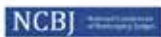


insolvency2020



Oct. 13, 2020, 3:30-4:45 p.m.

National Association of Bankruptcy Trustees: A Day in the Life of a Trustee (Comparisons of Chapter 7 and Subchapter V Trustees)

Paula S. Beran; Tavenner & Beran, PLC

Patricia B. Fugée; FisherBroyles, LLP

Russell D. Garrett; Jordan Ramis PC

Gary F. Seitz; Gellert Scali Busenkell & Brown, LLC

Educational Materials

A Day in the Life of a Trustee: (Comparisons of Chapter 7 and Sub V Trustees)

THE SUB V TRUSTEE PERSPECTIVE

Paula S. Beran, Esq.
Tavener & Beran, PLC
Serving as Subchapter V Trustee
Eastern District Virginia and Western District of Virginia

Patricia B. Fugée, Esq.
FisherBroyles, LLP
Serving as Subchapter V Trustee
Northern District of Ohio

I. APPOINTMENT PROCESS

Similar to trustees in the Chapter 7 and 13 arenas, Subchapter V Trustees are bonded¹ individuals.² But, unlike Chapter 7 Trustees who are on panels and Chapter 13 Trustees who are standing trustees, Subchapter V Trustees are in pools, appointed on a case-by-case basis in Subchapter V cases.³ Upon identification as a potential trustee, the individual is to determine if he/she is conflict free. Specific examples of conflicts include, without limitation: “the representation by a trustee’s firm of a debtor or any party in interest in any case being administered by the trustee. Further, a conflict exists if the representation of a client by a trustee or the trustee’s firm requires the trustee to take a position contrary to the fiduciary responsibilities of the trustee.”⁴ The individual must execute a Verified Statement of Subchapter V Trustee, attesting to being disinterested and providing for an hourly rate for services in the case.

Subchapter V Trustees are authorized to employ counsel or professionals but the same is only to be done if warranted under the circumstances of the case.⁵ To date, such employment authorization process has been utilized sparingly.

¹ § 1183(a). SBRA § 4(a)(3) amends § 322(a) to include Subchapter V Trustees.

² 28 U.S.C. § 586(b).

³ See Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP’s Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

⁴ U.S. DEP’T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials>, at 2-2.

⁵ *In re Penland Heating and Air Conditioning, Inc.*, Case No. 20-01795-5-DMW (Bankr. E.D.N.C. June 11, 2020), ECF No. 40.

The Court in *Penland* was one of (if not the) first to address the topic raised therein by the Subchapter V Trustee's Application to Employ Attorney. The Debtor already had employed counsel to assist it in its proposed wind-down and liquidation and was operating as a debtor-in-possession. The Subchapter V Trustee, through what appears to be a customary practice in the Eastern District of North Carolina in Chapter 7 cases, filed the application to retain counsel. The Trustee stated that he had no intention of having counsel actually perform services for him at the time of the application, and instead the application was merely submitted as a matter of course to ensure that representation was available should the need arise.

Judge Warren began her review where many begin in the Subchapter V world – examining Judge Bonapfel's Guide, which indicated that the purpose of Subchapter V was to keep administrative expenses down. *See* Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 Am. Bankr. L.J. 571, 591 (2019). Judge Warren then reviewed the Department of Justice's handbook for Subchapter V trustees, which states that it:

is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether employment of the professional is warranted under the specific circumstances of each case.

U.S. Dep't of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees* 3-17–18 (2020). Judge Warren determined that “authorizing a Subchapter V trustee to employ professionals including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA.” *Penland*, at *3-*4. The Court denied the application and held that the Subchapter V trustee had not made a showing that he required counsel to assist with “his basic duties to monitor and facilitate the Debtor's reorganization.” *Id.* at *4. Judge Warren did leave the door open to the Subchapter V trustee to retain counsel, should the trustee identify a “specific need.” *Id.* In a footnote, Judge Warren indicated:

The court cautions overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved. The court absolutely does not imply that the Trustee in this case had even a remote thought of performing services outside the scope of the SBRA. The Application was filed out of an abundance of caution and as a standard of practice like in Chapter 7 cases, and the court appreciates this opportunity to provide some guidance for this new legislation.

Id. at *4 n.2.

