MONKEY BUSINESS IN THE ELEVENTH CIRCUIT:

A DISCUSSION OF WHETHER THE §523 EXCEPTIONS TO DISCHARGE APPLY ONLY TO INDIVIDUAL SUBCHAPTER V DEBTORS UNDER §1192((2)

Hon. Jerry C. Oldshue, Jr.
Chief U.S. Bankruptcy Judge, Southern District of Alabama

As most Chapter 11 practitioners are aware, the advent of the Small Business Reorganization Act of 2019 ("SBRA"), provided corporate debtors with numerous potential advantages over traditional Chapter 11.[1] However, the issue of whether corporate debtors obtaining confirmation under§1192 are subject to the discharge exceptions of §523(a), is not yet settled in this jurisdiction. Although the Fourth and Fifth Circuits have held that both individual and corporate debtors covered by §1192 are subject to the discharge exceptions of §523(a), other courts, including the Ninth Circuit BAP and several bankruptcy courts in the Eleventh Circuit have found to the contrary, and the Eleventh Circuit Court of Appeals currently has the issue under advisement. Thus, this paper will discuss the perceived statutory conflict, the arguments on each side of the fence, and the case pending before the Eleventh Circuit.

[1] These benefits include: 1. elimination of the absolute priority rule, which allows equity holders to retain their ownership interests without paying all creditors in full;2. no mandatory appointment of a creditors' committee; 3. no mandatory requirement to file a disclosure statement; 4. appointment of a subchapter V trustee to assist in developing a consensual plan while leaving the debtor in possession of its assets and in control of its business; 5. the exclusive right to file a plan (which cannot be terminated); 6. the ability to modify a claim secured only by a security interest in the debtor's principal residence if new value received in connection with granting the security interest was used primarily in connection with the debtor's business and not primarily to acquire the property;7. the ability to confirm a plan even if all classes reject the plan; 8. the ability to pay administrative expenses over time under a plan; 9. modification of the disinterestedness requirements of § 327(a) for a professional that holds a pre-petition claim of less than $10,000; and 10. elimination of the requirement to pay quarterly U.S. Trustee fees. See *11 U.S.C. §§1181-1195*.

Statutory Conundrum

The juxtaposition of §1192(2) and the reference to "individual debtor" in §523(a)'s preamble has resulted in differing opinions on the issue of whether the §523 exceptions to discharge apply to Subchapter V corporate debtors confirmed non-consensually under §1191(b). Section 1191 provides in part:

> (a) Terms.--The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title1 are met.
>
> (b) Exception.--Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. §1191.

Section 1192, providing for discharge of Subchapter V debtors upon a non-consensual confirmation, states:

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

11 U.S.C. §1192.

Section 523 of the Bankruptcy Code provides that, " a discharge under section 727, 1141, 1192 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor* from any debt ..." that is enumerated in the 20 categories of debts listed therein. *11 U.S. C. §523(a).*

The Fourth And Fifth Circuits Have Held That Individual And Corporate Debtors Confirmed Under 1191(b) Are Subject To The Discharge Exceptions Of § 523(a).

The Fourth Circuit was the first Court of Appeals to address this issue of §523(a)'s applicability to Subchapter V corporate debtors in the context of non-consensual confirmation. *In re Cleary Packaging, LLC,* 36 F.4th 509(4th Cir. 2022). In analyzing the statutory language of §1192 excepting from discharge "any debt" . . . "of the kind specified in section 523(a)", the Fourth Circuit reasoned that "[t]he section's use of the word 'debt' is . . . decisive, as it does not lend itself to encompass the 'kind' of debtors discussed in the language of § 523(a) and "[t]his is confirmed yet more clearly by the phrase modifying 'debt'— i.e., 'of the kind'." *Id.* at 515. Thus, it concluded that the combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the list of non-dischargeable debts found in §523(a)." *Id.* Further, the Fourth Circuit added that, " — to the extent that one might find tension between the language of §523(a) addressing individual debtors and the language of §1192(2) addressing both individual and corporate debtors — that the more specific provision should govern over the more general." *Id.* Upon such reasoning, the Fourth Circuit concluded that §1192(2) provides discharges to small business debtors, whether they are individuals or corporations, except with respect to the kinds of debts listed in §523(a). *Id.* at 518.

