



AMERICAN
BANKRUPTCY
INSTITUTE

Alexander L. Paskay Memorial Bankruptcy Seminar

Trustees Come in All Shapes and Sizes

Michael R. Bakst

Greenspoon Marder LLP | West Palm Beach

Hon. Tiffany Payne Geyer

U.S. Bankruptcy Court (M.D. Fla.) | Orlando

Amy Denton Mayer

Stichter, Riedel, Blain & Postler, P.A. | Tampa

Douglas W. Neway

Office of the Chapter 13 Trustee | Jacksonville

Eric J. Silver

Stearns Weaver Miller Weissler Alhadeff & Sitterson | Miami

2025 Alexander L. Paskay Memorial Bankruptcy Seminar

Trustees Come in All Shapes and Sizes

The **United States Trustee Program (USTP)**, created under **28 U.S. Code § 586**, is part of the U.S. Department of Justice. It ensures the integrity and efficiency of the federal bankruptcy system by performing the following key functions:

1. **Monitoring:** The USTP oversees the conduct of bankruptcy parties, including debtors, creditors, and private estate trustees, and specifically monitors debtor-in-possession operations in Chapter 11 cases.
2. **Civil and Criminal Enforcement:**
 - **Criminal:** The USTP investigates bankruptcy fraud and works with law enforcement to prosecute crimes, including referrals to U.S. Attorneys' offices.
 - **Civil:** The USTP pursues actions against fraudulent debtors, lawyers, professionals, and petition preparers engaged in misconduct or violating the Bankruptcy Code.
3. **Appointing and Supervising Trustees:** The USTP appoints and oversees more than 1,000 private trustees for **Chapter 7 (liquidation)**, **Chapter 12 (debt adjustment for farmers/fishermen)**, and **Chapter 13 (individual debt adjustment)** cases, as well as about 250 trustees for small business cases under **Subchapter V of Chapter 11**.
4. **Facilitating Access to Justice:** The USTP works to reduce barriers for debtors, such as providing interpreters and virtual meetings, ensuring that individuals can access bankruptcy relief without unnecessary obstacles.
5. **Protecting Interests and Promoting Integrity:** As the "watchdog" of the bankruptcy system, the USTP ensures fairness for all stakeholders (debtors, creditors, and the public). It has the authority to raise and appear on any issue in bankruptcy cases and plays a role in shaping legal interpretations.

USTP Bankruptcy Code Sections

- **28 U.S.C. § 586 – Powers of the U.S. Trustee:** Gives the U.S. Trustee the authority to supervise the administration of bankruptcy cases, appoint trustees, and monitor bankruptcy filings. Grants the U.S. Trustee authority to supervise bankruptcy cases, appoint trustees (for Chapters 7, 12, 11, and 13), and monitor filings. It also gives the U.S. Trustee authority to investigate fraud and misconduct and to take action against improper conduct in the bankruptcy process.

- **Section 581 – United States Trustee Program** (establishes the role of the UST office)
 - This section outlines the UST's authority, functions, and responsibilities in overseeing the bankruptcy process.
- **Section 307– United States Trustee:**
 - The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.
- **Section 1104 – Appointment of Trustee:**
 - While this section primarily addresses the appointment of a trustee (including when a Chapter 11 trustee is needed), the UST has the authority to move for the appointment of a trustee if necessary (e.g., when a debtor-in-possession is failing to act in the best interest of creditors).
- **Section 1112 – Conversion or Dismissal:**
 - The UST has the authority to move for conversion (from one chapter to another) or dismissal of the case.
- **Section 1115 – Definition of "Post-petition Property":**
 - The UST is involved in ensuring that the debtor complies with requirements related to post-petition property, including in Chapter 11 and Subchapter V cases.
- **Section 1123 – Contents of Plan:**
 - The UST's role in Chapter 11 cases includes monitoring the development and confirmation of the reorganization plan, particularly ensuring the plan complies with statutory requirements and the best interest of the creditors and bankruptcy estate are being met.
- **Section 1183 – Subchapter V Trustee:**
 - The UST oversees Subchapter V of Chapter 11 and is involved in appointing a Subchapter V trustee to facilitate the streamlined bankruptcy process.
- **Section 1184 – Subchapter V Plan:**
 - The UST plays a role in ensuring the confirmation of the plan in a Subchapter V case, helping guide the process of debtor repayment to creditors.

Chapter 7 Trustee (Liquidation)

- **Section 701: Appointment of Trustee** – This section governs the appointment of a Chapter 7 trustee. Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 or that is serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.
- **Section 704: Duties of Chapter 7 Trustees – (See below for complete section)**
 - This section outlines the specific duties of a Chapter 7 trustee, including investigating the debtor’s financial condition, reducing the estate to cash, and distributing the proceeds. Further it sets out filing deadlines and actions the Trustee must take if deadlines are not properly met and if 707(b) applies. As well as the Trustee’s duties when pertaining to domestic support obligations and duties when a discharge under section 727 is granted.
- **Section 726: Distribution of Estate** – Trustees must distribute the proceeds of the estate to creditors in accordance with the priority schedule outlined in the Bankruptcy Code.

Chapter 13 Trustee (Reorganization)

- **Section 1302: Appointment and Powers of the Chapter 13 Trustee** – If the United States trustee appoints an individual under section 586(b) of title 28 to serve as standing trustee in cases under this chapter and if such individual qualifies under section 322 of this title, then such individual shall serve as trustee in the case. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as a trustee in the case.
 - Chapter 13 trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1302(b).
 - **Section 704 applies through this section see below**
 - Section 1302(b)(2): also requires the Trustee to appear at any hearings that concerns:
 - The value of the of property subject to a lien
 - Confirmation of a plan or;

- Modification of the plan after confirmation.
- (3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act;
- (4) advise, other than on legal matters, and assist the debtor in performance under the plan;
- (5) ensure that the debtor commences making timely payments under section 1326 of this title; and
- (6) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).
- (c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections **1106(a)(3) and 1106(a)(4)** of this title.
- Section 1302(d): the Trustee's duties when pertaining to domestic support obligations and duties when a discharge under section 1328 is granted
- **Section 1307(c): Grounds for dismissal or conversion** - The trustee may file a motion for dismissal or conversion of the case in the best interest of the creditors and the estate.
- **Section 1325: Confirmation of Plan** – The trustee reviews the plan to ensure it meets all the requirements of the bankruptcy code and informs the court if they recommend confirmation to assist the court in making the ultimate decision.
- **Section 1326: Payments** - If the court confirms the plan, the chapter 13 trustee will distribute funds received under the plan as soon as is practicable.
 - If the court declines to confirm the plan or the modified plan and instead dismisses the case, the court may authorize the trustee to keep some funds for costs, but the trustee must return all remaining funds to the debtor (other than funds already disbursed or due to creditors).
- **Section 1328: Discharge** - Once the debtor has completed the plan, the trustee ensures that the debtor receives a discharge of debts that are eligible for discharge and recommends case closure.
- **Section 1329: Modification of the plan after confirmation** - At any time after confirmation of the plan but before the completion of payments under such plan,

the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim.

Chapter 12 Trustee (Family Farmers/Fishermen Reorganization)

- **Section 1202 – Appointment of Trustee** – A trustee is appointed for family farmers or fishermen and plays a similar role to the Chapter 13 trustee, but with special provisions related to agricultural debtors.
 - **Section 704 applies through this section see below**
 - Additionally, this section all directs the Trustee to perform the duties specified in section **1106(a)(3) and 1106(a)(4);**
 - Section 1202(b)(3): also requires the Trustee to appear at any hearings that concerns:
 - The value of the of property
 - Confirmation of a plan
 - Modification of the plan after confirmation; or
 - The sale of property of the estate;
 - **Section 1202(4):** requires the Trustee to ensure that the debtor commences making timely payments required by a confirmed plan;
 - **Section 1202(5):** requires the Trustee to perform the duties of the DIP; if the debtor ceases to be a debtor in possession, perform the duties specified in sections **704(a)(8), 1106(a)(1), 1106(a)(2), 1106(a)(6), 1106(a)(7),** and 1203;
 - **Section 1202(6):** the Trustee’s duties when pertaining to domestic support obligations and duties when a discharge under section 1228 is granted
- **Section 1203 – Powers and Duties of the Chapter 12 Trustee** – Trustees have powers to review the debtor’s repayment plan, manage payments to creditors, and report on the debtor’s compliance with bankruptcy requirements.
- **Section 1225 – Plan Confirmation** – The trustee reviews the plan to ensure it meets all the requirements of the bankruptcy code and either recommends or does not recommend confirmation of the plan to the court.
- **Section 1226: Payments to the trustee** - Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in

accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deductions allowed under the code.

- **Section 1228: Discharge** - Once the debtor has completed the plan, the trustee ensures that the debtor receives a discharge of debts that are eligible for discharge and recommends case closure.
- **Section 1229: Modification of plan after confirmation** - At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim.

Chapter 11 Trustee (Reorganization)

- **Section 1104 – Appointment of Trustee** – At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee.
 - For cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor [...]
- **Section 1106 – Duties of the Trustee** – If a Chapter 11 trustee is appointed, they have a duty to manage the debtor’s estate, including business operations, under court supervision. The trustee works on behalf of creditors and must ensure fair treatment of all stakeholders.
 - **Section 704 applies through this section see below**
 - **Section 1106(a)(2)** if the debtor has not done so, file the list, schedule, and statement required under section **521(a)(1)** of this title;
 - (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;
 - (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;
 - (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;
 - (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 be filed, in light of the condition of the debtor's books and records and the availability of such information;
 - (7) after confirmation of a plan, file such reports as are necessary or as the court orders; and
 - (8) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c).
- (b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.
- Section 1106(c): the Trustee's duties when pertaining to domestic support obligations and duties when a discharge under section 1141 is granted
- **Section 1111 – Claims and Interest** - The trustee reviews the claims of creditors, ensuring they are legitimate and properly classified.
 - **Section 1116** – Duties of Trustee or Debtor in Possession in Small Business Cases
 - In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall—
 - (1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief—

- (A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or
 - (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;
- (2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances;
- (3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;
- (4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;
- (5) subject to section 363(c)(2), maintain insurance customary and appropriate to the industry;
- (6)
 - (A) timely file tax returns and other required government filings; and
 - (B) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and
- (7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.
- **Section 1121 – Who May File a Plan**– In most Chapter 11 cases, the debtor remains in control of the business and acts as debtor-in-possession (DIP), but if a trustee is appointed, that trustee may file a plan.
- **Section 1129 – Confirmation of Plan** – The trustee ensures that creditors are paid according to the terms of the confirmed plan and that payments are properly allocated.