II. THE SUBCHAPTER V TRUSTEE ROLE

The Subchapter V Trustee is tasked primarily with facilitating a consensual plan.⁶ All other duties flow from and/or relate to that primary duty as set forth in § 1183, which incorporates by reference certain Chapter 7 trustee duties as specified in § 704(a) and certain Chapter 11 trustee duties as specified in § 1106(a). The U.S. Dep't of Justice, Handbook for Small Business Chapter 11 Subchapter V Trustees specifically provides the following duties but indicates that the same is not an exhaustive list:

1. Be accountable for all property received [§ 704(a)(2)].
2. If a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper [§ 704(a)(5)].
3. If advisable, oppose the discharge of the debtor [§ 704(a)(6)].
4. Unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest [§ 704(a)(7)].
5. Make a final report and file a final account of the administration of the estate with the United States Trustee and the court [§ 704(a)(9)].
6. Perform the duties specified in § 1106(a)(3) and § 1106(a)(4) of this title if the court, for cause and on request of a party in interest, the trustee, or the United States Trustee, so orders. Pursuant to this provision, the trustee is required to:
 - a. 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 [§ 1106(a)(3)]; and
 - b. once the investigation is completed, file a statement of the investigation [§ 1106(a)(4)(A)].
7. After confirmation of a plan, file such reports as are necessary and the court orders [§ 1106(a)(7)].
8. Appear and be heard at the status conference under § 1188 and any hearing that concerns:
 - a. The value of property subject to a lien;
 - b. Confirmation of a plan filed under subchapter V;
 - c. Modification of the plan after confirmation; or
 - d. The sale of property of the estate [§ 1183(b)(3)].
9. Ensure that the debtor commences making timely payments required by a confirmed plan [§ 1183(b)(4)].

⁶U.S. DEP'T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials>, at 1-2.

10. If the debtor ceases to be a debtor in possession, pursuant to § 1183(b)(5), perform the duties specified in the following sections of the Bankruptcy Code, including operation of the debtor's business and:

- a. Perform various duties specified in section 704(a), including: (2) be accountable for all property received; (5) examine proofs of claim and object to improper claims; (7) unless the court orders otherwise, provide information regarding the estate as requested to parties in interest; (8) file reports of operations if the debtor is authorized to be operated (9) make a final report and file a final account of the administration of the estate; (10) provide notice of the debtor's domestic support obligation; (11) administer any employee benefit plan; (12) if debtor is a health care business, take reasonable steps to transfer patients. [§ 1106(a)(1)]
- b. File the list, schedules and statements required under section 521(1) if the debtor has not already done so. [§ 1106(a)(2)]
- c. 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 be filed, in light of the condition of the debtor's books and records and the availability of such information. [§ 1106(a)(6)]

11. If there is a claim for domestic support obligation, provide the applicable notice to the holder of the claim and appropriate State child support enforcement agency, as set forth in § 704(c). [§ 1183(b)(6)]

Courts have recognized that the list is not exhaustive and welcome expansive roles especially when the same is a component of obtaining a consensual plan. For example, in the case of *In re Turner Long Construction, Inc.*, 19-71589 (Bankr. W.D. Va 2020), the Honorable Paul M. Black allowed a Subchapter V Trustee to remain after confirmation of a consensual plan to review and, if appropriate, prosecute avoidance actions.

III. DAY TO DAY DUTIES OF A SUBCHAPTER V TRUSTEE

- Primary task is to facilitate a consensual plan
 - Early in the case, the Subchapter V Trustee should review the pleadings and speak with the parties to identify the issues that may require resolution
- Another essential task is to assess the financial viability of the small business debtor.
- The other essential task is helping ensure that the debtor files or submits complete and accurate financial reports.