Although the Fifth Circuit noted the complicated "textual awkwardness in the Bankruptcy Code, it ultimately sided with the Fourth Circuit's holding of *In re Cle*ary, finding that in non-

consensual Subchapter V proceedings, both corporate and individual debtors are subject to the §523 exceptions to discharge. *Matter of GFS Indus., L.L.C.*, 99 F.4th 223 (5th Cir. 2024). The Fifth Circuit explained that since the statutory language of §523(a) enumerates categories or "kinds" of non-dischargeable debts, "the most natural reading of §1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of discharge exceptions listed in §523." *Id.* at 228. The Court reasoned that, "the combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the list of non-dischargeable debts found in §523(a)"). *Id.* The Court further stated that,

> . . . §1192(2) does not say: "kind of debtor." Congress could have enacted those words in §1192 "kind of debt." That text cannot be read to incorporate a distinction between "individual" and "corporate" debtors. Rather, as the Fourth Circuit correctly reasoned, the reference to "kind[s]" of debt in §1192 serves as "a shorthand to avoid listing all 21 types of debts" in § 523(a), "which would indeed have expanded the one-page section to add several additional pages to the U.S. Code.". . . In addition, to the extent §§ 523(a) and 1192(2) clash, § 1192(2) governs as the more specific provision. Section 1192 deals directly with Subchapter V discharges, whereas § 523(a) cuts across various Bankruptcy Code provisions. See § 523(a) (listing "section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title"). As the Fourth Circuit observed, "to the extent that one might find tension" between the two sections, "the more specific provision should govern over the more general . . .

Id.

Thus, the Fourth and the Fifth Circuit have disregarded the reference to "individual debtor" in §523's preamble and construed the discharge exceptions to apply to both individual and corporate Subchapter V debtors under §1191.

Au Contraire Mon Frere: Other Courts Have Held That The Discharge Exceptions of §523(a) Do Not Apply to Subchapter V Corporate Debtors Under §1192

The Ninth Circuit Bankruptcy Appellate Panel and other bankruptcy courts, including those in the Eleventh Circuit, have held that the §523 non-dischargeability provisions apply only to

individual Subchapter V debtors. See *In re Off-Spec Sols., LLC*, 651 B.R. 862 (BAP. 9th Cir. 2023); *In re Davidson*, No. 23-30018, 2025 WL 511226(Bankr. N.D. Fla. Feb. 14, 2025); *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021). These courts have found that the better interpretation of §1192 is that it incorporates §523(a)'s limited applicability to individuals. They reasoned that: (1) when the statute's language is plain, the sole function of the courts—at least where the disposition required by the texts is not absurd—is to enforce it according to its terms; (2) courts may look to other sources to determine congressional intent, such as the canons of construction or the statute's legislative history; and (3) effect should be given to all provisions of a statute, so that no part will be inoperative or superfluous, void or insignificant. See *Off-Spec* at 866 (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank., N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)). The Ninth Circuit BAP Opinion states in part

> Section 523(a) unambiguously applies only to individual debtors. The reference in §1192 to debts "of the kind specified in section 523(a)" can reasonably be construed to mean the list of debts, but nothing in §1192 obviates the express limitation in the preamble of §523(a) or otherwise expands its scope to corporate debtors.(citation omitted.) ("[W]e presume, absent clear indications to the contrary, that Congress did not intend to change preexisting bankruptcy law or practice in adopting [or amending] the Bankruptcy Code ...."); *Cohen v. de la Cruz*, 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) (refusing to read the Bankruptcy Code as departing from past bankruptcy practice without a clear indication that Congress intended to do so).

Id. at 867.

