American Bankruptcy Institute

SubChapter V Task Force

July 14, 2023 Hearing

Written Statement of Susan K. Seflin, SubChapter V Trustee in the Central District of California

I. ABI Task Force on SubChapter V Hearing Protocols.

"The Task Force encourages participants to share all relevant experiences and insights on the operation of Subchapter V in practice and welcomes all perspectives." *See*, Subchapter V Task Force Hearing Protocols. Today's hearing is the third hearing and focuses on the role of the subchapter v trustee.

II. Introduction.

Good afternoon. I am a partner at BG Law LLP in Los Angeles, California and I serve as one of the nine case-by-case subchapter v trustees in the Central District of California. I have a JD and MBA and started my career working for an investment bank, which I did not enjoy. Having externed for a bankruptcy judge and for the U.S. Trustee's office in law school, I decided to become a chapter 11 bankruptcy attorney and loved it. I have represented well over a hundred small and mid-size chapter 11 debtors and successfully confirmed plans in an overwhelming majority of my chapter 11 cases where I am debtor's counsel. I am passionate about the cases I take, and I take chapter 11 debtor representation very seriously – experienced and effective chapter 11 debtor counsel (as a fiduciary of both the chapter 11 debtor and the chapter 11 estate) can make or break a chapter 11 case.

Since August of 2020, I have been appointed as subchapter v trustee in approximately forty cases.

III. SubChapter V in General.

Subchapter v was added to chapter 11 of the Bankruptcy Code in 2019 (and went into effect in 2020) to make reorganization bankruptcies more accessible to small businesses. Subchapter v was intended to give small businesses a simplified, less expensive process for reorganizing their business and, for the most part, it seems to be working in the cases where I have been appointed trustee. I note that extra effort by the U.S. Trustee's office, the bankruptcy courts and the attorneys for the Small Business Administration has helped to facilitate the successful subchapter v cases that I have been involved in. Subchapter v cases are really a team effort.

IV. The Duties and Role of the Subchapter V Trustee.

While there are many detailed descriptions in both statutory and case law as to a subchapter v trustee's "duties" in a case, the "role" of the subchapter v trustee in each case may vary depending on the facts of the case, the judge, the attorney from the U.S. Trustee's office, and/or the various counsel involved in a case. I tend to vary my role somewhat depending on where I see a need in a particular case. If a case has competent and experienced chapter 11 counsel who is negotiating a consensual plan without my intervention, then I will take less of a role as to avoid incurring unnecessary fees. If I see a case with landmines, I will take however active of a role I need to in an attempt to make it a successful chapter 11.

<u>Duties</u>

Section 1183(b) of the Bankruptcy Code lists the duties of a subchapter v trustee. These duties include, among other things, accounting for property received, examining proofs of claim, furnishing information when requested by creditors, investigating the debtor's business to determine its viability, and facilitating a consensual plan. The trustee is also required to attend status conferences and other important hearings such as financing hearings, plan confirmation hearings and sale hearings. The trustee may, in certain circumstances, be responsible for ensuring that plan payments are made, act as a disbursing agent post-confirmation, or be required to take over the business operations if the debtor is removed from possession. 11 U.S.C. § 1183(b). *See also, In re Ozcelebi*, 639 B.R. 365, 381–82 (Bankr. S.D. Tex. 2022) (noting that subchapter v trustee's duties are different from those in other chapters, and further, "The responsibility of the subchapter V trustee to participate in the plan process and to be heard on plan and other matters cloaks the subchapter V trustee with the statutory right to obtain information about the debtor's property, business, and financial condition."); *In re Corinthian Communications, Inc.,* 642 B.R. 224, 233 (Bankr. S.D. N.Y. 2022) ("A court may sua sponte issue an order expanding the Subchapter V Trustee's duties under section 1183(b), even though the subsection contains the phrase 'on request of a party in interest.'"); *In re AJEM Hospitality, LLC*, 2020 WL 3125276, *2 (Bankr. M.D. N.C. 2020) (court allowed for limited expansion of trustee's duties based on § 1106(a)(3) language "to the extent that the court orders …."). *See also*, Handbook for Small Business Chapter 11 Subchapter V Trustees ("SubV Handbook"), pg. 1-1 ("In each case in which a small business debtor elects to proceed under SBRA, a subchapter V trustee is appointed immediately to perform certain duties in connection with the administration of the case. In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor's payments to creditors under the confirmed plan of plan reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.")

Role

While Section 1183 of the Bankruptcy Code and the SubV Handbook do a good job setting forth a subchapter v trustee's duties, I have found that the most important part of my job as trustee is to fill in anywhere there are "gaps" and/or where I am needed to facilitate the administration of the bankruptcy case. Here are some examples:

a. Inexperienced Counsel. Counsel for the debtor is often inexperienced at chapter 11 cases and therefore (i) misses important deadlines, (ii) is not familiar with many local rules, UST rules and/or the bankruptcy code and bankruptcy rules as they relate to chapter 11's, (iii) does not have the wherewithal to draft a competent plan and confirmation order, (iv) does not understand the importance of operating within a cash collateral budget, and so much more. I now ask at every initial status conference for the Court to order that the debtor provide me with a draft of the plan prior to filing so that I can redline it. This has increased case efficiency enormously as most plans in my cases are approved for dissemination either upon their first filing or with only one amended version. Some plans I have been sent are so poorly written that I have had to completely redo them. The same goes for confirmation orders. I am also often the party the Court will charge with drafting cash collateral orders, and I often revise cash collateral stipulations. Often times, debtor's counsel will not understand that as debtor's counsel, he or she also has a fiduciary duty to the bankruptcy estate and I explain that duty to them. I offer to be a resource to debtor's counsel to attempt to help the case run smoothly.

b. Mediator or Unofficial Mediator. 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. With that training and my experience as chapter 11 debtor counsel, I have helped facilitate many consensual subchapter v plans and I have been appointed as the mediator in two of my subchapter v trustee cases. In the cases where I was appointed mediator, the respective debtors had one primary creditor where the underlying dispute needed to be resolved prior to the debtor to being able to propose a confirmable plan. I note that the judges in those cases were also very helpful in the successful mediation by scheduling regular status conferences and offering to hold evidentiary hearings if needed on valuation. I have acted as an "unofficial" mediator in a number of cases as well. In one case, counsel for the debtor and counsel for the secured creditor did not get along at all and there were weekly cash collateral hearings. I became an intermediary for them and was able to talk both sides down from unreasonable positions.

c. General Assistance. Often times, a subchapter v debtor will have problems opening up debtor in possession bank accounts, obtaining insurance, finding adequate bookkeeping, etc. and I have assisted the debtor and counsel with obtaining whatever resource is needed.

d. Claim Resolution. At the very beginning of each subchapter v case, if there is a dispute involving a significant claim, I offer my services to both debtor's counsel and the creditor's counsel. I often act as intermediary with respect to requesting various documentation, and I give my thoughts to each counsel as to how I perceive litigation would go. When Debtor's counsel and creditor's counsel are amenable to this type of informal resolution, often times we are able to collectively come up with a solution that works for each side and avoid litigation altogether.

V. Conclusion.

In sum, I think the role of a subchapter v trustee is to, of course, perform all statutory duties but also to think outside the box and come up with creative ways to make sure that the debtor can stay in business – whether that is by assisting debtor's counsel, mediating where necessary, drafting pleadings if appropriate, etc.