PEPPERDINE UNIVERSITY

The Journal of Business, Entrepreneurship & the Law

Volume 17 | Issue 1 Article 1

6-15-2024

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APPLICABILITY OF DISCHARGE EXCEPTIONS TO CORPORATE DEBTORS IN SUBCHAPTER V: A "DEATH BLOW" TO RESCUING SMALL BUSINESSES

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I. INTRODUCTION

The Small Business Reorganization Act of 2019 ("SBRA"),[2] enacted with bipartisan support on August 23, 2019[3] and taking effect on February 19, 2020,[4] created a new option to rescue small business debtors under Chapter 11 of the Bankruptcy Code,[5] i.e., Subchapter V.[6] SBRA reforms Chapter 11 for small business debtors and aims to reduce costs and eliminate barriers to successful reorganizations.[7] This legislation represents a clear policy orientation in favor of rescuing small businesses.[8]

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[2] Small Business Reorganization Act of 2019, H.R. 3311, 116th Cong. (2019); Small Business Reorganization Act of 2019, S. 1091, 116th Cong. (2019).

[3] Richard P. Cook, *Discharges in Subchapter V: What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?*, 41 AM. BANKR. INST. J. 24, 24 (2022); *see also* William L. Norton & James B. Bailey, *The Pros and Cons of the Small Business Reorganization Act of 2019*, 36 EMORY BANKR. DEVS. J. 383, 383 (2020).

[4] *See In re* Penland Heating and Air Conditioning, Inc., No. 20-01795-5-DMW, 2020 WL 3124585, at *1 (Bankr. E.D. N.C. June 11, 2020).

[5] 11 U.S.C. §§ 1101–1195. All references to "Bankruptcy Code" or "Code" are to Title 11 of the U.S. Code.

[6] 11 U.S.C. §§ 1181–1195.

[7] *See* Lafferty v. Off-Spec Solutions, LLC (*In re* Off-Spec Solutions, LLC), 651 B.R. 862, 868 (B.A.P. 9th Cir. 2023) ("Subchapter V of chapter 11 was created with the passage of the SBRA to create an expedited process for small business debtors to efficiently reorganize."); *In re* Baker, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020) ("The purpose of subchapter V is to reduce the barriers and associated costs that prevent small business debtors from successful reorganization, in part by reducing the length of time those debtors spend in bankruptcy."); *see also* Robert J. Landry, III, *Subchapter V and the COVID-19 Disruption: Did Congress Get Small Business Bankruptcy Reform Right this Time?*, 16 OHIO ST. BUS. L.J. 66, 68 (2021) [hereinafter Landry, *Subchapter*]; Brook E. Gotberg, *Reluctant to Restructure: Small Businesses, the SBRA, and COVID-19*, 95 AM. BANKR. L.J. 389, 402 (2021) (noting that SBRA was designed to "eliminate some of the more onerous requirements associated with a chapter 11 business reorganization for small businesses") [hereinafter Gotberg, *Reluctant*]; Norton & Bailey, *supra* note 3, at 383 ("The SBRA was enacted to provide small business debtors the opportunity to reorganize in a cost-effective manner."); PAUL W. BONAPFEL, SBRA: A GUIDE TO SUBCHAPTER V OF THE U.S. BANKRUPTCY CODE 2 (2021) (observing the purpose of SBRA to include streamline reorganizations and reduce costs).

[8] *See, e.g.*, Edward J. Janger, *The U.S. Small Business Bankruptcy Amendments: A Global Model for Reform?*, 29 INT'L. INSOLV. REV. 254, 255 (2020) ("Subchapter V . . . [is] aimed at facilitating the rescue of small businesses."); Robert J. Keach & Adam R. Prescott, *Balancing Act: How the Small Business Reorganization Act Facilitates Successful Reorganizations (And How Judicial "Re-Balancing" Could Affect that Success)*, 31 NORTON J. BANKR. L. & PRAC. 1, 2–4 (2023) (exploring the limited legislative history and other public

Toward this end, SBRA made several important changes to Chapter 11 for Subchapter V that are advantageous for debtors.[9] For example, SBRA requires that every case have a trustee.[10] The trustee is in charge of monitoring the small business debtor's progress toward confirmation of a plan and facilitating a plan of reorganization,[11] a rescue. SBRA also eliminated the "absolute priority rule."[12] This rule was a barrier to rescue under Chapter 11 because under this rule, absent consent from unsecured creditors, the owners of a business could not retain their equity interests in the business under the plan.[13] Thus, many small business Chapter 11 cases would not be able to effectively reorganize under Chapter 11.[14] SBRA eliminated this rule, and with the trustee facilitating a rescue, Subchapter V appeared poised to be an effective tool for small businesses in financial distress.[15]

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documents leading to the passage of SBRA and concluding "the intent of the SBRA [is] to facilitate reorganizations for viable small businesses that were not previously being served by Chapter 11").

[9] *See In re* Ikalowych, 629 B.R. 261, 267 (Bankr. D. Colo. 2021) (highlighting several changes and finding that "SBRA offers many potential advantages for qualifying Chapter 11 debtors").

[10] 11 U.S.C. § 1183(a).

[11] *See* 11 U.S.C. § 1183(b) (detailing the trustee duties including to "facilitate the development of a consensual plan of reorganization").

[12] *In re* Off-Spec Solutions, LLC, 651 B.R. at 868.

[13] *Id.* at 872. In many cases the owners of small businesses actively operate and manage the business. *Id.* Their continued work is a necessary component of a successful reorganization. *Id.* If equity interests cannot be retained in a small business reorganization, then then there would be little incentive for the owners to continue to operate the business. *See, e.g.*, *id.* at 872 (explaining the role of the absolute priority rule and impact on small business reorganizations).

[14] *See* Gotberg, *Reluctant*, *supra* note 7, at 408–09 (explaining the impact of the absolute priority rule on small businesses and how small businesses may simply let the business be liquidated, rather than being reorganized). *See also In re Penland Heating and Air Conditioning*, 2020 WL 3124585, at *1 (noting that small businesses had difficulty under Chapter 11 in reorganization efforts).

[15] *See, e.g.*, Gotberg, *Reluctant*, *supra* note 7, at 403 ("Many in the bankruptcy community applauded the new law, and anticipated greater likelihood of debtor success under its provisions."); Landry, *supra* note 7, at 89 (observing that SBRA was "a step in the right direction toward enhancing a small business debtor's opportunity for a successful rescue"); Janger, *supra* note 8, at 264 (SBRA "hold[s] the promise of making bankruptcy work better for smaller businesses.").

SBRA also included another important bedrock bankruptcy legal tool to help corporate[16] small businesses obtain a fresh start[17] through the discharge.[18] As with traditional Chapter 11, applied to large and small businesses, when a plan of reorganization is confirmed by a court *with the consent* of the creditors in a Subchapter V case,[19] the corporate small business debtor receives an immediate discharge.[20] The debtor is obligated to comply with the reorganization plan (the newly restructured debt repayment plan),[21] but this discharge of *all* prepetition obligations offers the corporate small business a fresh start—a core bankruptcy principal.[22]

However, in interpreting SBRA, some courts[23] have found that Congress curtailed the scope of discharge for corporate Subchapter V debtors when a non-consensual plan is confirmed.[24] These cases have found that the discharge in Subchapter V corporate cases is subject to exceptions; for example, under § 523(a) the debt will not be forgiven for

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[16] For convenience, the terms "corporate" or "corporation" are used as defined by the Bankruptcy Code, which includes other legal entities, such as limited liability companies. *See* 11 U.S.C. § 101(9)(A).

[17] It is well entrenched in bankruptcy law that one of the key purposes of bankruptcy is to provide a fresh start for debtors. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (Bankruptcy relief "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.").

[18] Entities or corporate debtors receive a discharge of debts provided for in the plan. 11 U.S.C. § 1141(d)(1).

[19] Provided "all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met," Subchapter V requires a court to confirm a consensual plan. 11 U.S.C. § 1191(a).

[20] *See* Norton & Bailey, *supra* note 3, at 386 (discussing the timing of discharge under a consensual confirmation of a plan in Subchapter V).

[21] The confirmed plan is binding on the debtor and creditors. 11 U.S.C. § 1141(a). The plan is a contract that controls the parties' relationship going forward post-confirmation. *Id.*

[22] *See supra* sources cited and text accompanying note 17.

[23] Cantwell-Cleary Co. v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509, 511 (4th Cir. 2022); *In re* Better Than Logs, Inc., 631 B.R. 670, 682 (Bankr. D. Mont. 2021). Some commentators have reached the same conclusion. *See* Norton & Bailey, *supra* note 3, at 386 ("Subchapter V makes applicable the nondischargeability provisions of § 523(a), thus preventing a corporate debtor from discharging fraud, tax, and other nondischargeable claims.").