The Ninth Circuit BAP further explained that as the Small Business Reorganization Act of 2019 ("SBRA") amended §523(a) by adding §1192 to the list of discharge provisions to which it applies, extracting only the list of nondischargeable debts from §523(a) without its limitation to individuals, would render the amendment surplusage. *Id.* (citing *Marx v. Gen. Revenue Corp.*, 568

U.S. 371, 386, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

The Ninth Circuit BAP also disagreed with the rule of statutory construction applied in *Cleary,* explaining that it only applies when statutes cannot be reconciled. *Off-Spec* at 868. Instead, it found it appropriate to harmonize the statutes and that "Section 1192 incorporates the types of debts that are nondischargeable under a nonconsensual subchapter V plan, and §523(a) limits the scope of non-dischargeability to individual debtors." *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)(explaining courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is their duty, absent a clearly expressed congressional intention to the contrary, to regard each as effective); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698 (D.C. Cir. 2014)("Absent congressional intent to the contrary, it is the court's duty to harmonize statutory provisions to render each effective.").

Further, the Ninth Circuit BAP, found that its interpretation was consistent with the purpose of Subchapter V and the limited scope of discharge exceptions applicable to corporate debtors prior to Subchapter V. *Id.* at 868. It recognized that the SBRA was created as an expedited process for small business debtors to efficiently reorganize, remains part of Chapter 11, and should be interpreted in accordance with the overall statutory scheme. The *Off-Spec* Court also noted that, when establishing chapter 11 under the Bankruptcy Code in 1978, Congress made an intentional decision to depart from pre-Code practice and eliminate exceptions to discharge for corporate debtors based on public policy considerations, it has limited corporate discharge only once by

enacting §1141(d)(6) and since then, the corporate discharge has been strenuously protected. *Id.* at 868, 869 (citing *In re Rtech* at 565; see also, *In re Am. Dental of LaGrange, LLC*, No. 24-10485-RMM, 2025 WL 384536, at 6 (Bankr. M.D. Ga. Feb. 3, 2025)(explaining that as a general matter, §523(a) exceptions do not apply to a corporate debtor, and a corporate debtor's discharge under §1141(d) encompasses debts of the kind identified in §523(a) (citing *In re Spring Valley Farms*, Inc., 863 F.2d 832, 834 (11th Cir. 1989)("'It is almost undebatable and universally held that a corporate Chapter 11 debtor is not subject to the dischargeability provisions of 11 U.S.C.A. §523."); *In re BFW Liquidation, LLC*, 471 B.R. 652, 667 (Bankr. N.D. Ala. 2012) (" If the debtor is not an individual, no proper question can be raised in a Chapter 11 case as to the dischargeability of a particular debt."). Consistent with the SBRA's purpose and limited application of §523 to individual debtors prior to its enactment, the Ninth Circuit noted that, "the suggestion that Congress incorporated 19 new exceptions to discharge for small corporations in a bill that was introduced in April 2019, and signed into law by the President in April 2019, seems not only improbable but also contradicts years of bankruptcy law and policy." *Off-Spec* at 869 (citing *In re Rtech* at 566). Thus, the Ninth Circuit BAP held that §523(a) does not apply to corporate debtors under §1192(b).

Recent bankruptcy decisions in the Eleventh Circuit have reached the same conclusion. See *In re Davidson*, No. 23-30018, 2025 WL 511226 (Bankr. N.D. Fla. Feb. 14, 2025)(finding the reasoning of the Ninth Circuit BAP convincing and dismissing non-dishargeability claims against Subchapter V corporate debtor); *In re Hall*, 651 B.R. 62, 68 (Bankr. M.D. Fla. 2023)("The Court reaches this conclusion primarily because the SBRA amended the language of §523(a) to add a reference to §1192. If Congress intended for §523(a) exceptions to apply to corporations receiving a discharge under §1192, then this addition was unnecessary"); *In re 2 Monkey Trading, LLC*, 650

B.R. 521, 523 (Bankr. M.D. Fla. 2023), motion to certify appeal granted, No. 6:22-BK-04099-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023)(agreeing with courts holding that §523(a) applies only to individuals, and not to corporate Subchapter V debtors under §1192(2)).