AMERICAN BANKRUPTCY INSTITUTE

- Participate in the initial debtor interview with the U.S. Trustee, within 10 days after the case is filed
 - In my district, I have been given an opportunity to ask additional and follow up questions after the U.S. Trustee analyst is done.
- Participate in the § 341 meeting of creditors.
 - Similarly, I have been given the opportunity after the U.S. Trustee's office is done, to ask additional and follow up questions
- Be prepared to participate in the status conference held in the first 60 days, 11 U.S.C. § 1183(b)(3)
- The U.S. Trustee may consult with the Subchapter V Trustee to determine whether an inspection of the debtor's place of business, books, and records, permitted under section 1116(7), is necessary or appropriate (11 U.S.C. §§ 1116(7), 1187(b)).
- Per § 1183(b)(1), the subchapter V Trustee shall perform the following duties specified in section 704:
 - Being accountable for all property received (§ 704(a)(2))
 - Examining proofs of claim and objecting as needed (§704(a)(5))
 - Opposing the debtor's discharge, if advisable (§ 704(a)(6))
 - Furnishing information concerning the estate requested by a party in interest, unless the court orders otherwise (§ 704(a)(7))
 - Making a final report and filing an account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9))
- Only if the Court, for cause and on request of a party in interest, the trustee or the U.S. Trustee, so orders, per § 1183(b)(2), the subchapter V Trustee shall perform the following duties specified in section 1106(a)(3) (investigate acts, conduct, assets, liabilities), (4) (file a statement of the investigation) and (7) (after confirmation of a plan, file such reports as are necessary or as the court orders).
- Trustee's duties may be expanded by the court, including on a limited basis (See *In re AJEM Hosp., LLC d/b/a Al's Burger Shack*, et. al., No. 20-80003, 2020 WL 3125276, at *2 (Bankr. M.D.N.C. Mar. 23, 2020) (expanding trustee's duties on a limited basis to investigate intercompany claims))
- Per 11 U.S.C. § 1183(b)(3), the subchapter V Trustee shall appear and be heard at any hearing that concerns:
 - Value of property subject to a lien;
 - Confirmation of a plan;
 - Modification of the plan after confirmation; or

- The sale of property of the estate.
- Plan of reorganization
 - Trustee is to ensure the debtor commences making timely payments, 11 U.S.C. §§ 1183(b)(4), (7)
 - If the Trustee is holding funds at confirmation, then whether the plan is consensual or non-consensual, the Trustee should distribute those funds in accordance with the plan (§1194(a))
 - Consensual plan: consummation concludes the duties of the trustee (§ 1183(c)(1))
 - Cram-down plan: confirmation does not, and instead, the trustee makes the payments during the plan (§ 1194(b))
- Trustees also do fee applications, not sooner than quarterly, and when awarded, can be paid over time as part of the plan.

Note: An excellent resource on Subchapter V is SBRA A Guide to Subchapter V of the U.S. Bankruptcy Code, by the Hon. Paul W. Bonapfel, which he encourages sharing. Email me if you cannot locate a copy, patricia.fugee@fisherbroyles.com. Good additional resources include the U.S. Trustee's Manual, chapter 3-17 Subchapter V Chapter 11 cases (found at <https://www.justice.gov/ust/united-states-trustee-program-policy-and-practices-manual>) and the U.S. Trustee's Handbook for Small Business Chapter 11 Subchapter V Trustees (found at https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download).

IV. FIDUCIARY DUTIES

Unlike the Chapter 7 arena where there is a plethora of case law and other authority delineating the fiduciary duties of a trustee, there is little direct guidance as of yet for Subchapter V Trustees. The Trustee's Handbook provides the general proposition that "[t]he trustee has a fiduciary responsibility to the bankruptcy estate."⁷ Thereafter, "fiduciary" is used an additional 7 times: (1) "protect and preserve estate assets that are in the trustee's control, among other fiduciary duties,"⁸ (2) "carry out fiduciary duties free from improper influence or conflict,"⁹ (3) "The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case,"¹⁰ (4) "Further, a conflict exists if the representation of a client by a trustee or the trustee's firm requires the trustee to take a position contrary to the fiduciary responsibilities of the trustee,"¹¹ (5) "The trustee is an independent third party who "steps into the shoes" of the debtor's management and becomes a fiduciary with an obligation of fairness to all parties in the case,"¹² (6) "The trustee, as fiduciary, must institute strong internal controls and an appropriate

⁷ See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 6, at 1-5.

⁸ *Id.* at 1-7.

⁹ *Id.* at 2-1.

¹⁰ *Id.* at 2-2.

