THE SMALL BUSINESS PREPACK: HOW SUBCHAPTER V PAVES THE WAY FOR BANKRUPTCY'S FASTEST CASES

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America has long styled itself as a place where entrepreneurs can dream big and — if things go well — make it big too. But when small businesses fail, does the American bankruptcy system provide a real opportunity to preserve value and try again? For decades, bankruptcy professionals, judges, and lawmakers have tried various approaches to small business bankruptcies, none of which seemed to work particularly well. But in 2019, Congress passed the Small Business Reorganization Act (the "SBRA"), one of the most significant amendments to the Bankruptcy Code in a generation. As practitioners, scholars, and judges work out the contours of the rules, we shine new light on one strategy for creditors and debtors that has gone unexplored so far: the small business prepack. Prepackaged bankruptcies, or "prepacks," are an aggressive and controversial approach for chapter 11 debtors that prioritize speed and certainty. Prepack debtors develop their reorganization plan, solicit votes, and prepare all necessary filings before entering court. At their fastest, some debtors have managed to get in and out of bankruptcy court in less than twenty-four hours. Filing a prepack reduces costs, lowers unpredictability, and keeps the debtor out of the public eye. While stringent notice, disclosure, and voting requirements make prepack bankruptcies challenging and contentious under regular chapter 11, we argue that subchapter V provides a more hospitable procedural outlet for the strategy. While the SBRA did not address prepacks expressly, the SBRA facilitates prepacks for small businesses, paving the way for bankruptcy's fastest cases both theoretically and practically. We walk through what a small business prepack would look like and analyze which small businesses would benefit most from this strategy. We conclude with several proposals to refine subchapter V to make small business prepacks more predictable,

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efficient, and fair. Not all bankruptcy cases can be fast, but the SBRA may now make it easier for some small businesses to reorganize at rocket speed.

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INTRODUCTION

"*[The] case will move fast and that alone will reduce costs.*"[1]

"*[T]he primary benefits … are speed, cost, and value.*"[2]

Bankruptcy professionals and their clients have long valued expediency and efficiency. Yet throughout much of bankruptcy's history in the United States, financially distressed small businesses often found themselves trapped in protracted and intricate bankruptcy cases or attempting to survive outside the auspices of the Bankruptcy Code.[3] Recognizing the incongruence of these options with the objectives of bankruptcy, and in the wake of numerous judicial and legislative attempts to solve the problem, Congress tried a new approach in 2019 by creating a new subchapter tailored to small businesses.[4]

The Small Business Reorganization Act (or "SBRA")[5] was one of the most significant amendments to the Bankruptcy Code in a generation.[6] It added a new process for small business bankruptcies — subchapter V — within chapter 11 of the Bankruptcy Code.[7] Subchapter V removed many of the complex requirements that had made bankruptcy unapproachable for small businesses.[8] It shortened the length of the bankruptcy process, lowered costs, reduced the number of seats at the negotiating table, and offered entrepreneurs the chance to start afresh by keeping a stake in their company

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[1] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. On Antitrust, Commercial, & Admin. Law of the H. Comm. on the* Judiciary, 116th Cong. 4 (2019) (Revised Testimony of A. Thomas Small on behalf of the Nat'l Bankr. Conf. in support of H.R.3311), https://docs.house.gov/meetings/JU/JU05/20190625/109657/HHRG-116-JU05-Wstate-SmallT-20190625.pdf [https://perma.cc/3WZA-JLKQ] [hereinafter Small Testimony].

[2] Sarah Borders & Stephen M. Blank, *1-Day Prepackaged Bankruptcy*, BL (Aug. 2021), www.bloomberglaw.com/product/health/document/X36CBBNO000000?resource_id=88977b9d4399e7b44389f427511e5d2c [https://perma.cc/YJT3-MT3C].

[3] 11 U.S.C. § 101 *et seq.*

[4] *See infra* Section I.A (describing the history of attempted changes to the Bankruptcy Code to address small business concerns).

[5] Small Business Reorganization Act of 2019, Pub. L. No. 116-54 (2019).

[6] *See, e.g.*, David A. Mawhinney, *Saving the Stakeholders*, 61 THE JUDGES' J. 26, 28 (2022) (describing the bipartisan legislation as "ushering in the most radical changes to federal bankruptcy law in 40 years"). As Mawhinney points out, the SBRA had mustered impressive support. The bill was signed into law only 56 days after it was introduced in the U.S. House of Representatives, and Congress debated it for only four minutes. *Id.* at 28 n.5 (citing *In re* Progressive Solutions, Inc., 615 B.R. 894, 896 (Bankr. C.D. Cal. 2020)).

[7] 11 U.S.C. §§ 1181–95.

[8] *See* Borders & Blank, *supra* note 2.

after three to five years of making payments out of disposable income.[9] By implementing these changes, the SBRA created a more accessible and streamlined framework for small businesses.

Subchapter V's innovations for small businesses arise at the culmination of a decades-long experiment by debtors' counsel to speed up chapter 11 cases by soliciting votes for a plan of reorganization before even filing the case. Debtors who file a prepackaged bankruptcy, or "prepack," enter bankruptcy court with their exit plan already set. Even though the plan of reorganization stands as the natural climax of a business bankruptcy case and is typically filed six to nine months after the petition date, in a prepack case the debtor seeks the initial protection of the bankruptcy court and the final endorsement of its plan in the same breath — right as it walks into court.[10] Over the past two decades, prepack debtors have strategized to enter and exit court more and more quickly. For bankruptcy attorneys at preeminent debtor-side firm Kirkland & Ellis LLP, a longstanding goal was the 24-hour prepack: a bankruptcy petition filed at night and a confirmed plan the next day. In 2019, Kirkland broke the record, confirming the first-ever 24-hour prepack.[11]

The two quotes at the outset of this Introduction endorse the twin values of expediency and efficiency. Yet, the first statement refers to subchapter V, and the second refers to a chapter 11 prepack. Despite sharing a common

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[9] *See infra* Section I.B (describing the SBRA's adjustments to the Bankruptcy Code that make the process smoother for small businesses).

[10] If that endorsement requires creditor votes, then the debtor has formally sought acceptance of its plan prior to filing for the bankruptcy. *See, e.g.*, Aurelio Gurrea-Martinez, *The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence, and Policy*, 24 EUR. BUS. ORG. L. REV. 93, 96 (2022); Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 969, 994 (2015).

[11] *In re* FullBeauty Brands Holding Corp., Case No. 19-22185 (Bankr. S.D.N.Y. Feb 3, 2019); *see also* David I. Swan & Thuc-Doan Phan, *Prepackaged Plans in 24 Hours*, AM. BANKR. INST. J. (Sept. 28, 2019), https://s3.amazonaws.com/abi-org-corp/journals/news_09-19.pdf [https://perma.cc//QP2L-JCJG]. Indeed, debtors' counsel has in numerous cases successfully pushed a chapter 11 case from filing the petition to confirming the plan in a few days or less. *See, e.g.*, *In re* Belk, Inc., Order Approving the Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Prepackaged Chapter 11 Plan, ECF No. 61, Case No. 21-30630 (Bankr. S.D. Tex. Feb. 24, 2021) (Isgur, J.) (less than 24 hours); *In re* SunGard Availability Servs. Cap., Inc., Order (I) Approving the Disclosure Statement and Confirming the Joint Prepackaged Plan of Reorganization of SunGard Availability Services Capital, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and (II) Granting Related Relief, ECF No. 46, Case No. 19-22915 (Bankr. S.D.N.Y. May 2, 2019) (Drain, J.) (less than 24 hours).

Lending support to some of the critics of prepack practice, the reorganized SunGard filed for a second chapter 11 case in 2022. *See In re SunGard AS New Holdings, LLC*, Decl. of Michael K. Robinson, Chief Executive Officer and President of the Debtors In Support of Chapter 11 Petitions and First Day Pleadings, ECF No. 7, at ¶ 7, No. 22-90018 (Bankr. S.D. Tex. Apr. 11, 2022) (stating that the previous bankruptcy "did not comprehensively address the Company's operating cost structure and capacity utilization challenges").

objective, these two mechanisms operate quite differently. Subchapter V accomplishes speed through explicit, congressionally approved provisions that shorten timelines and promote consensual plans.[12] In stark contrast, ultra-expedited prepacks are a development of zealous advocacy (to some, overzealous) by bankruptcy attorneys, greenlit by bankruptcy judges who approve the model by collapsing the default deadlines set forth in the Bankruptcy Code.

We think the two phenomena should be analyzed together. The rise of prepacks[13] and the creation of subchapter V[14] have each generated professional and scholarly discussion. Many of the reasons debtors choose to file prepacks — increased speed, reduced uncertainty, and decreased costs — can be accomplished for many small business debtors through a small business prepack. This Article, however, is the first piece of scholarship (of which we are aware) to analyze how the two might interrelate.

This may be in part because we have not yet seen a proposed or successful subchapter V prepack case. Some of the absence of a robust subchapter V prepack practice is because not every small business debtor fits the mold for a prepack. But a chunk of this void, we believe, is because bankruptcy practitioners are still coming to understand subchapter V. Conversely, the central promise of the prepack is certainty and speed; without those elements, parties will hesitate to commit upfront to a prepack strategy. As the contours of subchapter V have become clearer, we are seeing the bankruptcy bar inch

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[12] *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54 (2019). A consensual plan is a reorganization plan that has been agreed to and approved by the various classes of creditors involved in the bankruptcy case. *See* 11 U.S.C. § 1129(a)(8).

[13] Some of the most prominent critics of the super-fast prepack strategy include Law Professor Lynn LoPucki, who described the Belk prepack as part of "Chapter 11's Descent into Lawlessness," Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247 (2022), and Law Professor Adam Levitin, who described the super-fast prepacked bankruptcy case as a "24-Hour Drive-Thru Bankruptcy," Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1099–1103 (2022).

[14] For example, in 2020, Professor Christopher G. Bradley published an incisive assessment of strategies for creditors under subchapter V. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. L.R. 251 (2020). Bradley focused on the creditors' perspective, concluding (among other things) that they should resist delay and avoid holding general unsecured claims. *See id.* at 254–56. Due to the focus on creditor-driven strategies, Bradley's assessment does not cover whether a small business prepack is possible or desirable. For other excellent treatments of the SBRA, see Brook E. Gotberg, *Reluctant to Restructure: Small Businesses, the SBRA, and COVID-19*, 95 AM. BANKR. L.J. 389 (2021) (cataloguing and analyzing results of interviews with forty-three small business owners or managers in Columbia, Missouri, in the first few months of the COVID-19 pandemic); and Nicole C. Cipriano, *The Big Short: How the Big Step of the Small Business Reorganization Act Fell Short*, 50 HOFSTRA L. REV. 145 (2021).

toward the true small business prepack. Small business debtors are pushing for faster and faster confirmation of their plans. And some debtors have filed plans of reorganization alongside their petitions as a sort of initial offer for negotiations.[15] In our view, the prepack strategy represents the cutting edge of subchapter V practice.

The legislative innovations of subchapter V clear the way for small business prepack bankruptcies and address the most serious concerns of the prepack's detractors. Beyond that, small businesses are already less susceptible to some of bankruptcy's other problems, most notably forum- and judge-shopping.[16] As numerous scholars have underscored, bankruptcy's loose venue rules allow national conglomerates to file in almost any district they like,[17] leading to a proverbial "race to the bottom."[18] While big businesses can file almost anywhere, small businesses are much more likely to file for bankruptcy where they are headquartered or incorporated.

This Article proceeds in four parts. In Part I, we delve into the historical underpinnings of subchapter V and explore its unique procedures that make it an ideal choice for small business debtors seeking to restructure quickly. In Part II, we analyze how chapter 11 prepacks have reshaped chapter 11 cases despite certain limitations they may pose. Part III steps back to provide a theoretical lens on subchapter V and prepacks, elucidating why the speed of a prepack can best be achieved within the subchapter V framework. The

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[15] In his testimony to the Subchapter V Task Force, Attorney Daniel Etlinger noted that a growing number of debtors are filing "first day plans" that they "present[]as an opening offer to the creditors anticipating there will be negotiated modifications." Daniel Ettinger, *Post Hearing Written Statement of Daniel Etlinger*, at 2, AM. BANKR. INST. (Sept. 8, 2023), https://abi-subv.s3.amazonaws.com/statements/Daniel_Etlinger_Post-Hearing_Statement.pdf?VersionId=xkdJcjOzw93YHlr7LcWJyK0zp1elMGLp [https://perma.cc/XK4A-JDQ3]

[16] For an overview of forum shopping, see, for example, Sarah Jones, *How Abstention and Venue Transfer Can Ameliorate Bankruptcy's Forum Shopping Crisis*, 76 FLA. L. REV. __ (forthcoming 2024) (manuscript on file with authors); Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351 (2023); Lynn M. LoPucki, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2006).

[17] 28 U.S.C. § 1408(1) allows a business debtor to file in either its state of incorporation or the state where its principal place of business is located. On its own, that provision might lead to a concentration of bankruptcy cases in Delaware, where many businesses are incorporated, but it wouldn't allow forum-shopping otherwise. But 28 U.S.C. § 1408(2) allows a debtor to file in the district where a case of its affiliate is pending. Thus, a large corporate family can select (or incorporate) a subsidiary almost anywhere it likes, file the subsidiary into bankruptcy, then follow with the rest of the corporate family on the basis of subsection (2).

[18] *See, e.g.*, LoPucki, *supra* note 13; Levitin, *supra* note 13, at 1128–50; Brook Gotberg, *The Market for Bankruptcy Courts: A Case for Regulation, Not Obliteration*, 49 BYU L. REV. (forthcoming 2024).

new subchapter, we argue, helps assuage the concerns of critics of ultra-expedited prepacks, most notably Law Professor Lynn LoPucki. Finally, in Part IV, we walk through what a small business prepack would look like, as well as propose concrete suggestions to further streamline prepacks under subchapter V and ensure that the model adheres to the subchapter's legislative goals.

American small businesses, their founders, and their creditors deserve a bankruptcy model that works for them. Subchapter V is the best solution to date. At the same time, the intense pace of the prepack strategy has put pressure on the bankruptcy system, streamlining the process but undermining its legitimacy and transparency. In our view, subchapter V presents an appropriate channel for fast-track bankruptcies — and we attempt to sketch out how the bankruptcy bench and bar can best take advantage of it.

I. A NEW ERA FOR SMALL BUSINESS BANKRUPTCY

Small businesses and their founders face challenges from the onset: intense competition, limited resources, evolving markets, and more. When small businesses fall into economic or financial trouble, they can face acute and persistent financial distress. During these periods of financial instability, entrepreneurs or subsequent owners may turn to bankruptcy for a potential solution to their companies' financial woes,[19] which are often entwined with the owners' own financial futures. The American bankruptcy system — long admired around the globe — can preserve the value of a small business as a going concern, giving the company breathing room to negotiate with creditors and a chance to restructure its financial obligations.

Until recently, though, small businesses in financial distress had two options under the Bankruptcy Code — filing for chapter 7 or chapter 11 bankruptcy relief. And neither option was attractive to small businesses or their owners. A bankruptcy under chapter 7 of the Code creates an estate consisting of the debtor's assets. Under chapter 7, creditors elect a trustee to sell those assets and use the proceeds to repay the debtor's debts.[20] But chapter 7 liquidation cannot satisfy the evergreen optimism of a founder who hopes to retain control of her business and continue operating after the

[19] *See* David A. Mawhinney, *Written Statement of David A. Mawhinney* (June 9, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/David_Mawhinney_Statement.pdf [https://perma.cc/587T-T6K6] ("[B]ankruptcy relief remains the best tool we have to truly repair and restore the nodes in our economy.").

[20] *See* 11 U.S.C. §§ 702, 704(a)(1) ("The trustee shall . . . collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest.").

bankruptcy.[21] Chapter 11, by contrast, allows a debtor to restructure its debts through a court-approved plan while retaining control over its business operations during the case and (possibly) afterward.[22] But chapter 11 is inhospitable to many small businesses for other reasons. The bankruptcy court supervises the restructuring process, and the debtor must follow stringent guidelines to have its plan confirmed and a discharge granted. As a result, chapter 11 is time- and labor-intensive — as well as expensive. This practical reality left small businesses as "bankruptcy misfits," as Law Professor Laura Coordes terms them.[23]

In 2019, to help small businesses navigate bankruptcy more effectively, Congress enacted the SBRA.[24] The SBRA created a new subchapter V within chapter 11 of the Bankruptcy Code, another form of what Coordes calls "bespoke bankruptcy," and what one of us (riffing off of Coordes) has called "tailored bankruptcy."[25] Subchapter V was designed to simplify the complex requirements of chapter 11, shorten the length of cases, and reduce associated costs.[26] This Section sets out the origins and framework of subchapter V, showing its promise for a streamlined insolvency proceeding for small business debtors.

A. The Origins of Subchapter V

Congress has long wrestled with the problem of expediting a bankruptcy case while ensuring consistency, fairness, and accessibility. Chapter 11 bankruptcy was intended to establish "a framework for reorganizing a bankrupt business."[27] Since over 99.7% of businesses in the United States

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[21] The chapter 7 trustee sells all non-exempt assets in a chapter 7 liquidation. *See* 11 U.S.C. § 541(b) (excluding certain property from the estate). Individual debtors, not the focus of this Article, can also exempt certain property from the estate under section 522(b).

[22] See 11 U.S.C. § 1107 (allowing the debtor to step into the shoes of the chapter 11 trustee as the "debtor in possession"); *see also* Grant M. Hayden & Matthew T Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 348 (2021) (noting that the U.S. bankruptcy system relies on a debtor-in-possession "running the show").