In re 2 Monkey Trading, LLC

Section 523's applicability to non-consensual Subchapter V cases is presently under advisement before the Eleventh Circuit. *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023), motion to certify appeal granted, No. 6:22-BK-04099-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023). The Plaintiffs in *2 Monkey Trading, LLC,* filed an adversary proceeding against the Debtors based on 523(a)(6). The Subchapter V Debtors[2] sought dismissal under FRCP 12(b)(6) asserting that the Plaintiff's complaint could only be maintained against individual debtors and both of the Debtor-Defendants were limited liability companies.

Judge Geyer agreed with the reasoning of the bankruptcy courts finding that §523(a)'s discharge exceptions only apply to individual debtors, not corporations proceeding under Subchapter V. *Id.* at 523. Citing *In re Hall*, 651 B.R. 62 (rejecting the Fourth Circuit's holding in *Cleary* and explaining that when Congress created Subchapter V, it amended §523(a) to incorporate 1192, which would have been unnecessary if it intended for §523(a) exceptions to apply to corporations); *In re Lapeer Aviation*, Inc., No. 21-31500-JDA, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); (holding that because a corporate defendant proceeding under Subchapter V is not an individual debtor, actions under § 523(a) are not applicable to it.); *Rtech Fabrications*, 635 B.R. at 566 (finding that § 523(a)'s discharge exceptions only apply to an

[2] The Chapter 11 Subchapter V filings of 2 Monkey Trading, LLC and Lucky Shot USA, LLC were jointly administered.

individual debtor and §1192(2)'s reference to § 523(a) does not expand its applicability to entity debtors); *Satellite Rests.*, 626 B.R. at 873 (holding that §523(a) applies only to individuals, and not to corporations proceeding under Subchapter V). Thus, the Adversary was dismissed for failure to state a claim.

Thereafter, the Plaintiffs filed a Motion to Certify Order for Direct Appeal Pursuant to 28 U.S.C. §158. The Bankruptcy Court found that certification was appropriate under 28 U.S.C. § 158(d)(2)(A)(i) because the issue of whether the exception to discharge for debts 'of the kind specified in section 523(a)' contained in 11 U.S.C. §1192(2) applies to all debtors or only individual debtors has not been determined by the Eleventh Circuit or the Supreme Court of the United States. The Appeal was docketed on July 19, 2023. Upon being fully briefed, the Eleventh Circuit heard oral arguments on December 16, 2024.

During the oral arguments, the Court questioned Appellant's counsel's assertion that the discharge exceptions apply equally to all Subchapter V debtors. Justice Luck stated that he reads §1192 as providing a general rule for discharge of individual and corporate debtors and then another part, that excepts debts "of the kind specified in §523(a)", and he did not see how the fact that §1192 references debtors in the general rule, matters to the exceptions part. Justice Luck commented that since the §1192 exception language is passive, you look to §523 and he did not see why "of the kind specified in §523(a) " is not referencing "individual debts" as a category, especially since many of the §523 exceptions are tailored to individual debtors. He also noted that such a reading of the statute would be consistent with the inclusion of the reference to §1192 in the header of §523, which now states, "A discharge under section 727, 1141, *1192,* 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-- . . .". In response, Appellant's counsel argued that a "conforming amendment" cannot surpass the plain

language of the substantive statute. The Court noted that the rule for conforming amendments is that it can't have "radical but implicit changes" and questioned how adding §1192 right next to the words "individual debtor" in §523 was radical or implicit, as it seemed Congress was very explicit about what it was trying to do.

Counsel for the Appellee emphasized the various sections of 523(a) which apply exclusively to individual debtors and cannot possibly or logically apply to a corporate debtor.[3] The Appellee further argued that the 'conforming amendment' results in statutory language that is insurmountable by the Appellant because §523 is essentially a long, long sentence, so you can't just ignore, disregard, or minimize the beginning of the section, that a discharge under §1192 does not discharge an *individual* of the kinds of debt listed therein. Appellee also argued that §1192 can and should be read harmoniously with §523. In response to the Court's pointed question of why it should create a circuit split, Appellee's counsel argued that most bankruptcy courts, including all the bankruptcy courts in the Eleventh Circuit, have found that the Court should not disturb the long-standing rule that §523 exceptions to discharge do not apply to corporate debtors based on the statute's plain language. The Court acknowledged that the issue presented is a close and interesting one.