[24] Subchapter V provides that if impaired classes of creditor or interests do not consent to confirmation, "the court, on request of the debtor, shall confirm the plan . . . if the plan [(a)] does not discriminate unfairly and [(b)] is fair and equitable, with respect to each class of interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1191(b).

certain types of debts under such as fraud, false representation, certain tax claims, and other nondischargeable claims.[25] This is a dramatic change from the long standing principal that, upon confirmation of a plan, the corporate Chapter 11 debtor receives a broad discharge, with no exceptions under § 523(a) consensual or non-consensual.[26]

Thus, for corporate small business debtors in Subchapter V bankruptcy, the ability to obtain a fresh start and effectively reorganize is curtailed by the applicability of the discharge exceptions in a non-consensual plan.[27] This infringes on the rescue purpose of SBRA for small businesses.[28] The result provides a potential debt overhang post-confirmation stifling an effective rescue-a "death blow" to the viability of the small business debtor post-confirmation under Subchapter V.[29]

As with most areas of bankruptcy law in which the Supreme Court or Congress has not definitively provided an answer, there are conflicting decisions on the scope of the discharge for corporate Subchapter V debtors in a non-consensual confirmation of a plan. *In one camp*, the U.S. Court of Appeals for the Fourth Circuit found that the exceptions to discharge do apply to corporate small business debtors in Subchapter V.[30] *In the other camp*, bankruptcy courts in Florida,[31] Maryland,[32] Idaho,[33] Texas,[34] and

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[25] *See* 11 U.S.C. § 523(a) (details twenty-one types of debts that are excepted from discharge).
[26] *See, e.g.*, *In re* Off-Spec Solutions, LLC, 651 B.R. at 873 (noting that Congress eliminated the exceptions to discharge for corporate debtors over 50 years ago); Cook, *supra* note 3, at 24 (noting that "[p]rior to the SBRA's enactment, it was well settled in chapter 11 that exceptions to discharge under § 523 (a) did not apply to corporate debtors").
[27] Cook, *supra* note 3, at 24.
[28] *See In re* Off-Spec Solutions, LLC, 651 B.R. at 873 (observing that making § 523(a) debts nondischargeable "poses serious obstacles to the stated purpose of the SBRA to make reorganization efficient and expeditious for small business debtors").
[29] *See* Cook, *supra* note 3, at 58 (observing that applying the discharge exceptions can be "terminal to the small business").
[30] *In re* Cleary Packaging, 36 F.4th 509, 513 (4th Cir. 2022).
[31] *In re* 2 Monkey Trading, 650 B.R. 521, 521 (Bankr. M.D. Fla. 2023); *In re* Hall, 651 B.R. 62, 69 (Bankr. M.D. Fla. 2023).
[32] *In re* Satellite Restaurants Inc. Crabcake Factory USA, 626 B.R. 871, 874 (Bankr. D. Md. 2021).
[33] *In re* Rtech Fabrications, 635 B.R. 559, 563–64 (Bankr. D. Idaho 2021).
[34] *In re* GFS Indus., 647 B.R. 337, 342–45 (Bankr. W.D. Tex. 2022).

Michigan,[35] and the Ninth Circuit Bankruptcy Appellate Panel (BAP)[36] all interpret SBRA to permit a broad discharge in Subchapter V for corporate small businesses limiting the applicability of Section 523(a) to individual debtors. The divide among the two camps will likely grow as the issue is now pending in three U.S. Courts of Appeals: the Fifth Circuit,[37] Ninth Circuit,[38] and Eleventh Circuit.[39]

The inconsistent rulings regarding the scope of discharge for corporate small businesses in Subchapter V impacts the uniformity of the application of bankruptcy law on small business debtors[40] and the ability to achieve rescue under Subchapter V based on a debtor's location.[41] This may lead to forum shopping.[42] This raises fairness questions for debtors and seems contrary to the policy of Subchapter V.[43] Moreover, there is potential for conflicting Court of Appeals' decisions (Fourth, Fifth, Ninth

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[35] *In re* Lapeer Aviation, No. 21-31500-JDA, (Bankr. E.D. Mich. Apr. 13, 2022).

[36] *In re* Off-Spec Solutions, 651 B.R. 862, 867 (B.A.P. 9th Cir. 2023).

[37] *In re* GFS Indus., No. 22-50403-CAG, (Bankr. W.D. Tex. Feb. 3, 2023) (order granting motion for leave to appeal under 28 U.S.C. § 158(d)).

[38] *In re* Off-Spec Sols., 651 B.R. 862 (B.A.P. 9th Cir. 2023).

[39] *In re* 2 Monkey Trading, No. 6:22-BK-04099-TPG, (Bankr. M.D. Fla. June 12, 2023).

[40] *In re* Cleary Packaging, 36 F.4th 509 (4th Cir. 2022). Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, c. 4. The different federal courts interpreting the same statute in different ways does not violate the uniformity requirement of the Constitution, as the law enacted by Congress is uniform. *Id.* However, in practice and application, the intent to have uniform federal law is infringed upon. *Id.*

[41] *See, e.g.*, *id*. Subchapter V debtors in bankruptcy cases in Maryland, Virginia, West Virginia, North Carolina, and South Carolina are subject the discharge exceptions of § 523(a). *Id.* However, Subchapter V debtors, based on rulings by bankruptcy courts in several federal districts including Florida, Texas, Michigan, and Idaho, are not subject to the discharge exceptions of § 523(a). *See In re 2 Monkey Trading*, 650 B.R. 521 (Bankr. M.D. Fla. 2023); *In re GFS Indus.*, 647 B.R. 337 (Bankr. W.D. Tex. 2022); *In re Lapeer Aviation*, No. 21-31500-JDA, (Bankr. E.D. Mich. Apr. 13, 2022*)*; *In re Rtech Fabrications*, 635 B.R. 559 (Bankr. D. Idaho 2021).

[42] *See* 28 U.S.C. § 1408. Venue for filing bankruptcy is proper in a district under one of four grounds. *Id.* A small business debtor may be able to file in more than one district. *Id.* The debtor may choose a district that has the most advantageous interpretation of the scope of discharge, i.e. forum shop. *Id.*

[43] *See id.*; *see also In re* Cleary Packaging, 36 F.4th 509 (4th Cir. 2022).

and Eleventh Circuits), which could make the issue ripe for consideration by the U.S. Supreme Court.[44]

The paper argues for courts to interpret the application of discharge exceptions in a way that advances rescue. Recognizing that this by itself will not forestall conflicting judicial rulings, a statutory reform for Congress' consideration is offered to clarify the scope of discharge that will facilitate the rescue of small businesses in Subchapter V.

Following this Introduction, Part II provides an overview of traditional and Subchapter V Chapter 11, highlighting key distinctions. With that foundation, Part III provides the theoretical underpinning and policy objectives of SBRA. Part IV explores confirmation and discharge under SBRA. Part V examines the conflicting rulings by the courts on the scope of discharge. Part VI provides legal and policy analyses of the court rulings on the scope of discharge arguing the underlying policy objective of SBRA—rescue—is being hampered. Part VII offers a statutory solution that will advance rescue of small businesses under Subchapter V. Part VIII provides the conclusion.

II. OVERVIEW OF TRADITIONAL AND SUBCHAPTER V CHAPTER 11

Business bankruptcy under Chapter 11 of the Bankruptcy Code is a mechanism to address financial problems of a firm.[45] Fundamentally, Chapter 11 is a rescue tool for firms to continue to operate.[46] It can be a strategic tool for viable firms to reorganize and address short-term financial challenges.[47] The underlying thought is that a viable firm will create more value than in a liquidation.[48]

Under traditional Chapter 11, the typical goal is to formulate a plan among interested players, ideally through negotiation, to reorganize

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[44] *See, e.g.*, Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J. of L. 361, 361 (2014) ("Circuit splits . . . [are] probably the single most important factor in triggering Supreme Court review.").
[45] Gotberg, *Reluctant*, *supra* note 7, at 391.
[46] Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 456 (2017).
[47] Gotberg, *Reluctant*, *supra* note 7, at 391.
[48] *See, e.g.*, Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1689 (1996).

the debtor.[49] The debtor normally operates the business,[50] retains possession of assets,[51] and proposes a plan.[52] The debtor files a disclosure statement that summarizes the financial status of the debtor,[53] and the plan effectively provides the roadmap to restructure the affairs of the debtor.[54] Creditors and parties in interest whose interest is impaired under the plan[55] have an opportunity to vote on the plan.[56] After voting and notice, the court will hold a confirmation hearing.[57]

A court shall confirm a plan if it includes the statutory requirements for a plan,[58] and the requirements for confirmation are satisfied.[59] The most notable, and litigated, requirements are feasibility, the best interest test, and cramdown.[60] Feasibility requires a showing that the plan itself is "not likely to be followed by . . . liquidation, or the need for further financial reorganization."[61] The best interest test requires that a creditor, unless they agree otherwise, receives at least what the creditor would receive in a Chapter 7 liquidation.[62] Cramdown pertains to situations where confirmation is non-consensual, i.e., at least one class of impaired creditors has not accepted the plan.[63] In such situations, the court

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[49] Harry D. Lewis, *Enjoining Regulatory Action Against Chapter 11 Debtors*, 96 COM. L.J. 335, 351 (1991).
[50] 11 U.S.C. § 1108 (provides that the debtor may operate the business unless the court orders otherwise).
[51] 11 U.S.C. § 1115(b).
[52] 11 U.S.C. § 1121(a). The debtor has exclusive authority to file a plan for 120 days. 11 U.S.C. § 1121(b). Thereafter, other parties in interest can file a plan. 11 U.S.C. § 1121(c).
[53] 11 U.S.C. § 1125.
[54] *Id.* There are a host of plan requirements including classification of creditors in classes, identify impaired classes, specify treatment of the claims, treat creditors in same class equally, and provide means for execution of the plan. *See generally* 11 U.S.C. § 1123(a) (detailing what is required in a plan). The Code also details what may be included in a plan, such as treatment of executory contracts/leases, settlements of claims, sale of property, modification of non-homestead secured claims, and "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b).
[55] 11 U.S.C. § 1126(f).
[56] 11 U.S.C. § 1126(a).
[57] 11 U.S.C. § 1128.
[58] 11 U.S.C. § 1129(a)(1) (provides court "shall" confirm plan if it complies with Title 11); 11 U.S.C. § 1123(a) (required contents of plan).
[59] *See generally* 11 U.S.C. § 1129(a) (detailing confirmation requirements).
[60] *See* BONAPFEL, *supra* note 7, at 121, 156, 170.
[61] 11 U.S.C. § 1129(a)(11).
[62] 11 U.S.C. § 1129(a)(7).
[63] *See* 11 U.S.C. § 1129(b). Section 1129(a)(8) requires that all classes of impaired creditors accept the plan for confirmation, a consensual confirmation.

can confirm the non-consensual plan without the acceptance of the class of impaired creditors if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[64] The "fair and equitable" requirement is the absolute priority rule (APR), which prohibits junior claims or interests to retain property under the plan if the senior class of impaired claims has not been paid in full.[65] If a court finds the plan "fair and equitable" it can confirm the non-consensual plan, i.e. a cramdown.[66] The confirmation of the plan is binding on all creditors and the debtor,[67] and it typically vests property in the debtor[68] and normally provides for a discharge, at least for corporate debtors.[69]

Traditional Chapter 11 is largely a one-size-fits-all solution for firms in financial distress.[70] This approach to solving the financial woes of business does not work for all businesses. No two businesses are the same. It is equivalent to putting a square peg in a round hole. Unfortunately for small businesses, traditional Chapter 11 has not worked as an effective rescue tool for a myriad of reasons.[71]

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11 U.S.C. § 1129(a)(8). Otherwise, in order for a court to confirm the plan, a non-consensual plan, the requirements of § 1129(b), the cramdown requirements must be satisfied. 11 U.S.C. § 1129(b).

