because they were expected to change the transportation industry for the better while unlocking economic gains for investors. Matching passengers with drivers via an app was more convenient for consumers. Ridesharing also promoted the "gig" economy, empowering people to turn their cars and spare time into money. And yet in delivering these "improvements," ridesharing wreaked havoc on the taxi industry.

Laurel Bretta is an attorney based in eastern Massachusetts specializing in commercial law. She has counseled several taxi operators in resolving the economic fallout from ridesharing. According to Bretta, ridesharing was advantaged over the taxi companies in two ways: First, local governments exempted ridesharing companies from obtaining operating licenses, which allowed them to flood the market with drivers; second, these tech companies had a head start in smartphone apps, which they rightly understood would revolutionize the industry.

Just when ridesharing was beginning to eat into the industry's profits, Ernst refinanced the debt on On Y Va's medallion. The new loan, which Ernst personally guaranteed, was for \$430,000. At the time, he valued the medallion at between \$550,000 and \$750,000 and was relying on steady revenue to support the \$3,000 monthly payment obligation. The loan matured in November 2015.

By 2012, the knock-on effect of ridesharing was inevitable, and the financialization of the taxi industry exacerbated its negative effects. Like Ernst, many taxi drivers financed their medallions, essentially borrowing against future fare receipts. They were now struggling to service the debt. The medallion lenders were often unable to accept the significant write-downs on their own balance sheets that would be necessary to allow the drivers to continue to work. Drivers saw their daily revenues plummet. Many quit the business and unloaded their medallions, causing these once-valuable licenses to drop in value. Having previously traded for half a million dollars, Bretta estimates that a medallion like On Y Va's is worth about \$20,000 today.¹

With ridesharing taking his passengers, Ernst had to spend more time in the cab to generate a profit—often at the expense of managing his properties. Despite his best efforts, On Y Va defaulted on the medallion loan, causing the interest rate on the note to soar to 18.5 percent. Ernst paid what he could for several years, but each month he owed more, and his medallion was worth less.

In October 2019, the person holding the debt on his medallion sued Ernst on his

guaranty. Shortly thereafter, Ernst hired Bretta and filed for bankruptcy protection. On the petition date, he reported owing \$747,878 on the medallion, inclusive of interest, fees, and charges—far more than the \$430,000 he had borrowed.

Too Big to Succeed

Ernst filed bankruptcy under Chapter 13 of the Bankruptcy Code. A statute designed for “wage-earning” individuals, Chapter 13 offers a low-cost version of the more well-known Chapter 11. When a person files bankruptcy to reorganize (as opposed to liquidation), their goal is to obtain an order from the bankruptcy court confirming a plan. The plan is the legal document (similar to a contract) that says what creditors will receive on account of their claims, provides the terms and conditions of payment, and binds the debtor and every creditor to performance. Once the court confirms the plan, creditors are permanently enjoined from seeking payment on their debts outside of their rights under the plan. A typical Chapter 13 plan requires the debtor to pay creditors a dividend from their future earnings over three to five years.

Bretta placed Ernst in Chapter 13 consumer bankruptcy because she was aware of the challenges of attempting to reorganize as a business in Chapter 11. In many ways, small service businesses like cab drivers are more like consumer debtors than large corporations. While both are engaged in commercial activity, there is a world of difference between Ernst and General Motors. When large, publicly traded companies restructure, it is usually a matter of bondholders swapping their debt for new notes, an exchange facilitated by the debtor's access to capital markets. Small businesses face a more perilous journey, relying almost entirely on future revenue streams to fund a plan, sustain operations, and cover the cost of the bankruptcy itself. The cost and time of completing a Chapter 11 case, combined with the bargaining power of creditors, means that small businesses account for a disproportionate number of poor outcomes in Chapter 11.²

Beginning in 1994, Congress added a series of special rules for “small business debtors” to make Chapter 11 easier for

people in Ernst's situation. The reforms had mixed results. Congress tried to reduce the time spent in Chapter 11 by enacting a “streamlined” case with fewer procedural milestones. They did not address the debtor's lack of bargaining power, however. Debtors could theoretically get in and out of bankruptcy quicker by combining hearings on multiple aspects of their case, but they still faced an inability to bring powerful creditors to the table. Furthermore, Congress's enthusiasm for speed had the draconian consequence that debtors who failed to achieve confirmation 45 days after filing their plan could have their case dismissed.³ Originally optional, an amendment to the Bankruptcy Code in 2005 made these rules mandatory for any debtor that qualified as a small business.⁴ Consequently, small businesses and their restructuring counsel would think long and hard about attempting to run the Chapter 11 gauntlet. Why would a small business owner invest the last of their cash in a bankruptcy case that was likely to fail?