¹¹ *Id.*

¹² *Id.* at 3-8.

accounting system for both the cases and the funds administered,”¹³ and (7) “The trustee, as fiduciary, must institute strong internal controls and an appropriate accounting system for both the cases and the funds administered.”¹⁴

V. COMPLIANCE OBLIGATIONS

The Subchapter V Trustee is statutorily required to attend the status conference held pursuant to § 1188(a).¹⁵ In addition, the Subchapter V Trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.¹⁶ Recognizing a primary role of facilitating the parties’ negotiation and ultimate consent to a plan of reorganization, Courts are encouraging, if not requiring, participation by the Subchapter V Trustee in other matters such as employment matters, litigation and other case funding items, discovery disputes, lien and priority analysis.¹⁷

In addition, the Subchapter V Trustee has compliance related requirements to the Office of the United States Trustee: monthly and annual reports on all cases¹⁸ and case specific final reports and accounts.¹⁹ In instances where the Subchapter V Trustee did not handle funds, the final report is similar to a Chapter 7 No Distribution Report (“NDR”); and if funds are handled, the report is akin to a Chapter 7 Trustee Final Report (“TFR”).

VI. IMMUNITY / LIABILITY / COURT SUPERVISION

A. Immunity/Liability Issues

- In *Barton v. Barbour*, 104 US. 126 (1881), the United States Supreme Court held that a party must obtain leave from the appointing court before suing a receiver.
- This has been expanded and is now known as the “Barton” doctrine, which courts normally apply to bankruptcy trustees as well as various kinds of receivers. Accordingly, permission to pursue a bankruptcy trustee must be obtained before initiating an action. *See, e.g., In re VistaCare Group, LLC*, 678 F.3d 218 (3rd Cir. 2012) (joining numerous other circuits).

¹³ *Id.* at 4-3.

¹⁴ *Id.* at 4-8.

¹⁵ New § 1183(b)(3). *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 6, at 3-8 (“The trustee should review the debtor’s report carefully. . .” and “should be prepared to discuss the debtor’s report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.”).

¹⁶ § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

¹⁷ *See, e.g., In re Saxon Shoes, Inc., et al.*, Case No. 20-33453-KRH, (Bankr. E.D. Va. 2020); *In re Corbett*, 19-36309-KRH, (Bankr. E.D. Va. 2019).

¹⁸ 28 U.S.C. § 586(a)(3), 11 U.S.C. § 1183(b)(1), incorporating 11 U.S.C. § 704(a)(2).

¹⁹ 11 U.S.C. § 1183(b)(1), incorporating 11 U.S.C. § 704(9), 11 U.S.C. § 1183(b)(2), incorporating 11 U.S.C. § 1106(a)(7).

- The Barton doctrine serves the principle that the bankruptcy trustee is an officer of the court that appointed him/her, and so the court has a strong interest in protecting the trustee from unjustified personal liability for acts taken within the scope of official duties. *See, e.g., Lebovits v Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996); *see also In re Linton*, 136 F.3d 544 (7th Cir. 1998). It also enables the Bankruptcy Court to maintain better control over the administration of the estate. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993).
 - Generally, counsel for the trustee is also entitled to the protection of the Barton doctrine. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993). Other bankruptcy-appointed officers are protected as well. *See, e.g., Carter v. Rodgers*, 220 F.3d 1239 (11th Cir. 2000) (applying the Barton doctrine to a suit against the bankruptcy trustee and the court-appointed antiques dealer who conducted sale of estate property).
 - The Barton doctrine applies even after the bankruptcy case is closed. *See, e.g., Muratore v. Darr*, 375 F.3d 140 (1st Cir. 2004); *In re Linton*, 136 F.3d 544 (7th Cir. 1998).
 - There is a limited exception to the Barton doctrine, found at 28 U.S.C. 959(a), which provides that trustees, receivers and managers of any property, including debtors in possession, may be sued without leave of court with respect to any acts or transactions in carrying on the business (as distinguished from acts undertaken in connection with liquidation and distribution of assets; *see, e.g., Muratore v. Darr*, 375 F.3d 140 (1st Cir. 2004)).
- Trustees are generally entitled to immunity from liability for their actions taken in their official capacity.
 - Trustees are entitled to *absolute immunity* for all actions taken pursuant to a court order. *See, e.g. In re Ondova Ltd. Co. v. Sherman*, 914 F.3d 990, 993 (5th Cir. 2019).
 - Trustees are entitled to *qualified immunity* for personal harms caused by actions taken within the scope of their official duties. *See, e.g., Ondova*, 914 F.3d at 993; *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 872 F.3d 138 (3rd Cir. 2017) (Bankruptcy trustees are government officials, entitled under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to qualified immunity when they act in their official capacity in a manner that is not contrary to clearly established law.”)