[64] 11 U.S.C. § 1129(b)(1).

[65] 11 U.S.C. § 1129(b)(2)(A)–(B) (providing the requirements of "fair and equitable").

[66] *See* 11 U.S.C. § 1129(b)(1).

[67] 11 U.S.C. § 1141(a).

[68] 11 U.S.C. § 1141(b).

[69] *See* 11 U.S.C. § 1141(c)–(d)(1).

[70] *See Chapter 11 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Oct. 17, 2023).The Bankruptcy Code does include some provisions in traditional Chapter 11 specifically for small business debtors. *See generally* BONAPFEL , *supra* note 7, at app. E, 12–17 (summarizing the specific provisions available under traditional Chapter 11 for a "small business debtor" that does not elect Subchapter V). Even with these specific provisions, the overall legal framework of Chapter 11 is largely the same for large and small businesses. *Id.*

[71] Janger, *supra* note 8, at 255 (observing that while Chapter 11 works well for larger businesses, it is problematic for smaller firms seeking to reorganize); s*ee also* Blake Clevenger, Comment*, "Engaged In": The Rocky Marriage Between Commercial and Business Activity and Subchapter V Eligibility*, 39 EMORY BANKR. DEVS. J. 373, 376–77 (2023) (detailing the costs and complexities burdening small businesses in traditional Chapter 11).

Chapter 11 is too expensive and cumbersome for smaller firms.[72] The entire traditional Chapter 11 process is premised on negotiation with creditors and creditor committees; disclosure statements, voting, and potential cramdown for confirmation is quite expensive.[73] It can be so expensive that the underlying value of the firm may be diluted through the Chapter 11 process.[74] Moreover, abrogation of the APR was necessary "to allow an entrepreneur [equity/owners] to redeem the business from the creditors as a going concern."[75]

SBRA is designed to reform Chapter 11 so that it can be a more streamlined[76] and cost-effective rescue tool for small businesses than traditional Chapter 11.[77] Unlike traditional Chapter 11, Subchapter V provides several benefits to small business debtors that enhance the chances of a successful reorganization.[78] These benefits largely revolve around reducing barriers to success that increase costs and time in Chapter 11, which usually go hand in hand but often lead to Chapter 11 failures.[79]

Several direct costs are eliminated in Subchapter V.[80] First, there is no requirement for an unsecured creditors' committee, which reduces administrative expenses.[81] In smaller cases, most creditors are passive and the number of creditors is manageable; thus, the costs associated with a creditors' committee are not warranted or feasible.[82] Secondly,

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[72] Janger, *supra* note 8, at 254.
[73] *Id.* at 255.
[74] *Id.*
[75] Janger, *supra* note 8, at 256 (alteration in original).
[76] *See In re* Lost Cajun Enters., LLC, 634 B.R. 1063, 1073 (Bankr. D. Colo. 2021) ("Subchapter V streamlined the confirmation of Chapter 11 plans for small business debtors.").
[77] *See* Clevenger, *supra* note 71, at 377.
[78] *See* Lafferty v. Off-Spec Sols., LLC (*In re* Off-Spec Sols., LLC), 651 B.R. 862, 868 (B.A.P. 9th Cir. 2023) ("[D]ebtors under subchapter V enjoy certain benefits: they do not pay United States Trustee fees; they are not required to file a disclosure statement; and competing creditors' plans are not permitted. Subchapter V also permits a debtor to confirm a nonconsensual plan without satisfying the 'absolute priority rule.'"); *see also Lost Cajun Enters*., 634 B.R. at 1073 (Subchapter V "eliminated the 'absolute priority rule,' creditor committees, the requirement for approval of disclosure statements, and the requirement of at least one accepting class of impaired creditors. Effectively, it lowered the bar for confirmation.").
[79] *See* Lafferty v. Off-Spec Sols., LLC 651 B.R. at 868.
[80] Norton & Bailey, *supra* note 3, at 383.
[81] Norton & Bailey, *supra* note 3, at 383; *See also* Clevenger, *supra* note 71, at 379.
[82] Janger, *supra* note 8, at 257.

administrative expenses incurred for U.S. Trustee fees are eliminated in Subchapter V.[83]

Several structural statutory changes are centered around plans and confirmations in Subchapter V designed to speed cases up, which should reduce costs.[84] First, a debtor that elects to proceed under Subchapter V[85] has exclusive power to propose a plan,[86] but must do so within ninety days of filing, unless the court orders otherwise.[87] This exclusivity removes the costs and delay associated with competing plans,[88] and provides some leverage to the debtor in formulating a debtor-friendly plan.[89] Secondly, a disclosure statement is typically not required,[90] which should help reduce administrative costs associated with making extensive disclosures,[91] as well as reduce time in the process leading to a confirmation hearing. Thirdly, the APR rule is eliminated.[92] Thus, owners can retain their equity position in the debtor.[93] This provides leverage to the debtor and removes

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[83] 11 U.S.C. §§ 1102(a)(3), 1181(b); Norton & Bailey, *supra* note 3, at 383; Clevenger, *supra* note 71, at 377–78. Importantly, although this cost for U.S. Trustee fees is eliminated, the estate will incur the cost associated with a trustee. *See* Norton & Bailey, *supra* note 3, at 391–92 (discussing the costs associated with the Subchapter V trustee). It is not clear that the trade-off of U.S. Trustee fees with Subchapter V trustee fee will actually reduce administrative costs overall. *Id.* As time passes, empirical research will need to be conducted to analyze whether there have in fact been reduced administrative costs. *Id.*

[84] Clevenger, *supra* note 71, at 379.

[85] *See In re* Free Speech Sys., LLC, 649 B.R. 729, 733 (Bankr. S.D. Tex. 2023) (discussing and explaining the requirement of a debtor to elect to proceed under Subchapter V in the petition).

[86] 11 U.S.C. § 1189(a); Norton & Bailey, *supra* note 3, at 384; Clevenger, *supra* note 71, at 379.

[87] 11 U.S.C. § 1189(b).

[88] Clevenger, *supra* note 71, at 379 ("The subchapter V debtor's exclusive right to propose a plan lowers reorganization costs because the debtor is not forced to litigate to prevent the approval of competing plans."); *see also In re Lost Cajun Enters*., 634 B.R. at 1073 ("Subchapter V does not allow for competing plans because Subchapter V was designed to be a cost-effective tool for small business debtors to retain ownership and obtain a fast-track reorganization . . . .").

[89] *See* Clevenger, *supra* note 71, at 379.

[90] A disclosure is not required unless the court orders otherwise. 11 U.S.C. § 1181(b). Debtor will be required to include basic financial information in the plan. 11 U.S.C. § 1190; Norton & Bailey, *supra* note 3, at 38; Clevenger , *supra* note 71, at 379; Janger, *supra* note 8, at 258.

[91] Clevenger, *supra* note 71, at 379.

[92] Norton & Bailey, *supra* note 3, at 384; Clevenger, *supra* note 71, at 380–81.

[93] Norton & Bailey, *supra* note 3, at 385.

costly litigation around the APR.[94] Fourth, a Subchapter V plan can be confirmed without any votes of approval.[95] This gives the debtor leverage and avoids the hold-out effect of a large creditor that controls a class.[96] Fifth, "[a]fter confirmation, only a debtor can modify the plan,"[97] which provides leverage to the debtor and avoids litigation costs around post-confirmation modifications brought by third parties.[98] Sixth, a Subchapter V trustee will be appointed in each case to help facilitate confirmation of a plan.[99] The addition of a neutral to the Chapter 11 process as a facilitator, while the debtor remains in control of the business,[100] should help move cases along quicker, leading to reduced administrative costs.[101]

III. POLICY ORIENTATION OF SBRA

In analyzing any statutory reform, it is critical to consider the policy objective driving the reform. The policy orientation helps put the legislation in context and provides a framework to analyze the law.[102] This can aid policymakers in determining what reforms, if any, are needed to improve the legislation.[103] This section considers the policy behind SBRA to help inform the analysis of the scope of discharge for corporate debtors under Subchapter V.

As highlighted above, SBRA is designed to help streamline Chapter 11 and enhance the ability to reorganize.[104] It is an attempt to alleviate some of the hurdles and problems in Chapter 11 to rescue small businesses effectively.[105] The structure and costs of Chapter 11 made reorganizing under Chapter 11 for smaller businesses challenging.[106]

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[94] *See id.*
[95] *See* 11 U.S.C. § 1191(b); Norton & Bailey, *supra* note 3, at 385.
[96] Norton & Bailey, *supra* note 3, at 385–86.
[97] *Id.*; *see also* Clevenger, *supra* note 71, at 379.
[98] Norton & Bailey, *supra* note 3, at 385–86.
[99] 11 U.S.C. § 1183; Clevenger, *supra* note 71, at 377. The trustee would "assist management in determining the best course for the business, assist in negotiations with the creditors, and provide information to the court." Janger, *supra* note 8, at 257.
[100] Janger, *supra* note 8, at 257.
[101] Norton & Bailey, *supra* note 3, at 34.
[102] Clevenger, *supra* note 71, at 397.
[103] *Id.*
[104] *Id.* at 400–01.
[105] *See id.*
[106] *Id.* at 376.