- **Section 1141- Effect of confirmation** - The trustee ensures that once the plan is confirmed and fully executed, the debtor receives a final decree or a discharge of remaining debts and the case is closed.

Subchapter V Trustee (Small Business Reorganization in Chapter 11)

- **Section 1183** – If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.
 - **Duties Section 1183(b)**
 - The trustee shall—
 - (1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section **704(a)** of this title;
 - (2) perform the duties specified in paragraphs (3), (4), and (7) of section **1106(a)** 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;
 - (3) 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;
 - (4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;
 - (5) if the debtor ceases to be a debtor in possession—
 - (A) perform the duties specified in section **704(a)(8)** and paragraphs (1), (2), and (6) of section **1106(a)** of this title; and
 - (B) be authorized to operate the business of the debtor;

- (6) 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; and
- (7) facilitate the development of a consensual plan of reorganization.
- (c) Termination of Trustee Service.—
 - (1) In general.—
 - If the plan of the debtor is confirmed under section 1191(a) of this title, the service of the trustee in the case shall terminate when the plan has been substantially consummated, except that the United States trustee may reappoint a trustee as needed for performance of duties under subsection (b)(3)(C) of this section and section 1185(a) of this title.
 - (2) Service of notice of substantial consummation.—
 - Not later than 14 days after the plan of the debtor is substantially consummated, the debtor shall file with the court and serve on the trustee, the United States trustee, and all parties in interest notice of such substantial consummation.
- **Section 1184 – Trustee’s Role in Plan Confirmation** – The trustee helps the small business debtor (DIP) develop and confirm the reorganization plan, assisting with negotiations between creditors and the debtor.
- **Section 1190 - Confirmation of the plan** - The trustee monitors whether the debtor’s plan can be confirmed under the rules of Subchapter V and ensures it is feasible and meets the requirements of the Bankruptcy Code.
- **Section 1194– Payments-** Confirmation of the plan and distributions. Once the plan is confirmed, the trustee ensures that creditors are paid under the plan’s terms.

Subchapter V of Chapter 11

Under Subchapter V of Chapter 11, a trustee is mandatory in small business cases. In these cases, the Subchapter V trustee does not replace the debtor-in-possession but rather plays a more limited role. The Subchapter V trustee’s duties include:

- **Facilitating the Reorganization Process:** The Subchapter V trustee helps facilitate the debtor's efforts to create a reorganization plan, but the debtor remains in possession and control of the business.
- **Acting as a Mediator:** The trustee helps mediate between the debtor and creditors to create a feasible plan of reorganization.
- **Monitoring the Case:** The trustee ensures that the debtor is complying with the requirements of Subchapter V and submits progress reports to the court.

Common Duties

Section 704(a) – General Duties of a Trustee

Section 704(a)(3) of the U.S. Bankruptcy Code outlines the duties of a trustee in a bankruptcy case. Section 704(a)(3) requires that the trustee ensure that the debtor shall perform such other duties as are required by this title under section 521(a)(2)(B) of this title in Chapters 7, 12 and 13. In Chapter 11 and Sub V cases similar trustee duties are given through section **1106(6)(a)** and includes in this section **521(a)(1)** to be applicable as well.

Section 704 is applicable to through the following:

Section 1106(a)(1): perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a);

Section 1183(b)(1): perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;

Section 1202(b)(1): perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title;

Section 1302(b)(1): perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(4), 704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title;

Section 704 in full:

- **704(a)(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;
- **704(a)(2):** be accountable for all property received;
- **704(a)(3):** ensure that the debtor shall perform his intention as specified in section **521(a)(2)(B)** of this title;
- **704(a)(4):** investigate the financial affairs of the debtor;

- **704(a)(5):** if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
- **704(a)(6):** if advisable, oppose the discharge of the debtor;
- **704(a)(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;
- **704(a)(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;
- **704(a)(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;
- **704(a)(10):** if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);
- **704(a)(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
- **704(a)(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.

General Bankruptcy Provisions Regarding the Administration of Estates

- **Section 501: Filing of Claims** – Creditors must file claims to participate in distributions from the estate. Trustees are responsible for reviewing, verifying, and objecting to claims as necessary.
- **Section 502: Allowance of Claims** – A trustee must determine whether claims are allowable based on whether they are timely filed and meet the necessary legal standards.
- **Section 503: Allowance of Administrative Expenses** – This section details administrative expenses, such as trustee fees and legal costs, which must be allowed and paid from the estate.
- **Section 504: Compensation of Trustees** – Trustees are entitled to compensation for services rendered, often based on the amount of funds distributed in the case, subject to court approval.
- **Section 507: Priorities of Claims** – This section defines the order in which claims are to be paid, with certain claims, like administrative expenses, priority claims, secured claims and unsecured claims etc..
- **Section 341: Meeting of creditors** -Trustees in all chapters (7, 11, 13, 12, Sub V) are involved in conducting or overseeing the meeting of creditors, where the debtor is questioned about their financial affairs.
- **Section 361: Adequate protection** - requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;[...]
- **Section 523 – Exceptions to discharge** - Trustees may need to object to discharge under certain circumstances if fraud or misconduct is discovered.
- **Section 521 – Debtor's Duties** - Some Sections Apply to Each Chapter See Above
 - (a)The debtor shall—
 - (1) file—
 - (A) a list of creditors; and
 - (B) unless the court orders otherwise—

- (i) a schedule of assets and liabilities;
 - (ii) a schedule of current income and current expenditures;
 - (iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—
 - (I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or
 - (II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;
 - (iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;
 - (v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and
 - (vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;
- (2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
- (A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property,

or that the debtor intends to reaffirm debts secured by such property;
and

- (B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;
 - except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);
- (3) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;
- (4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;
- (5) appear at the hearing required under section 524(d) of this title;
- (6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—
 - (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
 - (B) redeems such property from the security interest pursuant to section 722; and
- (7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

- If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.
- (b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—
 - (1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and
 - (2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).
- (c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986), an interest in an account in a qualified ABLE program (as defined in section 529A(b) of such Code,[1] or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).
- (d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise avoidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this

subsection shall be deemed to justify limiting such a provision in any other circumstance.

- (e)
 - (1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.
 - (2)
 - (A) The debtor shall provide—
 - (i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and
 - (ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.
 - (B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.
 - (C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.
- (3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

- (A) at a reasonable cost; and
- (B) not later than 7 days after such request is filed.
- (f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—
 - (1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;
 - (2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;
 - (3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and
 - (4) in a case under chapter 13—
 - (A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and
 - (B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;
 - a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.
- (g)

- (1) A statement referred to in subsection (f)(4) shall disclose—
 - (A) the amount and sources of the income of the debtor;
 - (B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and
 - (C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.
- (2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
- (h) If requested by the United States trustee or by the trustee, the debtor shall provide—
 - (1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or
 - (2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.
- (i)
 - (1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.
 - (2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request.
 - (3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in

paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

- (4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.
- (j)
 - (1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.
 - (2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.
- **Section 542: Turnover of Property** - Requires turnover of property to the trustee from the debtor or third parties (e.g., financial institutions or other custodians). Trustee takes possession of any property of the estate from the debtor or third parties (e.g., bank accounts, property, and personal assets) to be liquidated for creditors.
- **Section 544: Trustee's Avoidance Powers (Fraudulent Transfers and Preferences)** - Trustee may investigate the debtor's financial transactions and recover any property transferred within a certain period before the filing date if those transfers are deemed fraudulent or preferential (e.g., favoring one creditor over others).
- **Section 547: Preferences** - Enables the trustee to avoid preferential payments made to creditors within a specified time before filing. Trustee can recover

preferential payments made within 90 days prior to the petition date to prevent certain creditors from being favored over others in the distribution process.

- **Section 548: Fraudulent Transfers** - Allows the trustee to **avoid fraudulent transfers** made by the debtor within two years of the filing date. Trustee has the power to investigate and undo transfers made with the intent to defraud creditors, such as hiding assets or giving away property for less than its value.
- **Section 503:** Allowance of Administrative Expenses. Trustees oversee the approval of administrative expenses.
- **Section 504:** Limitation on Professional Compensation. Trustees ensure that the compensation of professionals (e.g., attorneys) is reasonable and follows statutory limits.
- **Section 507:** Priorities of Claims. Trustees ensure claims are prioritized according to the code.
- **Section 522:** Exemptions. Trustees evaluate whether the debtor has correctly claimed exemptions.
- **Section 350: Closing of case-** The trustee files a final report and the case is closed after the debtor completes all required obligations.
- **Section 361: Adequate protection** - Trustee ensures adequate protection of creditor interests in reorganization cases, relevant in Chapter 11, Sub V, and sometimes Chapter 13.

How to Effectively Utilize the Subchapter V Trustee to Make Your Subchapter V Case Magical: The Statutory Role of the Subchapter V Trustee, the Subchapter V Trustee as Facilitator/Mediator, and Other Ways to Effectively Utilize the Subchapter V Trustee



SRBP STICHTER, RIEDEL, BLAIN & POSTLER, P.A.