- “Qualified immunity, ‘properly applied, ... protects all but the plainly incompetent or those who knowingly violate the law.’” *Phoenician*, 872 F.3d at 143 (internal citation omitted).
- Trustees generally are not immune with respect to *ultra vires* actions, i.e., actions taken outside the scope of their official duties as trustees. *See, e.g., Ondova*, 914 F.3d at 993.
- With respect to *ultra vires* actions, an injured party may not need to obtain leave of the bankruptcy court before bringing suit if the trustee is acting outside the scope of his/her authority. *See, e.g., Hahnfeldt v. Murphy*, 2017 U.S. Dis. LEXIS 76490 (D.C. Mass. 2017).
- Research reflects that these principles have not been tested with respect to Subchapter V Trustees. However, there seems to be no reason why Subchapter V Trustees, who are authorized by statute, would be treated any differently.

B. Supervision of Subchapter V Trustees

The Bankruptcy Court has considerable ability to supervise trustees.

- Section 322 of the Bankruptcy Code:
 - requires subchapter V trustees to have a bond in place in favor of the United States, conditioned on the faithful performance of such official duties
 - provides that a trustee is not liable personally or on the trustee’s bond in favor of the United States for any penalty or forfeiture incurred by the debtor
 - further provides that a proceeding on a trustee’s bond may not be commenced after two years after the trustee is discharged.
- Section 323 of the Bankruptcy Code provides:
 - that a trustee in a case under this title is the representative of the estate.
 - that a trustee in a case under this title has capacity to sue and be sued (but see immunity discussion, above).
- Section 324 of the Bankruptcy Code:
 - The Court, after notice and a hearing, may remove a trustee for cause.

- If the Court does so, then the trustee is removed from all cases in which the trustee is serving, unless the Court orders otherwise
- If a non-consensual plan is confirmed and the Trustee is handling the payments under the plan, the Trustee must file quarterly reports with the Court, with a copy to the U.S. Trustee (§§ 1183(b)(2); 1106(a)(7))
 - When all plan payments are complete, the Trustee should submit the final report and final account of the administration of the estate to the U.S. Trustee for review per § 1183(b)(1). After review, it will be filed with the Court (§§ 1183(b)(1), 704(a)(9))
- The U.S. Trustees also have supervision responsibilities over Subchapter V Trustees
 - Monthly and annual reports must made to US Trustee's office
 - U.S. Trustee must "supervise" (§ 1183(a); 28 U.S.C. § 586(a)(3))
 - Particulate focus is on banking, ensuring compliance with § 345(a)
 - Most U.S. Trustee districts maintain a list of approved financial institutions
 - Trustees must report any data breaches to the U.S. Trustee's office
 - U.S. Trustee will conduct periodic audits and field visits of trustees
 - U.S. Trustee also has enforcement power as needed

VII. STEPS TO MAKE SUBCHAPTER V TRUSTEES HAPPY

Step One: Communicate – Early and Often.

Step Two: Repeat Step One!

**NABT & INSOLVENCY SUMMIT
OCTOBER 13, 2020**

Day in a Life of a Chapter 7 Trustee

By Russell D. Garrett

I. Appointment Process

Chapter 7 trustees are typically selected from a panel established by the United States Trustee's Office in each region. In unusual or rare circumstances, a non-panel trustee will be appointed as a Chapter 7 trustee. This typically occurs when a case converts from Chapter 11 to Chapter 7.

Upon entry of the order for relief in a Chapter 7 case, a trustee is appointed, the Notice of both the order for relief and the first meeting of creditors is mailed to creditors on the mailing matrix. The trustee is identified and provided notice that he or she is the trustee. In a voluntary Chapter 7 case, the notice of appointment occurs immediately upon the filing of the bankruptcy because the order for relief is entered at that time. In an involuntary case, the order for relief is not entered until after the response period to the Petition or in the event of stipulation, at that point.

II. Roles

The Chapter 7 trustee's duties are found in 11 U.S.C. § 704.