Improving Chapter 11 for small businesses is not important on the single firm micro-level, but more broadly.[107] The challenges for a small business reorganizing under Chapter 11 are not merely a one-off issue for the firm.[108] An effectively functioning bankruptcy system is vital to a capitalist economic framework as it benefits not only the debtor firm but also the creditors and society.[109] It also promotes "entrepreneurship, risk-taking, and consumption on credit"[110]—all vital components of a capitalist society that embraces the free market.[111]

The rescue policy orientation of SBRA is broad in scope as it encompasses the panoply of interests impacted by a firm in financial distress.[112] This orientation is reflected in the legislative history.[113] Congress believed this legislation was needed because the SBRA "allows these debtors 'to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business which not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.'"[114]

IV. CONFIRMATION AND DISCHARGE UNDER SBRA

SBRA provides two pathways to confirmation of a plan: with the consent of the creditors or without the consent of creditors.[115] This part provides an overview of both types of confirmation and the legal consequences of each approach, focusing on the timing and scope of discharge under consensual and non-consensual confirmations.[116]

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[107] *See, e.g.*, Gotberg, *supra* note 7, at 390 (noting "[t]he impact of the pandemic on small businesses was particularly noteworthy, as these businesses were confronted with severely restricted revenues, leading many to experience significant financial distress.").
[108] *Id.* at 391–92.
[109] *Id.* at 391.
[110] *Id.*
[111] *Id.* at 414.
[112] *See* Clevenger, *supra* note 71, at 383.
[113] *See generally id.* at 397–400.
[114] H.R. REP. NO. 116-171, at 4 (2019) (citation and quotations omitted).
[115] *See* BONAPFEL, *supra* note 7, at 122–23 (providing an overview of the two options for confirmation: consensual and non-consensual, i.e., "cramdown").
[116] *See* WILLIAM L. NORTON, III, 5 NORTON BANKRUPTCY LAW & PRACTICE, THIRD EDITION (July 2023 Update) § 107:20 (providing a concise overview of the discharge and legal consequences under consensual and non-consensual plans in a Subchapter V case).

A. *Consensual Confirmation and Discharge*

If all impaired classes affirmatively vote to accept a plan and the debtor complies with all § 1129(a) confirmation requirements[117] except for subsection § 1129(a)(15),[118] which includes certain best-efforts requirements for individual debtors not making a subchapter V election, a court is required to confirm a plan.[119] This is colloquially referred to as "consensual confirmation," and there are several significant legal consequences of a consensual confirmation.[120] In such cases, debtors typically make plan payments.[121] Moreover, upon confirmation estate property vests in the debtor[122] and the trustee services terminate upon substantial consummation of the plan.[123]

In a consensual confirmation, the debtor is granted a discharge upon confirmation, whether the debtor is an individual or a corporate debtor.[124] However, the scope of the discharge for individuals and corporate debtors varies.[125] Debts excepted under section 523(a)[126] are not discharged for an individual debtor; however, this limitation on the scope of the discharge does not apply to corporate debtors.[127] This variation in the scope of discharge between individual and corporate debtors is consistent with a traditional Chapter 11 framework.[128]

Overall, the legal consequences of a consensual confirmation are positive for debtors and creditors. Bankruptcy is quicker in a consensual plan scenario, allowing a debtor exist Chapter 11 in a Subchapter V quicker than in a traditional Chapter 11. The shorter time in Chapter 11 and a shorter duration of oversight by a trustee should reduce

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[117] 11 U.S.C. § 1191(a).
[118] 11 U.S.C. § 1129(a)(15).
[119] 11 U.S.C. § 1191(a).
[120] *See* Norton & Bailey, *supra* note 3, at 386.
[121] *See* 11 U.S.C. § 1194(b) (providing that in non-consensual confirmation of a plan, "the trustee shall make payments to creditors" unless the court orders otherwise).
[122] 11 U.S.C. §§ 1141(b), 1181(a).
[123] 11 U.S.C. § 1183(c)(1).
[124] 11 U.S.C. §§ 1141(d)(1)(A), 1181(a).
[125] *See, e.g.*, 11 U.S.C. § 1141 (d)(6).
[126] 11 U.S.C. § 523(a) (detailing certain exceptions to discharge).
[127] *See* 11 U.S.C. § 1141(d)(2) (providing expressly that the limitation on discharge for debts provided for under § 523 is applicable to individuals).
[128] *See* discussion *supra* Part II.

administrative costs—a benefit to creditors.[129] As such, achieving consensual confirmation of a plan is a goal of subchapter V bankruptcy.[130] However, when that goal cannot be reached, Subchapter V provides an alternate path to a plan's confirmation without consent.

B. *Non-Consensual Confirmation and Discharge*

Confirmation of a plan is possible without the acceptance of all impaired class of creditors, i.e., non-consensual or cramdown confirmation.[131] Furthermore, confirmation can be obtained even if no class of impaired creditors accept the plan.[132] This is a significant change in the non-consensual confirmation requirements from traditional Chapter 11 cases. A Subchapter V debtor can confirm a plan without a class of impaired creditor's acceptance.[133] In a traditional Chapter 11 case, at least one class of impaired creditors must accept the plan.[134] Subchapter V debtors have a much stronger position than traditional Chapter 11 debtors to negotiate a plan and achieve confirmation because ultimate consent of an impaired class is not required.[135] Under traditional Chapter 11, small business debtors were often faced with a situation where a single secured creditor with large deficiency unsecured claims could exercise significant influence in the plan development and confirmation—effectively acting as a hold out to achieving confirmation.[136]

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[129] Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39(1) BANKRUPTCY LAW LETTER NL 1, 10 (Oct. 2019).
[130] *See* U.S. DEP'T OF JUST., EXEC. OFFICE FOR THE UNITED STATES TRUSTEES, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES, 3–10 (Feb. 2020); Cook, *supra* note 3, at 58.
[131] 11 U.S.C. § 1191(b) (confirmation can be obtained even if all classes of impaired creditors have not accepted the plan under § 1129(a)(8)); BONAPFEL, *supra* note 7, at 89 ("§1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan.").
[132] 11 U.S.C. § 1191(b) (confirmation can be obtained even if no classes of impaired creditors have not accepted the plan under § 1129(a)(10)); BONAPFEL, *supra* note 7, at 89 ("§1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan.").
[133] Garth Puchert, *Benefits of Subchapter V Under the Bankruptcy Code to Private Equity Funds in Managing Distressed Assets*, EISNERAMPER (Dec. 3, 2022), https://www.eisneramper.com/insights/financial-services/subchater-v-managed-distress-ea-1222/.
[134] 11 U.S.C. § 1129(a)(10) (requiring at least one class of impaired creditors accept the plan as prerequisite to confirmation).
[135] Puchert, *supra* note 133.
[136] Brubaker, *supra* note 129, at 11.

A Subchapter V debtor can obtain confirmation of a non-consensual plan without having to satisfy the APR.[137] The APR has been a barrier to confirmation on non-consensual plans[138] as it prohibits small business owners from retaining any property under the plan if higher up classes of creditors were not paid in full.[139] The APR is inapplicable in Subchapter V.[140] Under Subchapter V, a court shall confirm a non-consensual plan "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[141] "[F]air and equitable" is statutorily defined and is the key to satisfying the cramdown requirements for a non-consensual plan under Subchapter V.[142]

Compliance with the "fair and equitable" standard in Subchapter V differs depending on whether the creditors is secured or unsecured.[143] For a secured creditor, the plan must provide that the secured creditor retain their lien, by receiving payment equal to value of claim or indubitable equivalent.[144] Confirmation without the consent of unsecured claimholders is available if the plan offers all disposable income of the debtor over a three to five year period.[145] If the "fair and equitable" standard is satisfied, the owners of the business are able to retain their ownership interest without paying *senior* interests in full.[146] APR's

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[137] BONAPFEL, *supra* note 7, at 90 (explaining that the APR rule has been eliminated in a Subchapter V case).
[138] *See* 1 BANKRUPTCY PRACTICE HANDBOOK § 2:14 (2d ed) (observing that "[o]ne of the most significant barriers to confirmation of a plan by a business entity is the 'absolute priority' rule").
[139] BONAPFEL, *supra* note 7, at Appendix E–14 ("The absolute priority rule provides that, unless the claims are paid in full, holders of equity interests may not receive or retain anything under the plan.").
[140] *See* 11 U.S.C. § 1181(a) (Provides that 1129(b), which codifies the APR for Chapter 11 generally, does not apply to a Subchapter V case.). *See also* Landry, *supra* note 7; Robert J. Landry, III, *SBRA: Eligibility, Governance and Oversight*, 38 AM. BANKR. INST. J. 28, 41, n57 (2019).
[141] *Id*. at § 1191(b).
[142] *Id*. at § 1191(c).
[143] *Id*. at § 1191(c).
[144] *Id*. at § 1191(c)(1) (incorporating requirements for cram down of secured creditor class in 11 U.S.C. § 1129(b)(2)(A)).
[145] *Id.* at § 1191(c)(2).
[146] *See* 11 U.S.C. § 1191(c); Theresa A. Driscoll, *U.S. Senators Propose Legislation That May Make Chapter 11 Reorganization a Viable Option for Small Businesses*, NEW YORK LAW JOURNAL (Dec. 5, 2018, 2:40 PM), https://www.law.com/newyorklawjournal/2018/12/05/u-s-senators-propose-

removal eliminates a significant barrier in confirming small business debtors and enhances the prospect rescuing the business.[147]

There are a host of different, important legal consequences of confirmation of a non-consensual plan versus confirmation of a consensual plan.[148] Firstly, a nonconsensual confirmation property of the estate will *include* post-petition income and property, but in a consensual confirmation it will not.[149] In the confirmation of a nonconsensual confirmation property is retained by the debtor, but in a consensual plan property of the estate will revest in the debtor upon confirmation.[150]

Secondly, in a nonconsensual confirmation of a plan, the Subchapter V trustee continues to serve post-confirmation,[151] making payments to creditors under the plan.[152] The trustee's post-confirmation continued service will increase administrative costs as the trustee will be due compensation post-confirmation.[153] In consensual confirmation, the debtor typically makes payments directly,[154] and the trustee's services are terminated upon substantial consummation,[155] thus, minimizing administrative costs associated with the trustee post confirmation.

Thirdly, unlike discharge upon confirmation in a consensual confirmation, a debtor will receive a discharge "as soon as practicable after completion by the debtor of all payments due within the first 3 years of the

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legislation-that-may-make-chapter-11-reorganization-a-viable-option-for-small-businesses.

147 *See, e.g.*, Brook Gotberg, *Fixing Ch. 11 for Small Biz: SBRA Has Room for Improvement*, LAW360, (Feb. 12, 2021, 8:42 AM EST), https://www.law360.com/articles/1352870/print?section=bankruptcy (observing that the elimination of the APR was thought to "allow for more successful bankruptcy filings among smaller businesses.").

148 *See* BONAPFEL, *supra* note 7, at 126–27 (detailing the consequences of consensual versus nonconsensual confirmation).

149 11 U.S.C. § 1186(a); BONAPFEL, *supra* note 7, at 127.

