

A Look Into The Unique Role Of A Subchapter V Trustee

By **Clara Geoghegan**

Law360 (May 2, 2024, 6:35 PM EDT) -- When lawmakers **implemented a simplified Chapter 11 path** for small-business debtors in 2020, they introduced a new player to the bankruptcy world: the Subchapter V trustee.



Brian M. Rothschild

Tasked to "facilitate the development of a consensual plan of reorganization" for debtors that file under Subchapter V of Chapter 11, the on-the-ground role of a Subchapter V trustee can look very different from other types of bankruptcy trustees. Law360 caught up with Brian M. Rothschild, shareholder at Parsons Behle & Latimer and a Subchapter V trustee in the District of Utah Bankruptcy Court, to learn more about the newly created role, best practices and common pitfalls when working with a Subchapter V trustee.

Subchapter V was added to the Bankruptcy Code by the 2019 Small Business Reorganization Act in hopes of eliminating costs that might dissuade debt-saddled small businesses from reorganizing under Chapter 11 instead of liquidating under Chapter 7.

The simplified Chapter 11 process, among other things, eliminates the automatic appointment of a creditors committee; only lets a debtor file a plan; and sets a 90-day deadline to file a reorganization plan. A Subchapter V trustee is appointed by the Office of the U.S. Trustee to each case from a preselected pool of professionals in the district, usually attorneys or accountants.

Rothschild said he's been appointed to around 25 Subchapter V cases in the last four years, making up around 20% of his practice. Rothschild noted he's been paid on roughly 50% to 60% of the cases, since the trustee is only paid once a plan is confirmed and will rarely recoup fees if a case is converted or dismissed. When he's not doing trustee work, Rothschild handles traditional Chapter 11 matters.

A Subchapter V trustee takes a back seat compared to trustees in traditional Chapter 11s, Chapter 13s and Chapter 7s, Rothschild explained, noting that in most cases small-business debtors will keep control of their businesses and pay creditors themselves.

So what exactly does a Subchapter V trustee do? It depends, Rothschild said.

This interview has been edited for length and clarity.

How would you describe the role of a Subchapter V trustee?

The Sub V trustee is a neutral, honest broker that will observe and inform the court, the parties and even the debtor about the material issues in the bankruptcy, including feasibility, confirmation, discharge, claims allowance, cash collateral, viability and other major things. I'm there to help the reorganization be successful. That's it. That can be me sitting back doing almost nothing, or that could be me being extremely active. What I love about the role is that it's totally flexible based on the needs of the case.

Why did you apply to be a Subchapter V trustee?

I thought the role of the Sub V trustee in the statute was ill-defined. It's a little bit vague. I wanted to explore that and maybe even have a role in defining what the Sub V trustee is supposed to do. That seemed like just super geeky fun to me.

As part of the first group of Sub V trustees, how did you come to understand what the job entails?

There were two sources of guidance here.

One is that the U.S. trustee had a lot of thoughts. The U.S. trustee, I think, was very concerned about limiting the role of the Subchapter V trustee. There's a lot of overlap between the U.S. trustee's role and the Subchapter V trustee's role. The U.S. trustee investigates, reports and moves on eligibility, moves against confirmation or supports confirmation or against discharge or supports discharge; all of those are things that the Sub V trustee can also do. Every time I look at something and I say, "You know what, I think I should object to discharge here," or "I should object to the plan," or "I should move to dismiss this case," I contact the U.S. trustee first. They want me to consult about it, they want me to say something about it, but 99% of the time, they're like "No, no, don't run up fees on this, we'll do it." Really, I think their bent has been to limit the role as much as possible to keep the fees low.

Another source, I think, has been fellow trustees. We rely on each other to gut check things, as long as it's not about a case in which we're involved. We have a good source of very smart lawyers who are doing the same thing and have a perspective about those things. So eventually, I think that brain trust sort of congealed and we figured out what we're supposed to be doing here.

Are there any common misconceptions about what a Subchapter V trustee does?

Yeah. Mostly from the body of creditors. I get calls, and the IRS still sends me bills, thinking that I am a Chapter 11 trustee in possession. A creditor will call me and say, "Hey, you haven't paid me on X, I need you to pay me for the stuff I delivered to you last week." And I have to say, "Really sorry, I'm not that kind of trustee. Let me put you in touch with the debtor or the debtor's counsel."