The Waiting Game: Dispensing Of Justice Is Not Always Swift

Since *2 Monkey Trading* has been on appeal since 2023, the Eleventh Circuit's decision is eagerly anticipated by many, including the Bankruptcy Court for the Southern District of Alabama. Faced with the same issue presented in *2 Monkey Trading* and aware of the appeal but unwilling

[3] Citing as examples, §523(a)(5)(Domestic Support Obligations); 523(a)(9)(operation of vehicle while intoxicated); and 523(a)(15)(debt owed to spouse, former spouse or child of the debtor).

to indefinitely delay a pending Motion for Summary Judgment, the Southern District of Alabama issued its ruling in *In re Davidson*, No. 23-30018, 2025 WL 511226(Bankr. N.D. Fla. Feb. 14, 2025). It cast its lot with those courts finding that under §1192(2) corporate debtors are not subject to the discharge exceptions of §523(a). Although one notable ABI contributor characterized the holding in *Davidson* as swimming "against the tide", the *Davidson* opinion explained that its interpretation gives effect to all the statutory language, recognizes the long-standing application of §523(a) to only individual debtors, and comports with the overall purpose of the Small Business Reorganization Act.[4] Subsequent to the *Davidson* opinion, the Appellee filed a Rule 28j letter citing it as supplemental authority in support of its position. Stay tuned as an Eleventh Circuit Opinion on this issue, potentially causing a circuit split, could be issued any day.

Additional Materials

For those who are particularly enthralled by this topic, attached hereto is a recent Litigator's Perspective Article from the April 16, 2025 Edition of the *ABI Journal*. Additionally, the recording of the *2 Monkey's Trading LLC* Oral Arguments can be accessed on the Eleventh Circuit's website.

[4] See Rochelle's Daily Wire, February 26, 2025.

By Kathleen L. DiSanto and Luis E. Rivera II[1]

Applying § 523 to Corporate Sub V Debtors: A Conscious Policy Decision, or a Drafting Oversight?

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The Small Business Reorganization Act of 2019 (SBRA) took effect a little more than five years ago, creating subchapter V and introducing a series of entirely new Bankruptcy Code sections. The SBRA's enactment was uncontroversial; President Donald Trump signed the bill into law 66 days after it was introduced in the House.[2] It passed with broad bipartisan support, with congressional debate lasting only four minutes.[3]

However, over the past half-decade, bankruptcy courts and practitioners alike have grappled with new issues that have arisen while interpreting subchapter V and the required confirming amendments. Among the challenges has been sorting out the tension between the plain language of new Code sections and the potentially unintended consequences of piecemeal change and conforming amendments. Section 1192 of the Bankruptcy Code is one of those difficult provisions to reconcile.

Section 1192, which covers both individual and corporate subchapter V debtors, but only applies to nonconsensual plans confirmed under § 1191(b), provides that "the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) ... except any debt ... of the kind specified in section 523(a) of this title."[4] This new Code section was coupled with a conforming amendment to § 523, which added § 1192 to the preamble of § 523 so that it read, "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not...."[5]

There was little discussion regarding adding § 1192 to the preamble of § 523. The addition was not mentioned in the official bill summary compiled by the Congressional Research Service.[6] The SBRA made dozens of similar conforming amendments to the Bankruptcy Code to accommodate the newly minted subchapter V.[7] However, the effect of this conforming amendment was that § 523(a) now provides that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor* from" 20 types of nondischargeable debts.[8] How can this apparent inconsistency be reconciled?