[23] *See* Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359, 377–78 (2021) ("Small business debtors were bankruptcy misfits because the available Bankruptcy Code chapters did not work well for them.").

[24] Small Business Reorganization Act of 2019, Pub. L. No. 116-54 (2019).

[25] *See* Coordes, *supra* note 23; Christopher D. Hampson, *Bespoke, Tailored, and Off-the-Rack Bankruptcy: A Response to Professor Coordes's 'Bespoke Bankruptcy'*, 73 FLA. L. REV. F. 15, 19 & n.33 (2023).

[26] Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 AM. BANKR. L.J. 571, 574 (2019); *see also In re* Keffer, 628 B.R. 897, 910 (Bankr. S.D. W. Va. 2021) ("It is a brave new world for bankruptcy courts following enactment of the SBRA. Subchapter V is a valuable tool for qualifying debtors and will facilitate reorganizations that were not possible before.").

[27] Mission Prod Holdings, Inc. v. Tempnology, L.L.C., 139 S. Ct. 1652, 1658 (2019).

are small businesses,[28] it would make sense for the Bankruptcy Code to account for their lack of resources and need for speed compared to large enterprises. Unfortunately, this has not been the case. Chapter 11 takes too much time and money for it to be a viable solution for many small businesses. Before the SBRA, bankruptcy judges and federal legislatures tried several times to solve this problem — all of which were incomplete solutions.

Shortly after the Bankruptcy Code's enactment in 1978,[29] bankruptcy judges realized the need for quick bankruptcies for small business debtors.[30] Judges used their discretionary power to speed up cases for small businesses.[31] They ordered debtors to file their bankruptcy plan by a certain date and they informally reviewed the disclosure statement while combining the final disclosure approval hearing[32] with the plan confirmation hearing.[33] But these judicial innovations were not uniformly adopted, raising concerns about consistency, transparency, and legitimacy.[34]

In 1994, Congress responded with the Bankruptcy Reform Act of 1994 (the "BRA").[35] This act codified the "fast track" option for small businesses that allowed the disclosure statement hearing and plan confirmation hearing to be combined.[36] Moreover, the debtor was permitted to file a chapter 11

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[28] U.S. Small Business Administration Office of Advocacy, *Frequently Asked Questions* (Oct. 2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf [https://perma.cc/J8HR-XS9E].

[29] Small business reforms predate the Bankruptcy Code, of course. They were a major part of the bankruptcy reforms of the 1938 Chandler Act, also known as the "Act." Under the Act, small businesses would generally reorganize under Chapter XI, which gave more control to prebankruptcy directors. While Congress initially required absolute priority in Chapter XI, it eventually dropped the requirement. *See* DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS 77, 107, 109 (2022).

[30] Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. SM. & EMERGING BUS. L. 181, 206 (2000).

[31] *Id.*

[32] During a disclosure statement hearing, the bankruptcy court evaluates the adequacy of the proposed disclosure statement — a document that provides detailed information about the debtor's finances. *See* 11 U.S.C. § 1125(b).

[33] *See* Cipriano, *supra* note 14, at 153. A plan confirmation hearing is where the bankruptcy judge reviews and approves or denies a proposed repayment plan for a debtor's debts. *See* 11 U.S.C. §§ 1128, 1129.

[34] *See* Blum, *supra* note 30, at 208 (noting that "the creation by courts of an innovative discretionary procedure raise[d] a more general policy concern: A discretionary process, not mandated or regulated by the Code, is not universally adopted and, even where it is used, can vary quite significantly in the details of its scope and nature.").

[35] Bankruptcy Reform Act of 1994, Pub. L. No. 103–392, § 217, 108 Stat. 4106.

[36] *See* 11 U.S.C. § 1125(f) (providing that in a small business case, the court may "conditionally approve" the disclosure statement, combine the disclosure statement hearing with the plan confirmation hearing, or even determine that "the plan itself provides adequate information and that a separate disclosure statement is not necessary").

petition and begin soliciting votes on a plan immediately after filing.[37]

Approximately three years later, however, the National Bankruptcy Review Commission reviewed the modified small business bankruptcy procedures under the BRA and found them inadequate.[38] To be sure, small businesses benefited from various provisions of the "fast track" option, including the automatic stay and retention of business operations. But too often a business's ability to delay filing its chapter 11 plan only prolonged its ultimate failure.[39] Even with some incremental successes, the Bankruptcy Reform Act of 1994 left much to be desired for small businesses. and was the catalyst for an additional wave of legislative reform — the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[40]

In addition to its other goals, BAPCPA attempted to streamline chapter 11 reorganizations for small businesses.[41] BAPCPA retained a small business debtor's ability to "fast track" its chapter 11 case and further tightened the deadlines in such cases.[42]

It wasn't enough. From 2008 to 2015, only 27% of the 18,000 small businesses that filed for chapter 11 had a successful reorganization.[43] Those

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[37] Jeffrey T. Kucera et al., *Small Business Debtor Reorganization: An Overview of Chapter 11's New Subchapter V*, K&L GATES (Sept. 23, 2019), www.kigates.com/Small-Business-Debtor-Reorganization-An-Overview-of-Chapter-11s-New-Subchapter-V-09-23-2019 [https://perma.cc/7DVG-FAAW].

[38] James B. Haines Jr., *No Easy Answers: Small Business Bankruptcies After BAPCPA*, B.C. L. REV. 71, 74–75 (2005); *see also* Daniel O'Hare, *The Long and Winding Road to the Small Business Reorganization Act: Why Our Next Stop Should be Simplicity and Accessibility*, 124 W. VA. L. REV. 567, 578 (2022).

[39] O'Hare, *supra* note 38.

[40] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 59. BAPCPA had an enormous impact when it went into effect. *See* Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 29 (2008) ("[BAPCPA] went into effect in October 2005 and had an immediate and dramatic effect on the number of bankruptcy filings.").

[41] Robert J. Landry, *Subchapter V and the Covid-19 Disruption: Did Congress Get Small Business Bankruptcy Reform Right This Time?*, 16 OHIO ST. BUS. L.J. 66, 72 (2021).

[42] *See* David L. Bury Jr., *ABI Commission Report – Small and Medium-Sized Debtor Enterprises* (Aug. 18, 2015), www.planproponent.com/2015/08/abi-commission-report-small-and-medium-sized-debtor-enterprises/ [https://perma.cc/5PRK-FQEW]. Under BAPCPA, a small business debtor had the exclusive right to file a plan during the first 180 days of the case (compared with 120 days for non–small business debtors) and had to file a plan within 300 days of filing its petition. 11 U.S.C. § 1121(e). Additionally, the court was required to confirm a small business plan (so long as it met all the requirements) within 45 days after the debtor filed it. *Id.* § 1129(e). Courts could grant extensions to these timelines only if the debtor could demonstrate that it would "more likely than not" get a plan confirmed within the enlarged period. *Id.* § 1121(e)(3).

[43] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. On Antitrust, Commercial, & Admin. Law of the H. Comm. on the* Judiciary, 116th

figures do not include the small businesses that never filed a bankruptcy petition in the first place "because the Bankruptcy Code [was] seen as broken and unworkable."[44] It was clear bankruptcy was still impractical for many small businesses.[45] Even if a small business wanted to circumvent the small business provisions, a standard "[c]hapter 11 [was] . . . too slow and too costly for most middle-market companies to do anything other than sell its going concern assets in a 363 sale[46] or to simply liquidate the company."[47] Chapter

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Cong. (2019) (Statement of Robert J. Keach), https://docs.house.gov/meetings/JU/JU05/20190625/109657/HHRG-116-JU05-Wstate-KeachR-20190625.pdf [https://perma.cc/D8AU-JWTF] [hereinafter Keach Testimony].

[44] *Id.* Some of the reticence to file for bankruptcy may come from a lack of awareness. A longstanding hurdle to bankruptcy take-up is the lack of experience many debtors have with the system. Bankruptcy experience is rare enough that no Supreme Court Justice "[has] any personal experience with bankruptcy." Amy Howe, *Interpreting the Supreme Court: Finding Meaning in the Justices' Personal Experiences*, 68 FLA. L. REV. 393, 407 (2016).

[45] *See* Small Testimony, *supra* note 1. Unlike regular chapter 11 cases where creditors play an oversight role that is crucial for a case's success, creditors in small business cases are largely absent because "creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases." *See* Nadler, *Report to Accompany H.R. 3311* (H.R. Report No. 116–171) (July 23, 2019), www.congress.gov/congressional-report/116th-congress/house-report/171/1 [https://perma.cc/QX2W-35LJ].

[46] Section 363 of the Code allows the bankruptcy trustee to sell assets of the estate (up to the entire company) and use the proceeds to pay claims. 11 U.S.C. § 363. Section 363 sales have become so prevalent that two prominent bankruptcy scholars announced that they spelled the "end of bankruptcy." Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 751–55, 777–78 (2002). For a description of 363 sales, see, for example, Kimon Korres, *Bankrupting Bankruptcy: Circumventing Chapter 11 Protections through Manipulation of the Business Justification Standard in Sec. 363 Asset Sales, and a Refined Standard to Safeguard Against Abuse*, 63 FLA. L. REV. 959, 960 (2011) ("Section 363(b) of the Bankruptcy Code authorizes a Chapter 11 debtor-in-possession . . . to 'use, sell, or lease' estate property outside the ordinary course of business. Section 363 sales tend to be cheaper and more time efficient than reorganization alternatives."). Whether section 363 sales produce values sufficiently close to market value has been the subject of intense debate. *See, e.g.*, Jean-Marie Meier & Henri Servaes, *The Bright Side of Fire Sales*, 32 REV. FIN. STUD. 4228 (2019); James. J. White, *Bankruptcy Noir*, 106 MICH. L. REV. 691 (2008); Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007).

[47] *Dan Dooley Comments to ABI Commission Studying Chapter 11 Reform*, AM. BANKR. INST. (Apr. 18, 2013), https://commission.abi.org/sites/default/files/statements/19apr2013/ABI%20Testimony.pdf [https://perma.cc/FK99-NUWA]; *see also* Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to The Critics*, 107 MICH. L. REV. 603, 636 (2009) ("[T]he costs of Chapter 11 are sufficiently high that many small companies were squeezed out of the system, forcing the managers to liquidate the business quickly in Chapter 7, or die quietly completely outside the bankruptcy system."); Michael St. James, *Statement for ABI Subchapter V Task Force* (June 9, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Michael_StJames_Statement.pdf [https://perma.cc/DA9P-Q4MZ] ("I had never seen a successful Chapter 11 that did not incur

11 imposed unrealistic deadlines on small businesses, required expensive disclosure and reporting requirements, did not provide tools that helped small businesses create and implement an effective plan, and made it a struggle for a small business owner to retain ownership in the business.[48]

In 2009, the National Bankruptcy Conference ("NBC") formed a group to study small business bankruptcies. The NBC group found that "chapter 11 generate[d] exorbitant administrative costs, and chapter 11 include[d] requirements such as a high voting threshold and elaborate disclosures" that presented "roadblocks to reorganization."[49] The NBC proposed adding a subchapter to chapter 11 that was specifically tailored to the needs of small businesses. Similarly, in 2012, the American Bankruptcy Institute ("ABI") formed a commission to study and recommend a reform of chapter 11 for small businesses.[50] The commission drafted a report that mirrored many of the NBC's concerns about the chapter 11 provisions hindering successful reorganizations.[51]

Congress used the ABI and NBC reports as a framework for the SBRA,[52] which took effect on February 23, 2020.[53] Although the SBRA differed slightly from the ABI's proposed procedures, Congress's intent remained consistent with the ABI's recommendation to streamline bankruptcy for small business debtors.[54]

B. A New Framework for Small Businesses

Congress created subchapter V to provide small business debtors with a more efficient, less expensive, and more obtainable path to a chapter 11 discharge.[55] The subchapter contains several key innovations that streamline the process. Some of those innovations (the ones that made headlines) make

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at least $100,000 in Chapter 11 attorney's fees and . . . a 'fast' reorganization would still likely take at least 8 months.").

[48] Keach Testimony, *supra* note 43.

[49] *Id.*

[50] *See* Am. Bankr. Inst., *Commission to Study the Reform of Chapter 11* (2014) https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h [https://perma.cc/QMP5-UHA4].

[51] *Id.*

[52] Small Business Reorganization Act of 2019, Pub. L. No. 116-54 (2019).

[53] Press Release, Am. Bankr. Inst., President Signs Small Business Reorganization Act into Law (Aug. 23, 2019), https://www.abi.org/newsroom/press-releases/president-signs-small-business-reorganization-act-into-law [https://perma.cc/YC6J-QGY2].

[54] The key term here is *debtors*. As attorney Michael St. James artfully framed it, "Congress has appropriately established two reorganization regimes. In traditional Chapter 11, fairness to creditors takes precedence over expense and delay. In Sub V, access for small businesses and the concomitant requirements of speed and inexpensiveness take precedence over some creditor rights." St. James, *supra* note 47.

[55] H.R. REP. NO. 116–171 (2019).

subchapter V more attractive for entrepreneurs. Under the subchapter, debtor companies can receive a discharge if they pay off their secured debt and pay their disposable income to unsecured creditors for three to five years. After the discharge, the founder of the company can retain ownership and control of the company. This innovation makes bankruptcy more palatable to ever-optimistic founders and represents a departure from bankruptcy's famous absolute priority rule.[56] Less dramatically, but no less important, subchapter V also got rid of required U.S. Trustee fees.

The following discussion, however, emphasizes how subchapter V might pave the way for a small business prepack. Specifically, the SBRA (1) set forth broad debtor eligibility; (2) compressed early case deadlines; (3) reduced the cast of estate professionals; and (4) gave the debtor in possession tighter control over the plan confirmation process. We cover each in turn.

1. Broad Debtor Eligibility

First, subchapter V is available to a wide swath of financially distressed firms.[57] While subchapter V is only available to small business debtors, the statutory definition is more capacious than many people realize.[58] Law Professor Robert Lawless calculated that approximately forty percent of chapter 11 debtors in cases filed after October 2007 would have qualified.[59]

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[56] The absolute priority rule requires that the plan pay senior creditors in full before junior creditors can receive any distribution. *See infra* Section I.B.4.

[57] Craig Goldblatt, *ABI Task Force on Subchapter V Virtual Public Hearing*, AM. BANKR. INST. (July 14, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Craig_Goldblatt_Written_Statement.pdf [https://perma.cc/SB5X-WH63] ("Is every subchapter V case that files before us the kind of case that Congress had in mind when it enacted the Small Business Reorganization Act of 2019 — the corner grocer or local dry cleaner, run by a hard-working entrepreneur who has hit a bump in the road and is looking to save his small business? No.") (Goldblatt, J.).

[58] Subchapter V requires a qualifying debtor to elect its application. *See* 11 U.S.C. § 101(51D)(A); *see also* FED. R. BANKR. P. 1020 (requiring a voluntary debtor to state in its petition, and an involuntary debtor to state within fourteen days of the order for relief, whether it is a small business debtor and whether it is electing to proceed under subchapter V of chapter 11). A qualifying debtor who does not elect subchapter V will proceed under chapter 11's regular rules, unless it is small enough to fit within the definition of a "small business debtor" under the BRA, which has a much lower cap of $2 million in qualifying debt. See 11 U.S.C. § 101(51D)(A).

[59] *See* Bob Lawless, CREDIT SLIPS, *How Many New Small Business Chapter 11s?* (Sept. 14, 2019), www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html [https://perma.cc/SRR2-L62J]; *see also* Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of* 2019, at 3 (June 2022), www.flsb.uscourts.gov/sites/flsb/files/documents/Guide_to_the_Small_Business_Act_of_2019_%28Hon._Paul_Bonapfel_rev._06-2022%29.pdf [https//perma.cc//perma.cc/s9LX-75D6]. Professor Lawless made his

To qualify, a debtor must be "engaged in commercial or business activities[60] that has "aggregate noncontingent liquidated secured and unsecured debts" as of the date of the petition of no more than $7,500,000[61] (excluding debts owed to affiliates or insiders), most of which must arise from the commercial or business activities of the debtor.[62] That definition sounds more restrictive than it really is: it does not include contingent debts, unliquidated debts, or debts owed to affiliates or insiders.[63]

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calculation when the debt limit for a subchapter V debtor was $2.7 million; it is presumably higher now that the subchapter has a $7.5 million debt limit.

[60] 11 U.S.C. § 1182(1)(A). For a thorough overview of the developing caselaw of the phrase "commercial or business activities," see Christopher G. Bradley, *"Commercial or Business Activities" and Subchapter V Eligibility*, 43 BANKR. L. LTR. NL 1 (2023). Some commentators believe that the statutory language requiring a subchapter V debtor to be engaged in a "commercial or business activity" does not limit debtors to those engaged in business or commercial activities when they file for bankruptcy. *See* 2 *Collier on Bankruptcy* ¶ 101.51D (16th ed. 2020) ("The definition of a 'small business debtor' is not restricted to a person who at the time of the filing of the petition is presently engaged in commercial or business activities and who expects to continue in those same activities under a plan of reorganization."). Numerous courts have addressed the issue and reached differing opinions. *Compare In re Vertical Mac Constr., LLC*, No. 6:21-BK-01520-LVW, 2021 WL 3668037, at *3 (Bankr. M.D. Fla. July 23, 2021) (holding that debtor was eligible for subchapter V despite not having business operations because the inclusion of "activities" under the statute includes "maintaining bank accounts, having accounts receivable, analyzing claims, and winding down its business"); and *In re Wright*, No. CV 20-01035-HB, 2020 WL 2193240, at *2 (Bankr. D.S.C. Apr. 27, 2020) (holding debtor who sold all assets and was no longer operating a business met the statutory definition of a small business debtor because he was "'engaged in commercial or business activities' by addressing residual business debt."); *with In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020) (reasoning "[t]he plain meaning of 'engaged in' means to be actively and currently involved . . . 'engaged in' is written not in past or future but in the present tense"); *and National Loan Invs., L.P. v. Rickerson*, 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021) (holding that eligibility requires the debtor to be engaged in commercial or business activity on the petition date).