One of my [Section]1183 duties is to provide information about the case, so I'm happy to provide anybody with information about the case. If they've got some juicy information or if they have a

legitimate concern or inquiry — somebody hasn't paid a bill for so long, they're running up expenses that are not in monthly operating reports, big red flags — call me, I'm happy to deal with it. But when they want me to pay them, or provide a plan payment to them, or treat them a certain way, I can't help them. I can communicate that to the debtor.

As a Subchapter V trustee, you facilitate consensus among parties, but you can't mediate. What are the differences between a trustee's facilitation and a mediation?

I can't think of another role in the law that's like this. A mediator, paid or unpaid, they're true neutrals. They stay out of it. If you don't settle, you never see them again. That's what you think of when you think of mediation. The U.S. trustee balked at the word mediation. They said I wasn't allowed to mediate.

The idea that I am a neutral [as a facilitator] is still there, but I could become non-neutral pretty quickly. If I think you, as a secured creditor, are not entitled to what you're asking for — maybe your security interest is not perfected, maybe you're perfectly adequately protected and you don't need all that stuff that you're demanding — I can show up and oppose what you're asking for. If you don't need relief from stay, I can show up and oppose what you want. I have a cudgel I can smack one of those secured creditors with if they're not settling on reasonable terms in the mediation, and likewise with the debtor.

I'm there to support and help them reorganize, but if they're not going to negotiate in good faith, or provide treatment in the plan that I think passes muster under the Bankruptcy Code, I can object to their plan. I feel like in a way it's a much more powerful position to get people to settle. In mediation, I can walk into both parties' rooms and tell them, "You need to make some concessions here." I think that that gets parties to yes a lot faster.

What are best practices for debtors working with a Subchapter V trustee?

Have at least a monthly check in call with me and keep me informed. If you are sending stuff to the U.S. trustee — like, "I need to produce insurance coverage or other documents," "I'm going to misbudget this month because of X," or "We had a disaster or something didn't work out" — I don't want to read about it for the first time in the monthly operating report and say, "Hey, how come you didn't bring this to my attention?"

Communicate so much with the Sub V trustee. If you formulate a plan, check in with me. Just say, "Hey, is this something that you think we should confirm? Do you want to have comments on the form of the plan?" Just a lot of communication.

Are there any common pitfalls debtors might run into working with a Subchapter V trustee?

This is not always true, but I would say that the court is going to give a lot of credence to what the Subchapter V trustee says because the Subchapter V trustee is observing, monitoring and talking with the parties every day. If the Sub V trustee shows up and opposes confirmation, you probably ain't getting there.

Try to get the Sub V trustee on board. Don't antagonize the Sub V trustee by saying, "You don't matter," or "You don't have a role," or "You're not a real party in interest." If you are not listening to his or her suggestions and making reasonable changes, you could get crosswise with them and they could oppose [the plan].

Are there any new and emerging issues around Subchapter V trustees?

I think that there's a lot of ambiguity, and if there were a really contentious case, I don't know how things would shake out. I don't know what would happen if the court were to decide the debtor needs to be out of possession and the Sub V trustee is now in possession. What am I supposed to do with that case? I'm not allowed to propose a plan. Under Subchapter V, the debtor is the only person who

can propose a plan. What's the goal at that point? Do I seek dismissal? Do I want to convert it? Our district [in Utah] has looked at [such cases] as an untenable situation in advance and has mostly just converted them to Chapter 7s. But what if it's a clear reorganization? Do I need to try and rehabilitate the debtor then and put them back into possession so they can confirm a plan? Who knows what that's going to be like.

An interesting issue, which I wouldn't say is solved, but a practice going around now [is] if you file a Subchapter V case and it's really shaky — you don't have enough cash and maybe you're going to be able to pay your admin expenses — can the Subchapter V trustee request and the court require the debtor to pay the Subchapter V trustee a retainer? That's been the practice in Denver and it's been a practice in Florida and a couple other cases. We're trying it out here and we're going to see what happens. I'm not the trustee in that case, but I'm fully supportive because this case is shaky, and [the trustee is] not going to get paid [if a plan isn't confirmed].

I think the last thing is the trustee's ability or need to hire professionals. There was one case saying that there's no authority in the Bankruptcy Code for the Subchapter V trustee to hire professionals, but what if you really need to and you make a case to the court?

--Additional reporting by Rick Archer. Editing by Alanna Weissman.