ABI Task Force on Subchapter V Virtual Public Hearing
July 14, 2023

Remarks of Deborah L. Thorne, Bankruptcy Judge,
U.S. Bankruptcy Court for the Northern District of Illinois

I would like to thank the ABI and the Subchapter V Task Force—especially the Co-Chairs Judge Harner and Megan Murray—for this important study and the opportunity to speak today. My name is Deborah Thorne, and I am a bankruptcy judge sitting in the Northern District of Illinois.

I have been on the bench for nearly eight years, and, prior to that, I was a bankruptcy practitioner for thirty years, representing corporate debtors and secured and unsecured creditors. During the early days of my practice, I represented many middle-market debtors seeking protection under the Bankruptcy Code with the goal of reorganizing, paying vendors, dealing with a secured lender (usually a local bank), and continuing operations. During these early years real "reorganizations" happened, jobs were maintained, vendors continued relationships with the debtor, and banks were paid. During much of the last twenty years that I practiced, fewer middle market companies were able to reorganize as the expense and often a more complicated debt structure hampered their ability to successfully confirm a plan without a sale of substantially all their assets.

The enactment of the Small Business Reorganization Act of 2019 created a venue to allow small businesses to reorganize in an efficient manner. Since the enactment of the SBRA, the Northern District of Illinois has confirmed forty-seven plans. In large part, the success of each plan was the result of the work of the subchapter V trustees. In one case, the debtor appeared to be unable to effectively run its business, and I placed the subchapter V trustee in possession. As a result, the property will be sold and creditors most likely will be paid 100% of their secured and unsecured claims.[1]

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. As Judge Goldblatt noted in his statement, most of what happens in a chapter 11 case is not within the judge's purview. The 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. I rely upon subchapter V trustees' observations as to debtors' financial and operational improvements, and, on more than one occasion, the trustee has encouraged me to provide some additional time for a supply chain issue to resolve. I cannot emphasize enough the reliance I place on the impartial voice of the trustee to explain the work the debtor is doing to turn around the business, whether it is explaining the supply chain issue or the other issues which the debtor is trying to rectify.

The debtor also benefits from the subchapter V trustee's expertise. In one case currently pending before me, the subchapter V trustee has provided operational insight and advice which the debtor has implemented to save their business. 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.

<u>Possible Improvements to be Considered</u>

[1] It remains to be seen how the case will be concluded, as debtor's counsel has not remained involved, and the subchapter V trustee is orchestrating the marketing and ultimately the sale of the business. Section 1189(a) does not afford the trustee the authority to file the plan. Compensation of the counsel who is assisting with the sale is also not particularly clear and perhaps some thought needs to be given as to how the subchapter V trustee and a professional needed are to be fairly compensated.

Because I believe that the subchapter V trustees are invaluable in creating success in subchapter V cases, I am committed to ensuring that each trustee is compensated for their work. The Code does not provide for a specific guarantee that at the end of each case there will be sufficient cash to see that payment is made. Although by statute, subchapter V trustees' fees must be paid to confirm a plan, I worry about the possibility of administrative insolvency. Several trustees have agreed to take payment over time, but I would prefer that payment be made at confirmation. I am aware that some courts have required a set-aside each month to ensure sufficient funds, but I think this is perhaps an area that the Taskforce should consider.

Although not the subject of this hearing, I believe that, at a minimum, the current debt level of $7.5 million must be maintained. I believe that the efficiency that is inherent in the current statute could be expanded if an increased debt level were enacted. Many more companies could benefit from the provisions if the debt level were increased to include more middle-market businesses. The "luxury" of having an independent subchapter V trustee recommend operational and financial changes is something that many middle-market companies need, and this change would lead creditors to believe that restructuring is in their best interest. This is why I believe that so many of the cases pending in our court have been successful and resulted in consensual confirmed plans.

Thank you for the opportunity of meeting with you today. I am happy to answer any questions now or in the future.