Amy Denton Mayer, Shareholder

With Contributions From **Daniel R. Fogarty**,
Shareholder

110 E. Madison Street, Suite 220

Tampa, Florida 33602

Telephone: (813) 229-0144

Direct Dial: (813) 569-0924

Cell: (727) 808-3380

Table of Contents

1. Role of the Subchapter V Trustee	3
2. Facilitation Role is Most Important and is Unique	7
3. Always Disinterested, Sometimes Neutral.....	9
4. Facilitator is De Facto Mediator or Mediator-Like	11
5. Not a Mediator	13
6. Encouraging Candid Communications with the Trustee	16
7. Other Ways to Effectively Utilize the Subchapter V Trustee.....	18

1. Role of the Subchapter V Trustee

On March 27, 2020, the Small Business Reorganization Act of 2019 (as subsequently amended) (the “**SBRA**”) was enacted. *See* 11 U.S.C. § 1181 et. seq. (“**Subchapter V**”). It added Subchapter V to Chapter 11 of the Bankruptcy Code to make the long and often winding and expensive road to confirmation of a plan in a small business bankruptcy case faster, cheaper, and easier. To be eligible to file a small business bankruptcy, a debtor must meet the following tests: (1) the debtor must be a person (individual, partnership, corporation) that is not subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 or an affiliate of a corporation described above¹, (2) the debtor must be engaged in commercial or business activities as of the filing, (3) the debtor must have total noncontingent liquidated secured and unsecured debts as of the filing of not more than \$7.5 million (excluding any debt owed to affiliates or insiders but including any debts of affiliated debtors), and (4) the debtor’s primary business activity cannot be owning single asset real estate. *See* 11 U.S.C. § 1182(1). In many ways, a Subchapter V case is no different than a traditional Chapter 11. Unlike traditional Chapter 11s, however, every Subchapter V case comes with a Subchapter V trustee. Each region or district typically has a pool of Subchapter V trustees who are appointed by the Office of the United States Trustee on a case-by-case basis.

Who is the subchapter V trustee? What is his or her role? Is the trustee a friend or a foe? The Subchapter V trustee is a fiduciary for the estate. Absent expansion of the trustee’s role upon an order of the court, the debtor remains in possession and the trustee’s duties are largely

¹ Section 1182(1)(B)(iii) was amended by the Bankruptcy Threshold Adjustment and Technical Corrections Act (enacted April 7, 2022). The previous version of the statute made any debtor that was an affiliate of an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c) ineligible for relief under Subchapter V.

supervisory in nature. In every case, the trustee is required to perform the statutory duties enumerated in § 1183(b)(1), (3), (4), (6), and (7). Section 1183(b)(1) incorporates by reference certain chapter 7 trustee duties as specified in § 704(a)(2), (5), (6), and (7), and (9). It requires the trustee to:

- Be accountable for all property received [§ 704(a)(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)].
- If advisable, oppose the discharge of the debtor [§ 704(a)(6)].
- 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)].
- 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)].

In every case, the Subchapter V trustee is required to appear and be heard at the status conference conducted under § 1188 and at any hearing that concerns the value of property subject to a lien, confirmation of a plan, modification of a plan after confirmation, or the sale of property of the estate. § 1183(b)(3). In cases involving domestic support obligations, the trustee is required to provide written notice to the holder of the claim in accordance with § 704(c). § 1183(b)(6). Unlike any other chapter of the Bankruptcy Code, in every Subchapter V case, the trustee is required to facilitate the development of a consensual plan of reorganization and to ensure that the debtor commences making timely payments required by any confirmed plan. § 1183(b)(7), (4), respectively.

The U.S. Department of Justice, Executive Office for United States Trustees has published a *Handbook for Small Business Chapter 11 Subchapter V Trustees*, which describes additional duties that the trustee is expected to perform in each Subchapter V case (as necessary and appropriate):

- Review initial case filings to determine whether the trustee has any connection to any parties in the case or conflicts; communicate any issues to the United States Trustee; in the absence of a conflict, prepare and transmit to the United States Trustee for filing with the court a written verification establishing the trustee's disinterestedness.
- Review the docket and case file (petition, creditor matrix, schedules, and statement of financial affairs, first day pleadings, debtor's 1116 statement and accompanying financial documents (i.e. balance sheet, statement of operations, cash-flow statement, and tax returns)).
- Review the debtor's books and records.
- Meet with the debtor and counsel.
- Attend the initial debtor interview.
- Review the monthly operating reports.
- Analyze the debtor's eligibility for relief under Subchapter V.
- Attend the § 341 meeting of creditors (and examine the debtor as appropriate).
- Review the debtor's pre-status conference report.
- Analyze the debtor's claim of exemptions; communicate any concerns to the debtor; object (as appropriate).
- Review and analyze the plan; communicate any concerns to the debtor; object (as appropriate).
- Review and analyze other pleadings filed by the debtor, creditors, the United States Trustee, and other parties in interest; communicate any concerns; take positions as appropriate.
- Facilitate resolution of contested matters and adversary proceedings.
- File a final report and account of the trustee's administration of the estate.
- Refer suspected violations of criminal law (i.e. bankruptcy crimes, bank fraud, mail fraud, wire fraud, and tax fraud) to the appropriate United States Attorney.
- Report to the United States Trustee the loss or potential loss of personally identifiable information.
- Follow certain banking and accounting practices to protect monies of the estate in the trustee's possession in accordance with the provisions of § 345.

- Obtain and maintain an appropriate trustee bond for each case administered as required under § 322.
- Submit monthly and annual reports to the United States Trustee.
- Maintain and preserve adequate records for the cases administered.

U.S. Department of Justice, Executive Office for United States Trustees, *Handbook for Small Business Chapter 11 Subchapter V Trustees*, February 2020 (“**Handbook**”), at Chapter 3.

Available at: www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download.

The trustee’s statutory duties can be expanded by the court without removing the debtor-in-possession upon the request of a party in interest, the trustee, or the United States Trustee. If so ordered by the court, the trustee is required to:

- 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)].
- File a statement of the investigation once completed, 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 transmit a copy or a summary to any creditors’ committee, equity security committee, indenture trustee, or such other entity as the court designates [§ 1106(a)(4)].
- File post-confirmation reports as necessary or as ordered by the court. [§ 1106(a)(7)].

If the debtor-in-possession is removed, the trustee’s duties can be expanded to include taking possession of property of the estate and operating the debtor’s business. § 1183(b)(5). If so ordered by the court, the trustee is required to:

- 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 [§704(a)(8)].
- 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)].

- File the schedules and statements of financial affairs required under § 521(a)(1) if the debtor has not filed them [§ 1106(2)].
- 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)].

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. *Handbook*, at 1-1.

2. Facilitation Role is Most Important and is Unique

Of all the duties, the Subchapter V trustee's statutory duty to facilitate the development of a consensual plan of reorganization is perhaps the most important role and is unique to Subchapter V. 11 U.S.C. § 1183(b)(7). Section 1183(b)(7) of the Bankruptcy Code provides that a principal duty of the trustee is to facilitate the development of a consensual plan of reorganization. *Handbook*, at 3-9. The Subchapter V trustee appointed in each case is tasked primarily with facilitating a consensual plan. *Handbook*, at 1-2. *See also, In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) ("The Subchapter V trustee's primary duty is to "facilitate the development of a consensual plan of reorganization.").

The facilitator role is a role not given to trustees under other chapters of the Bankruptcy Code. "The subchapter V trustee's special duty to 'facilitate the development of a consensual plan of reorganization' appears nowhere else in the Bankruptcy Code and is specific to subchapter V."

Id. See also, In re 218 Jackson LLC, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021) (“The subchapter V trustee is the *only* trustee directed to ‘facilitate the development of a consensual plan of reorganization’. This duty is assigned to no other trustee in bankruptcy. This distinction is significant.”)

“The subchapter V trustee, tasked primarily with facilitating consensual plans, occupies a unique position as contrasted with its counterparts in traditional chapter 11 and other cases, who tend to be adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors.” *Ozcelebi*, 639 B.R. at 381. “Traditionally, trustees tend to be adversarial to the debtor as a result of their duties in protecting the estate and creditors.” *218 Jackson LLC*, 631 B.R. at 947. “Chapter 7 trustees take possession of the estate’s property and dispose of or administer those assets in order to pay creditors.” *Id. See also, Ozcelebi*, 639 B.R. at 381 (“Chapter 7 trustees marshal and administer estate assets to pay creditors”). “This role typically puts a trustee in conflict with the debtor and sometimes creditors.” *218 Jackson*, 631 B.R. at 947. “A chapter 11 trustee, if one is appointed, similarly takes possession of estate assets for the purpose of liquidation, sale, or less frequently, a reorganization.” *Id. See also, Ozcelebi*, 639 B.R. at 381 (“Chapter 11 trustees take possession of estate assets and facilitate either a liquidation or a reorganization”). “A chapter 13 trustee similarly is gathering assets, but in the form of plan payments in order to distribute to creditors.” *218 Jackson*, 631 B.R. at 947. *See also, Ozcelebi*, 639 B.R. at 381 (“Chapter 13 trustees gather assets in the form of plan payments for distribution to creditors”). “A chapter 12 trustee is perhaps the most similar here—not taking possession of estate property and occupying a similar oversight role.” *218 Jackson*, 631 B.R. at 947. *See also, Ozcelebi*, 639 B.R. at 381 (“Chapter 12 trustees are perhaps the closest to subchapter V trustees because they occupy a similar role as overseer without taking possession of estate property unless directed to do so in

the administration of a confirmed chapter 12 plan of reorganization.”). “But even a chapter 12 trustee is not charged with *facilitation* of a consensual plan.” 218 *Jackson*, 631 B.R. at 947.

The Subchapter V trustee’s role was intentionally designed to be less adversarial. *Id.* Facilitation of a consensual plan requires the Subchapter V trustee to work with the parties—the creditors and debtor—to agree on a plan. *Id.* “The definition of facilitate is to ‘make the occurrence of (something) easier; to render less difficult.’” *Id.* (quoting *Black’s Law Dictionary* 734 (11th Ed. 2019)). As a result, the Subchapter V trustee acts more like a mediator than an adversary. *Id.* (quoting *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020)) (“A substantial part of the Subchapter V trustee’s pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors.”).

