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Sub V DIP Removal:
Case-Saving or Litigation Tactic?

Removal of the Debtor as debtor in possession in Subchapter V cases and the effects - or ramifications – of that.

Judge Meredith S. Grabill
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In 2019, Chief Judge Grabill was appointed as a U.S. Bankruptcy Judge for the Eastern District of Louisiana. Prior to her appointment on the bench, Judge Grabill was a shareholder at Lugenbuhl, Wheaton, Peck, Rankin & Hubbard and practiced law primarily in the areas of bankruptcy, commercial, and oil-and-gas litigation in Louisiana and New York. Prior to entering the private practice of law, she served as a judicial clerk to Judge Edith Brown Clement, U.S. Court of Appeals for the Fifth Circuit, from 2007-2008; and Judge Martin L.C. Feldman, U.S. District Court for the Eastern District of Louisiana, from 2006-2007. After practicing in New York for several years, she served as judicial clerk to Judge Martin Glenn, U.S. Bankruptcy Court for the Southern District of New York. In addition to her current duties for the Court, Judge Grabill teaches an annual course at Tulane Law School on chapter 11 bankruptcy and restructuring.



Mr. Bunol is a Managing Member of The Derbes Law Firm, LLC located in Metairie, Louisiana. In his bankruptcy practice, Mr. Bunol represents businesses and individuals that are Debtors in Chapter 11 and Chapter 7 and represents Chapter 7 Bankruptcy Trustees, creditors, landlords, tenants, and other parties-in-interest in Bankruptcy Court. In addition, Mr. Bunol serves as a Sub V Trustee in Louisiana and Mississippi with most of his cases being in the Middle and Eastern Districts of Louisiana.



Leann Opotowsky Moses is a partner with the law firm of Carver Darden Koretzky Tessier Finn Blossman & Areaux LLC located in New Orleans, Louisiana. Ms. Moses' practice focuses on Commercial Litigation and Bankruptcy primarily representing creditors' interests in Chapter 7, 11 and 13 cases. Ms. Moses also mediates commercial/bankruptcy matters and has extensive experience mediating hurricane claims. Ms. Moses is admitted to practice in Louisiana and Texas.

Removal of the Debtor as the Debtor in Possession (Authorized under 11 U.S.C. §1185)

- Any party in interest can file the Motion to Remove the Debtor
- If the Court finds cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter, the Court can remove the debtor as Debtor in Possession. 11 U.S.C. §1185

What Factors Do Courts Consider When Determining Cause?

[1] the materiality of any misconduct,

[2] the debtor-in-possession's evenhandedness or lack thereof in dealings with insiders and affiliated entities in relation to other creditors,

[3] the existence of pre-petition voidable preferences or fraudulent conveyances,

[4] whether any conflicts of interest on the part of the debtor-in-possession are interfering with its ability to fulfill its fiduciary duties, and

[5] whether there has been self-dealing or squandering of estate assets.

See *In re Neosho Concrete Prods. Co.*, 2021 Bankr. LEXIS 1198, at *23-24 (Bankr. W.D. Mo. May 6, 2021)

Example of “Cause”

Cause can be “… a manifest demonstration that management is unable to conduct itself as an appropriate fiduciary for the bankruptcy estate is also "cause" to dispossess the debtor under § 1185.” *In re Comedymx, LLC*, 647 B.R. 457, 465 (Bankr. D. Del. 2022) (“First, Heldman repeatedly threatens to "demonetize" the debtors, meaning that he will take action that would entitle the debtors' streaming partners to stop paying the debtors for their content, thus causing the debtors' revenue to dry up. Second, Heldman trumpets his willingness to defy court orders, telling Beyond Blond's principal and outside counsel that they "cannot defeat someone who doesn't give a damn about the law.")

The Debtor is removed, now what?

- Automatic expansion of Sub V Trustee Duties pursuant to 11USC §1185(b)(5)
- The Trustee cannot file a Plan of Reorganization
- The next step will depend on the debtor in the case, the assets of the estate, type of business and procedural posture of the bankruptcy.

