

BY STEPHEN W. SATHER

## Multiple Levels of Responsibility for Subchapter V Trustees

When Congress enacted subchapter V of chapter 11, it created a unique type of trustee. Chapter 7 trustees are responsible for liquidating assets and paying creditors.<sup>1</sup> Chapter 12 and 13 trustees receive and disburse funds while also making sure that the debtor complies with his/her obligations.<sup>2</sup> A trustee under legacy chapter 11 replaces the debtor in possession (DIP) and takes over the responsibility to file a plan or otherwise get creditors paid.<sup>3</sup>

A subchapter V trustee can have varying roles depending on the case. In most cases, the subchapter V trustee is a facilitator who tries to help parties achieve a consensual plan. A subchapter V trustee may also act as disbursing agent under a plan or take on an investigatory role if ordered by the court. Finally, a subchapter V trustee can replace the DIP but with the important limitation that he/she cannot propose a plan. This article looks at the responsibilities of the subchapter V trustee at each of the four levels.

The duties of a subchapter V trustee are set out in § 1183.<sup>4</sup> There are seven, but not all apply in every case, and there are some additional duties contained elsewhere in the Bankruptcy Code. Because the duties of a subchapter V trustee are derived from the duties of other trustees, it is necessary to trace the cross-references in the Code.

### A Subchapter V Trustee's Regular Duties

There are some duties that apply in every case, including:

1. Perform the duties specified in paragraphs (2), (5), (6), (7) and (9) of section 704(a) of the Bankruptcy Code.<sup>5</sup> The cross-referenced sections require the trustee to:
  - (2) be accountable for all property received;<sup>6</sup>
  - (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;<sup>7</sup>

- (6) if advisable, oppose the discharge of the debtor;<sup>8</sup>

- (7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;<sup>9</sup> and

- (9) make a final report and file a final account of the administration of the estate with the court and with the United States [T]rustee.<sup>10</sup>

2. Appear and be heard at the status conference under section 1188 of this title and any hearing that concerns —

- (A) the value of property subject to a lien;

- (B) confirmation of a plan filed under this subchapter;

- (C) modification of the plan after confirmation; or

- (D) the sale of property of the estate.<sup>11</sup>

3. Ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter.<sup>12</sup>

4. If there is a claim for a domestic-support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title.<sup>13</sup> Section 704(c) is complicated. It is triggered if the debtor owes a domestic-support obligation. This would only apply to an individual debtor.

5. Facilitate the development of a consensual plan of reorganization.<sup>14</sup>

Except in the case where a debtor owes a domestic-support obligation, the basic duties of the subchapter V trustee are to appear and be heard at various hearings and facilitate confirmation of a consensual plan. The added duties with regard to domestic-support obligations appear to be limited to providing certain notices at the outset of the case.

### Disbursing Agent

In addition to the duties in § 1183,<sup>15</sup> § 1194(b)<sup>16</sup> provides that if the plan is confirmed under



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1 11 U.S.C. § 704(b).

2 11 U.S.C. §§ 1202, 1302.

3 11 U.S.C. § 1106.

4 11 U.S.C. § 1183.

5 11 U.S.C. § 1183(b)(1).

6 11 U.S.C. § 704(b)(2).

7 11 U.S.C. § 704(b)(5).

8 11 U.S.C. § 704(b)(6).

9 11 U.S.C. § 704(b)(7).

10 11 U.S.C. § 704(b)(9).

11 11 U.S.C. § 1183(b)(3).

12 11 U.S.C. § 1183(b)(4).

13 11 U.S.C. § 1183(b)(6).

14 11 U.S.C. § 1183(b)(7).

§ 1191(b)<sup>17</sup> (*i.e.*, if the plan is not accepted by all classes), “except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.” Thus, a subchapter V trustee may also act as a disbursing agent under a nonconsensual plan. This additional duty is apparently intended to provide further protection to creditors if the creditors do not consent to the plan. However, it is not mandatory as shown by the “except as otherwise provided” language.