In performing this role, the Handbook provides the following guidance to Subchapter V trustees. As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and encourage communication between all parties in interest as the plan is developed. *Handbook*, at 3-4, 3-9. “The trustee should be proactive in communicating with the debtor and debtor’s counsel and with creditors, and in promoting and facilitating plan negotiations.” *Handbook*, at 3-9 “Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.” *Id.*

3. Always Disinterested, Sometimes Neutral

Under § 1183, where there is no standing Subchapter V trustee, the United States Trustee is directed to appoint a disinterested person to serve as trustee in the case. § 1183(a). A “disinterested person” is a person (not necessarily an individual) who is not a creditor, equity security holder, insider, officer, employee or other stakeholder in the debtor, and does not have an

interest materially adverse to the estate or any class of creditors or equity security holders. 11 U.S.C. § 101(14). In essence, the Subchapter V trustee must not have any pecuniary interest in the outcome of the case, or any conflicts of interest that might impair the trustee's ability to carry out his or her duties. *Handbook*, at 2-2. Prior to appointment in a case, the Subchapter V trustee is required to prepare and submit to the United States Trustee a verified statement of disinterestedness. *Id.* at 2-3. As a result, the trustee begins the appointment as disinterested and is required to notify the United States Trustee of any circumstances that develop during the course of the case that impair the trustee's disinterestedness.

Does the disinterestedness requirement also require the trustee to be neutral at all times? Black's Law Dictionary defines "neutral" as "not supporting any of the people or groups involved in an argument or disagreement; indifferent to the outcome of a dispute; refraining from taking sides in a dispute; impartial; unbiased." NEUTRAL, *Black's Law Dictionary* (11th ed. 2019). The trustee is an independent third party who must be fair and impartial to all parties in the case. *Handbook*, at 2-2. From this standpoint, the Subchapter V trustee appears uniquely positioned to serve as an impartial actor to facilitate not only a consensual confirmation but perhaps also resolution of other contested matters and adversary proceedings.

However, the trustee is also party in interest in the case, with standing to take positions on a myriad of issues including, without limitation, eligibility for Subchapter V relief, use of cash collateral, payment of prepetition wages, payment of affiliate officer salaries, maintenance of prepetition bank accounts, employment of professionals, exemptions, stay relief, assumption and rejection of leases and contracts, asset sales, plan confirmation, objections to claims, conversion, dismissal, and other contested matters and adversary proceedings. Taking a position on any one

of the foregoing issues would not impact the trustee's disinterestedness but would terminate the trustee's case-inception neutrality.

While the trustee must always be “disinterested” that does not mean that the trustee must also be neutral at all times for all purposes. So, if a Subchapter V trustee is not necessarily neutral at all times and for all purposes, can the trustee serve as a mediator?

4. Facilitator is De Facto Mediator or Mediator-Like

A facilitator is someone that helps a group of people engage in discussions or work together; one who interacts with parties in negotiations, exchanging information and trying to further the process. FACILITATOR, *Black's Law Dictionary* (11th Ed. 2019). “The term ‘facilitator’ is often used interchangeably with the term ‘mediator. . .’” *Id.* (quoting U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide* 8–9 (2001)).

The role of facilitating plan confirmation or other case issues can look like conducting a mediation. Indeed, the trustee's facilitator role has been analogized to that of a mediator. See Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 Amer. Bankr. Inst. L. Rev. 251, 261 (2020) (“Trustees seem likely to play the role of mediator.”); 22 Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. (Nov. 2019) at 8 (the statutory goal of a consensual plan suggests that the trustee also fill a mediation role).

Bankruptcy courts have also described the Subchapter V trustee as a *de facto* mediator or mediator like. In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020), Judge Grossman described the role as follows:

A Subchapter V trustee is specifically charged with the duty to “facilitate the development of a consensual plan of reorganization.” 11 U.S.C. § 1183(b)(7). This role should include working not only with the debtor, but with creditors as well, to

facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a *de facto* mediator between the debtor and its creditors.

In *In re 218 Jackson LLC*, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021), Judge Vaughan described the role as follows:

“Facilitation of a consensual plan requires the subchapter V trustee to work with the parties—the creditors and debtor—to agree on a plan. The definition of facilitate is to “make the occurrence of (something) easier; to render less difficult.” Black's Law Dictionary 734 (11th Ed. 2019). As a result, the subchapter V trustee acts more like a mediator than an adversary.

As a practical matter, the trustee's facilitator role naturally matches a mediator's role. “The mediator's role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order.” M.D. Fla. L.B.R. 9019-2. The trustee's role as facilitator is identical.

In some instances, the trustee fulfills his or her facilitator role by engaging in shuttle diplomacy with respect to contested issues by transmitting settlement offers between counsel via telephone or email communications. In other cases, it is critical for the parties and their counsel to participate in face to face (Zoom or in-person) discussions/negotiations with the trustee with break-out sessions to facilitate the open flow of communication. During these negotiations, the trustee is not simply a message carrier. The trustee is actively analyzing issues, questioning perceptions, conducting private caucuses, stimulating negotiations between opposing sides, suggesting alternatives, and keeping order amongst the parties and counsel.

The author serves as a Subchapter V trustee in the Middle District of Florida for cases filed in Tampa and Fort Myers, and has been appointed in approximately 60 cases. In some cases, the court has ordered the parties and their counsel to participate in “meet and confer” or “mediation” sessions with the author, in her capacity as a Subchapter V trustee. *See e.g., In re Joseph Robert Verna and Karen Elizabeth Verna*, Case No. 2:22-bk-00021-FMD (M.D. Fla. 4/27/22) (Doc. No.

87) directing the parties to participate in zoom mediation with the Subchapter V trustee. In other cases, no formal order has been entered, but the court has orally directed the parties to participate in “meet and confer” sessions with the trustee.

5. Not a Mediator

But the Subchapter V trustee cannot, in the traditional sense, be a mediator. Mediators, by longstanding practice and by codification in almost all jurisdictions, are not involved in the underlying case. Mediators typically sign, and require the parties to sign, confidentiality agreements. Mediators are also subject to strict limitations on disclosures pursuant to professional and ethical standards. Thus, they are required to maintain the parties’ confidences. Once the mediation is concluded, mediators do not touch the case again; they do not show up in court at a subsequent hearing following an unsuccessful mediation and participate as a party in interest.

Mediation is “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” *MEDIATION, Black’s Law Dictionary* (11th ed. 2019). It is an opportunity for the parties to negotiate a mutually acceptable, but equally painful settlement consistent with the mediation policy of self-determination. “Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action.” *Id.* See also, *Florida Rules for Certified & Court Appointed Mediators* (“**Florida Mediation Rules**”), Rule 10.210 (August 2021) (“Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.”)

A mediator is “a neutral person who tries to help disputing parties reach an agreement. MEDIATOR, *Black’s Law Dictionary* (11th ed. 2019). “The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute.” *Florida Mediation Rules*, Rule 10.220. *See also*, M.D. Fla. L.B.R. 9019-2 (“The mediator’s role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order.”). “The mediator should not opine or rule upon questions of fact or law, or render any final decision in the case.” *Id.* Indeed, the ultimate decision-making authority rests with the parties. *Florida Mediation Rules*, Rule 10.220. At the conclusion of mediation, the mediator is required to report to the court (1) the identity of the parties in attendance at the mediation, and (2) that parties either reached an agreement in whole or in part or that the mediation was terminated without the parties’ coming to an agreement. M.D. Fla. L.B.R. 9019-2(a).

In most jurisdictions, mediators are governed by standards of professional conduct. *See e.g.*, *Florida Mediation Rules*, Part II. *See also*, M.D. Fla. L.B.R. 9019-2(d) (“All mediators who mediate in cases pending in this District, whether or not certified under the rules adopted by the Supreme Court of Florida, shall be governed by standards of professional conduct and ethical rules adopted by the Supreme Court of Florida for circuit court mediators.”). Typically, this prevents the mediator from disclosing, outside the context of mediation, any oral or written communications made during mediation or in furtherance of mediation. *See e.g.*, M.D. Fla. L.B.R. 9019-2(g)(2) (“Except as provided in this section (g), all Mediation Communications are confidential, and the mediator and the Mediation Participants shall not disclose outside of the mediation any Mediation Communication, and no person may introduce in any Subsequent Proceeding evidence pertaining

to any aspect of the mediation effort.”). In addition, communications made during mediation are generally privileged and not admissible in evidence in a subsequent proceeding. *See e.g.*, M.D. Fla. L.B.R. 9019-2(g)(3) (“Without limiting subsection (2), Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions or mediations apply.”).

While the trustee is not able to rule or render decisions in the context of mediation, the trustee is an estate fiduciary and a party in interest in the case. The trustee can be called upon by the court to express a position on sales of assets, confirmation of a plan, or other matters that come before the court. In such a case, the trustee may be required to make disclosure with respect to matters learned during the course of “mediation” even if the parties requested or directed the trustee to maintain confidentiality. This would undoubtedly place the trustee into a conflict position. That begs the question—can the parties waive the conflict?

Rule 10.340(a) of the *Florida Mediation Rules* provides that “[a] mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality.” *Florida Mediation Rules*, Rule 10.340(a). A mediator may serve following appropriate disclosure of a conflict so long as: (1) all parties agree, and (2) the conflict does not clearly impair the mediator’s impartiality. *Florida Mediation Rules*, Rule 10.340(c). If the conflict clearly impairs the mediator’s impartiality, the mediator is required to withdraw. *Id.* The result under the local bankruptcy rules in the Middle District of Florida is the same. *See* M.D. Fla. L.R. 9019-2(c)(2) (“The parties may waive a mediator’s actual or potential conflict of interest, provided that the mediator concludes in good faith that the mediator’s impartiality will not be compromised. The

unique nature of bankruptcy cases favors the parties' ability to waive conflicts and supersedes the concept of nonwaivable conflicts.”).

There will always be potential for conflict between the trustee's “mediator” role and its party in interest status. This is likely a conflict that clearly impairs the trustee's impartiality preventing the trustee from serving as a true mediator.