Given the problems with business bankruptcy, Chapter 13 was perfect for someone in Ernst's situation. But there was a catch: The trade-off for the law's debtor-friendly simplicity was an absolute cap on the amount of debt a person is allowed to carry and remain eligible for Chapter 13. On paper, the medallion debt pushed Ernst over the limit for Chapter 13.

Bretta argued that the bankruptcy court should omit the medallion debt when determining whether Ernst was under the



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restructuring, bankruptcy, and insolvency. In 2020, the Office of the United States Trustee appointed him to serve as a small business trustee under Subchapter V of Chapter 11 of the Bankruptcy Code.

Chapter 13 debt limit on the grounds that it was a contingent, unliquidated debt. The court disagreed. Ernst had guaranteed On Y Va's medallion debt without conditions. It counted, and Ernst was over the limit. He could either convert his case to Chapter 11 and attempt a more complex and costly restructuring, or exit bankruptcy, where a state court judgment on the guaranty seemed inevitable, and his investment properties faced imminent foreclosure. Unless he could find an alternative, Ernst risked losing everything.

Legislative Action

In the summer of 2019, the U.S. Congress did something extraordinary. It passed bipartisan legislation ushering in the most radical changes to federal bankruptcy law in 40 years.⁵ The Small Business Reorganization Act delivered a new set of laws under which eligible individuals and firms could restructure their debt under Chapter 11 of the Bankruptcy Code. Known as Subchapter V, this new section of Chapter 11 (which is optional, not mandatory for qualifying debtors) went into effect in February 2020. As of this writing, more than 3,500 small businesses have filed for relief under the new law.⁶ A survey published by the American Bankruptcy Institute in 2021 indicated that businesses in Subchapter V were able to exit bankruptcy faster than debtors in standard Chapter 11.⁷ Nearly 60 percent of these cases had creditor support.

Subchapter V differs from standard Chapter 11 in several ways, but three things have contributed more than anything else to the law's success, whereas earlier attempts to deal with small business Chapter 11 debtors came up short.

First, the debtor has exclusive control over the case. In standard Chapter 11, small business debtors have an "exclusive period" to file a plan, which ends 300 days from the filing.⁸ If they fail to confirm a plan in that time frame, a creditor can submit a competing plan. The creditor's plan will typically call for a liquidating transaction that transfers the business away from the current owners for the benefit of the creditors. By contrast, only the debtor may file a plan in Subchapter V.⁹ The exclusivity period is perpetual, and creditors gain

nothing by dragging the process out.

Second, the debtor can confirm a plan without creditor support. In Chapter 11, creditors get to vote to accept or reject the plan. In the spirit of encouraging consensus—and perhaps as a bulwark against unfairness—standard Chapter 11 requires the debtor to obtain the support of at least one class of creditors.¹⁰ Subchapter V does away with this requirement. The debtor is still incentivized to rally creditor support for the plan, but it can confirm the plan even if every creditor votes against it.¹¹

Third, standard Chapter 11 requires the debtor to pay creditors in full as a condition for owners retaining their interest in the business.¹² Known as the "Absolute Priority Rule," this provision reflects the reality that debt comes before equity. In the case of publicly traded companies, the Absolute Priority Rule is perfectly acceptable: Old stock gets wiped out. But the concept is problematic for small businesses, whose equity is usually held by a small group of insiders who work for the business and live off the wages it pays them. If these people lose their business, they lose their living. Bankruptcy case law has recognized workarounds to the Absolute Priority Rule,¹³ but for small businesses, the inability to redeem their equity has been a major stumbling block in Chapter 11. Subchapter V does away with the Absolute Priority Rule. Owners can keep their business even if they cannot pay creditors in full.

Subchapter V encourages reorganization plans funded by the business's projected disposable income.¹⁴ In exchange for letting the business continue, owners agree to turn the net profits over to creditors for the plan term (typically three years). Owners who work at the business can draw a salary during this time but are essentially subordinating their right to any distributions from retained earnings to the creditors' rights to plan distributions.