[61] 11 U.S.C. § 1182(1)(A). Congress initially set the debt limit for subchapter V debtors at $2,726,625 and then temporarily increased it to $7.5 million under the CARES Act. *See* Jeffrey Katz, *Tracking the Up(s) and Down of the SBRA Debt Limit,* Nat'l Conf. of Bankruptcy Judges (Oct. 2022), https://ncbjmeeting.org/2022/materials/NCBJ%20Five%20Secrets%20to%20Magical%20Sub-V.pdf [https://perma.cc/M5XF-7RJ7] (discussing amendments to subchapter V's debt limit). Some commentators have compared subchapter V's debt limit to chapter 12's 11-million-dollar debt limit for family farmers. *See* 11 U.S.C. §§ 101(18), 109(f). While subchapter V may benefit from a higher debt limit, a comparison between the two chapters cannot be made straightforwardly, since the debt that qualifies in each chapter differs — the chapter 12 debt limit counts all secured and unsecured debts, whereas the subchapter V debt limit counts the more limited set of debts described above.

[62] 11 U.S.C § 1182(1)(A).

[63] *See id.* Even with the expansive definition, practitioners should remain hesitant to elect subchapter V for an ineligible debtor. *See, e.g.*, *In re* Sullivan, 626 B.R. 326 (Bankr.

As an illustration: Imagine GatorCo is a retail store with estimated liabilities of $40 million, far above the nominal limit for subchapter V. GatorCo is a defendant in a slip-and-fall case where it estimates its liability will be $8 million. It also has a $12 million mortgage note owed to its parent company, a $15 million secured note also owed to its parent company, and a $5 million outstanding balance owed to its suppliers.

Although GatorCo's total debts far exceed the $7.5 million limit, the company may still be eligible for subchapter V because the only qualifying debt to establish its eligibility is the $5 million debt owed to suppliers. GatorCo's mortgage and secured note owed to its parent company are excluded from eligibility calculations under § 1182(a) because they are owed to affiliates. Similarly, any damages from the slip-and-fall litigation are not yet liquidated. So long as GatorCo's other debts are less than $2.5 million, it can file for subchapter V bankruptcy.[64]

With these carve-outs, the term "small business" is somewhat misleading. The businesses are not as small as they might seem, and in the aggregate the subchapter can cover a wide swath of financially distressed firms. Small businesses in the United States account for 99.7% of all firms with paid employees.[65] From a bankruptcy perspective, "approximately 90% of all chapter 11 debtors have less than $10 million in assets or liabilities, less than $10 million in annual revenues, and 50 or fewer employees."[66] Even a debtor who normally would not be eligible for subchapter V may find itself in luck:[67]

D. Colo. 2021) (converting case to chapter 7 after holding debtor filed in bad faith and finding debtor's debt made him ineligible for subchapter V); *In re* phenomenon Mktg. & Ent., LLC, No. 2:22-BK-10132-ER, 2022 WL 1262001 (Bankr. C.D. Cal. Apr. 28, 2022) (converting a case to a standard chapter 11 after holding debtor was an affiliate of an ineligible corporation and not a small business). A debtor is also ineligible for subchapter V if its primary activity is the business of owning single-asset real estate, it is a corporation subject to reporting requirements under the Securities Exchange Act of 1934, or it is a member of a group of affiliated debtors of a corporation subject to the reporting requirements of the Securities and Exchange Act of 1934. *See* 11 U.S.C. § 1182.

[64] *See generally* Brett Theisen & Natasha Songonuga, *Subchapter V Bankruptcy for Middle Market Debtors*, N.Y. L. J. (Sept. 17, 2021), www.gibbonslaw.com/resources/publications/subchapter-v-bankruptcy-for-middle-market-debtors [https://perma.cc/XKR9-FMP6].

[65] U.S. Small Business Admin. Office of Advocacy, *Frequently Asked Questions* (Oct. 2020), cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf [https://perma.cc/5VLB-JMQN].

[66] Michelle Harner, *Rethinking "Small Business Bankruptcies,"* CREDIT SLIPS (Jan. 26, 2015), www.creditslips.org/creditslips/2015/01/rethinking-small-business-bankruptcies.html [https://perma.cc/X8H6-2ULW].

[67] *But see* Adam R. Prescott, *American Bankruptcy Institute: Subchapter V Task Force* (June 23, 2023) ("[E]ligibility is a gating issue: Getting through the Subchapter V gate does not mean the debtor ultimately will benefit from the protections and powers of Subchapter

friendly creditors may be willing to take a "pre-petition 'haircut'" to lower the debtor's debt to under the limit.[68] Similarly, a debtor could refinance some of its debt with an affiliate or insider so that the debt would not qualify toward the limit.[69]

2. Compressed Early Case Deadlines

Second, subchapter V deviates from the chapter 11 model with accelerated deadlines.[70]

After a small business debtor files its bankruptcy case, deadlines follow quickly. Within ten days, the initial debtor interview for a subchapter V case occurs.[71] Within forty-six days, the debtor must submit a status report describing its efforts to reach a consensual plan.[72] Fourteen days later — a mere two months after the petition — the court must hold a status conference "to further the expeditious and economical resolution" of the case.[73] After only ninety days (three months) from the commencement of the case, a debtor must file its plan.[74] While subchapter V contains no deadline for plan confirmation and no limit on plan amendments — features that Bradley points out debtors may use to cause delay[75] — once the plan is filed, the timeline is officially in the hands of the bankruptcy judge.

Subchapter V again departs from chapter 11 by constraining judges' authority to grant extensions to the prescribed deadlines. In subchapter V, a judge may only grant an extension to the debtor's 90-day deadline to file a plan if "the need for the extension is attributable to circumstances for which

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V, as that debtor still must satisfy the many other obligations and statutory requirements in the case.").

[68] *See* Bradley, *supra* note 14, at 265.

[69] *Id.* at 265 ("It is possible that debtors seeking subchapter V eligibility will try to game the eligibility cap. For instance, a debtor might employ mechanisms to assign debts to non-affiliate insiders . . . .").

[70] *See In re* Rockland Indus., Inc., 2022 WL 451542, at *3 (Bankr. D.S.C. Feb 14, 2022) ("Subchapter V . . . permits small business debtors with the opportunity to reorganize more quickly."); *In re* Wetter, 620 B.R. 243, 251 (Bankr. W.D. Va. 2020) (citing *In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020)) ("Subchapter V, by its very nature, is intended to be an expedited process.").

[71] 28 U.S.C. § 586(7) (stating that the U.S. Trustee must conduct the initial debtor interview before the first meeting of creditors).

[72] 11 U.S.C. § 1188(c).

[73] *Id.* § 1188(a).

[74] *Id.* § 1189(b).

[75] *See* Bradley, *supra* note 14, at 272. Even with the notable absence of those deadlines, Bradley agrees that "the subchapter V scheme evidences an overall intention for cases to be prosecuted expeditiously by debtors." *Id.* at 272.

the debtor should not justly be held accountable."[76] Most courts make this standard very hard to satisfy, citing the legislative intent of subchapter V to facilitate an expedited process.[77] This standard is a big change from chapter 11, under which enlargement can be granted "for cause," a loose standard which many bankruptcy judges grant as a matter of course.

Congress has compressed case timelines and hindered opportunities to extend deadlines when it enacted subchapter V. If a debtor does not want to comply with the swift timeline of a subchapter V case, the solution is simple: do not opt in.[78]

3. Smaller Cast of Estate Professionals

Third, subchapter V has simplified the cast of estate professionals who typically sit around the table in a chapter 11 case. This Section briefly outlines the key distinctions in a subchapter V case.

a. Estate Professionals & Financing

Subchapter V makes it easier for debtors to work with their longstanding attorneys, accountants, and other professionals throughout the bankruptcy case. Chapter 11 generally prevents professionals with outstanding fees from continuing to represent a debtor after the petition is filed, due to the conflict arising from the professional becoming a creditor.[79] Even worse, once a debtor has fallen behind on payments due to its law firm or accountant, it cannot readily avoid the conflict by paying off the debt shortly before the

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[76] 11 U.S.C. § 1189(b); *see also In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 345 (Bankr. S.D. Fla. 2020) ("Based on a plain reading of this phrase, it is a clearly higher standard than the mere 'for cause'. . . .").

[77] *See, e.g.*, *In re* Trinity Legacy Consortium, LLC, No. 22-10973, 2023 WL 6217784, at *3 (Bankr. D.N.M. Sept. 25, 2023) (noting that "[c]ourts agree that § 1189(b) imposes a stricter standard than the 'for cause' standard set forth in § 1121(d)(1)") *In re* Online King LLC, 629 B.R. 340, 340 (Bankr. E.D.N.Y. 2021) (denying a debtor's motion to extend for failure to satisfy the stringent burden of demonstrating it was entitled to extension and holding that the fact no party in interest opposed debtor's motion did not relieve the debtor of its burden to establish the extension was warranted); *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 345 ("Congress purposefully set a short deadline for a debtor to file a plan under Subchapter V, and set a very high standard for an extension of that deadline.").

[78] *See* Small, *supra* note 1 at 6 ("Subchapter V is a voluntary chapter, and if a debtor does not believe it can be reorganized on the fact track . . . the debtor is not compelled to elect to be a small business enterprise debtor under subchapter V.").

[79] *See* 11 U.S.C. § 327(a) (providing that the trustee may retain professionals "that do not hold or represent an interest adverse to the estate"); *see also* Craig R. Tractenberg et al., *Subchapter V Bankruptcy is Available for Franchise Companies*, 24 FRANCHISE L. 16, 16 (2021).

bankruptcy filing: such a payment would be an avoidable preference.[80]

Large debtors solve this problem by retaining new bankruptcy counsel and paying them from a retainer. The bankruptcy counsel releases any prepetition debt to avoid conflicts. That solution, though, requires bringing new professionals up to speed and is too expensive for many small business debtors and their professionals. However, for subchapter V debtors, prepetition professionals are not disqualified so long as their unpaid fees, as of the filing date, do not exceed $10,000.[81] In other words, debtor's counsel do not have to waive all their claims to avoid disqualification, making it easier for debtors to convince their longstanding professionals to continue working with them through the bankruptcy case.

Similarly, subchapter V makes it easier for small business debtors to obtain financing for their case.[82] Because subchapter V allows a debtor to pay post-petition administrative expenses over a period of three to five years through the plan,[83] lenders can spread the DIP financing re-payment throughout the plan. As a result of this increased runway for repayment, subchapter V makes bankruptcy more accessible to many debtors.

b. Committees

In a regular chapter 11 case, the U.S. Trustee appoints a committee of unsecured creditors as a matter of course.[84] Not so in a case under subchapter V. In small business cases, an unsecured creditors' committee may not be appointed unless the court "for cause orders otherwise."[85] This adjustment reflects the fact that small businesses tend to have fewer creditors and a simpler financial profile.

c. Trustees

Instead of an unsecured creditors' committee, subchapter V requires a

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[80] An avoidable preference is a pre-petition payment that improperly prefers one creditor over others similarly situated. *See, e.g.*, *In re* Ozcelebi, 631 B.R. 629 (S.D. Tex. 2021) (finding that a $9,999 pre-petition payment to a law firm for unbilled time was permitted under subchapter V after a creditor asserted it was an avoidable preference).

[81] 11 U.S.C. § 1195.

[82] Due to bankruptcy's cost, many debtors lack the capital required to retain lawyers to prepare its bankruptcy and turn to a special form of financing called debtor-in-possession financing (or "DIP" financing), authorized under 11 U.S.C. § 364, to fund the business's ongoing operations during its bankruptcy case. *See* Sandeep Dahyia & Korok Ray, *A Theoretical Framework for Evaluating Debtor-in-Possession* Financing, 34 EMORY BANKR. DEV. J. 57, 60 (2017).

[83] *See* 11 U.S.C. § 1191(e).

[84] *Id.* § 1102(a)(1).

[85] *Id.* §1102(a)(3).

trustee to be appointed in every case.[86] The trustee is "unlike any other trustee appointed in the bankruptcy process"[87] because it is the only trustee whose primary function is not to operate or liquidate the estate, but to promote a consensual reorganization plan.[88] Consistent with this directive, the trustee must attend the status conference where "one function . . . is 'to encourage and facilitate the attainment of a consensual plan of reorganization.'"[89] The fact that the subchapter V trustee's role effectively ends upon plan confirmation (along with her fees[90]) provides additional support for their faciliatory function.[91]

4. Tighter Plan Control

Fourth, subchapter V gives the debtor tighter control over the plan proposal and confirmation process:

a. No Required Disclosure Statement

In a traditional chapter 11 case, a debtor needs to file a court-approved disclosure statement before votes on a plan can be solicited.[92] Disclosure

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[86] *Id.* § 1183(a).

[87] Jim White, *Understanding the Purpose of the Subchapter V Trustee*, NCBARBLOG (Nov. 11, 2021), https://ncbarblog.com/bk-understanding-the-purpose-of-the-subchapter-v-trustee/ [https://perma.cc/6Y85-K5QT].

[88] *See id.*; U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download [https://perma.cc/9594-MJ4G] (describing the most important duties of a subchapter V trustee); *see also In re* 218 Jackson LLC, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021) ("[T]he subchapter V trustee is the *only* trustee directed to 'facilitate the development of a consensual plan of reorganization' . . . . This distinction is significant"); 11 U.S.C. § 1183(b)(7).

[89] *See* 11 U.S.C. § 1188(a); Small Testimony, *supra* note 1, at 4.

[90] Subchapter V trustees bill hourly, and their fees can range from $300 to $600 per hour. *See* Bradley, *supra* note 68, at 258–59 (emphasizing that the addition of thousands of dollars in fees could be the difference between a plan's success and its failure). In rare circumstances, subchapter V trustee fees may exceed what a debtor may have paid to a U.S. Trustee in a traditional chapter 11 case. *See id.* (noting that the absence of U.S. Trustee fees does not offer a material cost savings because for small business cases the fees are manageable and giving an example of a $650 fee for cases with quarterly disbursements under $75,000). This is more likely if there is a nonconsensual plan requiring the subchapter V trustee to persist throughout the case.

[91] *See id.* ("The additional trustee fees seem to be a deadweight loss imposed to attempt to bludgeon parties into agreement"); Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 38 BANKR. L. LETTER, NO. 10, at 12 (Oct. 2019) (noting that "creditors will prefer to avoid the fees that the subchapter V trustee will collect from the debtor's plan payments (before payments to creditors) if confirmation is via cram-down.").

[92] *See* 11 U.S.C. § 1125(a).

statements give all parties the information necessary to make an informed vote on the plan.[93] However, disclosure statements drive up the expense of chapter 11[94] and prolong the debtor's exit from bankruptcy.[95] Subchapter V addressed these costs by eliminating the disclosure statement altogether.[96] Instead, the debtor's plan must include a brief history of the debtor's business operations, a liquidation analysis, and projections of the debtor's ability to make payments.[97]

To be sure, the court can reimpose the disclosure statement rules for cause.[98] However, even if it does so, the rules enacted under the BRA for small businesses applies.[99] That means that the court can conclude that a disclosure statement is not necessary, approve a standard form disclosure statement previously approved by the bankruptcy court,[100] conditionally

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[93] *See id.*

[94] Nika Aldrich & Lawrence Ream, *Chapter 11 Bankruptcy is Expensive; the Small Business Reorganization Act Provides a Realistic Opportunity for Small Businesses to Reorganize*, SCHWABE (July 2, 2020), www.schwabe.com/newsroom-publications-chapter-11-bankruptcy-is-expensive-the-small-business-reorganization-act-provides-a-realistic-opportunity [https://perma.cc/26VF-29BN] (noting that Chapter 11 bankruptcy is "notoriously expensive" because of procedural requirements including a "comprehensive disclosure statement").

[95] Jordan Weiss, *A More Accessible Chapter 11: Subchapter V*, MSEK (July 19, 2022), www.msek.com/blog/a-more-accessible-chapter-11-subchapter-v-by-jordan-weiss [https://perma.cc/2YRU-XF9N]. Indeed, one side effect of removing the laborious disclosure statement is a reduced amount of time for a subchapter V debtor to stabilize its business while under the protection of the bankruptcy court. The debtor is therefore forced into working quickly and considering all reorganization options prior to filing — factors required in a prepack.

[96] *See* 11 U.S.C. § 1181(b) (making section 1125, which requires disclosure statements, inapplicable in subchapter V, "[u]nless the court for cause orders otherwise"). The express removal of the disclosure statement addresses one of LoPucki's critiques of the *Belk* prepack: a disclosure statement cannot be inadequate, or provided to creditors on inadequate notice if it is not required in the first place. *See* LoPucki, *supra* note 13, at 276–77.

[97] *Subchapter V Cases – Small Business Reorganization Act*, United State Bankruptcy Court, Western District of Oklahoma, www.okwb.uscourts.gov/subchapter-v-cases-small-business-reorganization-act-2019 [https://perma.cc/6BHL-6NTQ].

[98] *See* § 1181(b).