(a) The trustee shall -

- (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;
- (2) be accountable for all property received;
- (3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;
- (4) investigate the financial affairs of the debtor;
- (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
- (6) if advisable, oppose the discharge of the debtor;
- (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 trustee, 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 trustee 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 trustee;
 - (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) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; 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 that—
 - (A) is in the vicinity of the health care business that is closing;
 - (B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and
 - (C) maintains a reasonable quality of care.
- (b)
- (1) With respect to a debtor who is an individual in a case under this chapter—
 - (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor’s case would be presumed to be an abuse under section 707(b); and
 - (B) not later than 7 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.
 - (2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor’s case should be presumed to be an abuse under section 707(b) and the product of the debtor’s current monthly income, multiplied by 12 is not less than—
 - (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or
 - (B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals.
- (c)
- (1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall—
 - (A)
 - (i) provide written notice to the holder of the claim described in subsection (a)(10) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;

- (ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency; and
 - (iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter;
 - (B)
 - (i) provide written notice to such State child support enforcement agency of such claim; and
 - (ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and
 - (C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of—
 - (i) the granting of the discharge;
 - (ii) the last recent known address of the debtor;
 - (iii) the last recent known name and address of the debtor's employer; and
 - (iv) the name of each creditor that holds a claim that—
 - (I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or
 - (II) was reaffirmed by the debtor under section 524(c).
- (2)
- (A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.
 - (B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

As revealed by the duties found under 11 U.S.C. § 704, a Chapter 7 trustee needs to review the docket for each of his or her cases on a daily basis, identify what has been filed, determine whether it alters the trustee's initial determination of how to administer the case, and identify if any action is needed. The difficult issues include reviewing amended schedules, including amended exemption schedules; reviewing the claims when they are filed and at the expiration of the claims bar date; review the claims in detail to determine whether objections need to be filed; following up on accounts receivable for collection; following up for recovery and turnover of assets that the debtor could not exempt; determining at the outset whether an asset and whether a meaningful distribution can be made to creditors.

The trustee liquidates the assets of the debtor for the benefit of creditors. This includes personal and real property as well as choses in action (lawsuits/claims). The trustee also reviews the details found in the schedules and statement of financial affairs, as well as the documents received from the debtor either through the Federal Rule of Bankruptcy Procedure 4002 documents or those requested as part of the initial investigation process to determine whether avoidable transfer exists under Chapter 5. Typical avoidable transfers include preferential transfers, fraudulent transfers, actions which an existing creditor could take under state law under 544(a), the strongarm provisions and unauthorized transfers under 549.

III. Day to Day Duties

- Review the docket
- Review motions filed the debtor to avoid liens or orders of abandonment
- Review motions for relief from stay and abandonment filed by creditors, and the documents associated therewith
- Reconcile bank accounts on, at least, a monthly basis.
- Review checks.
- Make interim distributions where appropriate.
- Negotiate compromises and file motions to compromise under Fed. R. Bankr. P. 9019 where appropriate.
- Retain counsel both as special counsel (with specific and narrow roles) or general counsel (as general counsel for all matters).
- Monitor the actions of all professionals including attorneys, accountants, liquidators, auctioneers.
- Employ professionals where appropriate, including CPAs, liquidators, auctioneers, locksmiths.
- Purchase bonds and insurance where appropriate and identify where insurance must be maintained.
- Identify where and an ombudsman may be required.
- Examine the debtor, certain creditors or other recipients of other assets and other parties who may have information concerning the debtor's financial condition under Fed. R. Bankr. P. 2004.
- Report certain matters to the United States Trustee's Office for review and, where appropriate, action including tax irregularity and fraud, non-dischargeability issues, creditor abuse, 11 U.S.C. § 707 abuse by the debtor, debtor's counsel's abuse and fee issues, irregularities with regard to the identity and personal identification of the debtor (usually after the first meeting of creditors), and potential irregularities with the case the trustee believes the United States Trustee's Office should be aware of.

IV. Fiduciary Duties

The trustee's role is that of a fiduciary to the creditors and also, at times, to the Chapter 7 debtor where a surplus case may exist. The Chapter 7 trustee is the representative of the estate. 11 U.S.C. § 323(a). In that capacity, the chapter 7 trustee has the capacity to sue and be sued. 11 U.S.C. § 323(b) and Fed R. Bankr P 6009. Chapter 7 trustees are fiduciaries charged with the responsibility to implement the goals and provisions of Chapter 7.

V. Compliance Obligations

- Report to the United States Trustee's Office when requested.
- Report to the Court when requested. This is typically a status report.
- Complete quarterly reviews of all cases.
- Document quarterly reviews and monthly bank account reconciliations.
- File all tax returns timely and pay all tax due.