## Investigatory Trustee

The trustee may also be vested with investigatory powers. Under 11 U.S.C. § 1183(b)(2), the trustee shall perform the duties specified in paragraphs (3), (4) and (7) of § 1106(a) “if the court, for cause and on request of a party-in-interest, the trustee or the [U.S.] Trustee, so orders.” The duties defined in § 1106(a) include the following:

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;<sup>18</sup>

(4) as soon as practicable —

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors’ committee or equity security holders’ committee, to any indenture trustee, and to such other entity as the court designates;<sup>19</sup>

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.<sup>20</sup>

Thus, the subchapter V trustee may be authorized to investigate the debtor and file a report with the court. The investigatory powers can be understood as complementary to the power to arrive at a consensual plan. By investigating issues relating to the debtor’s conduct and filing a report with the court, the subchapter V trustee may help the parties arrive at a consensual plan (or, conversely, may indicate the need for the case to be dismissed or converted).

These additional investigatory duties can only be imposed by the court for cause shown. However, the request for expanded powers may be made by a party-in-interest, the trustee or the U.S. Trustee. Most of the cases discussing the investigatory trustee bemoan the fact that no party-in-interest requested that the court grant these powers.<sup>21</sup> As a result, a subchapter V trustee who sees the

need for an investigation should not be reluctant to request these responsibilities.

## Trustee in Possession Enumerated Powers

Ultimately, the subchapter V trustee may serve as the trustee in possession. Under 11 U.S.C. § 1183(b)(5), “if the debtor ceases” to be a DIP, the subchapter V trustee “shall perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor.”<sup>22</sup> To make things more complicated, § 1106(a)(1) is itself a cross-reference to duties under § 704. To avoid duplication, the duties under § 704(a) are grouped together below. The duties derived from § 704(a) are as follows:

(2) be accountable for all property received;

(5) if a purpose would be served, examine proofs of claim and object to the allowance of any claim that is improper;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate’s administration as is requested by a party-in-interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States [T]rustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States [T]rustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States [T]rustee;

(10) if with respect to the debtor there is a claim for a domestic-support obligation, provide the applicable notice specified in subsection (c);

(11) provide certain notices to participants under [Employee Retirement Income Security Act] plans; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business.

Note that some of these are already duties of a subchapter V trustee. However, in the process of cross-referencing, some duties are mentioned multiple times. In addition, the cross references to § 1106 identify the following duties:

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(a)(1);<sup>23</sup> [and]

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to

15 11 U.S.C. § 1183(b).

16 11 U.S.C. § 1194(b).

17 11 U.S.C. § 1191(b).

18 11 U.S.C. § 1106(a)(3).

19 11 U.S.C. § 1106(a)(4).

20 11 U.S.C. § 1106(a)(7).

21 *In re Robinson*, 628 B.R. 168 (Bankr. D. Kan. 2021); *In re Ozcelebi*, 2022 Bankr. LEXIS 854 (Bankr. S.D. Tex. 2022).

22 11 U.S.C. § 1183(b)(5).

23 11 U.S.C. § 1106(a)(2).

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be filed, in light of the condition of the debtor's books and records and the availability of such information.<sup>24</sup>

Finally, § 1183(b)(5) adds the responsibility of "operating the business of the debtor." While this language is introduced by the qualifier "including" as though operating the business of the debtor is included in the other subsections incorporated, it seems to be an independent duty provided in subchapter V.

## Omitted Powers

There are some notable powers that are not vested in the authority of the subchapter V trustee in possession. The omitted powers from § 704(b) include:

- (1) 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;<sup>25</sup>
- (4) investigate the financial affairs of the debtor;<sup>26</sup> [and]
- (6) if advisable, oppose the discharge of the debtor.<sup>27</sup>

The omitted duties from § 1106(a) include the investigatory duties under § 1106(a)(3) and (a)(4), which have been previously discussed, and "(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case."<sup>28</sup>

