

# When Does a Subchapter V Trustee Have to Ask the Bankruptcy Court for Permission (or Risk Having to Beg It for Forgiveness)?

By Sam Della Fera, Jr., Esq.,  
Chiesa Shahinian & Giantomasi PC,  
Roseland, New Jersey  
and Gregory K. Jones, Esq.,  
Stradling Yocca Carlson &  
Rauth LLP, Los Angeles, California

**L**ike other bankruptcy trustees, small business bankruptcy trustees appointed under Subchapter V of Title 11, United States Code (the “Bankruptcy Code” or Code”) have certain, mandatory statutory duties. These are found in Code section 1183(b) and include (i) performing the duties applicable to chapter 7 trustees in Code section 704(a)(2), (5), (6), (7), and (9); (ii) appearing and being heard at the status conference required by Code section 1188 and any other hearing concerning (a) the value of collateral, (b) plan confirmation, (c) post-confirmation plan modification, or (d) the sale of estate property; (iii) “ensur[ing] that the debtor commences making timely payments” under a confirmed plan; (iv)

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“if there is a domestic support obligation with respect to the debtor, perform the duties specified in [Code] section 704(c); and (v) facilitating “the development of consensual plan of reorganization.”

The Bankruptcy Code also provides that a Subchapter V trustee may perform certain duties of a trustee appointed in a standard chapter 11 case, but only if “the court, for cause and on request of a party in interest, the trustee, of the United States trustee, so orders.” 11 U.S.C. § 1183(b)(2). These duties are specified in Code sections 1106(a)(3) (“investigate the acts, conduct, 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 formation of a plan”), 1106(a)(4) (file with the court and transmit to certain parties “a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetency, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate”), and 1106(a)(7) (“after confirmation of a plan, file such reports as are necessary or as the court orders”).

### Guidance from the Office of the United States Trustee

Beyond the Bankruptcy Code, the United States Trustee’s *Handbook for Small Business Chapter 11 Subchapter V Trustees* (February 2020) (the “UST Sub V Handbook”) identifies certain other actions that require, or that a Subchapter V trustee may only undertake, subject to bankruptcy court approval. These include (i) recovering appropriate portions of the trustee’s bond or blanket bond premium as an administrative expense in the cases that the trustee administers (see UST Sub V Handbook, Chapter 2.E, page 2-3), (ii) employing and paying professionals (see UST Sub V Handbook, Chapter 3.K.1, page 3-17; and Chapter 3.K.3, page 3-18), (iii) paying the trustee’s fees (see UST Sub V Handbook, Chapter 3.L.1, page 3-22), and (iv) recovering the costs of the trustee’s statutory duty under Code sections 1183(b)(1) and 704(A)(7) to provide information to parties in interest (see UST Sub V Handbook, Chapter 4.E, page 4-6).

Neither Congress nor the Office of the United States Trustee, however, could have envisioned all the eventual scenarios in which a Subchapter V trustee might have to take action. Following is an analysis of circumstances where Subchapter V trustees have sought, or should consider seeking, bankruptcy court approval with respect to certain actions.

### Expansion of a Subchapter V Trustee’s Powers

Bankruptcy Code section 1185(a) provides that “[o]n request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross

mismanagement of the affairs of the debtor.” If a bankruptcy court finds that removal of the debtor is appropriate, Code section 1183(b)(5) requires the Subchapter V trustee to perform the duties specified in sections 704(a)(8) and 1106(a)(1), (2), and (6), including “operat[ing] the business of the debtor.”

Upon taking possession of the debtor’s estate, a Subchapter V trustee’s expanded duties are set forth in several Bankruptcy Code sections. First, section 704(a)(8) (Duties of Chapter 7 Trustee) directs the debtor or trustee to file applicable periodic reports and summaries of a debtor’s business. Section 1106(a)(1) (Duties of Chapter 11 Trustee and Examiner) states that a trustee “shall perform the duties... specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a).” These sections address the following issues:

- §704(a)(2) – be accountable for all property received;
- §704(a)(5) – if a purpose would be served, examine proofs of claim and object to the allowance of any claim that is improper;
- §704(a)(7) – furnish information concerning the estate and the estate’s administration as is requested by a party in interest;
- §704(a)(8) – filing of reports and summaries of a debtor’s business;
- §704(a)(9) – make a final report and file a final account of the administration of the estate with the Court and U.S. Trustee;
- §704(a)(10) – if there is a domestic support obligation claim, provide applicable notice pursuant to section 704(c);
- §704(a)(11) – continue to perform ERISA benefit plans, if applicable; and
- §704(a)(12) – transfer patients from a health care business that is closing, if applicable.

Bankruptcy Code section 1106(a)(2) states that a trustee shall prepare the section 521(a)(1) statement if the debtor has not done so. Finally, section 1106(a)(6) provides that a trustee shall furnish information required by governmental units relating to tax records.