150 *Id*. at § 1141(b); BONAPFEL, *supra* note 7, at 127.

151 Brubaker, *supra* note 129, at 10; BONAPFEL, *supra* note 7, at 127.

152 11 U.S.C. § 1194(b); BONAPFEL, *supra* note 7, at 127.

153 *See* 11 U.S.C. § 326(b) (providing for compensation of Subchapter V).

154 11 U.S.C. § 1194(b) (providing for trustee to make payments in nonconsensual plan unless ordered otherwise by the court).

155 11 U.S.C. § 1183(c)(1) (under consensual confirmation the trustee's services are terminated upon substantial consummation of the plan).

plan, or such longer period not so exceed 5 years . . . ."[156] The delay in discharge is a significant consequence of nonconsensual confirmation of a plan.[157]

Fourth, and most important to this paper, beyond the timing of the discharge distinction between consensual and nonconsensual confirmation of plans, the scope of discharge varies for corporate small business debtors depending on whether the confirmation of the plan is consensual or nonconsensual.[158] The scope of discharge in the consensual confirmation of a plan for corporate small business debtors is governed by § 1141(d),[159] as highlighted above.[160] However, the scope of discharge in a nonconsensual confirmation of a plan is governed by § 1192.[161]

Section 1192 provides for a discharge of "debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan . . . ."[162] This discharge is subject to two important statutory limitations: First, debts "on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court" are excepted from discharge.[163] This is logical and provides some protection to nonconsenting creditors because the debtor will not receive a discharge unless the debtor performs under the plan.[164]

Second, section 1192 provides that debts "of the kind specified in section 523(a)" are excepted from discharge.[165] Section 523(a) provides

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[156] *Id.* § 1192; *see also* NORTON, *supra* note 116 ("If the plan is confirmed under the cramdown provision of Code § 1191(b), then the court may grant the debtor a discharge only as provided under Code § 1141(d)(1)(A) after completion of all payments due within the term of the plan.").
[157] *See generally* 11 U.S.C. § 1192.
[158] *See* NORTON, *supra* note 116 (recognizing the discharge varies for corporate debtors depending on whether plan confirmation is consensual or nonconsensual).
[159] *Id.* (In a consensual confirmation of a Subchapter V plan, "the Chapter 11 discharge provisions of § 1141(d) all apply, other than § 1141(d)(5) pertaining to discharges in individual Chapter 11 cases.").
[160] 11 U.S.C. § 1141(d)(1)(A); *see also* 11 U.S.C. § 1141(d)(2) (expressly provides that the limitation on discharge for debts provided for under § 523 is applicable to individuals); *see also supra* text accompanying notes 100–102.
[161] *See* 11 U.S.C. § 1192 (§ 1192 only applies to plans confirmed under § 1191(b), i.e. nonconsensual confirmation.).
[162] *Id.*
[163] *Id.* at § 1192(1).
[164] *See generally id.*
[165] *Id.* at § 1192(2).

that a discharge under several sections of the Bankruptcy Code, expressly including § 1192, "does not discharge an individual debtor from any debt" falling into one of 21 specified categories.[166] Section 1192(2) does not limit the applicability of the § 523(a) exception to discharge to individual or corporate debtors.[167] The language of § 1192(2) applies to all debtors in the context of a nonconsensual confirmation, without any statutory qualification.[168] Thus, under a plain reading of § 1192(2) the debts provided for in § 523(a) are excepted from discharge in a nonconsensual confirmation for individual and corporate debtors.[169] When presented with this issue of first impression, the Fourth Circuit Court of Appeals relied on the plain language of § 1192(2) and found that the § 523(a) exceptions applied to corporate small business debtors in nonconsensual confirmation of plans.[170]

For corporate debtors this is a dramatic change from the scope of discharge available under traditional Chapter 11.[171] For decades, debts under § 523(a) have not been excluded from the scope of discharge for corporate debtors in traditional Chapter 11.[172] With this historical

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[166] *Id.* at § 523(a) (contains 21 subsections identifying various types of debts excepted from discharge).
[167] BONAPFEL, *supra* note 7, at 130.
[168] *Id.* (Noting that "[n]ew § 1192(2) . . . states, without qualification, that debtors 'of the kind specified' in § 523(a) are excepted from discharge.").
[169] *See* NORTON, *supra* note 116. ("[I]t appears that Subchapter V was drafted with the intention to apply Code § 523 to non-individuals, which will provide equal discharges to Subchapter V debtors whether the debtor is an individual or a non-individual."); Jamie Wilson, *Subchapter V: Cramdown Discharges and Nonconsensual Plans*, 2 (Observing that "[t]his language, if read in isolation, indicates that the exceptions apply to both individuals and corporations.") (on file with author); BONAPFEL, *supra* note 7, at 130 (Judge Bonapfel noted this possible interpretation writing "[b]ecause § 523(a) specifies various debts, the conclusion is that a debt listed in § 523(a) is excepted from the § 1192 discharge.").
[170] *In re* Cleary Packaging, LLC, 36 F.4th 509, 517 (4th Cir. 2022).
[171] NORTON, *supra* note 116 (characterizing this change as "drastic"). This principle of broad discharge entities with no exceptions is well entrenched hornbook law. *See, e.g.*, GREGORY GERMAIN, BANKRUPTCY LAW AND PRACTICE, FOURTH EDITION 430 ("Note that there are no exceptions to discharge for entities – entities are discharged from all debts other than those provided by the plan, even if they committed terrible acts like fraud, breach of fiduciary duty, and the like.").
[172] *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. INST. L. REV. 757, 763–65 (2005) (Professor Brubaker discusses the historical treatment and reasoning behind Congress

backdrop, coupled with the purpose of SBRA, bankruptcy courts have interpreted the language of § 1192(2) to exclude from the exceptions to discharge debts provided in § 523(a).[173] These courts, as well as the Ninth Circuit BAP,[174] have taken a nuanced approach to analyzing § 1192(2) and rejected the plain language approach of the Fourth Circuit.[175]

This legal consequence of non-consensual confirmation is quite important as it impacts the ability of corporate small business debtors to effectively reorganize.[176] Non-discharge of § 523(a) debts may lead to a post-confirmation debt overhang that impacts the rescue of the debtor.[177] Also, inconsistent rulings and application of the discharge based on the geographic location of a debtor infringes on the uniform application of bankruptcy law.[178] The legal significance warrants a detailed examination of the courts' approaches and a critique of the approaches. This is provided in Part V.

V. SCOPE OF DISCHARGE FOR SUBCHAPTER V CORPORATE DEBTORS IN THE COURTS

This Part provides the legal analysis provided by the courts in analyzing the scope of discharge in a non-consensual plan for corporate small business debtors. The courts addressing the scope of discharge for corporate small business debtors in a non-consensual confirmation can be categorized into one of two camps. In one camp, courts have found that the exceptions to discharge in § 523(a) apply to corporate small business

providing a comprehensive discharge to corporate debtors with the passage of the Bankruptcy Code in 1978).

[173] *See* BenShot, LLC v. 2 Monkey Trading, LLC (*In re* 2 Monkey Trading, LLC), 650 B.R. 521, 523 (Bankr. M.D. Fla. 2023); *In re* Hall, 651 B.R. 62, 65, 69 (Bankr. M.D. Fla. 2023); Gaske v. Satellite Rests. Inc. (*In re* Satellite Rests. Inc.), 626 B.R. 871, 874 (Bankr. D. Md. 2021); *In re* Rtech Fabrications, LLC, 635 B.R. 559, 563–64 (Bankr. D. Idaho 2021); Avion Funding, LLC v. GFS Indus., LLC (*In re* GFS Indus., LLC), 647 B.R. 337, 344 (Bankr. W.D. Tex. 2022); Jennings v. Lapeer Aviation, Inc. (*In re* Lapeer Aviation, Inc.), No. 21-31500-JDA, 2022 WL 1110072, at *1, *2 (Bankr. E.D. Mich. Apr. 13, 2022).

[174] Lafferty v. Off-Spec Sols., LLC (*In re* Off-Spec Sols., LLC), 651 B.R. 862, 865 (B.A.P. 9th Cir. 2023).

[175] *See In re* 2 Monkey Trading, LLC, 650 B.R. at 521–23; *In re* Hall, 651 B.R. at 67–69; *In re* Satellite Rests. Inc., 626 B.R. at 874–79; *In re* Rtech Fabrications, LLC, 635 B.R. at 563–66; *In re* GFS Indus., LLC, 647 B.R. at 340–50; *In re* Lapeer Aviation, Inc., 2022 WL 1110072, at *1–2.

[176] *In re* Off-Spec Sols., LLC, 651 B.R. at 872.

[177] *Id.*; Janger, *supra* note 8, at 264.

[178] *See generally* U.S. CONST. art. I, § 8, cl. 4.

debtors in non-consensual confirmation in a Subchapter V case.[179] The second camp of courts found that the exceptions to discharge in § 523(a) do not apply to corporate small business debtors in non-consensual confirmation in a Subchapter V case.[180] Each camp's analysis warrants unpacking. The legal analysis of the courts is critiqued in subsection A.