[99] *See id.* § 1187(c) ("If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply."); 1125(f); *see also supra* note 36. The interaction of sections 1187(c) and 1125(f) present a neat problem in statutory interpretation. Section 1125(f), by its terms, only applies in a "small business case," which might lead one to think that the streamlined provisions for disclosure statements apply only where the subchapter V debtor also falls below the (far lower) $2 million debt ceiling. But the term "small business case" is defined by section 101(51C) to *exclude* debtors who have elected subchapter V. Thus, for section 1187(c) to mean anything, it must mean that the streamlined provisions of section 1125(f) apply to subchapter V cases even though the text plainly says the opposite.

[100] *Id.* § 1125(f)(2).

approve a disclosure statement, and consolidate a final hearing on the disclosure statement with the plan confirmation hearing.[101]

b. Small Business Payment Plans & Plan Exclusivity

Lastly, subchapter V gives debtors permanent plan exclusivity.[102] This gives small business debtors the benefit of never having to compete with a creditor's plan or defend against a proposed reduction in or termination of the debtor's exclusivity period.[103]

Aside from the traditional chapter 11 rules of classes under § 1123(a)(1), a subchapter V plan must include a brief history of the debtor's operations, a liquidation analysis, and projections regarding the debtor's ability to make payments under the proposed plan.[104] Moreover, the plan must provide a means for the debtor's future earnings to be in the subchapter V trustee's supervision and control if needed to execute the plan.[105] If all the requirements of § 1129(a) are met[106] and all impaired classes accept the plan, the plan will be confirmed on a consensual basis.[107] The subchapter V trustee's service is terminated when the plan is substantially consummated, reducing fees and expenses,[108] and the debtor receives an immediate discharge upon confirmation.[109]

Most radically, subchapter V departs from the absolute priority rule for cramdown cases, allowing a small business debtor to overcome objections to the plan by making payments to creditors for three to five years and then have its unsecured debt wiped away.[110] A subchapter V plan is considered "fair

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[101] *Id.* § 1125(f)(3).

[102] 11 U.S.C. § 1189(a).

[103] Tractenberg et al., *supra* note 88, at 16–17.

[104] 11 U.S.C. § 1190(1).

[105] *Id.* § 1190(2).

[106] *Id.* § 1191(a).

[107] *Id.* § 1129(a)(8).

[108] *Id.* § 1183(c).

[109] *Id.* § 1141(d). Under subchapter V, "[t]he benefits of . . . consensual confirmation are significant." *In re* Louis, No. 20-71283, 2022 WL 2055290, at *17 (Bankr. C.D. Ill. June 7, 2022) (noting the benefits of consensual plans are "discharge at confirmation, the exclusion of property acquired post-petition as property of the estate, and termination of a trustee's services and charges upon substantial consummation of the plan.").

[110] 11 U.S.C. § 1191(b); *see also* Coordes, *supra* note 23, at 379 ("This modification allows small business owners to retain their businesses even if they do not pay their creditors in full, provided they commit all of their disposable income to plan payments during the life of the plan"); *In re Chip's Southington, LLC*, at n.5 ("[A] Subchapter V plan may be crammed down on unsecured creditors even if stockholders, who are junior to unsecured creditors, retain their equity under the plan."). It is important to note that this projected disposable income rule for an individual debtor applies only when one or more classes do

and equitable" for dissenting classes of impaired unsecured creditors if the debtor applies all projected disposable income[111] received within the first three to five years of the plan to make payments under the plan or if the value of the debtor's property distributed under the plan in the first three to five years is at least the projected disposable income of the debtor.[112] This innovation solves a longstanding problem in small business cases: the entrepreneur, deprived of her equity stake in the company, has lost all incentive to maintain the business as a going concern.[113]

C. Growing Caselaw & Coming Refinements

Bankruptcy practitioners, judges, and scholars are still working out the mechanics of subchapter V and devising strategies for debtors and creditors.[114] Most commentators seem to welcome bankruptcy's newest subchapter, recognizing that the default chapter 11 rules were too complex, too expensive, and led too many small business debtors with going-concern value to eschew the bankruptcy courts altogether.[115] A growing body of caselaw applying the subchapter is starting to work over uncertain parts of the text.[116] Even so, the bankruptcy community continues to express concerns that debtors will use the subchapter to drag out resolution of cases

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not accept the plan. *See* 11 U.S.C. § 1191(b). Scholars disagree about the relative merits of the absolute and relative priority rules. *Compare* Douglas C. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 164 U. PA. L. REV. 785, 792 (2017), *with* Jonathan Seymour & Steven L. Schwarcz, *Corporate Restructuring Under Relative and Absolute Priority Default Rules: A Comparative Assessment*, 1 U. ILL. L. REV. 1 (2021).

[111] Although there are various definitions of disposable income in the Bankruptcy Code, disposable income in a subchapter V case is the income the debtor receives that is not reasonably necessary to be spent on maintenance or support of the debtor, a domestic support obligation, or payments needed for the "continuation, preservation, or operation" of the debtor's business. 11 U.S.C. § 1191(d).

[112] 11 U.S.C. § 1191(c)(2). The debtor must be able to make all payments under the plan or have a reasonable likelihood of making all payments. 11 U.S.C. § 1191(c)(3)(A).

[113] *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, Essay, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 947 (2001) (noting the perverse incentives created by the absolute priority rule).

[114] *See, e.g.*, Bradley, *supra* note 14 (discussing creditor strategies in subchapter V). The American Bankruptcy Institute has assembled a taskforce to review subchapter V's efficacy and evaluate whether changes are needed. *See* Subchapter V Taskforce, AM. BANKR. INST. https://subvtaskforce.abi.org [https://perma.cc/MAB5-787K].

[115] *See* Brian L. Shaw, *Written Statement of Brian L. Shaw, American Bankruptcy Institutes Subchapter V Task Force* (June 9, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Brian_Shaw_Statement.pdf [https://perma.cc/YR26-YK8B].

[116] Judge Bonapfel's Guide contains a compilation of recent subchapter V cases. *See generally* Bonapfel, *supra* note 26.

or to avoid paying creditors.[117] Policymakers continue to debate the optimal debt limit for eligibility (and whether it should be automatically or periodically updated).[118] And some commentators query whether the subchapter V trustee should be able to propose a plan, along with the debtor.[119]

Despite this flurry of activity, one strategy that has not yet been fully explored is the small business prepack. Since Congress intended for subchapter V cases to be more streamlined, the prepack approach seems like a natural fit for the subchapter. The next Part turns to explore the prepack litigation strategy.

II. HOW PREPACKAGED CASES HAVE RESHAPED CHAPTER 11

Even as Congress enacted subchapter V to streamline bankruptcy for small businesses, chapter 11 debtors and their legal counsel have been refining their own strategy to minimize the costs and publicity of being in bankruptcy court. As described above,[120] this strategy is called a "prepackaged" bankruptcy, or a "prepack" for short. The approach is counterintuitive — and controversial. To the layperson, the filing of a petition in bankruptcy might represent the end of business as usual and the beginning of a prolonged, public court process. But neither is necessarily true: under the modern American bankruptcy regime, businesses reorganize under chapter 11 all the time — and some of them do so at rocket speed.

Take the case of Belk, Inc., a large department store, headquartered in

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[117] *See, e.g.*, Bradley, *supra* note 14, at 271.

[118] *Compare* Sumner A. Bourne, *Public Hearing on Subchapter V Eligibility*, AM. BANKR. INST. (June 23, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Sumner_Bourne_Statement.pdf [https://perma.cc/QV8M-VNUE] ("I . . . would favor a permanent raise to $10,000,000), *and* Cipriano, *supra* note 14 (arguing that the debt limit should be raised to $10 million), *with* Paul M. Black, *Statement*, AM. BANKR. INST. (June 23, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Paul_Black_Statement.pdf [https://perma.cc/Z9E8-LANP] ("[T]he current debt limit of $7,500,000 is effective and appropriate. It should be maintained . . . .").

[119] *See, e.g.*, Amy Denton Mayer, *ABI Task Force on Subchapter V*, AM. BANKR. INST. (July 14, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Amy_Denton_Mayer_Written_Statement.pdf [https://perma.cc/X7VK-WYB9] ("Should the Subchapter V trustee be permitted to file a plan if the debtor is removed from possession pursuant to Section 1185?); Hannah L. Blumenstiel, *Written Statement of the Hon. Hannah L. Blumenstiel (Bankr. N.D. Cal.)*, at 4–7, AM. BANKR. INST. (June 9, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Hannah_Blumenstiel_Statement.pdf [https://perma.cc/VY76-P2QW] ("Where a debtor proves unable to propose a confirmable plan, whether due to feasibility concerns, bad faith, or other reasons, it might make sense to terminate the permanent exclusivity afforded by Subchapter V and to allow the SubV trustee to propose a plan.").

[120] *See supra* note 11 and accompanying text.

North Carolina, that experienced financial distress in the early days of 2021.[121] On February 23, 2021, Belk filed for chapter 11 bankruptcy.[122] An informed observer of traditional, large retail bankruptcies might have guessed that Belk's bankruptcy case would take somewhere between six and eighteen months.[123] But at 10:08 AM the next morning, the bankruptcy court confirmed Belk's reorganization plan, blessing its exit from bankruptcy.[124] Nor was the plan somehow dreamed up overnight: Belk is not a small company, and the plan was complex. It reduced Belk's debt by $450 million, approved $225 million in new capital, and extended maturities on its term loans by three years.[125]

Belk was able to get its plan confirmed in just over twelve hours because it filed a prepack.[126] In addition to its regular first-day filings, a debtor filing a prepack submits its reorganization plan along with its petition.[127] This move is a deviation from the default practice. In a traditional chapter 11 case, after filing for bankruptcy, the debtor must submit its plan, along with a disclosure statement, to the creditor body and solicit the votes of the creditors. In a prepack, the debtor has already distributed the proposed plan and disclosure statement and has already solicited votes for its plan before filing its petition. The debtor comes into court saying, in effect, here we are, this is what we want to do, our creditors have already voted, so please confirm our plan.[128]

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[121] *See* Press Release, *Sycamore Partners Reaches Agreement to Recapitalize and Retain Control of Belk*, BELK (Jan. 26, 2021), https://newsroom.belk.com/restructuring [https://perma.cc/55RB-D8AU].

[122] *See* Steven Serajeddini & Josh Sussberg, *A One-Day Ch. 11 Turnaround? Belk Shows It Can Be Done*, KIRKLAND & ELLIS (Mar. 2, 2021), www.kirkland.com/news/in-the-news/2021/03/a-one-day-ch-11-turnaround-belk-shows-it-can-be-do [https://perma.cc/4UUJ-FCLM].

[123] *See* Warren & Westbrook, *supra* note 47, at 626, 629.

[124] Serajeddini & Sussberg, *supra* note 122. Judges do not close a bankruptcy case after confirming a plan, but plan confirmation represents the definitive end to what are usually the most controversial and contested matters in a chapter 11 reorganization case, leaving subsidiary and administrative matters for further resolution.

[125] *Id.*

[126] *Id.*

[127] *See, e.g.*, Morris J. Massel, *The Pros and Cons of Prepackaged Bankruptcy*, LAW360 (Oct. 2, 2013), www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1647.pdf?sfvrsn=2 [https://perma.cc/4LV8-5Y4V].

[128] Belk's one-day prepack is an extreme example that requires the retention of many professionals and significant planning. While a few debtors have the resources required to expedite their exit to this degree, most prepacks typically take around four months to reach plan confirmation. Nevertheless, a four-month exit remains relatively fast in the chapter 11 context, deviating from the ordinary chapter 11 timeline of approximately eighteen months.

Prepacks have become increasingly popular,[129] and for many debtors rightfully so. A prepack minimizes the time a debtor remains in bankruptcy and thus reduces the costs of litigating through a drawn-out court process.[130] But prepacks have generated concern and controversy too, particularly when debtors seek plan confirmation at rocket speed. Critics of the practice, most notably LoPucki, argue that prepacks circumvent statutory periods and risk unjust results.[131]

In this Section, we describe the prepack litigation strategy, describe why debtors (and some creditors) choose it, and explain the limitations and risks of the approach. We then proceed (in Part III) to explain why the new rules for small business bankruptcies may be especially appropriate for prepacks.

A. Prepacks as Litigation Strategy

When a business enterprise files for bankruptcy, the case can proceed along several different paths, such as a liquidation under chapter 7 of the Bankruptcy Code, a plan of reorganization under chapter 11, or a sale of the business's assets under section 363.[132] The Code does not direct which path a debtor selects and leaves the decision to the debtor (at least in the first instance). Indeed, the Code gives the debtor a period of exclusivity during which it, and only it, may propose a plan for how to reorganize the business.[133] Before filing, debtors considering a bankruptcy filing — at least when the case is not a "freefall" bankruptcy — discuss their approach to the litigation with their legal team. And, as has been the practice for several decades now, debtors generally invite their senior secured creditor, or whoever is paying for the bankruptcy case, into that discussion.[134]

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[129] Indeed, there is a growing literature discussing prepacks in insolvency practice around the globe. *See, e.g.*, Gurrea-Martinez, *supra* note 10 (detailing the rise of prepacks in Singapore, India, Spain, the Netherlands, and the Philippines); Anya Droege Gagnier, *The French Prepack Is Now Available*, 5 INSOLVENCY & RESTRUCTURING INT'L 32 (2011) (analyzing the *Sauvegarde Financière Accélérée*, inspired by American chapter 11 practice); Barbara Tomczyk & Przemysław Wierzbicki, *Pre-pack under Polish Law*, 11 INSOLVENCY & RESTRUCTURING INT'L 42 (2017) (same for Poland).

[130] *See, e.g.*, *In re* Genco Shipping & Trading Ltd., 509 B.R. at 462 ("A successful prepack can cut down the duration of a bankruptcy case and, therefore the incredible cost associated with a long, drawn out bankruptcy process.").

[131] LoPucki, *supra* note 13, at 276.

[132] *See generally* 11 U.S.C. § 363.

[133] *See Id.* § 1121(b).

[134] In recent decades, companies in financial distress usually do not have any cash available to pay for the bankruptcy process, and must turn to a secured creditor, or less commonly, a new lender, to fund the bankruptcy process. The Bankruptcy Code strictly curtails the ability of debtors to use cash collateral, 11 U.S.C. § 363(c)(2), and in 1998,

Debtor control of the trajectory of a bankruptcy case applies to prepack cases. In a prepack case, even as the debtor files its petition in bankruptcy, it formally proposes its chapter 11 plan and seeks confirmation of that plan. If creditor voting is required to confirm the plan, the debtor has already solicited votes. This strategy collapses the beginning and the end of the bankruptcy case into a single moment and represents a dramatic acceleration of the normal timelines in bankruptcy.

Consider the standard timeline. The Code's notice requirements contemplate a confirmation hearing no earlier than four weeks after the petition date. This is because the debtor is typically required to file a disclosure statement with its plan and provide time for creditors to vote on the plan. In its disclosure statement, the debtor must describe the plan so that creditors can understand the proposal. The debtor must obtain court approval of the disclosure statement and distribute the plan and disclosure statement to creditors four weeks (28 days) before a hearing on the disclosure statement.[135] Once the court has approved the disclosure statement, the creditor body typically has another four weeks (28 days) to vote on the plan. After the creditor body has voted, the debtor moves for plan confirmation.[136] Correspondingly, the period during which only the debtor may file a plan is 120 days.[137] The Bankruptcy Code thus contemplates plan confirmation between an inside date of two months after the petition and an outside date of four months after the petition, subject to court adjustment of those deadlines.

In a prepack case, the debtor seeks to move as much of this process as

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amendments to Article 9 of the Uniform Commercial Code made it easier for lenders to perfect a security interest in substantially all of their borrowers' assets, including cash and proceeds of collateral. *See, e.g.*, Cynthia Grant, *Description of the Collateral Under Revised Article 9*, 4 DEPAUL BUS. & COM. L.J. 235 (2006) (discussing the revised U.C.C. § 9-504). As a result of the U.C.C. revisions, new credit markets for distressed firms, and the eternal reluctance of American debtors to file any sooner than necessary, companies filing for bankruptcy in recent decades have tended to enter bankruptcy with their cash already serving as collateral. *See, e.g.*, David A. Skeel, *Bankruptcy's Identity Crisis*, at *9 (May 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4417213 [https://perma.cc/THJ8-C4G4]; David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 925 (2003); Charles J. Tabb, *Credit Bidding, Security, and the Obsolescence of Chapter 11*, 2013 U. ILL. L. REV. 103, 142 (2013). *But see* Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831 (2015) (presenting empirical findings challenging the prevalence of the "hog-tied" debtor in bankruptcy.

[135] *See* FED. R. BANKR. P. 3017(a).

[136] *See* 11 U.S.C. § 1129.

[137] 11 U.S.C. § 1121(b). The bankruptcy court may, for cause, extend this period up to 180 days after the petition date. Any such extensions are subject to outer limits that cannot be adjusted by the bankruptcy court. *See id.*; *see also id.* §1121(d) (authorizing the court to "reduce or increase" the exclusivity period up to 18 months).

possible back before the petition date. Working with creditor constituencies, it thus drafts the plan and disclosure statement along with its petition in bankruptcy, distributes the documents to its creditor body, solicit votes if necessary, and — in an "ultra-expedited prepack,"[138] even gives creditors the statutory opportunity to draft objections — all before filing the case. By the time the bankruptcy begins, key creditors are locked into supporting the plan through a restructuring support agreement (or "RSA"), a development that Law Professor Douglas Baird calls a "quiet revolution."[139] Commercial litigation practice has no obvious parallel; it would be as if the plaintiff sent the complaint to the defendant, the parties engaged in discovery, agreed that trial would not be necessary, and filed the complaint, answer, motions to dismiss, and motions for summary judgment all on Day One.