6. Encouraging Candid Communications with the Trustee

There are two concerns expressed by practitioners with respect to communications with the trustee: (1) confidentiality (i.e., protection from disclosure in almost all circumstances), and (2) admissibility into evidence under Rule 408 of the Federal Rules of Evidence.

The disclosure issue was discussed in section 5, above. Unfortunately, not every disclosure made to the trustee is protected. Astute bankruptcy practitioners are keenly aware of that fact. Some are refusing to engage in candid communications with the trustee or refusing to utilize the trustee's facilitation services for fear of subsequent disclosure compromising their case. There are certainly instances where the parties need a third-party mediator. But, the key is recognizing those instances and separating the issues for mediation from the issues which can be addressed efficiently and economically by the Subchapter V trustee without compromising the case.

Take this case for example. A creditor files an objection to the debtor's eligibility to proceed in Subchapter V. The debtor really wants to be in Subchapter V, but knows its eligibility case is weak and does not want to spend the time or money litigating the eligibility issue. Debtor's counsel wants to try and negotiate a quick plan to avoid having to litigate the eligibility issue. In order to express the exigency in getting a deal done, debtor's counsel wants the third-party neutral to know just how weak his case is. Obviously, debtor's counsel does not want the third-party neutral to communicate that to creditor's counsel. If the trustee serves as the third-party neutral

with respect to the eligibility issue and learns of weaknesses in the debtor's case, the trustee may be obligated to make subsequent disclosure to the court if the eligibility issue goes to trial and the court prompts the trustee for his or her position. In this case, the parties would be best served by a third-party mediator.

In most cases, however, the trustee is best suited to serve as *de facto* mediator with respect to contested matters and adversary proceedings. Why? The trustee is already up to speed. The trustee knows the parties, their counsel, the case, the financial issues, and the legal issues. In addition, many trustees bill at an hourly rate that is a significant discount off of their market rates. Therefore, utilizing the Subchapter V trustee should save the parties and their counsel substantial time and money.

So, how do you encourage parties to have candid communications with the trustee? Rule 408 of the Federal Rules of Evidence provides that “evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.”

Fed.R.Evid. 408.

The trustee along with the parties and their counsel could agree that all oral and written communications about a particular matter are intended to be confidential settlement communications subject to Rule 408. Specifically, the trustee could have each party and their counsel sign an agreement which provides that statements made and materials used during the course of the settlement negotiations shall not be subject to disclosure in discovery (except for

statements and materials otherwise subject to discovery, which were not prepared specifically for use in the settlement negotiations) or admissible in any judicial or administrative proceeding.

7. Other Ways to Effectively Utilize the Subchapter V Trustee

Having a successful case depends upon several factors, perhaps the most important of which is determining whether the debtor has a viable business worth preserving or whether the owner(s), who have invested their blood, sweat, and tears into the business are simply delaying the inevitable. Whether you are a *pro se* debtor, represent the debtor, are a creditor, or represent a creditor, the Subchapter V trustee can help you analyze whether the dog can hunt. That is, the trustee can aid in determining whether the debtor has a viable business to reorganize, whether the business should be sold as a going concern, or whether the business should liquidate.

Making this determination requires the debtor and its counsel to timely furnish the trustee with financial statements (balance sheet, income statement, cash flow statement, and profit and loss statement), tax returns, accounts receivable aging reports, accounts payable aging reports, inventory turnover reports, etc. A deep dive through the financial history of the company will enable the trustee to help diagnose the problem(s)² and discuss potential solutions³ with the debtor, its counsel, and other constituents.

One of the most significant challenges facing small business debtors is that they lack in-house resources to comply with the financial mandates of the Bankruptcy Code, the Bankruptcy Rules, the United States Trustee's Operating Guidelines, and the local rules, practices, and

² Some of the more common problems plaguing debtors include incompetent or inefficient management; rapid expansion (and often loss of quality control); overleveraging assets (often to support the lifestyle of the principals); failure to shed unprofitable locations, divisions, or products.

³ Potential solutions include rejecting or renegotiating unprofitable leases and contracts, eliminating products or services with low margins, downsizing or rightsizing the company, restructuring secured indebtedness, selling excess inventory or other assets, obtaining debtor in possession or exit financing, and selling the company as a going concern.

procedures of the bankruptcy court. Often, debtor's counsel is forced to assist the debtor with preparing an initial two-week cash collateral budget, a 13-week cash flow forecast, weekly budget to actual cash collateral reports, monthly operating reports, plan projections, a liquidation analysis, and a schedule of plan distributions. In other instances, the debtor prepares these items, only for debtor's counsel to have to painstakingly review and attempt to correct errors. Even where debtor's counsel is equipped to assist the debtor with these tasks, doing so distracts debtor's counsel from its primary responsibilities.

Although it is not the role of the Subchapter V trustee to prepare financial projections or reports that are the obligation of the debtor in possession, the trustee can provide valuable input regarding both the substance and the presentation of the reports. The trustee can provide insight to the debtor to ensure that all bankruptcy reporting is on a cash basis and that the formatting is consistent with the expectations of the court and local practice. The trustee can also review the initial two-week cash collateral budget with the debtor to ensure that it contains only those expenses that the debtor must pay in the first two weeks of the case (i.e. payroll, utilities, insurance, inventory). The trustee can provide valuable input regarding the terms of a proposed plan, and assist in plan negotiations with creditors. The trustee can analyze the plan projections in comparison to historical financial statements and bankruptcy case reporting (i.e. cash collateral reports, and monthly operating reports) and be a valuable resource in the feasibility analysis for confirmation. The trustee can review the liquidation analysis be a valuable resource in the analyzing the best interest of creditors test and facilitating resolution of valuation disputes .

The trustee can also facilitate resolution of a myriad of other contested matters and adversary proceedings including, without limitation, eligibility objections, stay relief/adequate protection motions, objections to claims, objections to confirmation, as well as adversary

proceedings seeking an injunction, avoidance and recovery of chapter 5 causes of action, and to deny the debtor's discharge or the dischargeability of a particular debt.

The key to ensuring that you have a magical Subchapter V case is communicating with the Subchapter V trustee early and often, and responding timely to the Subchapter V trustee's requests for documents and information, emails, and telephone calls. Beyond that, here are some suggested best practices to effectively utilize the Subchapter V trustee:

- If you have not heard from the trustee within 24 hours of his or her appointment, reach out to discuss the case and the plan. The trustee is particularly interested in hearing the back story—not the one you put in your case management summary. Who is the debtor? How did it get here? Who are the problem creditors? Who are the allies? What are its primary goals in the case? How can the trustee help you to achieve the goals? Will the plan be filed on time (or early)? What will the plan look like? Are there threshold issues that need to be addressed pre-confirmation?
- To the extent possible, provide the trustee with drafts of the following before filing them with the Court:
 - Motion to use cash collateral and the cash collateral budget;
 - Motion to value property subject to a lien along with the valuation;
 - Motion to sell property of the estate;
 - Plan, the plan projections, and the liquidation analysis,
 - Motion to modify the plan after confirmation; and
 - Any pleading seeking emergency or expedited relief.
- If you cannot provide the trustee with a complete draft of the plan prior to filing, provide a plan term sheet. If you anticipate filing one of the other motions, but are unable to provide a draft to the trustee prior to filing, call or email the trustee to preview the relief being requested.
- Provide the trustee with a case update prior to each hearing.

The Value of the Subchapter V Trustee: A Success Story

The American Bar Association Business Law Section hosted its Spring Meeting in Orlando in April of this year. I had the pleasure of participating on a panel with The Honorable Scott M. Grossman (United States Bankruptcy Judge for the Southern District of Florida, Fort Lauderdale Division) and Megan W. Murray (Underwood Murray PA, Tampa, Florida) regarding “Subchapter V – How is the Experiment Working?” The conclusion of the panel, much like the conclusion of the American Bankruptcy Institute’s Subchapter V Task Force, is that Subchapter V is working as intended by Congress and that the \$7.5 million debt limit should remain intact in the long-term.

With the exception of the moderator, all of the panelists practice in or preside over cases in the Middle and Southern Districts of Florida. The Middle District has the most Subchapter V activity of any district in the country and the Southern District is not too far behind. During the panel discussion, a couple of attendees rose to offer their experiences with Subchapter V and, specifically, the Subchapter V trustee, in other districts across the country. Much to my dismay, they reported that Subchapter V filings are few and far between, that the Subchapter V trustees function more like Chapter 7 trustees and are not helpful to the reorganization process, and that the typical fees of the Subchapter V trustee are in the range of \$20,000-\$25,000 compared to approximately \$5,000-\$10,000 in the Middle District of Florida. This experience is disheartening to this Subchapter V trustee.

There is significant value to the parties if they utilize the Subchapter V trustee optimally. The primary role of the Subchapter V trustee is to “facilitate the development of a consensual plan of reorganization.” 11 U.S.C. § 1183(b)(7). In order to facilitate the development of a consensual plan, the trustee may have to facilitate resolution of other contested matters and adversary proceedings including, without limitation, eligibility objections, stay relief/adequate protection

motions, objections to claims, objections to confirmation, as well as adversary proceedings seeking an injunction, avoidance and recovery of chapter 5 causes of action, and to deny the debtor's discharge or the dischargeability of a particular debt.

The case of Carla & Ambrose, LLC (the "Debtor"), is a recent success story where the Subchapter V trustee actively engaged the parties and their counsel early in the case, settling a number of disputes and resulting in the filing of a consensual plan just fifty-five days after the petition date.

In January 2023, the Debtor purchased a bar on Linebaugh Avenue in Tampa known as ThunderBay. In 2023, various disputes arose between Lovie Hudson, who purported to own 100% of the membership interests in the Debtor, and Jacqueline Oliverio Miller, who purported to own 50% of the membership interests in the Debtor, and her husband, Luke Miller, both of whom operated the bar since the Debtor's acquisition.

On January 18, 2024, O and A Real Estate Investment LLC ("OA RE") obtained an Amended Uniform Final Judgment of Foreclosure (the "Foreclosure Judgment") with respect to an alcoholic beverage license (License Number 3900441 4COP) previously owned by a non-debtor, but which had been transferred to the Debtor by Ms. Hudson. A foreclosure sale of the Liquor License was scheduled and looming in early 2024.