- File annual interim reports with the United States Trustee's Office as required.
- Make available all file materials to the United States Trustee's Office whenever requested.
- Comply with internal audit requests by the United States Trustee's Office for both field audits and outside audits by retained certified public accounts.
- Maintain relevant bonding and insurance as required by the United States Trustee's Office.
- Maintain records in a format both during the case and up to 4 years following the case closure.
- Maintain strict supervision over personnel with access to the trustee's software and personal property.
- Encrypt machines subject to offsite disposition.
- Establish and supervise checks and balances for money handling and control processes according to United States Trustee's policy and guidelines.

VI. Immunity / Liability / Court Supervision

A. Immunity

Trustees are not automatically immune to liability. Trustees have the authority and power to sue and be sued as indicated above. Indeed, trustees are the real party in interest as to choses in action included as property of the estate under 11 U.S.C. § 541. In general, Chapter 7 trustee's acting under court order and within the authority granted by the court pursuant to an order enjoy quasi-judicial immunity.

B. Liability

The standard for liability against a Chapter 7 trustee varies from circuit to circuit. The liability ranges everywhere from simple negligence to intentional conduct.

Negligence Standard: Second, Third, Ninth and Eleventh Circuits.

Gross Negligence Standard: First, Fifth and Eighth Circuits.

Intentional and Deliberate Standard: Fourth, Sixth, Seventh and Tenth Circuits.

C. Court Supervision

The United States Trustee's Office supervises the trustees. However, the Bankruptcy Court in each case in which the trustee has been appointed by the United States Trustee's Office, supervises the trustee's actions as well.

Barton Doctrine: The Barton Doctrine prohibits a party from bringing an action against the trustee outside of the court in which the trustee was appointed for actions taken in the official capacity of the trustee and within the course and scope of the Trustee's authority. See *Barton v. Barbour*, 104 U.S. 126 (1881) and *In re Kashini*, 190 BrR. 875, 884 (Bankr. 9th Cir. 1995)

Quasi Judicial Immunity: immunity for actions by trustee taken within the course and scope of their duties and authority pursuant to and within the scope of an order of the Bankruptcy Court.

VII. Steps to Make the Trustee Happy

- Comply with 4002 and provide the required documents prior to the first meeting of creditors.
- Debtor's should review schedules and statement of financial of affairs to make sure they are true, accurate and correct, as well as complete.
- Cooperation with the trustee and providing any information or documentation is essential.

Faculty

Paula S. Beran is a member of Tavenner & Beran, PLC in Richmond, Va., and has focused on bankruptcy and insolvency matters throughout her career. Her experience includes representing chapter 11 debtors, official unsecured creditors' committees, stalking-horse purchasers, and chapter 7 and liquidation trustees. She also has represented entities in out-of-court reorganizations and liquidations, and served as a corporate receiver in a matter pending in a Virginia circuit court. Prior to entering private practice, Ms. Beran clerked for Hon. Douglas O. Tice Jr. in the U.S. Bankruptcy Court for the Eastern District of Virginia and for the Fourth Circuit U.S. Court of Appeals Office of Staff Counsel from 1992-94. She is a regular speaker at continuing legal education seminars for local and state bar associations and business organizations. In addition, she has served as a faculty member for ABI's Bankruptcy Litigation Skills Program and has lectured on bankruptcy at the University of Richmond Law School. An AV-Rated attorney by Martindale-Hubbell, Ms. Beran was selected as one of the Top 25 Female Attorneys by *Virginia Super Lawyers* and has been recognized in the bankruptcy/creditors' rights field in numerous editions of *The Best Lawyers in America*, *Virginia Super Lawyers* and *Virginia Business* magazine. She is a member of ABI and the Virginia Bar Association, and she is a past chair of the The Bar Association for in the City of Richmond's Bankruptcy Section, past member of the Virginia State Bar's Bar Council and past chair of its Mandatory Legal Education Board. Ms. Beran received her B.A. cum laude from Randolph-Macon College in 1988, where she was a member of Phi Beta Kappa and Omicron Delta Kappa, and her M.B.A. and J.D. cum laude from Wake Forest University in 1992, where she was articles editor of the *Wake Forest Law Review*.