While the prepack strategy represents an extreme departure from the standard trajectory envisioned by the Bankruptcy Code, it is not without statutory hooks. The prepack goes back at least to the beginning of today's Bankruptcy Code.[140] When Congress enacted the Code in 1978, it included provisions implicitly accepting prepackaged cases.[141] Specifically, the Code expressly authorizes a debtor to file its chapter 11 plans with its petition,[142] as well as to solicit votes prior to the case's commencement — the quintessential feature of a prepack.[143] It also provides a crucial workaround

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[138] *See* Chafetz & MacDonald, *supra* note 151 (defining ultra-expedited prepacks as "prepacks in which at least half of the 28-day period provided for filing objections to confirmation under Rule 2002(b) of the Federal Rules of Bankruptcy Procedure (the Rules) has elapsed prior to the filing of the debtor's petition.").

[139] Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593 (2017).

[140] Indeed, prepackaged cases can be traced back to nineteenth-century receivership proceedings. *See, e.g.*, Dennis F. Dunne et al., *Pre-packaged Chapter 11 in the United States: An Overview*, GLOB. RESTRUCTURING REV. (Dec. 11, 2019), globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-1/article/pre-packaged-chapter-11-in-the-united-states-overview#footnote-162 [https://perma.cc/3DXW-V3TV]. Bondholders could deposit their bonds with a committee that would then propose a reorganization plan and seek confirmation. *Id.* In Chapter X of the old Bankruptcy Act, Congress banned this prepetition solicitation of plan acceptances, responding to concerns that insiders were controlling the committees at the expense of bondholders. *Id.* However, in 1978, Congress got rid of Chapter X's prohibition of pre-petition solicitation. *Id.*

[141] *See id.*; *In re* Genco Shipping & Trading Ltd., 509 B.R. 455, 462 (Bankr. S.D.N.Y. 2014) ("The Bankruptcy Code clearly contemplates the use of prepack plans"). One of the attorneys involved in drafting the 1978 Code, J. Ronald Trost, advocated for provisions clearly allowing parties to negotiate their way to a solution before filing the case. As Baird puts it, "Trost was not fashioning something out of whole cloth": Chapter XI reorganizations had often followed this template. BAIRD, *supra* note 29, at 139.

[142] 11 U.S.C. § 1121(a) ("The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.").

[143] *See* 11 U.S.C. § 1126(b); *see also* 11 U.S.C §§ 341(e), 1121(a), 1102(b)(1), 1125(g)

to the requirement of an official unsecured creditors' committee, allowing the bankruptcy court to deem *ad hoc* prepetition committees as having satisfied that statutory requirement.[144]

BAPCPA, too, modified procedures of standard chapter 11 cases to facilitate prepacks.[145] Before BAPCPA, debtors filing a prepack had to complete its solicitation before they filed its case.[146] If the solicitation was interrupted for any reason, such as an involuntary bankruptcy being filed, the debtor had to start over.[147] This changed with BAPCPA's addition of sections 1125(g) and 341(e) to the Bankruptcy Code. Section 1125(g) permitted debtors to continue solicitation of votes post-petition and without a court-approved disclosure statement.[148] Section 341(e) allowed the court to order the United States trustee not to convene a meeting of creditors in a prepack case.[149]

True, approving a chapter 11 plan so quickly runs afoul of various statutorily prescribed deadlines, something LoPucki and other critics have assailed.[150] The Bankruptcy Code expressly empowers the bankruptcy court

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(allowing solicitation of votes prior to the commencement of the bankruptcy case); FED. R. BANKR. P. 3018(b) (setting forth procedure for equity security holders and creditors who vote on the plan before the commencement of the case); Robert K. Rasmussen & David A. Skeel Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85, 97 n.54 (1995) ("Congress explicitly contemplated that some debtors would use this strategy.").

[144] Section 1102(b)(1) of the Bankruptcy Code provides for the appointment of the official creditors' committee but allows for the committee to consist of "the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented".

[145] *See* Andre M. Tropp et al., *The Mechanics of Prepacks: What Happens Pre-Petition, and How to Make it Stick Post-Petition*, AM. BANKR. INST. (July 2014), https://abi-org-corp.s3.amazonaws.com/cle/materials/2014/Jul/MechanicsOfPrepacks.pdf [https://perma.cc/NCC6-KDW7]. Unfortunately, BAPCPA's focus on speed neglected other important considerations. As one practitioner noted: "While BAPCPA may have sought to reduce the cost of bankruptcy by shortening the time period for developing a reorganization plan, it appears to have impaired the rehabilitative goal of bankruptcy by leaving insufficient time to rehabilitate or fix many bankruptcy businesses." Gerald P Buccino, *Statement to the ABI Commission to Study the Reform of Chapter 11*, AM. BANKR. INST. (2012), https://commission.abi.org/sites/default/files/statements/03nov2012/Buccino.pdf. [https://perma.cc/E3D6-EP4H]. BAPCPA was also "confusing, overlapping, and sometimes self-contradictory" to the extent that trying to understand its provisions was "like trying to solve a Rubik's Cube that arrived with a manufacturer's defect." *In re* Donald, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006).

[146] Tropp, *supra* note 145.

[147] *Id.*

[148] 11 U.S.C. § 1125(g).

[149] *Id.* § 341(e).

[150] *See* LoPucki, *supra* note 13 (criticizing Belk's bankruptcy case as unlawful).

to shorten those deadlines for cause, but those reduction provisions would almost never allow a bankruptcy plan to be confirmed faster than four days after the filing of the petition.[151] While the Code also gives the bankruptcy court broad authority to issue any orders "necessary or appropriate to carry out the provisions" of the Code, that authority cannot be wielded to contravene anything in the Code[152] but only to fill in statutory gaps.[153]

B. Strategic Advantages for Debtors and Creditors

Prepacks provide both debtors and creditors with significant advantages. Bankruptcy courts can provide extraordinary relief, and prepacks allow business enterprises to spend a significantly reduced time in court to obtain that relief.[154]

Debtors cannot always solve their financial problems outside of bankruptcy. Although some out-of-court restructurings may provide some benefits, they cannot provide all the protections that bankruptcy offers. Most importantly, bankruptcy can eliminate holdouts.[155] Holdout problems are a common thorn in the side of financially distressed firms, and occur when one creditor refuses to work with the debtor in the hopes that all the other creditors will work with the debtor to reduce *their* claims, leaving its claim

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[151] *See* FED. R. BANKR. P. 9006(b) (covering enlargement) and 9006(c) (covering reduction); *see also infra* notes 205–206 and accompanying text.

[152] *See* 11 U.S.C. § 105(a); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017) (holding that the bankruptcy court could not rely on section 105(a) to modify creditors' rights upon dismissal of a case, in contravention of distribution and priority rules); Law v. Siegel, 571 U.S. 415, 421 (2014) (holding that the bankruptcy court could not rely on section 105(a) to surcharge a debtor's homestead exemption in contravention of section 522); *see also* 28 U.S.C. § 2075 (providing that the Bankruptcy Rules "shall not abridge, enlarge, or modify any substantive right". Law Professor Jonathan Seymour compares section 105(a) to the All Writs Act, 28 U.S.C. § 1651, pointing out that it only "authorizes a limited selection of procedural remedies, such as the right to issue injunctions in order to make effective some other provision of the statute." Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1982 (2022).

[153] *But see* Eric Chafetz & Myles R. MacDonald, *Ultra-Expedited Prepacks Are No Longer an Academic Curiosity*, N.Y. L.J. (Dec. 31, 2019), www.lowenstein.com/media/5419/20191230-new-york-law-journal-ultra-expedited-prepacks-are-no-longer-an-academic-curiosity-chafetz-macdonald.pdf [https://perma.cc/S9X2-KA2G] (summarizing a prepackaged case where the court "was not certain that it had a statutory basis to confirm a plan of reorganization so quickly [so] the court heavily relied on its equitable powers, which are themselves codified in § 105(a) of the Bankruptcy Code.").

[154] *See supra* note 11 (listing several cases in which debtors' counsel successfully brought their client from petition to plan within a matter of days).

[155] *See, e.g.*, Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delewarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 288 (2001).

unaffected.[156] Out-of-court restructurings do not allow modification of a creditor's claim without that creditor's consent, and so debtors face a one-by-one negotiation with every single creditor, each of whom has an incentive to "hold out" for the best deal possible. Holdouts can frustrate otherwise productive negotiations, and stymie efforts by debtors and their creditors to reach consentual modification of the debtor's balance sheet.

The Bankruptcy Code, however, permits a court to modify creditors' claims without their consent, both by allowing claims to be classified and soliciting consent by class,[157] and by allowing nonconsensual plans to be "crammed down" on nonconsenting classes.[158]

At the same time, bankruptcy comes at a price:

First, of course, there is the matter of sheer cost. As many commentators have noted, a chapter 11 case is expensive — with debtors required to submit monthly financial reports, pay quarterly fees to the U.S. Trustee, and retain counsel throughout the reorganization plan.[159] While some of those costs parallel costs outside of bankruptcy (a distressed firm might still retain outside counsel, for example), not all of the costs of chapter 11 have nonbankruptcy parallels. In a chapter 11 bankruptcy, for example, the court appoints a statutory committee of unsecured creditors, a committee whose legal fees are usually paid out of estate assets, at least in part.[160] Outside bankruptcy, creditors are typically responsible for their own legal fees. All told, the difference in cost between an out-of-court workout and an in-court workout can create significant sticker shock.

Second, bankrutpcy comes with court oversight and significant limitations on the debtor's ability to operate. While debtors may continue to operate in the ordinary course of business, the Bankruptcy Code keeps a sharp eye on payments going out from the estate for any prepetition debts. Thus, a debtor in bankruptcy needs court approval for even mundane tasks such as paying utility bills or taxes.[161] Any business decision outside the ordinary course requires court approval as well,[162] sharply curtailing the debtor's ability to change its approach. This, too, creates a high price of admission that is reduced when a debtor exits bankruptcy quickly.

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[156] *Id.*

[157] *See* 11 U.S.C. § 1126. If the debtor solicits a positive vote from a majority of creditors in each class who hold over two-thirds of the debt, that class has "accepted" the plan, even though individual creditors have not accepted the plan.

[158] *Id.*

[159] *See, e.g.*, Dunne et al., *supra* note 140.

[160] 11 U.S.C. § 1102.

[161] *See, e.g.*, *Region 21 Operating Guidelines & Reporting Requirements for Chapter 11 Debtors in Possession and Chapter 11 Trustees* (Oct. 2022), www.justice.gov/ust-regions-r21/file/ch11_guidelines_reporting_req.pdf/download [https://perma.cc/YH2A-WPUQ].

[162] 11 U.S.C. § 363(b).

Prepacks thus allow debtors — and those creditors who support the plan — to access the protections of bankruptcy without incurring all the costs of a drawn-out bankruptcy case.[163] Debtors filing a prepack receive these benefits of bankruptcy and the speed and privacy seen in certain out-of-court restructuring strategies. Getting in and out of court quickly reduces costs, keeps the debtor out of the public eye,[164] instills confidence in stakeholders,[165] and allows the debtor to continue operating as usual.[166] Whether prepacks lead to success is hard to empirically determine. A 2015 study by LoPucki and Doherty determined that prepackaging a bankruptcy case was marginally more likely to result in a successful reorganization, but the authors conclude that selection bias likely explains the result: companies with a prepack in hand that suspect imminent failure decide not to file.[167]

C. Limitations, Risks, and Legitimacy of Prepacks

With all this said, the prepack strategy comes with significant limitations, some risks, and sharp concerns about legitimacy.

Let us start with limitations. Prepacks work only for debtors with certain types of capital structures since the plan must still meet the Bankruptcy Code's stringent requirements for plan confirmation. Those requirements mean, in effect, that a prepack debtor must have a viable underlying business and plan to use the bankruptcy process to reduce its debt overhang, in coordination with its secured creditors.[168]

First, the prepack strategy cannot work for debtor companies with unsecured creditors that (i) cannot be identified in advance and (ii) stand to recover some percentage of their debt in bankruptcy. This is because the voting rules in bankruptcy require one class of creditors that will not be repaid in full to sign off on the plan.[169] When that role can be filled by a small set of identifiable secured creditors, they can design a plan with the debtor and

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[163] Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1375 (2000) ("The prepackaged bankruptcy thus provides the firm with the benefit of class-wide voting to minimize holdout problems, while simultaneously minimizing the time the firms spends in bankruptcy.").

[164] *See* Dunne et al., *supra* note 141.

[165] Having votes solicited prior to commencing the case gives key stakeholders certainty that the company will continue business as usual. This reduced uncertainty makes it more likely that the business will continue operating as usual. *See id.*

[166] *See id.*

[167] LoPucki & Doherty, *supra* note 10, at 995.

[168] *See* Chafetz & MacDonald, *supra* note 151 (stating that an ultra-expedited prepack requires "(1) a debtor with a healthy underlying business filing solely because of too much debt; (2) a fulcrum class of secured creditors . . . and (3) no holdouts.").

[169] 11 U.S.C. § 1129.

vote on it in advance. But if the secured creditors can be paid in full, the next class of creditors whose consent is needed becomes the class of unsecured creditors. But if those unsecured creditors cannot be identified in advance, as is usually the case for operating companies, they cannot vote on the plan before confirmation. The result is that prepacks tend to be used either by (i) operating companies who are deep enough in debt that the unsecured creditors will receive no distribution under the plan or (ii) holding or mezzanine companies who, by virtue of not being operating companies, have a closed universe of unsecured creditors.

Second, even apart from voting requirements, the bankruptcy court must sign off on the plan as "feasible" and authorize any sales of estate property out of the ordinary course.[170] Thus, a debtor that proposes to sell the business or slash major business lines will be unlikely to convince a bankruptcy judge that such dramatic changes are appropriate without notice and an opportunity to hear objections — including from the U.S. Trustee's office (a division of the Department of Justice and bankruptcy's watchdog). For that reason, prepack cases typically propose only balance-sheet restructuring rather than wholesale reworking of business plans.

Then there are risks to the prepack strategy. A financially distressed firm that attempts to negotiate a global resolution outside of bankruptcy does not have the benefit of bankruptcy's automatic stay, which provides helpful "breathing room" for debtors in bankruptcy.[171] Soliciting votes before the stay may cause creditors to attempt to collect debts or alter terms of their contract.[172] Bankruptcy is no small decision, and "[i]f word of an impending bankruptcy filing leaks out . . . vendors may cease shipping, other creditors may seek to exercise remedies, competitors may seek to take away business, customers may look elsewhere, and employees may hit the street looking for a more secure job."[173] And even though involuntary bankruptcy cases are rare,[174] circulating a proposed prepack could be used to support the propriety

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[170] *See id.* § 363(b).

[171] For a description of the automatic stay, see Auriga Polymers Inc. v. PMCM2, LLC, 40 F4 1273, 1277–78 (11th Cir. 2022) ("The automatic stay provides breathing room for the debtor to negotiate with its creditors and craft a plan of reorganization.").

[172] Douglas M. Foley & James E. Van Horn, *Prepacks on the Rise in Chapter 11 Bankruptcies, Prenegotiated Plan Can Accelerate Reorganizations*, MCGUIREWOODS LLP (Aug. 2008), www.mcguirewoods.com/news-resources/publications/prepacks.pdf [https://perma.cc/JKN8-R8PM].

[173] John D. Ayer et al., *The Life Cycle of a Chapter 11 Debtor Through the Debtor's Eyes*, ABI J. (Sept. 7, 2003), www.kirkland.com/media/publications/article/2003/09/chapter-11-101--the-life-cycle-of-a-chapter-11-deb/friedland--life-cycle-of-a-chapter-11-debtor.pdf [https://perma.cc/686X-Ba4H].

[174] *See, e.g.*, Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127, 1127 (2020) ("Just 0.05 percent of petitions are involuntary.").

of a creditor-filed, involuntary bankruptcy case.[175]

Debtors may also find they have inadequate leverage when attempting to negotiate before filing a bankruptcy petition because they cannot invoke certain rights received in bankruptcy court. For example, chapter 11 allows debtors to reject certain executory contracts and leases, turning those debts into unsecured claims and (in some instances) to cap the damages for breach of contract.[176] This power gives the debtor the ability to defang certain creditors in bankruptcy court.[177]

Additionally, there is no guarantee that the bankruptcy court will find the debtor's efforts adequate. If the court finds that the proposed disclosure statement or solicitations do not meet the stringent requirements set forth in chapter 11, the debtor is back at square one and has lost a lot of money from the pre-petition preparation. Not only can the court raise concerns with the prepack process *sua sponte*, a single creditor or the U.S. Trustee's office can object to plan confirmation claiming the pre-petition disclosure, notice, and solicitation were inadequate.[178] The consequences of getting it wrong can derail the chance of a consensual resolution, especially when many prepacks "are agreed to by creditors on the assumption that they will proceed through bankruptcy with the unusual speed for prepackaged plans for which the Bankruptcy Code provides."[179]

All of these risks take place against the backdrop of significant critique of the prepack strategy. The Bankruptcy Code provides for notice periods that the ultra-expedited prepacks at best distort and at worst violate.[180] For

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[175] A debtor in the process of negotiating a prepackaged bankruptcy when an involuntary petition is filed might simply not contest the involuntary petition and regain control of the case by converting it to chapter 11 and seeking a subchapter V designation. Pursuant to Bankruptcy Rule 1020, an involuntary debtor has fourteen days after the court rules on the involuntary petition to state whether it elects subchapter V. *See* 11 U.S.C. § 303(h); FED. R. BANKR. P. 1020(a).