Granted, the interplay between §§ 1192 and 523 is awkward and clumsy, given § 523(a)'s preamble, which refers to "an individual debtor."[9] The first bankruptcy courts to address the applicability of § 523 to corporate subchapter V debtors almost uniformly concluded that corporate subchapter V debtors were not subject to § 523 and summarily dismissed creditors' adversary proceedings.[10] While these decisions focused on principles of statutory construction, these early courts' interpretations of §§ 1192 and 523 were later criticized by some as seemingly strained and likely influenced by policy and practical and equitable considerations rather than the plain language of the statutes.

The tides turned when bankruptcy and appellate courts engaged in a deeper analysis of the plain language of the statutes, and a new majority position gradually emerged. The Fourth Circuit was one of the first courts to conclude that § 523's discharge exceptions apply equally to corporate and individual debtors. The Fourth Circuit's holdings were later adopted by the Fifth Circuit in *GFS Industries*.[11] However, the debate rages on in bankruptcy courts across the nation, with one court swimming upstream against the weight of existing authority from the Fourth and Fifth Circuits.[12]

1 Ms. DiSanto is a subchapter V trustee, and Mr. Rivera is a chapter 7 trustee. They are both "40 Under 40" honorees (2023 and 2017, respectively).
2 *In re Progressive Solutions Inc.*, 615 B.R. 894, 896 (Bankr. C.D. Cal. 2020).
3 *Id.*; Small Business Reorganization Act of 2019, P.L. 116-54 (Aug. 23, 2019), 133 Stat. 1079.
4 11 U.S.C. § 1192.
5 H.R. 3311, 116th Cong. § 4(a)(5)-(12) (1st Sess. 2019).
6 H.R. 3311, Small Business Reorganization Act of 2019, congress.gov/bill/116th-congress/house-bill/3311 (last visited on Feb. 25, 2025).
7 H.R. 3311, 116th Cong. § 4(a)(5)-(12) (1st Sess. 2019).
8 11 U.S.C. § 523(a) (emphasis supplied).
9 *Matter of GFS Indus. LLC*, 99 F.4th 223, 226, 228 (5th Cir. 2024) ("[T]he question is complicated by a certain textual awkwardness in the Bankruptcy Code.").
10 *Lafferty v. Off-Spec Solutions LLC (In re Off-Spec Solutions LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023); *In re 2 Monkey Trading LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023), *motion to certify appeal granted*, No. 6:22-BK-04099-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re Lapeer Aviation Inc.*, No. 21-31500-JDA, 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); *In re Rtech Fabrications LLC*, 635 B.R. 559, 568 (Bankr. D. Idaho 2021); *In re Cleary Packaging LLC*, 630 B.R. 466, 468 (Bankr. D. Md. 2021), *rev'd and remanded sub nom., In re Cleary Packaging LLC*, 36 F.4th 509 (4th Cir. 2022); *In re Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. 871 (Bankr. D. Md. 2021).
11 *Cleary Packaging LLC*, 36 F.4th 509.
12 *Spring v. Davidson (In re Davidson)*, Adv. Proc. No. 23-3005-JCO, 2025 WL 511226 (Bankr. N.D. Fla. Feb. 14, 2025); *Halo Human Res. LLC v. Am. Dental of LaGrange LLC (In re Am. Dental of LaGrange LLC)*, Adv. Proc. No. 24-01004-RMM, 2025 WL 384536, at *8 (Bankr. M.D. Ga. Feb. 3, 2025) (court declined to enter fray as to whether § 523 applies to corporate subchapter V debtors because case was confirmed consensually under § 1191(a); therefore, court did not need to reach issue).

In reconciling the tension between § 523(a)'s specific reference to individual debtors with the silence of § 1192, which applies to both individual and corporate debtors, the Fourth Circuit relied on the statutory interpretation principle of *lex specialis*, meaning that the more specific provision controls over the general.[13] The Fourth Circuit explained that § 1192's reference to the "kind[s] of debt specified in section 523(a)" is "a shorthand to avoid listing all 21 types of debts" enumerated in § 523.[14]

For better or worse, given principles of separation of powers, the judiciary's duty is to interpret the plain meaning of unambiguous statutes — even if that analysis results in unintended consequences. In the case of unambiguous laws, judges do not reach policy considerations or arguments. Perhaps this is the best result, as opinions differ on whether — based on practicality and policy — § 523 should apply to corporate debtors.