The omission with respect to investigatory powers is not so much omitted duties as they are "à la carte" duties that can be vested in an appropriate case. Thus, the real duties that are omitted are the duties to liquidate the assets of the estate and to file a plan. The fact that the trustee cannot file a plan is reinforced by 11 U.S.C. § 1189(a), which states that only the debtor may file a subchapter V plan.<sup>29</sup>

## Gray Areas

There are some gray areas. A subchapter V trustee in possession is authorized to operate the debtor's business but is not authorized to "collect and reduce to money the property of the estate."<sup>30</sup> Does that mean that the subchapter V trustee in possession may not file a motion to sell assets? Section 363 allows the "trustee" to use, sell or lease property of the estate. The term "trustee" is not defined. Does that mean that the trustee-in-possession may sell assets?

There are several cases where the debtor has been removed as DIP where the court's stated purpose was to allow the subchapter V trustee in possession to liquidate assets.<sup>31</sup> Thus, a subchapter V trustee in possession may perform those duties available to trustees. This would include assuming or rejecting contracts under § 365 and incurring

credit under § 364. A subchapter V trustee may also file a motion to compromise under Rule 9019 of the Federal Rules of Bankruptcy Procedure.<sup>32</sup> Not allowing the subchapter V trustee in possession to exercise these basic functions would cripple the trustee-in-possession so much that there would be limited utility to the remedy.

**While the most common use of the subchapter V trustee is to facilitate a consensual plan, the Bankruptcy Code contemplates a sliding scale where additional responsibilities may be granted to the trustee.**

May a subchapter V trustee move to convert the case to chapter 7? The ability to convert a case is one of the powers granted to a regular chapter 11 trustee that was not granted to a subchapter V trustee.<sup>33</sup> However, both logic and common practice suggest that a subchapter V trustee may move to dismiss or convert a case. If a case has reached a dead end, the subchapter V trustee should not be left powerless waiting for someone else to file a motion to dismiss or convert.

May a subchapter V trustee amend the petition to remove the subchapter V designation, then proceed under a regular chapter 11? The trustee is only given the power to file lists, schedules and statements if the debtor has not done so.<sup>34</sup> The trustee is certainly not given the power to file a petition, since only a debtor can do that. However, Bankruptcy Rule 1009 states that the debtor may amend a voluntary petition, list, schedule or statement "as a matter of course." It goes on to state, "On motion of a party-in-interest, after notice and a hearing, the court may order any voluntary petition, list, schedule or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court." The subchapter V trustee is certainly a "party in interest" and would therefore have the authority to ask the court for permission to amend the petition to opt out of subchapter V, even though this is not an enumerated power of the subchapter V trustee in possession.

## Conclusion

While the most common use of the subchapter V trustee is to facilitate a consensual plan, the Bankruptcy Code contemplates a sliding scale where additional responsibilities may be granted to the trustee. The court, parties and subchapter V trustee should consider these tools when evaluating how to solve problems in a particular subchapter V case. **abi**

<sup>24</sup> 11 U.S.C. § 1106(a)(6).

<sup>25</sup> 11 U.S.C. § 704(a)(1).

<sup>26</sup> 11 U.S.C. § 704(a)(4).

<sup>27</sup> 11 U.S.C. § 704(a)(6).

<sup>28</sup> 11 U.S.C. § 1106(a)(5).

<sup>29</sup> *In re Body Transit Inc.*, 613 B.R. 400 (Bankr. S.D. Tex. 2020).

<sup>30</sup> 11 U.S.C. § 704(a)(1).

<sup>31</sup> *In re Young*, 2021 Bankr. LEXIS 765 (Bankr. D.N.M. 2021); *In re Pittner*, 2022 Bankr. LEXIS 292 (Bankr. D. Mass. 2022).

<sup>32</sup> *In re Micron Devices LLC*, 2021 Bankr. LEXIS 1377 (Bankr. S.D. Fla. 2021).

<sup>33</sup> Section 1106(a)(5) is not one of the powers granted to a subchapter V trustee in possession. It includes both the power to file a plan and the power to move to dismiss or convert the case.

<sup>34</sup> 11 U.S.C. § 1106(a)(2).