[176] *See* 11 U.S.C. § 365.

[177] *See id.*

[178] *See generally, e.g.*, *In re* LATAM Airlines Grp. S.A., 2022 WL 2206829 (Bankr. S.D.N.Y. June 18, 2022) (ruling on a U.S. Trustee's objection to confirmation due to, in part, inadequate solicitation).

[179] *See In re* Houghton Mifflin Harcourt Pub. Co., 474 B.R. 122, n.51 (Bankr. S.D.N.Y. 2012) ("[S]takeholders can be grievously injured, and value can be destroyed, when chapter 11 cases are not concluded quickly . . . . Those concerns are even more applicable with respect to prepacks, which are agreed to by creditors on the assumption that they will proceed through bankruptcy with the unusual speed for prepackaged plans for which the Bankruptcy Code provides.").

[180] The Office of the United States Trustee (U.S. Trustee) has critiqued ultra-fast prepacks for violating due process. *See, e.g.*, Objection of United States Trustee to Debtors' Emergency Scheduling Motion and Joint Prepackaged Plan of Reorganization, *In re* Belk, Inc. (Bankr. S.D. Tex., No. 21-30630), ECF No. 44. The U.S. Trustee's objections have not impeded the prepack.

example, in *Belk*, "[t]he court did not give the creditors notice of the disclosure statement or plan confirmation hearings until after those hearings were held."[181] The court attempted to assuage concerns by issuing a "due process preservation order," which allowed parties to raise due process objections after confirmation.[182] Even so, for LoPucki, this approach represents part of bankruptcy's recent "descent into lawlessness."[183] To be sure, other commentators do not share the same concerns. Creditors' acceptance of prepackaged plans may indicate their approval and support the contention that the modified procedures injure no one.[184] Even so, the notion of codified rules not being followed may erode the perceived legitimacy of the Bankruptcy Code and weaken the legal footing of the prepack strategy.[185]

The reader may already start to see how, in subchapter V, Congress addressed many of the same risks described above for small business debtors, including inadequate leverage with creditors, the uncertainty of success, and of the need to adjust the Bankruptcy Code's standard notice provisions. In the next Part, we show how the prepack strategy fits neatly into Congress's innovation for small business bankruptcies.

III. WHY PREPACKS FIT NEATLY INTO SUBCHAPTER V

A. For Whom Are the Bankruptcy Courts Open?

Bankruptcy law and policy have always presented a mix of public and private values — and this is no less true for prepacks. As noted in Part II, the prepack litigation strategy has generated a firestorm of controversy. That controversy is particularly acute because prepacks attempt to take as much of the bankruptcy process out of the public eye as possible. Whether that gambit seems evasive or prudent turns in large part on one's priors about what bankruptcy courts are meant to accomplish. Put differently, for whom are the bankruptcy courts open?

The two major schools of thought are called traditionalist (or

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[181] LoPucki, *supra* note 13, at 247.

[182] *See* Due Process Preservation Order, *In re Belk, Inc.* (S.D. Tex., No. 21-30630) ECF No. 62.

[183] LoPucki, *supra* note 13, at 247.

[184] *But see* LoPucki, *supra* note 13, at 252 ("the acceptance of a Chapter 11 plan signal approval of the plan no more than turning over one's wallet signals approval of an armed robbery.").

[185] *See id.* ("the bankruptcy courts have no authority to ignore the law"). Even with chapter 11's premium on creditor voting, Skeel points out that flat bans on distortions (like RSAs and "deathtrap" provisions) might cause more harm than good. *See* David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020). The same principle might apply to prepacks too.

functionalist) and proceduralist. Each of them present both a descriptive and normative portrayal of how bankruptcy works and how it should be reformed. The differences between the two camps run deep. Indeed, after years of back-and-forth debating, in a 1998 law review article, Baird declared an impasse, arguing that the two camps were building from different "uncontested axioms."[186] Yet while each school of thought has a leading paladin or two, most bankruptcy professionals find themselves somewhere in the middle.

This is to be expected of high theory, of course. Sociologist Max Weber pioneered the concept of ideal types ("*Idealtypen*") in his work on bureaucracies and, later, capitalism.[187] For thinkers using ideal types in the Weberian sense, concepts are to be used for empirical testing, not platonic metaphysics. The sociologist describes a pure form of a social construct, but only as a way of measuring deviations from that form in the real world. As relevant for our purposes, then, let us understand an "institution" as an established organization that reflects public values and a "forum" as a public meeting place for the expression or adjudication of private values. Are bankruptcy courts "institutions" or "fora"? The real question isn't to pin an empirical phenomenon to an ideal type but to *measure* them against the ideal type. Bankruptcy courts have elements of both.

1. The Traditionalist Take on Prepacks

For the traditionalist or "functionalist" school, bankruptcy is a public solution to private financial distress. Championed by then–Law Professor (and now Senator) Elizabeth Warren,[188] the traditionalist school sees bankruptcy courts as a sort of emergency room, funded by the public and taking all comers. And, to push the metaphor perhaps too far, the goal of the system is to stabilize the patient and stop the bleeding. The bankruptcy system cannot accomplish that goal in a way that makes everyone happy: they will implement rough justice. And, more aggressively, bankruptcy

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[186] Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 574 (1998).

[187] *See* MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES (1949); *see also* THOMAS BÜRGER, MAX WEBER'S THEORY OF CONCEPT FORMATION: HISTORY, LAWS, AND IDEAL TYPES (1987); Donald McIntosh, *The Objective Bases of Max Weber's Ideal Types*, 16 HISTORY & THEORY 265 (Oct. 1977), https://doi.org/10.2307/2504833 .

[188] *See, e.g.*, Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) ("I see bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors. Bankruptcy encompasses a number of competing — and sometimes conflicting — values in this distribution. As I see it, no one value dominates, so that bankruptcy policy becomes a composite of factors that bear on a better answer to the question, 'How shall the losses be distributed?'").

policymakers can impose policy goals upon the process.[189] If they want to insulate workers from being fired on the petition date, they can do so. If they want to ensure that healthcare companies do not leave their patients high and dry, they can do that too.

Perhaps a better name for this way of thinking about bankruptcy is "institutionalist," rather than traditionalist. Warren and others value the bankruptcy courts as public institutions with public goals. Just like the SEC and CFTC set out to protect investors[190] and the CFPB sets out to protect consumers,[191] the bankruptcy courts set out to preserve go-forward value in a way that spreads around the pain and ensures that communities across the country are not devastated by financial distress. These values are the price of admission.[192]

Viewed in this light, traditionalist bankruptcy scholars tend to view prepacks with suspicion, even alarm. After all, the premise of the prepack is to take advantage of bankruptcy rules while spending almost no time in bankruptcy court. And if bankruptcy courts are meant to keep a watchful eye out for unsecured creditors (the "little guys"), the fact that the debtor and secured creditors have conducted most of the process before notifying the court or unsecured creditors seems evasive.

2. The Proceduralist Take on Prepacks

By contrast, the proceduralist school sees the primary goal of bankruptcy as providing a level playing field whereupon parties can compete toward a resolution of the company's financial distress. Spearheaded by Law Professors Thomas H. Jackson and Douglas Baird,[193] the proceduralists argued that bankruptcy was not about adjusting debtors' or creditors' legal rights, but rather about providing "breathing room" and a forum for debate. Their arguments were both descriptive and normative: not only was this

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[189] Law Professor Ronald Mann has argued that any "reorganization surplus" created by the bankruptcy process can be allocated by the state to whichever stakeholder it chooses. *See* Ronald Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993 (1995).

[190] *See* Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 544, 556–57 (2022).

[191] *Id.* at 585; Alexandra Sickler & Kara Bruce, *Bankruptcy's Adjunct Regulator*, 72 FLA. L. REV. 159, 163 (2020).

[192] Whether bankruptcy values clash with or resonate with the values of debtor enterprises with an expanded social mission is an open question, and one that one of us has explored at length when it comes to benefit corporations in bankruptcy. *See* Christopher D. Hampson, *Bankruptcy & the Benefit Corporation*, 96 AM. BANKR. L.J. 93 (2022).

[193] *See, e.g.*, THOMAS JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986); Douglas Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 101 (1984).

theoretical framing the best way to depict bankruptcy law as it exists, but also it was the best way to safeguard and reform it in those areas where it deviated from this vision. Bankruptcy judges, for example, should not put a "thumb on the scale," as Baird recently described it, but should restrain themselves to overseeing a fair and inclusive process, reserving their suspicion and ire for breakdowns in the negotiating process.[194] Any "goodies" provided to the parties by the bankruptcy courts over and above their state law entitlements would create a perverse incentive for parties to bring their disputes to bankruptcy court when they should be working it out in the state court system.[195]

Law Professor Robert K. Rasmussen took this logic a step further, arguing that firms should be able to design the regime that would govern in the event of insolvency, selecting from a menu of options.[196]

Viewed in this light, proceduralist scholars have largely endorsed prepacks as a way of making bankruptcy negotiations even more efficient. If inclusivity and disclosure are the guiding lights of bankruptcy negotiation postpetition, then so too prepetition. And while the bankruptcy judge may not be able to supervise any prepetition process, so long as the judge is given an opportunity to assess the process and determine whether it provided an appropriate forum, the threat of judicial oversight is still serving its function within the system.

Still, even proceduralist scholars may hold some discomfort with prepack bankruptcy cases. After all, the prepack takes the bankruptcy procedure and moves most of it earlier, away from court supervision. The prepack thus runs roughshod over bankruptcy's default notice provisions, and bankruptcy professionals may well suspect that certain deviations in the process may undermine its inclusivity or fairness.

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[194] BAIRD *supra* note 29, at 108.

[195] *See, e.g.*, Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 828 (1987) ("Allowing priorities outside of bankruptcy but not inside is an open invitation to forum shopping and would exacerbate all the problems Jackson and I want to minimize").

[196] *See* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 66–67 (1992). Contractualism provoked another debate among bankruptcy scholars. *See, e.g.*, Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197 (2005); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503; Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343, 346–48 (1999) (proposing a rolling contractualist approach to bankruptcy); Steven L. Schwarz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 584–85 (1999); Lynn LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317, 341–42 (1999).

B. Small Business Cases Complicate the Picture

1. Bankruptcy Values in Miniature

Small businesses bring unique issues to the bankruptcy debate. They are, as Professor Coordes puts it, "bankruptcy misfits."[197] Small businesses tend to be owned by one person (or a small group of people) whose business identity is tied to the company.[198] The owner may be the founder or entrepreneur who started the business, someone who has been building the company for twenty years. The owner may also be the business's sole key employee, someone without whom the business simply cannot run. And, correspondingly, the owner's financial future may be tightly connected to the success of the business. Indeed, small business owners sometimes do not take salaries from the business; they are compensated wholly in profits — if there are any.

Additionally, the economies of scale that allow middle-market to large debtors to hire bankruptcy counsel for an expensive chapter 11 case simply are not in play with small business debtors. When they face financial distress, they have no large corporate treasury to draw on.

For those reasons, prepacks fit neatly into the financial profiles and business situations of many small businesses. Owners want to maintain their control over the company and want the certainty that a prepack provides, and constituencies like secured creditors may see a prepack bankruptcy as an efficient and clear-cut approach to an in-court workout.

From a theoretical perspective, proceduralist scholars may see some small businesses as the paradigmatic example of cases where prepacks may be helpful. Small businesses — with limited funds and strong reputational concerns from ownership — may find especially appealing a resolution to financial distress that spends as little time in bankruptcy court as possible. Traditionalist scholars, too, may see some small business cases as presenting strong candidates for prepacks. While large businesses are owned either by the wealthy, diffuse individual investors, or institutional investors with diverse portfolios, small businesses can be the "nest egg" for their owners. Giving ownership a chance to work out a plan with their secured creditors before the bankruptcy gets underway carries the same risks of trampling the rights of the unsecured creditors as it does in a large case, but the benefits are correspondingly higher.

This conclusion is buttressed by the reforms of the SBRA. As discussed above, the SBRA makes the bankruptcy process more streamlined for small businesses and reduces the number of players at the bargaining table — both

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[197] Coordes, *supra* note 23, at 377.

[198] See, e.g., BAIRD, *supra* note 29, at 188 n.13.

innovations that make prepacks easier to accomplish. The SBRA has thus addressed some of the prepack critics' most compelling arguments against the strategy. For example, LoPucki points out that no official unsecured creditors' committee was appointed in *Belk*, and that the court blessed Belk's prepetition "ad hoc groups."[199] In a subchapter V case, of course, the absence of an official unsecured creditors' committee is a nonissue. Similarly, while a standard chapter 11 case generally requires twenty-eight days' notice for the disclosure statement hearing and (subsequently) for the confirmation hearing, in a small business case those deadlines can be collapsed.[200]

Vote solicitation may be easier in subchapter V too. Since plan confirmation does not require an impaired accepting class,[201] some courts have concluded that a subchapter V cramdown plan does not require voting at all, so long as the other requirements are met.[202]

To be clear, we are not confident that the ultra-expedited prepacks can comply with the Bankruptcy Code, whether under subchapter V or chapter 11 generally. As LoPucki, Levitin, and others have pointed out,[203] the Bankruptcy Code's requirement of twenty-eight days' notice of plan confirmation can be shortened for cause,[204] but is still subject to other rules that constrain the limits of the strategy. For example, as LoPucki points out, the Rule 2002 notice usually must be given by mail,[205] so that even if a bankruptcy judge reduced the notice period to one day, the shortest effective deadline (given the Bankruptcy Code's other rules for mailings) would be

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[199] *See* LoPucki, *supra* note 13, at 289. LoPucki does not address whether Belk's prepetition *ad hoc* groups could have been appropriate under section 1102(b)(1), which specifically authorizes the court to bless creditor-organized, prepetition committees if they were "fairly chosen and … representative of the different kinds of claims to be represented."

[200] *See* FED. R. BANKR. P. 2002, 3017, 3017.1.

[201] *See* 11 U.S.C. § 1191(b) (eliminating the 11 U.S.C. § 1129(10) requirement for confirmation).

[202] *See, e.g.*, *In re* Arsenal Intermediate Holdings, LLC, No. 23-10097, 2023 WL 2655592, at *2 (Bankr. D. Del. Mar. 27, 2023) (Goldblatt, J.).

[203] *See* LoPucki, *supra* note 13, at 276; Levitin, *supra* note 13, at 1099–103.

[204] *See* FED. R. BANKR. P. 9006(c)(1) ("[W]hen an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.). Indeed, Rule 9006(c)(1) is subject to exceptions in subsection (c)(2), one of which are the deadlines for filing a plan of reorganization under Rule 3015 in a chapter 12 or chapter 13 case, which cannot be shortened. The negative implication is, of course, that the bankruptcy court may shorten other deadlines relating to confirmation. Similarly, the plan exclusivity period is subject to strict outer deadlines, deadlines which do not apply in subchapter V. *See* 11 U.S.C. § 1121(d)(2).

[205] *See* FED. R. BANKR. P. 2002(b). Excluding adversary proceedings, the court can send electronic notices, instead of mailings, to any recipient who consents in writing or who is a registered user of the court's electronic filing system (ECF). *See* FED. R. BANKR. P. 9036(b).

four days.[206] Subchapter V does not alleviate those concerns, so for small business debtors hoping to avoid any impropriety, a twenty-eight-day prepack may be the fastest possible case.

2. Small Is Not Always Simple

Even so, not all small businesses are appropriate candidates for prepack bankruptcies. Small does not always mean simple. A small business that readily clears the debt ceiling for subchapter V might have a messy balance sheet, with disputed, contingent, or unliquidated debt — or a universe of creditors that are unknown or unknowable.[207] And since a prepack typically requires the cooperation of secured creditors, small businesses whose secured creditors are unaccustomed to prepack practice — landlords, trade creditors, or regional banks, say — may have a harder time prompting an effective out-of-court negotiation. Small business debtors who cannot bring the required parties to the table outside of bankruptcy (or who cannot pay for the transaction costs of doing so) may face debt collection action and need the automatic stay and bankruptcy's forum to work out a deal.

Conversely, not all simple cases are small. Imagine a holding company ("HoldCo") or a mezzanine company ("MezzCo") whose only business is holding stock in an operating company ("OpCo"). Absent rare legal remedies like piercing the corporate veil, counsel for HoldCo or MezzCo may know — with as close to certainty as one can get — the identities of the entire creditor body. If HoldCo or MezzCo cannot negotiate an out-of-court workout, they may need bankruptcy to cram a plan down on holdouts. But that plan might be close to consensual, and even if it isn't, the attorneys for HoldCo and MezzCo can solicit a prepetition vote and provide any nonconsenting debtors with notice of their bankruptcy filing. Now, let's appreciate that the simplicity of this situation does not turn on the dollar

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[206] LoPucki, *supra* note 13, at 278 (citing FED. R. BANKR. P. 9006(f) (providing that when service is by mail, "three days are added after the prescribed period would otherwise expire under Rule 9006(a))). LoPucki registers "doubt that a court could reduce the 28-day periods to one day without abusing its discretion." *Id.* at 278. Of course, abuse of discretion is an appellate standard of review, so the real question is whether a party asking for such a reduction can show cause under Rule 9006(f) — a standard that should require, at a minimum, an evidentiary hearing. The only possible workaround would be if the entire universe of creditors had consented to electronic notice or were registered ECF users. *See supra* note 205.