A Plan Comes Together

With Chapter 13 out, Bretta decided to convert Ernst's case to Chapter 11 and attempt to reorganize under Subchapter V.¹⁵ The statute mandates the appointment of a trustee in every Subchapter V case.¹⁶ Subchapter V trustees are restructuring

professionals (often lawyers or accountants) vetted by the U.S. Trustee Program, the component of the U.S. Department of Justice responsible for overseeing bankruptcy cases and private trustees.¹⁷ About a week after Ernst converted to Subchapter V, I received a call from the U.S. Trustee's office asking if I was willing and able to serve as the trustee in his case.

I reviewed Ernst's schedules of assets and liabilities.¹⁸ He listed \$2,200 in household goods, \$500 in used electronics, \$200 worth of clothing, and \$1,200 worth of jewelry among his assets. He had \$221 in cash and another \$1,530 in the bank. He valued his real estate at just under \$1 million and estimated that he had about \$350,000 in aggregate equity after the mortgages. The final asset on his schedule was the medallion for On Y Va, which he valued at zero dollars.

Before he converted to Subchapter V, Ernst's Chapter 13 case had languished under deteriorating circumstances for a year and a half. Bankruptcy had shielded Ernst from his creditors, but he could not avoid the impacts of the COVID-19 pandemic. No one was taking cabs in 2020. Ernst reported making just \$46 on a six-hour shift. His tenants were also struggling to keep up with rent payments. Ernst himself would be hospitalized for several months with a COVID-related illness.

Ernst's bankruptcy case came back to life in Subchapter V under his attorney's skillful hand. By July 2021, he had filed a plan, and Bretta set to work drumming up creditor support. She was able to reach deals with the mortgage holders that capitalized the past-due mortgage payments and reamortized the debts. Ernst would keep his properties, which would generate the income to fund his plan.

The biggest breakthrough came with the medallion creditor. As trustee, I had a duty to "facilitate a consensual plan of reorganization,"¹⁹ and I spent time conferring with the creditor's attorney about the Subchapter V process. We discussed Ernst's income projections and the value of his investment properties. Counsel appreciated that his client would be unable to block a plan that was otherwise proposed in good faith and with a feasible payment structure.

Ultimately, the creditor capitulated, accepting a modest dividend from Ernst's projected disposable income over five years.

On October 4, 2021, the court entered an order confirming the plan. Every creditor class voted in favor of the plan. The plan projected a net income of \$818 per month from the investment properties. In addition, Ernst stated an intention to get back to driving a cab for a company owned by his brother. On December 13, 2021, the court entered an order discharging Ernst from his debts and the case was closed.

Saving the Stakeholders

"In Ernst's case, it's really important to recognize that it wasn't his fault," Bretta explains. "This was an industry collapse." Cab driving has historically offered immigrants a means to make money in America and build equity. Ernst's story provides a vivid illustration of how ridesharing disrupted the livelihoods of an entire industry of workers. Innovation can both create and destroy wealth, often at the same time.

Success in Subchapter V requires outcomes that creditors can accept as fair and just. The statute is very clear about the parties' respective rights and obligations. Ernst's case was Bretta's first foray into Subchapter V. She was quick to say that the administrative simplicity of the statute and the inability of creditors to arbitrarily block the plan with a "no" vote took a lot of pressure off Ernst. The medallion creditor had been difficult pre-bankruptcy and was initially skeptical about the Subchapter V process. According to Bretta, my presence as a neutral trustee helped to improve relations during the case. I found this comment surprising. There had been no marathon mediation sessions. I simply discussed the plan with the creditor's lawyer. Sometimes, the shadow of the law is sufficient to quash protracted arguments.

As we concluded our interview, Ernst acknowledged the rule of law and respect for property rights in this country: "Thank you to the system," he said. Like many immigrants, he does not take a functioning government for granted. "In America, it is easier to start a business."

Ernst's case gave me a deeper and more meaningful appreciation of my profession

as a bankruptcy lawyer. Societies that support liberal policies like private property rights and capital markets must be accepted as legitimate and fair by a critical mass of stakeholders if they are to keep those policies. It is no coincidence that as wealth has become increasingly concentrated, more people are questioning the legitimacy of our institutions. There is a saying in bankruptcy: Equality is equity. The social good bankruptcy delivers is preserving something for the greatest number of stakeholders. Subchapter V helps small business owners hold onto what they have. It is a bulwark against financialization, preserving individual wealth and keeping it diffuse across society. Ultimately, this increases the number of stakeholders and strengthens the legitimacy of our institutions. A strong liberal society depends on lots of individuals with a vested stake.