The Sub V Trustee Essentially Has Three Options:

1. **Work with Debtor to confirm a Plan**
2. **Convert to Ch.7**
3. **Dismissal**

Option 1: Working with the Debtor

- The Sub V Trustee's next step is going to depend on the debtor in the case, the assets of the bankruptcy estate, the type of business, and the procedural posture of the bankruptcy.

- If there is a viable path forward for the debtor to reorganize, the Sub V Trustee may choose to work with the debtor and debtor's counsel to see if the debtor will either amend the Plan, if one has been filed, or file a Plan. *In re Duling Sons, Inc.*, 650 B.R. 578, 582 (Bankr. D.S.D. 2023) ("As a practical matter, to preserve the benefits of subchapter V in this case, the Trustee and Debtor must jointly propose a plan. If a subchapter V plan is not timely filed in accordance with this order, the case will convert to chapter 7… .")

Option 2: Conversion to Chapter 7

- Any party in interest, which includes the Sub V Trustee, can request that the case be converted or dismissed. See 11 USC §1112(b)(1) and 11 USC §1109.

- *Conversion may not be in the best interest of the Bankruptcy Estate. See In re Duling Sons, Inc.*, 650 B.R. 578, 582 (Bankr. D.S.D. 2023) ("Where, as here, a business debtor intends to market and sell its assets to fund a liquidating plan, staying in Subchapter V will prevent the estate from incurring substantial chapter 11 UST fees or the statutory compensation of a chapter 7 panel trustee." Further, "the [Sub V] Trustee has extensive knowledge of the Debtor and its estate from its prior investigation and mediation in the case.")

Option 3: Dismissal

- The Sub V Trustee may consider a structured dismissal with a final accounting that authorizes the Sub V Trustee to distribute cash on hand in accordance with a final account.

- Similarly, in some Chapter 11 Cases the Court has determined that a structured dismissal is appropriate. *See In re Buffet Partners, L.P.*, 2014 Bankr. LEXIS 3204 (Bankr. N.D. Tex. July 23, 2014).

Are there other handicaps that occur if a Debtor in Possession is removed?

- Depends- Type of business and whether its operating
- Is the principal of the Debtor critical to the operations
- Relationship with vendors and customers
- Relationship with employees
- Insufficient cash to operate and pay expenses.

Considerations for Creditors before removing a DIP

- Type of client (Institutional or Individual)
- Pre- and Post Petition experience with Debtor (Prior bad acts, fraud, preference acts, hidden assets, repeated filings, manipulated income and expenses, delays, objections)
- Amount of debt
- Delays in filing Plan vs. Speed – both can create issues or “prejudice” for a creditor
- Is Debt secured fully or partially or Unsecured (is there a market for collateral, does the creditor want it or should they seek adequate protection or modify the stay)
- How is the Case being run (for the creditors or the debtor)
- Amount of debt

Continued - Considerations for Creditors before removing a DIP

- Is there a market for the collateral?
- Client prefers state court recovery or allowing Debtor to remain as DIP (pending foreclosure or litigation when bankruptcy is filed)
- Are the client and other creditors and/or Sub V Trustee aligned
- Are adequate protection payments being made
- Likelihood of reorganization and the Plan
    - Climate for the Debtor's business
    - Likely recovery for the creditor
    - Are the Debtor's projections reasonable?
    - Are there injunctions in the proposed plan to delay recovery from guarantor? *See In re Hal Luftig Company, Inc*., 25-CV-02580, 2026 WL 2935950, USBC SDNY (9/30/2026)

Other considerations?

- What goal is trying to be achieved?
- Can the Sub V election be withdrawn, the case converted to a standard Chapter 11 and the court appoint a chapter 11 Trustee with powers to file a plan?
- Is the Sub V Trustee willing to take on the role as the Debtor in Possession?

What are alternatives to the Sub V Trustee being removed that the parties and Court should consider?

- Consider the goal that is trying to be achieved
- Consider whether the Sub V election can be withdrawn, the case converted to a standard Chapter 11, and the Court appoint a Chapter 11 Trustee with powers to file a plan.
- Consider if the Sub V Trustee is willing to take on the role as the DIP.

Questions?

Thank You!

CONTACT INFORMATION

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