As set forth above, a Subchapter V trustee in possession of a debtor’s business must consider and comply with various additional Code provisions. Notably, at this point in the case, creditors likely are dissatisfied with the debtor’s actions as a debtor in possession, and the trustee may wish to take a bigger role in the reorganization process. As described below, however, a Subchapter V trustee in possession is limited by statute in what she or he can accomplish. Is the bankruptcy court able to help by ordering certain relief?

### A. Operation of the Debtor’s Business

When a Subchapter V debtor is removed from possession, the most critical issue facing the trustee is to stabilize the day-to-day operations of the debtor. Section 1183(b)(5) duties specifically states that the trustee shall be responsible for “operating the business of the debtor.”

As the person stepping into the debtor’s shoes, courts have held that the Subchapter V trustee should be given the same ability as a debtor to take actions in the ordinary course of business, and to request court authority for actions outside of the ordinary course of business. One bankruptcy court recently

### About the Authors



**Sam Della Fera, Jr.**, as Chair of CSG Law’s bankruptcy and creditors’ rights group, Sam serves as a Subchapter V trustee in the District of New Jersey.

**Gregory K. Jones** is a partner with Stradling Yocca Carlson & Rauth LLP in Los Angeles, Greg serves

as a Subchapter V trustee in the Central District of California.

stated that trustees not in possession of the debtor’s assets can utilize Bankruptcy Code section 363(b):

“With exceptions not applicable here, chapter 3 of the Bankruptcy Code applies to causes under chapter 11. Under section 363(b), a ‘trustee, after notice and a hearing, may use . . . other than in the ordinary course of business . . . property of the estate.’ By its plain and express language, section 363(b) of the Bankruptcy Code is available to trustees. The Subchapter V Trustee is a trustee under the Bankruptcy Code and may move for relief under section 363(b).”

*In re Roe*, 2024 Bankr. LEXIS 129, \*4 (Bankr. D. Ore. 2024). The *Roe* court went further and addressed potential arguments to the contrary:

“Some may question whether section 1184 divests a subchapter V trustee from the power to use section 363(b). It does not. Section 1184 provides that the debtor in possession ‘shall have all the rights . . . and powers, and shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter.’ However, section 1184 does not say that the debtor in possession has exclusive access to the rights and powers under the Bankruptcy Code.”

*In re Roe*, 2024 Bankr. LEXIS 120 (Bankr. D. Ore. 2024)

Hence, upon taking possession of a debtor’s assets, the trustee may utilize section 363(b) and engage in acts in the ordinary course of business and/or ask the Bankruptcy Court for permission to take actions outside the ordinary course of business, if such action meets the business judgment standard. This view of the provisions of Subchapter V of the Code allows for a smooth transition from the debtor to the trustee.

## B. Asset Sale/Liquidation

While a Subchapter V trustee in possession is authorized to operate the debtor’s business, it appears unlikely that he or she can sell assets of the debtor’s estate. Bankruptcy Code section 1183(b)(5) specifically excludes section 704(a)(1) (collect and reduce to money the property of the estate) from the list of duties of the trustee in possession. Based upon that omission, a recent decision in the Eastern District of California expressed doubts about the trustee’s ability to sell assets. See *In re Pinnacle Foods of Cal. LLC*, 2025 Bankr. LEXIS 745 (Bankr. E.D. Cal. March 27, 2025).

In examining whether to place a trustee in possession of a debtor, the *Pinnacle* court examined the actions that a trustee could take. It noted that “[t]here is also at least a question as to the limits of any expanded power. The court then cited Code section 704(a)(1) and stated that “[n]otably absent in subchapter V is any reference to a subchapter V trustee having the power to liquidate assets parallel to the duty of a chapter 7 trustee.” *Pinnacle Foods*, 2025 Bankr. LEXIS, \*22. Ultimately, it is unlikely that a trustee in possession could ever sell the debtor’s assets. *But see*



*Coeptis Equity Fund LLC v. Hoskins (In re Coeptis Equity Fund LLC)*, 2022 Bankr. LEXIS 3524, 18-19 (9<sup>th</sup> Cir. BAP 2022) (unpublished) (affirming an order granting a subchapter V trustee’s fee application that included fees incurred in selling assets).

## C. Avoidance Actions

As a neutral party in possession of assets, a Subchapter V trustee would be an ideal person to determine if the estate should commence avoidance actions against third parties. However, the Bankruptcy Code does not grant such a trustee standing to file complaints on behalf of the debtor:

“None of the subchapter V trustee’s general duties authorize the Subchapter V trustee to pursue estate causes of action pursuant 11 U.S.C. section 1184. As such, the subchapter V [sic] lacks statutory standing to bring claims on behalf of the debtor.”

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because the underlying dispute arose from a dischargeable debt.” *Id.* at 552.

Before getting to the merits of the appeal, the Court rejected the State Bar arguments as to sovereign immunity and abstention. First, the Court held the “Eleventh Amendment sovereign immunity does not apply to the bankruptcy proceed-

ings,” and second, “[t]he bankruptcy Court did not need to abstain from ruling on Ms. Lacher’s motions.” *Id.* at 556 and 569, respectively (“The State Bar also argues that Ms. Lacher’s requested relief – the reinstatement of her law license – would run afoul of the *Younger* abstention doctrine. We again disagree.”).