On March 9, 2024, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, and made an election to proceed under Subchapter V. The case was filed by Ms. Hudson, as the 100% purported owner of the Debtor. Ms. Miller filed a motion to dismiss the bankruptcy case asserting that Ms. Hudson did not have the authority to file the case. OA RE indicated that it

intended to file a motion to dismiss the case as well as a motion for relief from stay to proceed with the foreclosure sale of the Liquor License.

On March 24, Ms. Hudson, based upon her assertion that the Millers denied her access to the Debtor's premises, its assets, and its records, filed an emergency motion to enforce the automatic stay and to compel the Millers to turn over the Debtor's assets and records. The Bankruptcy Court held a hearing on the turnover motion on March 27.

Prior to the hearing, I consulted with counsel for the parties to determine whether they would be willing to participate in a settlement conference with me, as the Subchapter V trustee. Two of the three parties and their counsel indicated that they were willing to participate. One party was skeptical about the favorable prospects of settlement and declined to participate voluntarily. At the March 27 hearing, I made an *ore tenus* motion to compel the Debtor, the Millers, and OA RE to participate in a settlement conference. The Court granted my *ore tenus* motion.

On April 3, the parties and their counsel participated in a three-hour settlement conference with me via Zoom. Between April 3 and April 25, I conducted several, separate follow up settlement conferences with counsel for the parties and exchanged several drafts of a proposed settlement agreement. On April 25, the Bankruptcy Court held a hearing on the motion to dismiss. At the hearing, the parties announced the terms of a tripartite settlement agreement. The agreement was executed on April 26, and on April 29, the Debtor filed a motion seeking approval of the compromise.

The settlement provides for: (i) Ms. Miller to execute such documents as are necessary and appropriate to ratify the Debtor's filing of the bankruptcy case; (ii) the motion to dismiss to be abated until the entry of a final order approving the compromise, and thereafter for the motion to dismiss to be withdrawn with prejudice; (iii) the Millers (or their designee) (the "Purchaser") to

purchase all the Debtor's assets except for the Liquor License and a malpractice claim for the sum of \$24,000 (the "Purchase Price") payable in 5 installments; (iv) the Purchase Price to be remitted to and held by the Subchapter V trustee; (v) the lease for the business premises to be assigned to the Purchaser; (vi) the Millers to operate and manage the bar prior to and following closing (or such other persons as they shall designate); (vii) the Debtor to file a plan consistent with the settlement agreement that extinguishes all membership interests in the Debtor and issues 100% of the membership interests in the reorganized debtor to Ms. Hudson; (viii) the Debtor to have the discretion to appeal the Foreclosure Judgment; (ix) monthly payments of \$2500 to be remitted (first by the Subchapter V trustee and then the reorganized debtor once funds held by the Subchapter V trustee have been exhausted) to OA RE during the pendency of the appeal; and (x) the Debtor to sell the Liquor License or OA RE to proceed with foreclosure of the Liquor License in the event the Debtor declines to pursue the appeal or is not successful on appeal; (xi) a nondisparagement provision between Ms. Hudson and the Millers; and (xii) general mutual releases between the parties except for rights, claims, defenses, counterclaims, and crossclaims relating to the Liquor License, the Foreclosure Judgment, the state court action, the appeal, or OA RE's claim in the bankruptcy case.

On May 3, just fifty-five days after the case was filed, the Debtor filed a plan which mirrors the compromise motion and the settlement agreement attached thereto. The Bankruptcy Court confirmed the plan on July 18, 2024, in just 131 days, or just over the exclusivity period in a traditional Chapter 11. More importantly, by embracing (or being forced to embrace) the role of the Subchapter V trustee early in the process, the Debtor and the Millers obtained a business divorce, the Debtor obtained the time and money to prosecute its appeal with respect to foreclosure of the Liquor License, OA RE obtained compensation akin to adequate protection/supersedeas

bond during the appeal period, and the parties and the Court avoided time-consuming litigation over a number of contested matters.

Best Practices when Filing a Chapter 13 Case in Jacksonville

Douglas W. Neway, Chapter 13 Standing Trustee

Pre-Petition Issues to Consider When Preparing to File a Chapter 13 Case

- I. Documents normally required to be filed.
 - a. The petition.
 - b. A statement of the debtor's Social Security number.
 - c. A list of names and addresses for all creditors and certain other entities with account numbers.
 - d. A certificate from an approved counseling agency that the debtor received credit counseling within 180 days before filing. See *In re Al-Ameem*, 3:22-bk-00813-BAJ, at DE 37.
 - e. A certification that the debtor has received the disclosures required by Section 342(b).
 - f. The debtor's Statement of Financial Affairs and Schedules.
 - g. Form 2030 disclosing compensation to the debtor's attorney, paid or promised. (F.R.B.P. Rule 2016(b)).
 - h. Chapter 13 Model Plan. (Accessible in External Procedures Manual at www.flmb.uscourts.gov)
 - i. A statement of current monthly income and commitment period. (Forms 122C-1 & C-2).
- II. Importance of Accurately Completing Debtor's Schedule of Assets and Statement of Financial Affairs. Debtor's Attorney must sufficiently impress the seriousness of accuracy and completeness to their client.
 - a. "Debtors have an **absolute duty** to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." *In re Yonikas*, 974 F.2d 901, 904 (7th Cir. 1992)
 - b. Debtors and their attorneys must properly and thoroughly review schedules in each case and not simply reuse schedules from a prior case. See *In re Thomas*, 612 B.R.46 (Bank. E.D. Pa. 2020), where the court sanctioned debtor's attorney for failing to make a reasonable inquiry into debtor's schedules after attorney filed nearly identical schedules in a second case he filed for the debtor.

- c. “Debtors are presumed to have read the schedules and statements before signing the documents, and are responsible for their contents ... [and] debtors bear an independent responsibility for the accuracy of the information contained in their schedules and statements.” *In re Rolland*, 317 B.R. 402, 414 (Bankr. C.D. Cal. 2004).
 - d. “Adopting a cavalier attitude toward the accuracy of the schedules and expecting the court and creditors to ferret out the truth is not acceptable conduct by debtor.” *AT&T Universal Card Services Corp. v. Duplante (in re Duplante)* 215 B.R. 444, 447 n.8 (B.A.P. 9th Cir. 1997).
 - e. Criminal Penalty – Concealment of Assets, False Statements, False Claims, filing under Fictitious Names, Perjury and Bribery are considered bankruptcy crimes that carry a penalty of up to 5 years imprisonment, a fine of not more than \$250,000.00, or both.
- III. Other Documents needed prior to filing and submitted to the Chapter 13 Trustee. Documents are always to be uploaded to 13documents.com in the appropriate drop-down selection. If there is no appropriate drop-down selection, please contact Trustee’s office for further instructions.
- a. Chapter 13 Administrative Order requires no later than 7 days prior to the initial meeting of creditors, Debtor shall provide Trustee with:
 - i. Copies of Tax Returns for the two years preceding the petition date (or an affidavit that Debtor is not required to file tax returns), 3 years of tax returns for self-employed debtors;
 - ii. Copies of all pay stubs, advices, or documentation of income sources for the six-month period ending on the last day of the month preceding the month of the petition date, including social security and pension benefit statements. Self Employed debtors will need to provide 6 months of profit and loss statements and bank statements for each of those 6 months;
 - iii. Documentation regarding proof of a non-debtor spouse’s income;
- IV. Other Documentation required when circumstances of debtor warrant.
- a. Documents that show the amount that someone else regularly contributes to the household expenses;
 - b. Documents that show non-filing spouse’s separate expenses (i.e., child support/alimony payments a non-filing spouse makes to a former spouse or payments on separate debts);

- c. Deed on real property owned jointly with someone not in the bankruptcy;
 - d. Proof of any tenancy by the entirety exemption listed on Schedule C;
 - e. Any family court orders requiring debtor to pay alimony or child support;
- V. Chapter 13 Plan
 - a. Review most recent mortgage statement, foreclosure complaint or foreclosure final judgment to determine mortgage arrears.
 - b. Review other documentation to determine payoffs on secured claims and priority claims.
 - c. Calculate 31% of debtor's gross income to determine if MMM is beneficial and use lesser of contractual mortgage payment or 31% figure.
 - d. Utilize the trustee excel spreadsheet to avoid mathematical errors.
- VI. Post Filing Advice to Debtor – Debtor should understand what has happened and what will happen next.
 - a. Advise debtor of Notices issued by the Court, including Notice of Appointment of Trustee and Notice of Section 341(a) Meeting of Creditors;
 - b. Advise debtor of all additional documentation that is needed prior to the Meeting of Creditors;
 - c. Advise debtor when, where and how payments under the Chapter 13 plan should be made. Chapter 13 plan payments must begin within thirty (30) days after the order for relief (normally the filing of the petition);
 - d. Advise debtor of the financial education course requirement and give information about how to take the course;
 - e. Advise debtor of their rights under the automatic stay provisions;
 - f. Advise debtors not to enter into new credit transactions without consultation;
 - g. Advise that any property acquired post petition or change of financial circumstances must be immediately disclosed.

Expediting Confirmation of a Chapter 13 Plan with Efficiency

- I. Communication with the Trustee's Office.
 - a. Email is the preferred method of communication with the Trustee's office. We retain communications with attorneys throughout the pendency of a case for reference.

- b. A Case Administrator will email the attorney of record 7-10 days prior to the scheduled confirmation hearing.
- c. Each email states the obstacles to confirmation, including claims, disposable income, liquidation, and informational issues.
- d. The email is meant to be instructive and tailored to responses. Please respond to all parties with questions and concerns. If it is a legal issue, please request a response from the attorney assigned to that case.