A. *Section 523(a) Discharge Exceptions Applicable to Corporate Debtors*

To date, the Fourth Circuit Court of Appeals is the only circuit court to address this legal issue.[181] The facts of the case are straightforward and put the issue in context. A state court entered a $4.7 million dollar judgment in favor of a creditor ("judgment creditor") and against Cleary Packaging, L.L.C. ("Cleary") for tortious interference with business relations and intentional interference with contracts.[182] Cleary then filed Chapter 11 electing Subchapter V.[183] Cleary, a small business corporate debtor, proposed to pay the judgment creditor under its Subchapter V plan approximately $140,000.00, and if the plan were confirmed the balance of the debt would be discharged.[184]

The judgment creditor filed an adversary proceeding in the bankruptcy court to have the bankruptcy court declare the $4.7 million dollar judgment nondischargeable under 11 U.S.C. §§ 1192(2) and 523(a).[185] Cleary and the judgment creditor agreed that the underlying judgment was "for willful and malicious injury"[186] – making the debt the

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[179] *In re* Cleary Packaging, LLC, 36 F.4th at 517–18.
[180] *In re* Hall, 651 B.R. 62, 65 (Bankr. M.D. Fla. 2023).
[181] Cantwell-Cleary Co. v. Cleary Packing, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509, 510 (4th Cir. 2022) (observing that this is a matter of apparent first impression for the court and the Court of Appeals). Noteworthy, this issue is now pending before the Fifth Circuit Court of Appeals in a direct appeal from the bankruptcy court. *See* Avion Funding, L.L.C. v. GFS Indus., L.L.C. (*In re* GFS Indus., L.L.C.), No. 23-50237 (5th Cir filed Apr. 7, 2023).
[182] *In re* Cleary Packaging, LLC, 36 F.4th at 511–12.
[183] *Id.* at 512.
[184] *Id.*
[185] *Id.* at 512–13.
[186] 11 U.S.C. § 523(a)(6). Section 523(a)(6) provides that "[a] discharge under section . . . 1192 . . . does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.*

type of debt that is non-dischargeable under § 523(a)(6).[187] However, the parties disagreed whether the judgment debt was dischargeable in this case, focusing on the interplay of § 1192(2) and § 523(a).[188]

Cleary, the debtor asserted it was discharged and the judgment creditor asserted it was non-dischargeable.[189] The difference in analysis and application of the § 523(a) discharge exception focused on the *class of debtor* – individual or corporate.[190] When a plan is confirmed without consent, § 1192 provides for a discharge, but excepts from discharge debts "of the kind specified in section 523(a)."[191] Section 1192 does not make any reference to the *class of debtor* – individual or corporate.[192]

Cleary's position was that the § 1192(2) discharge is limited by the language of § 523(a) which provides that the discharge exceptions set forth in § 523(a) apply to *individual debtors* only.[193] Cleary focused on the language of § 523,[194] which does address the *class of debtor* in the prefatory section leading into the specific exceptions.[195] Section 523(a)(6) provides "[a] discharge under section . . . 1192 . . . does not discharge an *individual* debtor from any debt . . . (a)(6) for willful and malicious injury by the debtor to another entity or to the property of another entity."[196] Therefore, according to Cleary, although the judgment debt is the *type* of debt included in § 523(a), the debt was dischargeable because Cleary, a corporate debtor, was not the *class of debtor* the § 523(a) discharge exception applies to.[197]

The judgment creditor, in analyzing the interplay of section 1192(2) and 523(a), focused on the language of section 1192(2), that expressly excludes the *type* of debts listed in section 523(a) - without any reference to the *class of debtor*, individual or corporate.[198] It was argued that section 1192(2), the specific provision governing discharge in Subchapter V, should control the general provision regarding discharge -

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[187] *In re* Cleary Packaging, LLC, 36 F.4th at 513.
[188] *Id.* (noting the dispute turns on the "conflicting interpretations of the two relevant provisions – § 1192(2) and § 523(a)").
[189] *Id.*
[190] *Id.*
[191] 11 U.S.C.§ 1192(2).
[192] *Id.*
[193] *In re* Cleary Packaging, LLC, 36 F.4th at 513.
[194] *Id.*
[195] *See* 11 U.S.C. § 523(a).
[196] 11 U.S.C. § 523(a)(6).
[197] *In re* Cleary Packaging, LLC, 36 F.4th at 513.
[198] *Id.*

section 523(a).[199] Section 1192(2) does not incorporate section 523(a) generally, it only references the "debts of the kind" included in section 523(a) as an exclusion to all Subchapter V debtors, regardless of class of debtor. The judgment creditor argued that since the debt was the type of debt listed in section 523(a), the debt is excepted from discharge.[200]

The Fourth Circuit overruled the bankruptcy court and found that section 1192(2) "provides discharges to small business debtors, whether they are individuals or corporations, except with respect to the 21 kinds of debts listed in § 523(a)."[201] The Fourth Circuit relied on textual review, consideration of the provisions in context, and practical and equitable considerations.[202] The underlying reasoning of the Fourth Circuit warrants unpacking.

First, the Fourth Circuit's textual review emphasized that section 1192(2) used the language "debt of this kind" and makes no reference to class or type of debtor.[203] This language according the Fourth Circuit "indicates that Congress intended to reference only the list of non-dischargeable debts found in § 523(a)."[204] The cross-reference of section 1192(2) to section 523 makes no reference to class or type of debtor, but rather, only refers to the kind of debt.[205] Moreover, the Fourth Circuit found that the more specific discharge provision of section 1192(2) for Subchapter V should control over the more general discharge provision of section 523(a).[206]

Secondly, in regard to the contextual considerations relied on by the Fourth Circuit, the court looked to Chapter 12 of the Code for guidance.[207] The language at issue in section 1192(2) is nearly identical to statutory language in section 1228(a) which excludes from a Chapter 12 discharge the kind of debts specified in section 523(a) without regard to class of debtor – individual or corporate.[208] Courts have interpreted the discharge provision in section 1228(a) excluding the kinds of debt

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[199] *Id.*
[200] *Id.*
[201] *Id.* at 517.
[202] *Id.* at 513.
[203] *Id.* at 515.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*

specified in section 523(a) to apply to both individual and corporate debtors.[209] The Fourth Circuit reasoned that giving "the same language in the same statute" different interpretations would not be rational.[210] The prior interpretations of the same language provided support for the Fourth Circuit's interpretation.[211]

Thirdly, the Court addressed practical and equitable considerations. The purpose of SBRA is to reduce costs and simplify Chapter 11 for small businesses.[212] To help achieve this end traditional Chapter 11 provisions were modified, including eliminating the absolute priority rule.[213] This enhanced a small business debtor's ability to reorganize, giving the debtor leverage in a non-consensual confirmation.[214] The applicability of the traditional discharge provision of 1141(d), which makes distinctions between individual and corporate debtors, was limited in Subchapter V and replaced with § 1192.[215] Section 1192 applies to both individuals and corporations and in the non-consensual context excludes 523(a) debts which provides leverage to creditor(s).[216] This exclusion from discharge provides "an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor."[217] The Fourth Circuit found that to interpret § 1192(2) and § 523(a) to exclude the discharge exceptions to corporate debtors would not only violate this balancing of interests in Subchapter V, but also "violate the text of § 1192(2)."[218]

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[209] *Id.*
[210] *Id.* at 517.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*

B. *Section 523(a) Discharge Exceptions Not Applicable to Corporate Debtors*

In contrast with the holding of the Fourth Circuit, the vast majority of bankruptcy courts[219] and the Ninth Circuit BAP[220] have found that the discharge exceptions under § 523(a) do not apply to corporate debtors in a Subchapter V case. The Ninth Circuit BAP's analysis is consistent with the approaches by the bankruptcy courts in this camp and illustrates how the analysis of the Fourth Circuit and courts in this camp diverge.[221]

The facts germane to the Ninth Circuit BAP's legal analysis are straightforward. Off-Spec Solutions, LLC ("Off-Spec"), the debtor, filed Chapter 11 electing subchapter V.[222] Lafferty, the creditor, filed an adversary proceeding asserting a nondischargeable claim under § 523(a)(6).[223] The factual basis of Lafferty's claim pertains to alleged sexual harassment, discrimination, and retaliatory discharge by Off-Spec.[224] Off-Spec filed a motion to dismiss the adversary proceeding, asserting that § 523(a) only applies to individuals subchapter V debtors, and, therefore the complaint fails to "state a cognizable claim for relief."[225] The bankruptcy court granted Off-Spec's motion to dismiss, finding that the § 523(a) exceptions to discharge do not apply to corporate subchapter V debtors.[226] Lafferty appealed, arguing that the bankruptcy court erred by relying on the analysis of the Fourth Circuit in the *Cleary* case.[227] The Ninth Circuit BAP rejected Lafferty's argument affirming the bankruptcy court dismissal of the adversary proceeding complaint and held "that §

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[219] As highlighted above, numerous bankruptcy courts found that the § 523(a) discharge exceptions do not apply to corporate Subchapter V debtors. *See supra* notes 31–35. The Ninth Circuit BAP found that bankruptcy courts "have uniformly concluded . . . that § 1192 does not make § 523(a) applicable to corporate debtors." *Lafferty v. Off-Spec Solutions, LLC* (*In re* Off-Spec Solutions, LLC), 651 B.R. 862, 865 (9th Cir. BAP 2023). However, at least one bankruptcy court has held to the contrary. *In re* Better Than Logs, Inc., 631 B.R. 670, 682 (Bankr. D. Mont. 2021).

[220] *Lafferty v. Off-Spec Solutions, LLC* (*In re* Off-Spec Solutions, LLC), 651 B.R. 862, 873 (9th Cir. BAP 2023).

[221] *See id.*

[222] *Id*. at 864.

[223] *Id*.

[224] *Id*.

[225] *Id*.

[226] *Off-Spec Solutions*, 651 B.R. at 865.

[227] *Id*.