The Court went on to hold “[t]he bankruptcy court properly determined that the discharge injunction did not bar the disciplinary proceedings and that those proceedings were not discriminatory under § 525(a). We discern no error and AFFIRM.” *Id.* at 552. 🏠

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*In re Turkey Leg Hut & Co., LLC*, 659 B.R. 539, 544 (Bankr. S.D. Tex. 2024); *see also Ghatanfard v. Zivkovic (In re Ghatanfard)*, 666 B.R. 14, 26 (S.D.N.Y. 2024) (“Debtor provides no authority for the proposition that a Subchapter V trustee can be empowered to pursue avoidance actions ...”). Given this inability to pursue avoidance actions, a court might be more willing to convert a case to chapter 7 rather than entering an order granting the Subchapter V trustee possession. *See In re DRTMG*, 2025 Bankr. LEXIS 718 (Bankr. S.D. Ohio 2025) (“The Trustee has also identified potential avoidance actions which he believes ought to be investigated. As a subchapter V trustee, he has been unable to fully investigate or pursue them, but a chapter 7 trustee can do so if there is value to be realized.”).

### D. Filing of Plan

Bankruptcy Code section 1189 makes clear that “[o]nly the debtor may file a plan under this subchapter.” A Subchapter V trustee in possession of the debtor’s assets remains responsible to “facilitate the development of a consensual plan of reorganization,” but cannot be the sole proponent of a plan. *See The Honorable Paul W. Bonapfel, “A Guide to the Small Business Reorganization Act of 2019,”* at 8 (“Only the sub V debtor may file a plan or a modification of it.”).

### Establishment of Interim Compensation/Fee Escrows

Bankruptcy Code section 330(a) allows a bankruptcy court to award compensation to Subchapter V trustees. Specifically, a court may allow trustees to obtain “reasonable compensation for actual, necessary services rendered” and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a). Accordingly, there is no limitation on compensation for Subchapter V trustees.

However, Subchapter V trustees often have different issues with obtaining payment from the debtor after a case concludes (either through plan confirmation, conversion, or dismissal). Indeed, even one court stated that administrative claims could only be satisfied through “a distribution from the bankruptcy estate. If there are no funds currently held by the Trustee, it is difficult to understand how this claim would be paid.” *In re Tri-State Roofing*, 2020 WL 7345741 (Bankr. D. Idaho 2020).

Accordingly, certain districts have created Local Rules to provide fee escrows for Subchapter V trustees upon request. *See, e.g., Local Bankruptcy Rule 2016-1(e)*, Central District of California (“At any status conference the court may rule on any request of the Subchapter V Trustee to order a retainer or any other proposed assurance that the trustee will be paid any allowed fees and expenses.”); Case Management Order Regarding Procedures in

Chapter 11 Subchapter V Case, Scheduling Case Conference, and Setting Deadlines for Filing Plan,” December, 2023, Western District of New York; “General Order Establishing An Initial Deposit Requirement for Cases Filed Subchapter V of Chapter 11,” dated November 17, 2021, Southern District of West Virginia (providing that debtor must “tender to Subchapter V Trustee the sum of one thousand dollars... [the] Trustee must hold these funds in escrow for the purpose of providing a source of funds from which the Subchapter V Trustee may receive compensation...”).

Absent such a local rule in a particular district, the Subchapter V trustee would be wise to seek similar relief from the bankruptcy court at the outset of the case.

### Requiring the Debtor to Prepare a Disclosure Statement

Bankruptcy Code section 1181 sets forth the portions of the Bankruptcy Code that are inapplicable to Subchapter V cases. Among other things, section 1181(b) provides that “[u]nless the court for cause orders otherwise... [section] 1125 of this title do[es] not apply in a case under this subchapter.” Hence, disclosure statements are not necessary in a Subchapter V case, unless the court “for cause” enters otherwise. *See, e.g., In re Najar Trucking Inc.*, 2025 Bankr LEXIS 108, \*10 (Bankr D. Nev. 2025) (overruling confirmation objections based on a lack of alleged adequate information because “neither the disclosure requirement nor the adequate information requirement under Section 1125(a) (1) apply in a subchapter V proceeding unless otherwise ordered by the court”).

Given that the primary goal of a Subchapter V proceeding is to preserve fees and costs, it would be a rare case where a Subchapter V trustee would request a disclosure statement. However, such a request is an option for the Subchapter V trustee in a particularly complicated case, or when creditors may be less sophisticated than in the typical chapter 11 case.

### Conclusion

Although Subchapter V trustees are largely bound by the express limitations imposed upon them by the Bankruptcy Code and the United States Trustee’s guidelines, they are not entirely without opportunity to request court authority for certain actions, particularly where the trustee is in possession of the debtor’s estate and/or operating the debtor’s business. The authors hope that as lessons continue to be learned in Subchapter V cases, both Congress and the United States Trustee’s Office will modify applicable law and guidance to permit Subchapter V trustees to act more expansively and creatively for the benefit of creditors, as well as for the small business debtors themselves. 🏠

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