Patricia Brown Fugée is a partner in the Perrysburg, Ohio, office of FisherBroyles, LLP and chairs its Bankruptcy, Financial Restructuring & Reorganization Practice Group. She focuses her practice on all aspects of creditors' rights law, including real estate lending transactions, bankruptcy, foreclosure, workout and commercial litigation matters. In lending matters, Ms. Fugée serves on the firm's opinion team, providing mortgage-enforceability opinions and bankruptcy opinions. In bankruptcy matters, she represents secured and unsecured creditors, landlords, asset-buyers and trustees, including chapter 7, 13 and 11 trustees. Ms. Fugée's work spans numerous industries, including manufacturing, hotel and hospitality, health care and medical facilities, and retail and commercial real estate. She represents parties such as banks and financial institutions, borrowers, debt-buyers, asset-buyers, landlords and trade creditors in various proceedings, including bankruptcy cases, foreclosures, workouts and receiverships. Her clients have also included bankruptcy trustees, a securities trustee under the Securities Investor Protection Act, state and federal receivers, and debtors. As part of her practice, Ms. Fugée represents clients in the investigation, prosecution and recovery of assets where fraudulent activity is involved, including Ponzi schemes, fraudulent transfers, bankruptcy fraud, bank fraud and similar conduct, as well as discharge litigation. In commercial litigation matters, she has experience with the Uniform Commercial Code in the areas of secured transactions, sales and banking (articles 2, 3, 4 and 9), as well as breach-of-contract matters, lender liability, lien disputes and other commercial disputes. Ms. Fugée's practice on the transactional side includes workouts, restructurings, lending and opinions, including enforceability, true lease and substantive nonconsolidation. She has served as a state court receiver to operate and liquidate an industrial machinery dealer and several manufacturing businesses, and she has been appointed as an examiner under the Bankruptcy Code to investigate transactions in both 2011 and 2018. Since 2009, Ms. Fugée has been Board Certified in Creditors' Rights Law by the American Board of Certification, and she has served on its board of directors for

the last several years, having served as its treasurer for 2019. Ms. Fugée received her B.A. from Wellesley College and her J.D. with high honors from Rutgers University-Camden.

Russell D. Garrett is a shareholder with Jordan Ramis PC in Portland, Ore., and has more than 30 years of experience representing clients in complex business and financial issues both in and out of the courtroom. He routinely advises businesses and individuals on strategic issues, particularly where there are shareholder/management disputes and where financial distress exists. Mr. Garrett has represented creditors, chapter 7, 12 and 13 trustees, debtors, creditors' committees and asset-purchasers in bankruptcy and bankruptcy litigation. He also has represented both state and federal receivers. Mr. Garrett practices primarily in Oregon and Washington, but is available to appear in jurisdictions outside of the Northwest. He is an experienced trial lawyer and has appeared before the Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals. Mr. Garrett has served as a panel chapter 7 trustee for the Western District of Washington since 1998 and has served from time to time as a chapter 11 trustee court-appointed receiver. He currently serves on the Washington State Bar Association's Debtor-Creditor Executive Committees, is a board member of the National Association of Chapter 7 Trustees, and is a former Ninth Circuit Lawyer Representative. Mr. Garrett is rated AV-Preeminent by Martindale-Hubbell and is recognized as a *Super Lawyer* and one of *The Best Lawyers in America* in his practice areas. He also is a regular speaker on bankruptcy and creditors' rights topics. Mr. Garrett received his B.S. from the University of Oregon in 1980 and his J.D. in 1988 from Willamette University College of Law.

Gary F. Seitz is a member of Gellert Scali Busenkell & Brown LLC in its Philadelphia office. He concentrates his practice in the areas of commercial bankruptcy, commercial litigation and transportation, including admiralty and maritime law. Mr. Seitz serves as a chapter 7 panel trustee in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania and acts as trustee in chapter 7 and chapter 11 cases in the Eastern District of Pennsylvania and the District of Delaware. He has experience handling bankruptcy matters for creditors, asset-purchasers and trustees. He also has expertise in admiralty and maritime litigation and transactions with particular emphasis on marine financing and vessel foreclosures. Mr. Seitz is admitted to practice in Delaware, Pennsylvania and New Jersey, the U.S. Courts of Appeals for the Third and Fifth Circuits, and the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey and the District of Delaware. Previously, he chaired the Bankruptcy and Business Finance Practice Group of Rawle & Henderson, LLP. Mr. Seitz received his B.A. *magna cum laude* in 1983 from Buena Vista University, his J.D. in 1986 from the University of Iowa College of Law and his LL.M. in admiralty in 1988 from Tulane University School of Law.