[207] *See, e.g.*, Shaw, *supra* note 115 ([T]he misguided Chapter 11 Lite moniker has resulted in a less expected issue that is raised by sophisticated parties that are surprised when they occasionally find themselves in a Subchapter V. That issue is the erroneous belief that Subchapter V is only for the cheap and easy cases — and that anything that is complicated or deemed sophisticated should not be able to take advantage of Subchapter V despite fitting within its debt cap defined parameters — which belief is wrong.).

amounts in the capital structure. HoldCo and MezzCo could be small business debtors, eligible for subchapter V — or they could have billions of dollars in debt on their books.

3. Ideal Debtors For Small Business Prepacks

We can identify at least two types of debtors whose situation and capital structure make them ideal for the small business prepack strategy.

First, consider a holding company or a mezzanine company that can identify its universe of creditors because it is not an operating company. In situations where the debt burden starts to become overwhelming, the secured creditor might decide to deleverage the balance sheet by filing a quick chapter 11 case to sweep away the unsecured bond or bank debt — or to negotiate a composition or extension against the backdrop of the threat of a discharge. Such a plan could be fully consensual; if it were, the advantages of subchapter V would be in reduced trustee fees and greater certainty of a smooth path to confirmation. If such a plan were not fully consensual, the secured creditor might well decide that the regular chapter 11 cramdown provisions — which emphasize absolute priority and *pro rata* treatment — are easier to meet at a contested confirmation hearing than subchapter V's cramdown provisions. If the secured creditor is undersecured (the case for many small businesses), the unsecured creditors stand to gain nothing in a cramdown chapter 11 plan. But their cooperation could be obtained in exchange for some of the value provided by the relatively more streamlined subchapter V consensual plan. The negotiation over whether to do a prepack bankruptcy at all would thus encompass whether the prepack was filed under subchapter V or not.

Second, imagine a small operating business who owes significant debt to a bank that holds liens on all or substantially all the assets of the debtor. The collateral is currently worth more than the amount of the secured debt, so the bank is oversecured. In addition to the bank, the debtor owes numerous unsecured creditors, like trade vendors and employees, who are therefore partially in the money and partially out of the money. The business is limping along, making enough money to service its secured debt, but not much else. The problem for the creditors is that the cooperation of the founder is required: the business will plummet in value without the founder's labor and expertise. The secured creditor wants to wipe the slate clean of unsecured debt, but it cannot cram a plan down in chapter 11 without washing away the founder's equity. Instead, the secured creditor proposes a cramdown subchapter V plan that pays off the secured debt, pays nominal or no disposable income over the life of the plan, and then allows the founder to emerge from bankruptcy with a cleaner balance sheet.

Taking all this into account, we think subchapter V does smooth the path for small business prepacks, but that doesn't mean that prepack cases and small business cases will be coextensive. Plus, as we explore in the next Part, we see several initiatives that bankruptcy professionals could undertake to help achieve prepack speed in a subchapter V case.

IV. ACHIEVING PREPACK SPEED IN A SUBCHAPTER V CASE

As we argued above, subchapter V's new rules incentivize debtors and creditors to reach a consensual plan,[208] and thus increase the chance of a successful prepack.[209] The debtor will want to avoid the costs associated with up to five years of a subchapter V trustee's supervision and receive its discharge sooner.[210] Unsecured creditors have a greater incentive to reach a consensual plan, too, because subchapter V makes cramdowns easier for a debtor.[211] This result is also consistent with the legislative intent to promote a consensual plan, shown by the subchapter V trustee's statutory obligation to "facilitate the development of a consensual plan of reorganization."[212]

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[208] *See In re* Louis, No. 20-71283, 2022 WL 2055290, at *17 (Bankr. C.D. Ill. June 7, 2022) ("[A]lthough the provisions of Subchapter V do not affirmatively require a debtor to try to attain a consensual confirmation . . . the Debtor's decision in this case to forego that effort from the start was certainly contrary to the spirit of the law. And, as it pertains to the Trustee's role, it was contrary to both the spirit and letter of the law.").

[209] A prepack is more likely to result in a successful reorganization when the debtor obtains a consensual plan. *See* Practical Law Bankruptcy & Restructuring and Practical Law Finance, *The Prepackaged Bankruptcy Strategy*, THOMSON REUTERS (2022) https://us.practicallaw.thomsonreuters.com/9-503-4934 [https://perma.cc/TM9W-JPDC] ("Execution risk is reduced if the deal is highly consensual, with most key creditors supporting the plan.").

[210] Courts, too, may put pressure on debtors to propose shorter plans. *See, e.g.*, *In re Urgent Care Physicians, Ltd.*, No. 21-24000-BEH, 2021 WL 6090985, at *10–11 (Bankr. E.D. Wis. Dec. 20, 2021) ("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, 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.").

[211] *See* Barcelona Cap., LLC v. Neno Cab Corp., No. 22-CV-00090 (HG), 2023 WL 363067, at *1 (E.D.N.Y. Jan. 23, 2023) ("Subchapter V modifies the rules under which particular classes of claims can be crammed down, which means that a bankruptcy court has greater authority to adopt a debtor's plan of reorganization even if creditors object to the plan.").

[212] *See* 11 U.S.C. § 1183(b)(7); *see also* Michelle M. Harner et al., *Subchapter V Cases by the Numbers*, AM. BANKR. INS. J. (Oct. 2021), https://s3.amazonaws.com/abi-org-corp/journals/numbers_10-21.pdf [https://perma.cc/JMM5-EW2U] (finding preliminary data

In this Part, we first walk through what a subchapter V prepack would look like, imagining the case of GatorCo. We then advocate for several changes that, while representing only minor adjustments to the SBRA's framework, would further smooth the path toward a small business prepack.

A. The Small Business Prepack: A Walk-Through

This Section illustrates how our fictitious retail store from earlier, GatorCo,[213] will file its subchapter V case:

By this point, GatorCo has concluded bankruptcy makes the most sense after considering out-of-court remedies. After consultation with counsel, GatorCo has concluded it would like to continue operating after bankruptcy, and therefore a chapter 7 liquidation does not make sense. Moreover, GatorCo would like to maintain a positive public image and has emphasized it would like to exit bankruptcy court as quickly as possible.

GatorCo has two options: it can proceed as a small business case under chapter 11 or elect subchapter V. After a review of the costs and benefits of each approach, GatorCo determined subchapter V makes the most sense.[214]

GatorCo's first step will be to review its financials. GatorCo begins preparing its 12-week cash flow models and long-term feasibility model spreadsheets. GatorCo should also investigate whether it anticipates realizing any recovery from a fraudulent, preferential, or other avoidable transfers. GatorCo asks its secured creditor if it wants to advance new funds to pay for the bankruptcy case. With the newly established local rules and guidance regarding subchapter V prepacks,[215] GatorCo can go to its secured creditor with confidence that it can promise a quick reorganization.

GatorCo then reaches out to its unsecured creditors. Unsecured creditors have much less leverage under subchapter V. In some respects, the debtor's outreach to the creditors is out of courtesy, since even if all classes reject the plan (or as is often the case — do not vote at all) it can still be crammed down

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shows that over half of subchapter V cases were able to reach a consensual plan, with most cases being confirmed within 168 days.). When a consensual reorganization plan is developed, the trustee's role is terminated, and administrative costs are diminished. This saving aligns with subchapter V's and prepacks' goal of reducing costs. *See* Small, *supra* note 1.

[213] See *supra* Section III.D.1 for an analysis of GatorCo's eligibility under Subchapter V.

[214] In particular, GatorCo's founder, Allie, is willing to keep working her backbreaking schedule to keep the business operation, but only if she stands to recover some of the equity value once GatorCo emerges from the plan. Without Allie, the business cannot survive, so debtor's counsel determines that subchapter V is the best option for a path through bankruptcy.

[215] *See supra* Section IV.B.

if it does not discriminate unfairly and is "fair and equitable" with respect to each class of claims.[216] Consequently, GatorCo tells the creditors it would like to reach an amicable resolution and, if the creditors agree and sign an RSA, they may receive a better distribution, plus the bankruptcy case will be cheaper than if the plan had to be crammed down.[217]

In form, GatorCo's restructuring plan is much more condensed than a typical chapter 11 plan. GatorCo has decided to take advantage of the easy-to-use Official Form 425A — essentially a "fill-in-the-blank" reorganization plan.[218] None of the information required to complete the form is contingent on post-petition activity and can be completed before the bankruptcy filing.

Once GatorCo prepares its first-day filings, it reaches out to the U.S. Trustee's office a few days before it files, asking the U.S. Trustee and the subchapter V trustee likely to be assigned to its case[219] to pass along any comments that they may have. GatorCo has followed all requirements of solicitation and disclosure for subchapter V and the U.S. Trustee and subchapter V trustee had only minor changes. In particular, the office asks GatorCo to draft a clearer backup plan in case it cannot make payments.[220] GatorCo's submittal of the supplemental filings required the local rule also puts most of its creditors at ease.

While GatorCo was hoping for a consensual prepack, not enough unsecured creditors care enough to vote. Instead, GatorCo files for bankruptcy and seeks court confirmation of its plan on a cramdown basis; this requires that it pay off its secured debt in full and commit its projected disposable income to pay down its unsecured debt over the next three years.

When GatorCo submits all its filings, the court agrees at the First Day Hearing that no disclosure statement is required and sets a plan confirmation hearing for twenty-eight days out. One especially testy creditor objects to GatorCo's definition of "disposable income" and argues that the court should require GatorCo to make payments for five years, not three. But with support from the secured creditor, the U.S. Trustee, and the subchapter V trustee, the bankruptcy judge has her concerns assuaged, decides that GatorCo's plan complies with the law, and confirms the plan. One month after filing its petition, GatorCo emerges from bankruptcy and begins making payments.

Ultimately, by using subchapter V as an avenue to restructure its debt, GatorCo was successfully able to exit bankruptcy within a month. The ball

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[216] *See* 11 U.S.C. § 1191(c).

[217] This additional money results from the subchapter V trustee's role and payments being terminated earlier than if the plan was a cramdown.

[218] Official Form 425A, Plan of Reorganization for Small Business Under Chapter 11 (Feb. 2020), https://www.uscourts.gov/sites/default/files/b_425a_0.pdf [https://perma.cc/CR4Q-XLQW].

[219] *See supra* Section IV.B.

[220] *See* 11 U.S.C. § 1191(c)(3)(B)(ii).

was in GatorCo's court during the case, allowing it to bypass many of the risks it would have faced had subchapter V not existed.

B. How to Smooth the Path Forward

Throughout this Article, we have emphasized the legislative intent of subchapter V to promote speed. However, as Judge Benjamin Kahn framed it, a better iteration of its purpose is "to provide small businesses with the presumption of a faster, more efficient, and feasible path to reorganization."[221] A debtor entering subchapter V is not guaranteed to exit quickly. And although not all small businesses are suited to have their cases disposed of quickly, or filed as a prepack,[222] there are multiple ways to streamline the process for those debtors who are suited for the small business prepack. We cover those improvements below.

1. Promote Pre-Crisis Preparation

First, small businesses should insulate their businesses from the chaos of financial distress by maintaining good records beforehand. Financial distress can feel like a maze for small businesses, leaving them puzzling "how did get here" and "what's the best escape route?" Answering these questions is not usually a simple task, and one that is best undertaken before a bankruptcy filing.

To be sure, subchapter V makes bankruptcy cases simpler.[223] Even still, it is difficult to file a subchapter V without preparing beforehand: "the roadmap for [the] fast path to success must be ready early on the case. So, without the necessary preparation, the subchapter V cannot possibly work as [intended]."[224] Some courts have even revoked the subchapter V designation

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[221] Benjamin A. Kahn, *June 23, 2023 Hearing on Eligibility Issues* (June 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Benjamin_Kahn_Statement.pdf [https://perma.cc/3M3U-6MJ3].

[222] Some debtors enter bankruptcy ill-prepared or needing the protection of the bankruptcy court while it works out its issues. *See supra* Part III.

[223] The easy-to-use form plan B 425A and the contracted disclosure under the SBRA — which can be set out in the plan and need not be a separate form — all point towards subchapter V's inherent efficiency.

[224] Catherine Peek McEwen, *Don't Put the Brakes on Subchapter V*, TAMPA BAY BANKR. ASS'N (Aug. 26, 2021), www.tbbba.com/dont-put-the-brakes-on-a-subchapter-v/ [https://perma.cc/YU2U-T8JB]; *see also In re* Seven Stars on the Hudson Corp., 618 B.R. 333, 347 (Bankr. S.D. Fla. 2020) ("Subchapter V is intended to be an expedited process. The debtor has the opportunity to use new, powerful tools to reorganize and save its business; but it must do so quickly.").

when the debtor has not moved with the speed envisioned by Congress.[225]

Because the cramdown and feasibility rules in subchapter V are more demanding than under chapter 11, small business debtors may need to do an even better job at keeping records than their chapter 11 counterparts. If GatorCo has no documentation of its revenues or operating expenses, how will it formulate a reorganization plan? Similarly, how will it prove projected disposable income or feasibility of its plan (if it can create one)?

For small businesses to navigate bankruptcy swiftly, they must maintain accurate records. For that reason, we urge pre-crisis preparation. While the costs of professional help feel high to cash-strapped businesses, many small businesses cannot afford not to hire professionals.[226] Those outside of the bankruptcy bar — corporate counsel, accountants, tax preparers — should urge their small business clients to invest in professional help, or, at a minimum, use financial management software like QuickBooks. Even with subchapter V, this preemptive approach is a pre-requisite to escaping the protracted financial nightmares that bankruptcy was for small businesses, not too long ago.

2. Clarify Standards for Cramdown Plans

Second, the standards for cramdown plans must be sketched out with greater clarity, whether by adjudication, local rule, or Congressional action.[227] In the context of subchapter V, the "fair and equitable" standard and the "feasibility" standard are both ambiguous. This ambiguity makes plan confirmation ripe for contestation — especially since feasibility "is the most important element of [plan confirmation]."[228]

Recall that subchapter V plans must be "fair and equitable with respect to each class of claims or interests."[229] The Code introduces two requirements for a cramdown plan to be "fair and equitable": the plan must (1) pay secured creditors in full (whether through cash, deferred payments, or retained liens),

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[225] *See, e.g., In re* Nat'l Small Bus. All., Inc., 642 B.R. 345, 349 (Bankr. D.D.C. 2022) (revoking the debtor's subchapter V designation after finding "the Debtor's case has not progressed with the expediency Subchapter V case[s] are expected to achieve.").

[226] Many thanks to subchapter V trustee Amy Denton Mayer for this point.

[227] *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L.R. 875, 915 (2003) ("[A]mbiguity is the enemy of law.").

[228] *In re* Bashas' Inc., 437 B.R. 874, 915 (Bankr. D. Ariz. 2010). Feasibility functions to distinguish aspirational plans from realistic plans — a distinction that can alter the outcome of any case. *In re* Curiel, 651 B.R. 548, 561 (B.A.P. 9th Cir. 2023) ("[T]he purpose of the feasibility requirement 'is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." (citation omitted)).

[229] 11 U.S.C. § 1191(c); *see also id.* § 1129(b)(2)(A).

the same as in a normal chapter 11; and (2) pay projected disposable income toward unsecured debt. In addition, the plan must be "feasible": the debtor must prove it will be able to make all payments under the plan (or has a reasonable likelihood of making all plan payments and has an appropriate contingency plan if that fails).[230]

Notably, though, the definition of "disposable income" in subchapter V is so flexible that, as Bradley points out, debtors may exploit it to their advantage.[231] For business debtors in subchapter V, "disposable income" means income "not reasonably necessary to be expended . . . for the continuation, preservation, or operation of the business of the debtor."[232] Even though "disposable income" is more sharply defined in chapters 12[233] and 13,[234] income requirements are hard to write and susceptible to gaming.[235] Debtors have every incentive to allocate generous amounts to the "continuation, preservation, or operation" of the business, lowballing payments to creditors. Creditors, conversely, will focus on the word "necessary." Any uncertainty may lead to a contested confirmation hearing, especially when debtors propose to pay creditors with actual disposable income, rather than fixed payments. Courts will have to address how disposable income fits into decisions to grow or shrink the business, as well as clarify whether the owner may take a salary over the life of the plan. If the contours of the rule are not successfully sketched out by caselaw, Congress may need to provide further clarity.

The third requirement, subchapter V's "feasibility" test, requires a more in-depth look than a standard chapter 11 analysis. While chapter 11 requires a court to find that the plan is not likely to lead to another liquidation or reorganization,[236] subchapter V also requires the court to conclude that the debtor can make all the payments — and if the court is not convinced, that

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[230] *Id.* §§ 1191(c)(2), (3).

[231] *See* Bradley, *supra* note 14, at 274 ("Debtors will have every incentive to lowball their projected revenues and to maximize their projected expenses, leaving a fig leaf of a plan payment to unsecured creditors beyond what is required to pay priority and secured claims.").

[232] 11 U.S.C. § 1191(d).

[233] *Id.* § 1225(b)(2).

[234] *Id.*

[235] *See* Bradley, *supra* note 14, at 273 n.101; *see also, e.g.*, Sizzler USA Restaurants, Inc. v. Guzman, No. 3:20-bk-30748, *Trustee's Objections to Debtors' First Amended Chapter 11 Plan* (Dec. 29, 2020) (ECF 108) (subchapter V trustee objecting to plan because the debtor's projections were a "moving target").