1192 does not make debts specified in § 523(a) applicable to corporate debtors in subchapter V."[228]

The Ninth Circuit BAP's reasoning centered around three areas of analysis: statutory construction,[229] context,[230] and policy considerations.[231] The Ninth Circuit BAP's statutory analysis, like the Fourth Circuit's analysis in *Cleary*, analyzed the interplay of § 1192 and § 523(a).[232] The Ninth Circuit BAP found § 1192's reference to debts "specified in section 523(a)"[233] was a reiteration of "§ 523(a)'s application to debtors under subchapter V."[234] The court found that § 523(a) "unambiguously applies only to individual debtors" and there is nothing in § 1192 that alters this express limitation of § 523 or "expands its scope to corporate debtors.[235]

The Ninth Circuit BAP rejected the Fourth Circuit's application of the general/specific canon in *Cleary* for two reasons.[236] First, while the court agreed with the statutory cannon that a specific statutory provision governs a general statute relied on by the Fourth Circuit, the court found it was inapplicable in the case at bar because the two statutory provisions at issue—§ 1192 and § 523(a)—can be reconciled, rendering both provisions effective.[237] The court reasoned, "Our construction harmonizes the statutes. Section 1192 incorporates the types of debts that are nondischargeable under a nonconsensual subchapter V plan, and § 523(a) limits the scope of nondischargeability to individual debtors."[238] Second, even if the general/specific cannon applied, the Ninth Circuit BAP noted that § 523(a) applicability to individual debtors would control § 1192.[239] According to the Ninth Circuit BAP, § 523 is the specific statute because it limits the scope of discharge and § 1192 is the general discharge statute under subchapter V.[240]

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[228] *Id*. at 873.
[229] *Id*. at 866–68.
[230] *Id.* at 868–71.
[231] *Id.* at 871–73.
[232] *Id.* at 866–68.
[233] 11 U.S.C. § 1192(2).
[234] *In re* Off-Spec Solutions, LLC, 651 B.R. at 867.
[235] *Id.*
[236] *Id.* at 867–68.
[237] *Id.*
[238] *Id.* at 868.
[239] *Id.*
[240] *Id.*

The Ninth Circuit BAP considered the context of subchapter V and the statutory provisions at issue.[241] The court looked to the scope of discharge for corporate debtors under traditional Chapter 11 to provide context for interpreting the scope of discharge for corporate debtors under subchapter V, which is part of Chapter 11.[242] Since the enactment of the Bankruptcy Code in 1978, traditional Chapter 11 corporate debtors enjoy a broad discharge in which the § 523(a) discharge exceptions are inapplicable.[243] For public policy reasons, Congress intentionally changed the "pre-Code practice and eliminated exceptions to discharge in appliable to corporate debtors."[244] Since the passage of the Bankruptcy Code, Congress has curtailed the corporate scope of discharge only once.[245] In so doing, Congress expressly established this narrow exception.[246] Otherwise, the scope of discharge has been "strenuously protected."[247] In light of the context of Chapter 11, the Ninth Circuit found it improbable Congress changed the long-standing broad scope of discharge.[248]

The Ninth Circuit BAP also considered the context of discharge provisions in other chapters of the Code.[249] Section 523(a)'s discharge exceptions apply to all chapters of the Code.[250] Even though 523(a) applies to all chapters of the Code, each specific discharge provision in Chapters 7, 11, 12 and 13 includes a reference to § 523(a) similar to the reference contained in § 1192 for subchapter V.[251] The court found that these references to § 523(a), while redundant, classify "that each discharge provision is limited by § 523(a), which makes debts nondischargeable for individual debtors."[252] Likewise, the Ninth Circuit BAP found that Congress's reference to debts "of the kind specified in section 523(a)"

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[241] *Id.* at 868–71.
[242] *Id.* at 868.
[243] *Id.*
[244] *Id.*
[245] *Id.* at 869 (Congress enacted § 1141(d)(6) expressly excepting certain debts from corporate debtors).
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.* at 869–71.
[250] *Id.* at 870 (noting that "§ 103(a) makes the provisions of chapter 5 applicable to chapters 7, 11, 12, and 13, and § 523(a) specifically excepts debts from discharge under the referenced discharge statutes").
[251] *Id.*
[252] *Id.* at 871.

reiterates "§ 523(a)'s application to individual debtors under subchapter V."[253]

Beyond statutory construction and context, the Ninth Circuit BAP found that policy considerations supported its holding.[254] The underlying purpose of SBRA—"to make reorganization efficient and expeditious for small business debtors"[255]—would be undermined and provide little benefit to unsecured creditors if § 523(a) debts were nondischargeable in a nonconsensual confirmation of a plan.[256] The Ninth Circuit BAP rejected the argument that the application of the nondischargeable debts to corporate debtors in nonconsensual confirmation was a way to balance the interests of the creditor with that of the debtor in a Subchapter V case.[257] The court reasoned that although a nonconsensual confirmation eliminates the APR, which benefits the debtor, excluding debts from discharge does not provide corresponding benefits to creditors.[258] Rather, the Ninth Circuit BAP found that excluding debts from discharge would harm most general, unsecured creditors with increasing litigation in small business cases.[259]

VI. LEGAL AND POLICY ANALYSES OF THE CASELAW

The two camps' approaches to analyzing the issue are generally consistent and entail a two- pronged approach.[260] First, the primary focus involves performing a legal analysis of the statutory language.[261] Second, the courts delve into a policy analysis that considers the legislative history, context, and purpose behind SBRA.[262] The two camps diverge based on the outcome of the analyses.[263] Part VI examines and critiques each prong of the analysis employed by the courts.

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[253] *Id.*
[254] *Id.* at 871–73.
[255] *Id.* at 873.
[256] *Id.* at 872–73.
[257] *Id.* at 872.
[258] *Id.*
[259] *Id.*
[260] Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, CONG. RSCH. SERV. (Apr. 5, 2018), https://crsreports.congress.gov/product/pdf/R/R45153/2.
[261] *Id.*
[262] *Id.*
[263] *Id.*

A. *Legal Analysis*

The legal analysis, rooted in rudimentary statutory analysis, supports excluding the § 523(a) debts from discharge for corporate debtors in Subchapter V.[264] As directed by the Supreme Court, statutory analysis should begin with the text of the statute.[265] If the statutory language is plain, the courts should enforce the statute as written.[266]

Section 1192(2) is clear and does not refer to type of debtor, but rather refers to the type of debt.[267] There is nothing on the face of the statute to indicate that Congress intended to differentiate between individual or corporate debtors.[268] Section 1192(2) excepts from discharge types of debts without referencing the type of debtor.[269] It provides that debts "of the kind specified in section 523(a) of this title" are excepted from discharge.[270] Because the language is clear on its face, the courts should not second-guess Congress's judgment to exclude from discharge types of debts included in § 523(a) to Subchapter V corporate debtors.[271] Congress could have distinguished between types of debtors, as it has done explicitly in other parts of the Code, but it did not do so here.[272]

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[264] *See* Aleksandra Abramova, et al., *Are Subchapter V Corporate Debtors Subject to the §523(a) Exceptions to Discharge?*, THOMPSON COBURN LLP (June 15, 2023), https://www.thompsoncoburn.com/insights/blogs/credit-report/post/2023-06-15/are-subchapter-v-corporate-debtors-subject-to-the-523a-exceptions-to-discharge.

[265] Van Buren v. United States, 141 S. Ct. 1648, 1654, 210 L. Ed. 2d 26 (2021) ("[W]e start where we always do: with the text of the statute."); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) ("The task of resolving [a] dispute over the meaning of . . . [a statute] begins where all such inquiries must begin: with the language of the statute itself.").

[266] Caminetti v. United States, 242 U.S. 470, 485 (1917).

[267] *See* 11 U.S.C. § 1192(2).

[268] *See id.*

[269] *Id.*

[270] *Id.*

[271] *See, e.g.*, Bartenwerfer v. Buckley, 143 S.Ct 665, 676 (2023) (In the context of analyzing the application of the § 523(a)(2)(A) discharge exception to individuals, the Supreme Court relied on the language of Congress and stated that "it is not our role to second-guess that judgment.").

[272] 11 U.S.C. § 1141(d)(2). Congress provided: "A discharge under this chapter does not discharge a debtor who is an *individua*l from any debt excepted from discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2) (emphasis

Importantly, there is no conflict between § 1192(2) and § 523(a).[273] Section 1192(2) does not incorporate by reference § 523(a); it merely references the type of debts excluded from discharge.[274] Thus, the application of the prefatory phrase in § 523(a) applying the discharge exceptions to only individuals is not applicable.[275] Congress could have incorporated § 523(a) in its entirety when drafting § 1192(2); however, it did not do so.[276] Congress only referred to the type of debts listed in § 523(a).[277]

Assuming, arguendo, there is a conflict between § 1192(2) and § 523(a), the specific/broad statutory construction principle supports applying the discharge exceptions included in § 523(a) to corporate debtors. Section 523(a) is a general provision referencing discharge provisions in the Code.[278] As such, the specific statute, § 1192(2), should control the general statute, § 523(a).[279]

The statutory language at issue is nearly identical to language in Chapter 12, and courts interpreting the Chapter 12 provisions have applied the discharge exceptions to corporate debtors.[280] Chapter 12 allows a family farmer or family fisherman to file for relief.[281] The Chapter 12 debtor can be an individual, an individual and a spouse, a corporation, or a partnership.[282] Section 1228(a)(2) provides that any debt "of a kind specified in section 523(a) of this title" is excepted from discharge.[283] Section 1228(a)(2) does not differentiate types of debtors—just as § 1192(2).[284] Bankruptcy courts interpreting § 1228(a)(2) have applied the

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added). Similarly, in § 1141(d)(6) Congress expressly curtailed the scope of discharge for corporate debtors. 11 U.S.C. § 1141(d)(6).

[273] *See* 11 U.S.C. § 1192(2); 11 U.S.C. § 523(a).

[274] 11 U.S.C. § 1192(2).

[275] *See* 11 U.S.C. § 523(a).

[276] *See* 11 U.S.C. § 1192(2).

[277] *Id.*

[278] 11 U.S.C. § 523(a).

[279] *See* Cantwell-Cleary Co. v. Cleary Packaging, LLC, 36 F.4th 509, 515 (4th Cir. 2022) (explaining the specific versus general analysis).

[280] NORTON, *supra* note 116, at § 107:20 ("[I]t appears that the drafters created Subchapter V to mirror Chapter 12, and courts have interpreted identical language in Chapter 12 to include corporations."); Cook, *supra* note 3, at 25 (discussing the Chapter 12 cases and arguments to apply the analysis of those cases to the Subchapter V context).

[281] 11 U.S.C. § 109(f).

[282] 11 U.S.C. § 101(18)(B), (19A)(B).

[283] 11 U.S.C. § 1228(a)(2).

[284] *Id.*

discharge exception to individual and corporate debtors.[285] Likewise, bankruptcy courts interpreting § 1192(2) should apply the discharge exceptions of § 523(a) to corporate debtors in Subchapter V. This is consistent with the basic principle that "identical words and phrases within the same statute should normally be given the same meaning."[286] There is no basis to deviate from the principle.