On one hand, debtors may argue that the Fourth and Fifth Circuits' interpretations of §§ 523 and 1192 produce unintended — if not absurd — results. One of the SBRA's primary policy objectives was to streamline the reorganization process by relieving small business debtors from the absolute-priority rule and thereby reducing the administrative costs of the case. Debtors argue that subjecting corporate subchapter V debtors to § 523 flies in the face of that goal.[15]

Objections to the dischargeability of debts are costly to litigate and involve fact-intensive factual disputes. Thus, a corporate subchapter V debtor might face an even greater and more expensive burden than the absolute-priority rule if forced to defend dischargeability actions under § 523.

Debtors may also argue that applying § 523 to corporate debtors in a subchapter V case will allow the unreasonable creditor to hijack the entire reorganization to the detriment of other creditors and interested parties. Regardless of the size of its claim or whether it controls the vote of a class of claims under the plan, any creditor could functionally bring the reorganization to a screeching halt by objecting to the dischargeability of its debt.

No matter how hard the debtor tries, the creditor landscape in many subchapter V cases often makes it impossible to avoid this roadblock by arriving at a consensual confirmation. The U.S. Small Business Administration (SBA) and merchant cash advance loans are often creditors in subchapter V cases. Regardless of the treatment of the SBA's claim, however favorable, it is often impossible for a debtor to obtain the SBA's acceptance of the plan. Likewise, merchant cash advance lenders seldom participate in the bankruptcy process, given the dubious and sometimes predatory nature of their dealings with the debtor. In short, applying § 523 to a corporate debtor allows an indignant creditor to capitalize on the inaction of others and entirely thwart the reorganization effort.

Debtors also argue that applying § 523 to corporate subchapter V debtors presents temporal procedural issues. Rule 4007 of the Federal Rules of Bankruptcy Procedure fixes the time for filing a complaint objecting to discharge under § 523(a)(2), (a)(4) and (a)(6) as 60 days after the first date set for the § 341 meeting of creditors — before the debtor may know whether the plan will be confirmed consensually or nonconsensually, and whether § 1192 governs the discharge.

Presumably, a bankruptcy court might abate a preconfirmation nondischargeability complaint until it is determined whether the debtor is able to confirm a plan consensually to avoid additional and unnecessary administrative expenses. However, extending the time for filing dischargeability complaints is not a solution, because a debtor will want to know before confirmation whether it will face litigation over the dischargeability of a debt so that the costs of litigation can be factored into the debtor's projected disposable-income calculations. Another wrinkle is this: Can a debtor withdraw the subchapter V election if a nondischargeability complaint is filed and proceed under traditional chapter 11 when the debtor has an impaired accepting class and can overcome the absolute-priority rule?

Creditors, on the other hand, might argue that subchapter V affords debtors significant advantages, and that applying § 523's exceptions to discharge to corporate debtors was a fair trade. For example, only the debtor may propose a plan, plans may be confirmed nonconsensually without the acceptance of any creditors, and the absolute-priority rule does not apply. Is it fair for the individual responsible for the acts or conduct giving rise to a dischargeability complaint to retain his or her interest in the debtor without paying the claim of the aggrieved creditor in full? Perhaps, as acknowledged by the Fifth Circuit in *GFS Industries*,[16] applying § 523 to corporate debtors strikes a balance between the rights of debtors and creditors in subchapter V, while also incentivizing debtors to pursue a consensual plan consistent with the policy goals and objectives of the subchapter V process.

Creditors might also argue that they have wielded their right to object to dischargeability judiciously. Since the SBRA's enactment, only a small number of adversary proceedings to determine the dischargeability of debt under § 523 have been initiated against corporate subchapter V debtors. The Middle District of Florida leads the U.S. in subchapter V filings with more than 1,000 cases to date, yet adversary proceedings initiated against corporate subchapter V debtors in that district have led to only two published decisions on the issue.