Today, Ernst counts nearly 50 relatives living in Massachusetts, including many of the younger siblings whose education he funded. Most of his family is in the medical field. His son is attending college. His daughter is a dental hygienist. A brother is a registered nurse. Although his life did not unfold as he planned, he acknowledges that it could be worse. "Life is a fight," he tells me. "You need to fight every day. I accept it for what it is." ■

Endnotes

1. See Chapter 11 Plan of Reorganization for Small Business Debtor Under Subchapter V, Case No. 19-41836, (Bankr. D. Mass.), section A, *Description and History of the Debtor's Business*.

2. A 2018 study published by the American Bankruptcy Institute looked at tens of thousands of Chapter 11 cases filed between 2008 and 2017 and reported that only about 25 percent of the debtors with assets or liabilities less than \$10 million were able to confirm a Chapter 11 plan. See Ed Flynn, *Chapter 11 Is for Individuals and Small Business?*, 37 ABI J., no. 12, December 2018, at 102-03.

3. See 11 U.S.C. § 1129(e); see also *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 258 (Bankr. S.D. Tex. 2015).

4. See *In re Roots Rents, Inc.*, 420 B.R. 28, 35 (Bankr. D. Idaho 2009).

5. The absence of controversy surrounding the Small Business Reorganization Act of 2019 cannot be understated. The bill was introduced into the U.S. House of Representatives on June 18, 2019, and signed into law by the president 56 days later. Congress debated the law for approximately four

minutes. See *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896 (Bankr. C.D. Cal. 2020).

6. The American Bankruptcy Institute compiles data on Subchapter V filings and makes it available on its terrific dashboard at <https://www.abi.org/sbra>.

7. Hon. Michelle M. Harner, Emily Lamasa & Kimberly Goodwin-Maigetter, *Subchapter V Cases by the Numbers*, 40 ABI J., no. 12, October 2021, at 59.

8. See 11 U.S.C. § 1121(e).

9. See *id.* § 1189(a).

10. See *id.* § 1129(a)(7), (8), (10). Only creditors whose rights are "impaired" by the plan are eligible to vote to accept or reject the plan. Creditors vote in classes, and the class votes to accept or reject the plan. The specifics of plan solicitation are beyond the scope of this article.

11. See *id.* § 1191. If the debtor has the votes to satisfy the confirmation requirements of section 1129(a)(7), (8), and (10), it is rewarded by receiving a discharge of debts at confirmation. Otherwise, in a "nonconsensual" plan, the debtor is not discharged until it completes all payments under the plan (this will usually take three years).

12. See *id.* § 1129(b)(2)(B)(ii).

13. Bankruptcy courts recognize the "New Value Exception" to the Absolute Priority Rule, which allows owners to retain their interest in the debtor by contributing money or money's worth to the reorganization. In other words, they get to buy their equity back by funding the plan. Provided that the new value is fair and reasonable, everyone benefits: The creditors see an enhanced recovery (even if they still are not paid in full) and owners are able to retain their business. See *In re Platinum Corral, LLC*, No. 21-00833, 2022 WL 127431, at *11-12 (Bankr. E.D.N.C. Jan. 13, 2022). Satisfying the New Value Exception, however, requires access to significant cash on the effective date of the plan.

14. See 11 U.S.C. § 1191(b), (c).

15. Although an individual, Mesidor qualified as a "small business debtor" because he derived his income from the commercial activity of being a landlord and driving a cab. In addition, at least 50 percent of his debts arose from commercial or business activities by virtue of the mortgages on his investment properties. See *id.* § 1182(1) (defining who is eligible to be a debtor in Subchapter V).

16. See *id.* § 1183.

17. See *id.* § 586(a)(3).

18. The information from the debtor's schedules is available via the U.S. Court System's PACER website, <https://ecf.mab.uscourts.gov>. The case is *In re Ernst Mesidor*, No. 19-41836 (Bankr. D. Mass.).

19. See 11 U.S.C. § 1183(b)(7).