Congress distinguished between individual and corporate debtors in the Code.[287] Here, Congress did not make any such distinction in § 1192(2).[288] Congress's inclusion of language in a statute section and omission of that language in another statute section is generally deliberate.[289] There is nothing to indicate that this was not a deliberate choice.[290]

B. *Policy Analysis*

The previous section's statutory analysis supports the Fourth Circuit's application of the discharge exceptions to corporate debtors. However, consideration of the legislative history (or lack thereof) of SBRA, the core attributes of SBRA, and the policy behind discharge generally lends itself to the interpretation of most bankruptcy courts[291] and the Ninth Circuit BAP,[292] which do not apply the discharge exceptions to corporate debtors.[293]

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[285] *In re* Breezy Ridge Farms, Inc., 2009 WL 1514671, at *2 (Bankr. M.D. Ga. 2009); *In re* JRB Consol., Inc., 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995) ("The wording in § 1228(a)(2) describing 'debts of the kind' specified in § 523(a) does not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in § 523(a). Debts of the kind easily seems to be limited to the subparagraphs of § 523(a) which identify the types of debts which are eligible to be excepted from discharge.").

[286] Hall v. United States, 566 U.S. 506, 519 (2012).

[287] *See supra* note 272 (providing examples).

[288] *See* 11 U.S.C. § 1192(2).

[289] Bartenwerfer v. Buckley, 598 U.S. 69, 78 (2023).

[290] *Id.*

[291] *See, e.g.*, NORTON, *supra* note 116, at § 107:20 (noting, without legislative history, it is not surprising bankruptcy courts are reluctant to interpret the statutory change to exclude § 523(a) debts from the discharge under § 1191(b)).

[292] Lafferty v. Off-Spec Solutions, LLC, 651 B.R. 862, 872 (9th Cir. BAP 2023).

[293] *See id.*; NORTON, *supra* note 116, at § 107:20.

First, there is no legislative history to suggest a change in the scope of discharge for corporate debtors.[294] It does not seem Congress would modify the long-standing principle of a broad discharge for corporate debtors without some clear indication.[295] When Congress enacts laws, it is deemed to know the existing law.[296] Here, the broad discharge to corporate debtors has been part of the fabric of Chapter 11 law for over fifty years.[297] Changing it without any indication in the road to the legislation seems unlikely.

In this vein, at least one court has found that the phrase "any debt that is otherwise dischargeable" in the legislative history[298] of § 1192(2) "logically refers to the existing form of [s]ection 523(a) which by its express language applies only to individual debtors."[299] This reading is consistent with the law in place for over fifty years, and it is rational considering the lack of any legislative history or other indication Congress intended to modify the law.[300]

Second, curtailing the scope of discharge for corporate debtors is inconsistent with the limited legislative history of SBRA generally.[301] Subchapter V is designed to streamline Chapter 11 and help small

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[294] NORTON, *supra* note 116, at § 107:20 (observing there is no legislative history regarding Congress's intent to modify the scope of discharge for corporate debtors); Cook, *supra* note 3, at 25 ("[C]ourts have found that nothing in the legislative history indicates that corporations could now be subject to such a 'dramatic change' in chapter 11 practice.").

[295] *See* NORTON, *supra* note 116, at § 107:20; Cook, *supra* note 3, at 25.

[296] *See The Legislative Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/ (last visited Oct. 22, 2023).

[297] *See* Beard v. A.H. Robins Co., 828 F.2d 1029, 1032 (4th Cir. 1987) ("The present Bankruptcy Act retains the earlier distinction between the dischargeability of a 'willful and malicious' tort claim in an individual bankruptcy, and the dischargeability of a similar such claim in a corporate reorganization: in the individual bankruptcy, such a claim is not dischargeable, but under the corporate reorganization provision of the Bankruptcy Act it is dischargeable."); *In re* Push & Pull Enter., Inc., 84 B.R. 546, 548 (N.D. Ind. 1988) ("It is almost undebatable and universally held that a corporate Chapter 11 debtor is not subject to the dischargeability provisions of 11 U.S.C.A. § 523.").

[298] *In re* Satellite Rests. Inc., 626 B.R. at 878 (quoting 290 H.R. Rep. No. 116-171, at p. 8 (2019)).

[299] Cook, *supra* note 3, at 25, n.16 (quoting Satellite Rests. Inc., 626 B.R. at 878).

[300] *See* Cook, *supra* note 3.

[301] *See* H.R. REP. NO. 116-171, at 1 (2019).

businesses reorganize.[302] If the exceptions to discharge apply to corporate Subchapter V debtors, such debtors will be subject to litigation and reorganizations will be uncertain.[303] This will increase costs of Chapter 11 in terms of money and time.[304] This directly runs counter to the purpose of Subchapter V—a streamlined, efficient Chapter 11 process for small businesses.[305]

Third, core attributes of Subchapter V oppose subjecting corporate debtors to the § 523(a) discharge exceptions.[306] Subchapter V permits debtors to retain control in the plan process, promotes quick and cost-effective process, and favors consensual confirmation of plans.[307] Allowing the discharge exceptions to apply diminishes the effect of each attribute.[308] The control and leverage given to the debtor in the plan process through elimination of the APR, plan exclusivity, and no votes required to achieve confirmation are eroded if a single creditor can hold out forcing a non-consensual confirmation and assert a discharge claim.[309] The leverage granted to a debtor can be lost and given to a single creditor.[310] This loss of leverage for the debtor will increase administrative costs through delays, as well as costs of litigating a § 523(a) claim.[311] It will also run counter to the intent of Congress to favor consensual plans.[312] Thus, the statutory framework and key tenants of Subchapter V is inconsistent with applying § 523(a) discharge exceptions to corporate debtors.[313]

Fourth, the policy behind the broad discharge supports limiting the application of the discharge exceptions to corporate Subchapter V debtors.[314] Discharge gives debtors a fresh start.[315] This fresh start is "the

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[302] *Id.*
[303] *See id.*
[304] *See id.*
[305] *See id.*
[306] Cook, *supra* note 3, at 25.
[307] *Id.*
[308] *Id.*
[309] *Id.* at 25, 58.
[310] *See id.*
[311] *Id.* at 58.
[312] *Id.*
[313] *See id.* at 25, 58 (analyzing in detail the basic tenants of SBRA, which do not support applying the discharge exceptions to Subchapter V corporate debtors).
[314] *See id.*
[315] Brubaker, *supra* note 172, at 759.

driving force behind modern discharge policy."[316] If debts are potentially not discharged, this will lead to a debt overhang, and, importantly, uncertainty post-confirmation leaving the prospect of a successful rescue at risk.[317]

Moreover, courts have narrowly applied discharge exceptions unless the statute plainly expresses the intent to apply the discharge exception.[318] In light of that principle and the fact that § 1192(2) does not "plainly" express an intent to apply the discharge exceptions to corporate Subchapter V debtors, it should not be interpreted as such.[319]

VII. PROPOSED REFORM

The current divide in the courts does not appear to be narrowing. Rather, with three circuit courts addressing the issue in the coming months and one already having addressed the issue, it is likely that there will be a split among the circuits. Bankruptcy courts will likely continue, when there is no binding circuit precedent, to rule in a way that is consistent with the underlying policy of SBRA, as most bankruptcy courts have done to date.[320] To resolve the divide and ensure that Subchapter V operates in a way that promotes the rescue of small businesses and is consistent with pre-SBRA law, the approach of the bankruptcy courts should be codified.[321] There are a couple ways this change can be statutorily made.

First, § 1192(2) can be modified to expressly state that the discharge under that section is subject to § 523(a). This approach is logical and reiterates that § 523(a)'s general applicability throughout the Code applies in Subchapter V. Since § 523(a) limits its application to individual debtors only, and does not mention corporate debtors, then the discharge exceptions would not apply under § 1192(2) to corporate debtors.[322] The modified § 1192(2) would read as follows:

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[316] *Id.*
[317] *See id.* at 766 (noting that in drafting the Bankruptcy Code, Congress considered discharge exceptions to corporations but concluded that adding exceptions would create unacceptable uncertainty in reorganizations).
[318] Cook, *supra* note 3, at 58 ("Exceptions to discharge should be confined to those plainly expressed . . . .") (quoting Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998)); *see also* Gleason v. Thaw, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed . . . ."); Bullock v. BankChampaign, N.A., 569 U.S. 267, 275 (2013).
[319] Cook, *supra* note 3, at 58.
[320] *See* Cook, *supra* note 3.
[321] *See id.*
[322] *See* 11 U.S.C. § 1192(2); 11 U.S.C. § 523(a).

> 1192 Discharge.
> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—
> (1) *any debt* on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
> (2) *as provided* ~~of the kind specified~~ in section 523(a) of this title

The new language – "as provided" – in § 1192(2) references § 523(a). Section 523(a) expressly references 1192 and limits its applicability to individual debtors.[323] Section 523(a) provides as follows:

> "523. Exceptions to Discharge
> (a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> (1) . . . [listing specific debts] …. (20)."[324]

Thus, modified § 1192(2) when read in conjunction with § 523(a) clearly limits the applicability of the discharge exceptions to individuals.

Secondly, § 1192(2) could expressly state that the types of debts excepted from discharge under § 523(a) apply only to individual debtors and not to corporate debtors. The modified § 1192(2) would read as follows:

> 1192. Discharge.

[323] 11 U.S.C. § 523(a).
[324] *Id.*

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except ~~any debt~~
> (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or
> (2) *of individual debtors* ~~of the kind~~ as specified in section 523(a) of this title.

This will achieve the same result as the first option. It will be clear that the § 523(a) discharge exceptions only apply to individuals under § 1192 discharge. The specific discharge provision of § 1192(2) reiterates the general discharge provision's application to individual debtors only. This will leave no room for ambiguity in applying the statute.

VIII. CONCLUSION

From the debtor's perspective, limiting the scope of discharge in Subchapter V is certainly a negative attribute of SBRA.[325] That debt overhang can result can be a "death blow" to rescuing small businesses.[326] This negative attribute has broad implications beyond the particular business seeking relief, as a less effective rescue regime impacts all stakeholders including creditors, employees, communities, as well as others.[327] It may also stifle or hamper the ability or willingness of the owners of the business to enter into other small business endeavors.[328] To ensure that Subchapter V fulfills its purpose of streamlining and promoting reorganization of businesses as well as reaps the benefits of a well-functioning rescue regime, Congress needs to reform the Code to ensure a broad discharge for small business corporate debtors.

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[325] Norton & Bailey, *supra* note 3, at 386 ("One negative for small business debtors is that Subchapter V makes applicable the nondischargeability provisions of § 523(a), thus preventing a corporate debtor from discharging fraud, tax, and other nondischargeable claims.").
[326] *See id.*
[327] *See id.*
[328] *See id.*