Finally, while there is scant legislative history on the addition of § 1192 to the preamble of § 523, creditors often note the fact that the SBRA's drafters modeled subchapter V after chapter 12 in many instances.[17] For 30 years, courts have interpreted nearly identical language to apply § 523 to corporate chapter 12 debtors.[18] In addition, the "Notice of Chapter 11 Bankruptcy Case for Corporations or Partnerships under Subchapter V" (Official Bankruptcy Form 309F) and the "Official Plan of Reorganization for Small Business

13 *Cleary Packaging LLC*, 36 F.4th 515.

14 *Id.*

15 H.R. Rep. No. 116-171, 1 (2019) (SBRA's purpose is to "streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs").

16 *GFS Indus. LLC*, 99 F.4th at 232. In rejecting the debtor's arguments, the Fifth Circuit explained that the debtor "misunderstands the compromises [that] Congress made in Subchapter V" and attempts to "rewrite that compromise."

17 See William L. Norton III, 2021 No. 6 *Norton Bankr. L. Adviser NL* 1 ("It appears that Subchapter V was drafted with the intention to apply dischargeability exceptions under ... § 523 to corporations.").

18 *Sw. Georgia Farm Credit v. Breezy Ridge Farms Inc. (In re Breezy Ridge Farms Inc.)*, Adv. No. 08-12038-JDW, 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'Ship v. JRB Consol. Inc. (In re JRB Consol. Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

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Under Chapter 11" (Official Bankruptcy Form 425A) both contemplate that § 523's exceptions to discharge apply to corporations and partnerships. Most commentators also embrace the application of § 523 to non-individual debtors in the context of subchapter V.[19]

Alas, insolvency practitioners may never enjoy the satisfaction of knowing whether applying § 523 of the Bankruptcy Code to corporate debtors was Congress's informed policy decision or merely a drafting error. Perhaps the answer is immaterial, given the statute's plain language and the consistent interpretation to date by the circuit courts of appeals. A predictable system that allows for strategic and deliberate decision-making benefits debtors and creditors alike.

Even so, as courts try to harmonize the strained interplay between §§ 1192 and 523, Congress should either re-evaluate the policy considerations behind subjecting corporate subchapter V debtors to nondischargeability litigation, or more clearly articulate the policy objectives of balancing the interests of debtors and creditors. One suggestion might be for Congress to amend § 1192 to exclude from the exception to discharge those kinds of debts that are most hotly contested and less suited to corporate debtors: claims that a debt results from fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny (§ 523(a)(4)); and claims that a debt results from willful and malicious injury by the debtor to another (§ 523(a)(6)). Generally, these kinds of claims are least suited to corporate debtors because of the *mens rea* requirement,[20] yet they can easily derail a case to the detriment of both debtors and creditors alike.

One might also argue that claims that a debt was obtained by false pretenses, a false representation or actual fraud (§ 523(a)(2)) should also be excluded from § 1192's exception to discharge given the potential for meritless fraud claims.[21] Wherever the line is drawn, a narrowing of § 1192's exceptions to discharge would balance Congress's primary policy objective of streamlining the reorganization process for small businesses while maintaining a balance between the rights of debtors and creditors in subchapter V. abi

Editor's Note: *ABI's Subchapter V Task Force's Final Report and recommendations to Congress is posted at subvtaskforce.abi.org. All members are invited to submit their experiences with subchapter V at abi.org/subvstories.*

19 See William L Norton III, 2021 No. 6 *Norton Bankr. L. Adviser NL* 1; William L. Norton III & James B. Bailey, "The Pros and Cons of the Small Business Reorganization Act of 2019," 36 *Emory Bankr. Dev. J.* 383, 386 (2020); I.R.M. 5.9.8.5.1; *but see* Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019*.

20 *See, e.g., Matter of Berkemeier*, 51 B.R. 5, 6 (Bankr. S.D. Ind. 1983) (noting that embezzlement is act committed by individual).

21 *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 365 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787 (noting potential for creditors to initiate "false financial statement exception to discharge actions [under § 523(a)(2)] in the hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start").