II. Document Requests

- a. Section 521(a)(3) and F.R.B.P. Rule 4002(a)(4) requires the debtor to cooperate with the Trustee as necessary to enable the Trustee to perform his duties.
 - 1. If the Trustee has not received the requested taxes or proof of income, a Plan cannot be confirmed.
 - 2. If the Trustee has not received proof of requested documents, including but not limited to bank statements, deeds, titles, proof of Schedule J or means test deductions, a plan cannot be confirmed.
 - 3. Please provide the requested documents at least 2 days prior to any hearing date for proper review. Remember to upload documents bkdocs.us.

III. Spreadsheets/Summaries

- a. The Trustee reviews the mathematical accuracy of each plan (filed and housekeeping) by utilizing an Excel spreadsheet. The spreadsheet is available under the Attorney Helpful Forms tax at www.ch13jaxfl.com.
- b. It is recommended you become familiar with and learn how to navigate the spreadsheet. Our confirmation emails will have a spreadsheet attached to illustrate the plan of record.
- c. Spreadsheets can be used to show plan payment/distributions being made to creditors in the plan, specifically priority claims and mortgage arrears where the plan does not allow for monthly payment to be shown on the plan. Spreadsheets are a valuable tool to determine whether disposable income and liquidation tests are being met.
 - 1. Summaries can be used for these purposes.
- d. A spreadsheet/summary cannot be used as a substitute for a plan. If the plan and spreadsheet conflict in anyway, the Trustee will defer to the terms in the Plan.

IV. Proofs of Claim

- a. Every filed POC needs to be addressed.
 - 1. Provided for in the plan.
 - 2. Valued in the plan with separate motion
 - 3. Objected to

V. Claim Issues

- a. Mortgage Issues
 - 1. Regular monthly payments and total arrears are on POC attachment 401a.
 - 2. Pursuant to FLMB-2020-7, if the mortgage has an arrearage, the regular monthly and arrears payments must be made through the plan.

Judge Burgess has ruled that if the arrears claim is not the result of a default, but only either a Property Preservation fee or escrow analysis that results in a small deficiency he will allow the de minimus arrears claim to be paid outside the plan and allow direct mortgage payments to the creditor through ACH.

- b. Auto Claim Issues
 - 1. Interest rates: Till rate has increased. Adjust proposed plans accordingly. Lenders are objecting more often and confirmations are being delayed as a result.

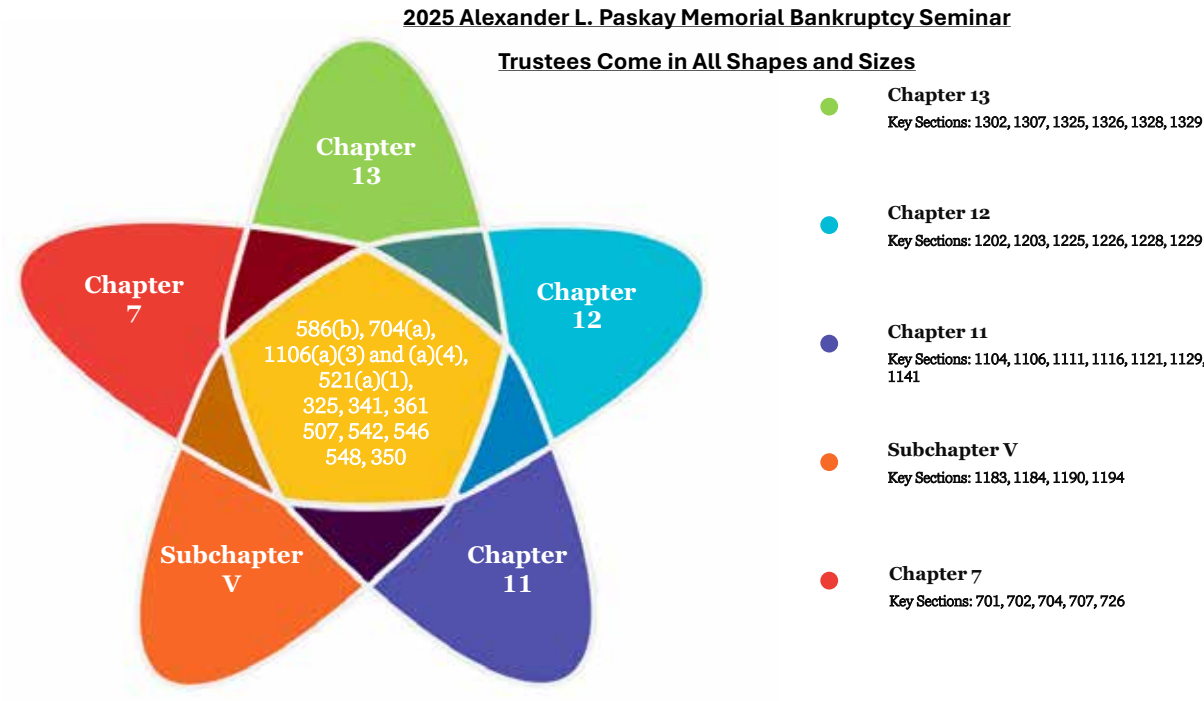
Under Till v. SCS Credit Corp., the Supreme Court adopted the formula approach of looking to the national prime rate and adjusting it to account for the greater nonpayment risk that bankrupt debtors typically pose. Clearly lots of factors will determine risk, however, the national prime rate today stands at 8.50%. To propose a cramdown interest rate of less than that the national prime rate is not providing for the Till rate.

Fun Facts: The prime interest rate when Till filed bankruptcy in October, 1999 was 8.25% and they ended up at 9.5% after the Supreme Court ruling.

The highest prime rate in U.S. history was 21.5% on 12/19/1980

2. *If the auto payment extends past the plan term, the arrears are to be paid by separate provision.*
 3. If the auto is paid off in full in the plan term, the arrears are included in the total debt.
 - c. Proof of Automatic Payment/ACH
 1. FLMB-2020-7 states “Debtor shall make direct payments via automatic debit/draft from a bank account and provide documentation to the Trustee upon request. The establishment of an automatic debit/draft at Debtor’s Request is not a violation of the automatic stay.
 2. Failure to provide the correct documentation will result in a delay of confirmation.
 - d. Leases shall be provided for in Section 6 of the Model Form Plan. Expired Leases are required to be rejected if the lease box of the POC is checked. The same rules for claim arrears in secured claims applies to leases.
 - e. Claim Objections/Valuations
 1. FLMB 2020-7 states “Debtor shall file objections to any claims that Debtor seeks to have disallowed, in whole or in part, no later than 28 days after the claims bar date or 14 days after the filing of an amended proof of claim.”
 2. FLMB-2020-7 also requires valuation motions and motions to avoid liens be filed no later than 28 days after the claims bar date.
 3. Model Chapter 13 Plan Section 5(d) requires a separate motion to be filed to determine secured status or value collateral.
 4. Delays in filing the motions will result in delays in Plan confirmation. If a motion or objection is filed 10 days prior to confirmation, the Trustee may recommend confirmation if the parties agree to special language, i.e. confirmation subject to objection/motion.
- V. Amended Plans and Housekeeping Plans
- a. Circulation of Chapter 13 Plans.
 1. Interested Parties are required to be provided with notice of any changes that negatively affect their claim’s treatment--notice is 21 days + 3 days service.
 2. FLMB-2020-7 requires an amended Plan be filed no later than 28 days after the expiration of the claims bar date.

3. Failure to file an amended plan will result in delay of confirmation. Repeated inaction may result in dismissal and/or disgorgement of attorney fees.
- b. Housekeeping Plans.
 1. For efficient administration of cases, the Trustee accepts housekeeping plans. These plans are provided directly to the Trustee in preparation for confirmation and not filed.
 2. The plan must not negatively impact any creditor or class of creditor.
 3. The plan must not greatly alter treatment of a creditor or class of creditor.
 4. It is recommended the housekeeping plan is provided to an objecting creditor prior to the hearing date.



GreenspoonMarder^{LLP}

Chapter 7 Trustees

Panel Trustee
Southern District of Florida

Presented By:
Michael R. Bakst

CHAPTER 7 TRUSTEE GOALS

- Administer Chapter 7 estates as efficiently as possible for \$60.00, and next to nothing, in fee waiver cases.
- Determine value of any non-exempt assets and reduce them to money as quickly as possible
- Ascertain whether a debtor is an honest debtor, whether their attorney is properly doing their job and whether to refer the matter to the U.S. Trustee
- Abandon property when appropriate
- File contested matters and adversary proceedings when necessary
- Review claims, file necessary objections and submit final report and fee applications as quickly as is feasible

BUSINESS CASES

- Secure all assets, bank accounts, and business locations
- Secure all data, including computers and documents
- Quickly verify liens and liquidation value of assets
- Verify the nature and scope of insurance
- Comply with all required tax filings
- Notify all landlords, vendors, suppliers, and customers that may separately pursue debtor
- Make sure Suggestions of Bankruptcy have been filed wherever appropriate wherever litigation is pending
- Most Importantly: if the case does not appear to be an asset case, consider emergency dismissal

DEBTOR'S COUNSEL: PREFILING

- Obtain a clear retainer agreement spelling out what is and is not included
- Give the client realistic expectations of the process
- Make sure dates of domicile are exact
- Make sure dates of purchases and transfers are exact, with specific disclosures of information
- Train clients on Zoom
- Get documents and photos before filing the case
- In business cases, make sure principal understands who you represent, verify liens, prepare suggestions of bankruptcy and file, shut down business, secure all premises and contact trustee immediately upon filing

DATE OF FILING THROUGH 341 MEETING

- My Objective: Perform all investigation by the date of the 341 meeting to decide on that date whether to open or RND case
- Evaluate real property:
 - Need complete address, proper description of ownership and accurate value
 - How is it claimed as exempt on Schedule C: Florida, federal or state exemptions? Dollar amount claimed as exempt? Schedule C Question 3 answers on dollar amount and date of acquisition
 - Schedule D: Is the date of debt listed?
 - SOFA #3: Are addresses from last 3 years disclosed?
 - SOFA #18: Was it purchased with proceeds of another real property?

DATE OF FILING THROUGH 341 MEETING, cont.