[236] *See* 11 U.S.C. § 1129(a)(11) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.").

the debtor has an appropriate backup plan.[237] But courts struggle effectively to oversee debt adjustment plans extending far into the future.[238] While each determination must be made on a case-by-case basis, courts can provide guidance on what types of financial documents and evidentiary support are most helpful to supporting a plan at confirmation. Providing additional legislative or judicial clarity on the feasibility determination will ensure that courts are confirming only the plans that actually meet the requirements,[239] and will assist parties in negotiating their way to a confirmable plan prior to the bankruptcy case being filed.

3. Clarify the Subchapter V Trustee's "Watchdog" Role

Third, the role of the subchapter V trustee should be clarified. A subchapter V trustee plays an imperative role in the case. Perhaps most notably, the subchapter V trustee's presence helps judges who benefit from the subchapter V's unbiased opinions.[240] As emphasized by Bankruptcy Judge Deborah L. Thorne, "[t]he negotiations which happen during phone calls or in conference rooms are what lead to success, and the subchapter V trustee — who is present for these discussions but has no emotional or financial ties to the debtor — can provide sage and independent insight to the court."[241] According to proceduralists, the bench should endorse these out-of-court workouts with open arms. However, some judges value an impartial endorsement from someone who was "in the room" during negotiations. But even if the subchapter V trustee is "in the room," are they obligated to vet for and report misconduct, such as an insider transaction? The law is not clear.

Bankruptcy Judge Craig Goldblatt frames this question as whether the

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[237] *In re* Samurai Martial Sports, Inc., 644 B.R. 667, 698 (Bankr. S.D. Tex 2022) ("Section 1191(c)(3) . . . . fortifies the more relaxed feasibility test that § 1129(a)(11) contains.").

[238] For a helpful overview of the theoretical and practical problems plaguing the bankruptcy courts' supervision of estates, see Jonathan M. Seymour, *The Limited Lifespan of the Bankruptcy Estate: Managing Consumer and Small Business Reorganizations*, 37 EMORY BANKR. DEV. J. 1 (2020).

[239] *See, e.g.*, LoPucki, *supra* note 13, at 252–53 (underscoring the importance of the feasibility determination in prepack cases).

[240] Deborah L. Thorne, *ABI Task Force on Subchapter V Virtual public Hearing, Remarks of Deborah L. Thorne, Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of Illinois* (July 14, 2023) https://abi-org.s3.amazonaws.com/SubV/wstatements/Deborah_Thorne_Written_Statment.pdf [https://perma.cc/GU3X-WSWW] ("Having a third party who can evaluate without emotion or financial interest has greatly assisted judges and has increased the success rate in subchapter V cases.").

[241] *Id.*; *see also* Goldblatt, *supra* note 57 ("judges should be careful not to jump to conclusions about what they think is happening in rooms that they are not in.").

subchapter V trustee, as an "honest broker," has a duty to be a "watchdog."[242] The watchdog role is traditionally undertaken by the U.S. Trustee's office and the creditors' committee — that the latter of which subchapter V removed.[243]

We argue that subchapter V trustees are obligated to take on this role, but only to an extent. The trustee's explicit duty to "facilitate the development of a consensual plan of reorganization" implicitly requires the trustee to help develop a *lawful* plan. In this sense, Judge Goldblatt's belief that the watchdog role of the trustee's should be delineated through caselaw, not necessarily congressional clarification, may be correct.[244] The Department of Justice's Subchapter V Trustee Handbook already requires the trustee to report any bankruptcy crime under §§ 152 and 157.[245] However, the Handbook should be revised to require that the subchapter V trustee report any suspected insider dealings to the U.S. Trustee.[246]

The "watchdog" role is necessary to streamline subchapter V cases. When a plan is filed with the court immediately, the subchapter V trustee's scrutiny may alleviate some of the concerns associated with the lack of court oversight in regular prepack cases.[247]

4. Facilitate Coordination with the Subchapter V Trustee

Fourth, court districts should facilitate prefiling coordination with the subchapter V trustee likely to be assigned to the case. Not only do trustees provide value to judges when attesting to what happened "in the room," but they can also provide guidance to debtors during negotiations.[248] Subchapter V trustees possess unique skill sets.[249] Some are litigators, others are

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[242] *Id.*

[243] Should the court be made aware of a potential improper dealing, it retains the authority to appoint a creditors' committee. 11 U.S.C. § 1181(b). Caselaw seems like the best choice to establish when the court should appoint a creditors' committee.

[244] *Id.*

[245] U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020) [hereinafter SBRA Handbook].

[246] *See, e.g.*, *In re* Corinthian Commc'n Inc., 624 B.R. 224 (Bankr. S.D.N.Y. 2022).

[247] However, additional time may be required because the subchapter Trustee must communicate any concerns with the plan to the U.S. Trustee before filing an objection with the court. SBRA Handbook, *supra* note 240, at 3-10.

[248] Thorne, *supra* note 240 ("In several cases, the operational experience of the subchapter V trustee has led to improved pricing, marketing, and other business advice which has saved businesses and led to confirmable plans.").

[249] In theory, all subchapter V trustees should hold the requisite skills need to facilitate plans efficiently, However, as some practitioners noted, "the skill sets and motivations of the pool of application were understandably varied." Meredith S. Grabill, *July 14, 2023 Hearing*

accountants or turnaround specialists. However, this knowledge is valueless if the debtor does not communicate with the trustee.

The SBRA anticipated that subchapter V filings would become common enough that jurisdictions might need one or more standing subchapter V trustees.[250] Districts that want to encourage subchapter V prepacks should consider appointing standing subchapter V trustees, so that debtors' counsel can share the plan with them before filing.[251]

For the same reason, jurisdictions should require debtors to communicate regularly with the subchapter V trustee. Take, for example, the initial order for debtors in the Middle District of Florida:

> Communication with Subchapter V Trustee. Debtor's counsel or, if Debtor is self−represented, Debtor, shall contact the Subchapter V Trustee (the "Trustee") within five days of the date of this order to discuss the Trustee's facilitation of the development of a consensual plan of reorganization. The Debtor is expected to communicate regularly and share information with the Subchapter V Trustee as is appropriate under the facts of the case.[252]

The rule is a step in the correct direction but should go further in specifying the minimum timing of communication. For example, a debtor is required to submit a plan within 90 days of the initial petition.[253] This means the debtor

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on the Role of the Subchapter V Trustee (July 14, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Meredith_Grabill_Written_Statement.pdf [https://perma.cc/CH3W-WJZZ]. For this reason, we also urge the U.S. Trustee to offer training to potential trustees to "promote uniformity and consistency in skill sets among [them]." *Id.* Some jurisdictions are already doing so. *See* Susan K. Seflin, *Written Statement of Susan K. Seflin, SubChapter V Trustee in the Central District of California* (July 14, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Susan_Seflin_Written_Statement.pdf [https://perma.cc/J9AA-2TXV] ("In January of 2021, the subchapter V trustees in the Central District of California participated in a weeklong mediation training program to improve our mediation skills and it was incredibly helpful.").

[250] *See* 28 U.S.C. § 586(b) ("If the number of cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 commenced in a particular region so warrants, the United States trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee, or designate one or more assistant United States trustees to serve in cases under such chapter."); *see also* 11 U.S.C. § 1183(a).

[251] Subchapter V trustees are paid out of the plan, *see* 28 U.S.C. § 586, so their business model already relies on deferred payments. Thus, a subchapter trustee might welcome the opportunity to review a small business prepack plan before it was filed, saving time and expense later in the case.

[252] Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference (MDFL Bankr.) (on file with authors). Penalties for failing to comply include "imposition of sanctions against the Debtor or Debtor's counsel, including, but not limited to, conversion or dismissal of the case, removal of the Debtor as debtor-in-possession, and monetary sanctions." *Id.*

[253] 11 U.S.C. § 1189(b).

could submit the plan on the 90th day, without the trustee ever seeing the plan. And some debtors do. Unfortunately, many of these plans are mere "placeholders" where the debtor did not provide the trustee with an opportunity to review the plan. A rule specifying the requirements of communication, specifically requiring the debtor to submit filings to the trustee, may streamline the case. Consider this addition:

> The Debtor shall submit any disclosure statement, proposed plan, and related motions to the Trustee no later than three days before the Debtor files the papers with the court.[254]

The addition of one sentence would not only allow the subchapter V trustee to advise the debtor of any oversight but would also force regular correspondence with the trustee.

5. Clarify or Develop Local Rules

Finally, and consistent with bankruptcy's obective to facilitate the efficient resolution of cases, courts can promulgate local rules that delineate what is necessary to streamline a debtor's time in court.[255] Local rules work in tandem with the Bankruptcy Code provisions to achieve "the orderly and expeditious disposition of cases."[256] A significant advantage of local rules is their ability to be implemented and revised quickly by the judiciary. Moreover, local rules can respond to the differing needs of specific jurisdictions. Notably, while numerous jurisdictions have promulgated local rules for chapter 11 prepacks,[257] we have not identified any local rules explicitly addressing subchapter V prepacks.

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[254] This order is entered into a case after the debtor files its case, and thus would not require the debtor to submit filings to anyone before entering court. However, we do suggest that jurisdiction enact local rules doing exactly that. *See infra* Section IV.B.5.

[255] FED. R. CIV. P. 83; FED R. BANKR. P. 9029.

[256] *Federal Rules, Local Rules & General Orders*, U.S. District Court, NDNY, www.nynd.uscourts.gov/federal-rules-local-rules-general-orders [https://perma.cc/2BVG-4QHR]; SDNY Prepack Guidelines *supra* note 18 ("[T]his document . . . attempts to provide bankruptcy practitioners with help in dealing with practical matters which either is not addressed at all by statute or rules or are addressed indirectly in a piecemeal fashion.").

[257] The Bankruptcy Court for the Southern District of Florida recently abrogated its local rule for chapter 11 prepacks in favor of the "current local rules and procedures set forth on the individual web pages for each judge." *In re Abrogation of Local Rule 3017-3, Court Guidelines for Prepackaged Chapter 11 Cases, and Clerk's Instructions for Chapter 11 Cases*, Admin. Order 2021-04, U.S. Bankr. Ct. SDFL (May 27, 2021), www.flsb.uscourts.gov/sites/flsb/files/documents/general-orders/AO_2021-04_Abrogation_of_Local_Rule_3017-3,_Court_Guidelines_for_Prepackaged_Chapter_11_Cases,_and_Clerk%E2%80%99s_Instructions_for_Chapter_11_Cases.pdf.

Although courts have not specifically addressed subchapter V prepacks, local rules governing chapter 11 prepacks should apply equally to subchapter V.[258] These established local rules address a range of matters relevant to the small business prepack, including filing requirements, disclosure obligations, notice procedures, and plan confirmation standards.[259]

First, local rules should require a debtor desiring a small business prepack to submit its plan and all first-day papers to the U.S. Trustee's office at least one week before it intends to enter court.[260] With the imperative role that a subchapter V trustee plays in a subchapter V case, submitting filings to the U.S. Trustee's office (and, through that office, to the subchapter V trustee assigned to the case) before the case's start would allow the debtor to resolve any issues the trustee has with the filing, reduce the uncertainty of whether the trustee will delay the case with objections, and reduce the administrative burden on the U.S. Trustee's office. The U.S. Trustee's office already mandates that a prospective subchapter V trustee review initial case filings within two days of the case being filed.[261] And, "[i]mmediately upon appointment, the trustee must determine the status of the case."[262] Thus, the subchapter V trustee has no time to waste after the initial case filing, and prescribing for early satisfaction of those obligations will alleviate some of the pressure the office is under to ensure a speedy case.

Second, courts adopting subchapter V guidelines should address presumptively reasonable notice periods[263] and provide a model official ballot. Presumptive notice period will give creditors ample opportunity to contest the plan, even though such objections may be overcome with subchapter V's easier path to cramming down a plan. Similarly, the model

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[258] *See generally In re* Double H Transp. LLC, 603 F. Supp. 3d 468, 474 (W.D. Tex. 2022) ("[S]tatutory sections that apply to standard Chapter 11 bankruptcies apply to Subchapter V.").

[259] For example, although the "Procedural Guidelines for Prepackage Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York," SDNY Prepack Guidelines outlines rules such as Creditors' Committees and voting requirements, that are not relevant in subchapter V, other rules such as scheduling motions and notice requirement are applicable to subchapter V cases. *See supra* Section II.B.3 (noting the lack of a statutory committee of unsecured creditors); "[T]here is no requirement that creditor votes be solicited in a case under subchapter V." *In re* Arsenal Intermediate Holdings, LLC, No. 23-10097, 2023 WL 2655592, at *2 (Bankr. D. Del. Mar. 27, 2023).

[260] Standard chapter 11 prepack guidelines consistently have provisions requiring a debtor to communicate with the U.S. Trustee (UST) prior to filing bankruptcy. *See, e.g.*, *Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York*, NYSB, www.nysb.uscourts.gov/sites/default/files/prepack.pdf [https://perma.cc/8X4V-ZP98] [hereinafter NYSB local guidelines].

[261] SBRA Handbook, *supra* note 240, at 3-10.

[262] *Id.*

[263] *Cf.* NYSB Local Guidelines, *supra* note 260, at 15–16.

official ballot provides a pre-approved means to collect votes, diminishing the chance that a successful objection can be made as to the ballot's adequacy.[264]

CONCLUSION

Small businesses need a bankruptcy process that enables them to reorganize effectively — especially given the vital role that small businesses play in the American economy.[265] For decades, Congress has tried to speed up chapter 11 bankruptcies without hindering bankruptcy's rehabilitative goals. Those attempts have not worked for small businesses. The Bankruptcy Reform Act of 1994 codified a fast-track option for small businesses but neglected to account for small business debtors' lack of resources. BAPCPA directly addressed prepacks and sped up small business cases, but its provisions were so convoluted that very few debtors could successfully exit bankruptcy.

The SBRA represents Congress's best approach to date. Subchapter V's departure from the absolute priority rule, simplified paperwork, and quicker timelines allow debtors to successfully exit bankruptcy quickly.[266] The ability for a small business owner to keep equity in the company after getting through the subchapter V payment plan incentivizes small business owners to take advantage of bankruptcy. For their part, creditors are more likely to work with debtors to facilitate a consensual plan so that they avoid subchapter V's easier path to a cramdown.

As we have argued above, these innovations also make subchapter V a particularly viable forum for a small business prepack. Subchapter V implicitly fosters prepacks while avoiding many of the limitations of standard

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[264] *See In re* Walat, 87 B.R. 408, 413–14 (Bankr. E.D. Va.), *aff'd*, 89 B.R. 11 (E.D. Va. 1988) (finding that a bankruptcy court had the authority to issue a local rule prescribing a form for chapter 13 plans that differed from the Official Forms and that the rule "insure[d] the just, speedy and inexpensive determination of chapter 13 plan confirmations.").

[265] *See, e.g.*, Cipriano, *supra* note 14, at 149 (describing how small businesses "drive the American economy"); Mawhinney, *supra* note 6, at 29 ("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.").

[266] *See* Robert J. Gonzales, *Written Statement for June 23, 2023 Public Hearing on Eligibility Issues in Subchapter V Cases* (June 23, 2023), https://abi-org.s3.amazonaws.com/SubV/wstatements/Robert_Gonzales_Statement.pdf [https://perma.cc/VFP9-EGJT] ("My firm has successfully confirmed every Subchapter V case we have filed, and the timeframe for confirmation has been as little as 49 days (petition date to confirmation order.").

chapter 11 prepacks, including scholars' concerns with prepacks violating notice periods. Because of this revolution in bankruptcy law, practitioners should reassess their standard bankruptcy practices. Debtors who want to exit bankruptcy quickly should reassess their subchapter V eligibility. Similarly, debtors already filing a subchapter V case should consider whether their case might make sense as a prepack. A debtor who fails to be ready early in the case lacks respect for the legislative intent of subchapter V and may "artificially press[] the brakes" on its case.[267]

Time will tell. Small businesses have been using the Bankruptcy Code to reorganize for a long time, but subchapter V practice is still relatively young. We take no position on how voluminous small business prepacks will become. Subchapter V's pro-debtor innovations may alter the equilibrium so that prepacks are less necessary than they were before the SBRA. Debtors may file for subchapter V to obtain the benefits and expertise of a subchapter V trustee. And as discussed above, not every small business debtor fits the profile for a prepack strategy; the approach only works in very particular circumstances — and most crucially require debtors and creditors who can coordinate prebankruptcy.

There is, moreover, still a lot to be worked out, as we discussed above in Part IV. The standards for cramdown plans under subchapter V are murky. Even though courts can attempt to delineate the edges of projected income, Congress may need to provide further clarity. Similarly, coordination with the U.S. Trustee's office, subchapter V trustees, and pre-crisis preparation may help smooth the path forward to fast-track reorganization. Lastly, courts should provide clear guidance with local rules, as many already do for chapter 11 and chapter 11 prepack cases.

Chapter 11 is not always the end of the story for American businesses. It can represent an opportunity for a fresh start, and the system accordingly sets out to preserve not just the value of the business's assets, but the go-forward value of the enterprise as a whole. To be sure, bankruptcy is an area of hard-edged negotiation, and — in the big business context — attracts bankruptcy professionals who spend their working days in the gritty world of financial distress.[268] But for small business owners, bankruptcy also stands for American pragmatism and American optimism. Creative and problem-solving lawyers who represent small businesses, their creditors, and their stakeholders, should take advantage of the SBRA — prepacks and all — to find strategies that enable small business debtors to turn around and try again.

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[267] McEwen, *supra* note 224.

[268] *See, e.g.*, Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083 (2022) (analyzing the increasing role of bankruptcy directors appointed prepetition); Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745 (2020) (describing the rise in hard-edged tactics in insolvency).