- Evaluate Vehicles:
 - Need complete model, year, VIN, miles and explanation of ownership
 - Check KBB and compare to lien on Schedule D
 - Seek photos, inside and out, all four corners and of odometer
 - Verify insurance

REVIEW OF EXEMPTIONS

- Are proper exemptions and dollar amounts claimed?
- Are unknown exemptions or \$1.00 exemptions claimed?
- Are groups of assets combined together?

SCHEDULED CREDITORS

- Is date of lien and scope of lien explained?
- Are support and tax obligations disclosed?
- Are dates of debts incurred for unsecured creditors provided?
- Are there creditors that appear to be individual creditors listed?
- Has any creditor contacted me that is not listed?
- Are consumer creditors distinguished from business creditors?
- Does the dollar number of creditors warrant the filing of this case?

HELPFUL CREDITORS

- Contact me early in the case through counsel who is objective
- Sends helpful documents, particularly supporting dates of default, threats of litigation and actual litigation dates, including date of service of process
- Understands my standing and what is property of the estate
- Recognizes their own independent standing and reaches out before seeking stay relief
- Doesn't try to use 341 meeting as a 2004 exam
- Reaches out before filing objections to settlements
- Files clear proof of claim with proper attachments and is not overreaching

SCHEDULES I AND J : ARE THEY IN THE RIGHT CHAPTER?

- Is spouse income disclosed and/or are expenses for a married couple without proper disclosures?
- Are certain payroll and other expenses doubled between I and J?
- Are proper dependents listed?
- Life Insurance / Policy disclosed on Schedule B?
- Vehicle payments and insurance / Are all vehicles on Schedule B?
- Alimony and support / Are they listed on Schedule E?

STATEMENT OF FINANCIAL AFFAIRS

- Marital Status
- Addresses / SOFA #2
- All Income Disclosed? SOFA 4 and 5
- SOFA #9 : Litigation
- SOFA #18: Transfers: name and address, description of property and value, consideration and actual date
- SOFA #23: Holding property for another
- SOFA #27: Business entities match Schedule B-19

COMMUNICATING WITH A CHAPTER 7 TRUSTEE

- Send email to proper trustee email address
- List case name and number in subject line
- Respond with “Reply-All” – Be aware that the Trustee will do the same
- Do not send emails as urgent/high priority absent a real emergency
- Do not send multiple emails with large attachments
- If requested documents are uploaded into a portal, notify the trustee separately
- Don't send photographs of documents
- Don't blindly forward documents from your clients

FEBRUARY 2020

- Counsel meets with Debtor and sits with Debtor at 341 meeting
- Physical review of driver's license and social security card at 341 meeting
- Rule 2004 Exam and depositions in person
- Court hearings are live or, at most, by telephone
- Production of documents in discovery bate stamped and in paper, or perhaps on a flash drive

FEBRUARY 2025

- All by Zoom with Debtor usually separate from counsel
- Photocopies of driver's license and social security card
- Most Rule 2004 Exams and depositions by Zoom
- Many non-evidentiary court hearings on Zoom
- Production of documents in discovery all scanned and uploaded into a portal

CONVERSION TO AND FROM CHAPTER 7

- New claims bar date – especially important in conversions from Chapter 11
- Post conversion 341 meeting
- Any leases or contracts to assume and assign?
- Prior Chapter admins come behind Chapter 7 admins
- Turn over of assets / review of post petition transfers
- Investigate encumbered assets / consider auction and other attempts to sell assets
- Review insurance policies / recover and review all data
- In business case, the trustee holds the attorney client privilege
- Review value of assets where post petition debt payments may have occurred, especially vehicles in cases converted from Chapter 13

CHAPTER 7 TRUSTEE DISCRETIONARY POWERS

- Payments for assets above exemptions / limitations involving motor vehicles
- Criminal referrals to U.S. Trustee
- Motions to Compel / Review Compensation of Counsel
- Avoidance actions
- Objections to Discharge
- 9019 Settlements / Limited Scope of releases
- Objections to Claims
- Interim Distributions

GreenspoonMarder^{LLP}

Thank You!



Partner
Greenspoon Marder LLP
Michael.bakst@gmlaw.com
Phone: (561) 838-4523

Disclaimer

This presentation has been prepared for information purposes only and does not constitute legal advice. Such presentation is not intended to create, and receipt thereof does not constitute, formation of an attorney-client relationship. The presentation should not be relied upon for any purpose without seeking legal advice from licensed attorneys. The author expressly disclaims all liability in respect to actions taken or not taken based on any or all the contents of this presentation or related materials and information.

Faculty

Michael R. Bakst is a partner with Greenspoon Marder LLP in West Palm Beach, Fla., and is experienced primarily in various fields of bankruptcy and insolvency, including representing creditors, bankruptcy trustees and receivers. He also represents litigants within complex bankruptcy matters, commercial litigation, receiverships and assignments for the benefit of creditors. Mr. Bakst is a panel trustee for the Southern District of Florida. He also has served as an examiner appointed through the offices of the U.S. Trustee. Mr. Bakst frequently speaks at continuing education seminars for bankruptcy and commercial litigation practitioners, as well continued education seminars for trustees in bankruptcy on a regional level. He received his B.A. in 1987 from the University of Miami and his J.D. in 1990 from the University of Miami School of Law.

Hon. Tiffany Payne Geyer is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed by the Eleventh Circuit Court of Appeals on March 25, 2022. Previously, she was a partner with BakerHostetler in Orlando and practiced primarily in the areas of bankruptcy and creditors' rights. Judge Geyer represented both corporate and individual debtors in chapter 11 cases and individuals in chapter 7 cases, and her clients included health care businesses and medical professionals, investment bankers and financial advisors. She also represented clients in the hospitality sectors, assisted in representing debtors in the energy sectors, and negotiated multiple settlements of guarantor liability and assignments for the benefit of creditors. In addition, she represented secured creditors, unsecured creditors, landlords and panel trustees. Judge Geyer has been listed in *Chambers USA* for Bankruptcy/Restructuring in Florida and in *The Best Lawyers in America* in 2020 for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. She began her legal career in Orlando clerking for Bankruptcy Judge Karen S. Jennemann, whose vacancy she filled upon her retirement, and she volunteered at a Florida nonprofit organization devoted to housing and educating young adults struggling with homelessness. Judge Geyer received her B.A. with honors in political science and public administration in 1998 from the University of Central Florida, and her J.D. in 2000 from the University of Florida Levin College of Law, where she received the Book Award for Legal Drafting and was a member of a trial competition team.

Amy Denton Mayer, CPA is a shareholder with Stichter, Riedel, Blain & Postler, P.A. in Tampa, Fla., and has more than 21 years of restructuring experience. She specializes in the representation of debtors, assignors, committees, creditors, trustees, assignees, purchasers and other parties in bankruptcy cases, assignments for the benefit of creditors and out-of-court workouts. She has been particularly active in the representation of real estate developers and home builders, medical practices and physicians, agribusinesses, independent and franchised restaurant chains and other food service companies, and business entrepreneurs. Ms. Mayer joined the firm in March 2003 and became a shareholder in 2010. She also serves as a subchapter V trustee. Ms. Mayer is Board Certified in Business Bankruptcy Law by the American Board of Certification and is a Fellow with the Litigation Counsel of America. She is rated AV-Preeminent by Martindale-Hubbell, is listed in *The Best Lawyers in America* in the area of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law for 2020 and 2021, is listed in *Chambers & Partners* for Bankruptcy/Restructuring from 2015-21, and is listed in *Florida Super Lawyers* from 2018-22. She also is one of only two Florida honorees of ABI's 2019 "40 Under 40" class. Ms. Mayer received her J.D. with honors in 2002 from

the University of Florida and interned for Hon. Paul M. Glenn and Hon. Michael G. Williamson in the Middle District of Florida.

Douglas W. Neway has served as the Chapter 13 Standing Trustee for the Jacksonville Division and Chapter 12 Trustee for Jacksonville and Orlando Divisions in Florida since October 2007. Previously, he was the managing partner of Bond, Botes & Neway, P.C. in Orlando from 1997-2007, where he represented debtors in consumer bankruptcy cases. Mr. Neway has served as chairman of the Orange County Bankruptcy Bar Association, the Central Florida Bankruptcy Law Association, the Jacksonville Bankruptcy Bar Association and the Orlando Division's Bankruptcy Judicial Liaison Committee, and he was an original member of the Middle District of Florida's Districtwide Bankruptcy Steering Committee. He was also the Florida State Chairman of the National Association of Consumer Bankruptcy Attorneys, is a member of the Florida Bar's Bankruptcy/UCC Committee and the Statewide Bankruptcy Judicial Liaison Committee, and serves on the board of directors for the Jacksonville Bankruptcy Bar Association. Mr. Neway is a frequent lecturer on consumer bankruptcy topics at seminars, colleges and law schools. He successfully argued *In re Tanner* before the Eleventh Circuit, which allowed strip-off of mortgages in chapter 13 cases, and drafted an amendment to F.S. 222.25, increasing Florida's personal property exemption law that was enacted in July 2007. Mr. Neway received his B.F.A. in acting from Marymount Manhattan College and his J.D. from Nova University School of Law.

Eric J. Silver is a shareholder in the Business Restructuring department of Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A. in Miami and is a member of the firm's board of directors. He handles complex commercial restructuring and related litigation matters in both federal and state courts, and he regularly represents court-appointed fiduciaries, secured and unsecured creditors, and purchasers of distressed assets. Prior to joining the firm in 2010, Mr. Silver clerked for Hon. Robert A. Mark in the U.S. Bankruptcy Court for the Southern District of Florida. He is a member of ABI and was president of the Bankruptcy Bar Association of the Southern District of Florida for 2020-21. In addition, he was the Miami chair of its *Pro Bono* Committee from 2016-19 and *Pro Bono* Committee Liaison of the FLSB Bankruptcy Lawyers Advisory Committee from 2018-19, and is a member of The Florida Bar's Business Law Section. Mr. Silver was honored as one of ABI's 2021 "40 Under 40." He received his J.D. *magna cum laude* from the University of Miami School of Law jointly with his M.B.A. from the School of Business Administration.