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## **Trustee Duties and Liability**

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## TRUSTEE DUTIES, LIABILITIES AND REMOVAL

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- I. Duties: The Impossible Dream
- II. 11 U.S.C. §§ 521, 704, 1106, 1202, 1302; 28 U.S.C. § 959(b); Fed. R. Bankr. P. 5009, 9011
- III. Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 Am. Bankr. L. J. 147 (2006).
  - A. Loyalty
  - B. Maximize distributions
  - C. Diligence
  - D. Care
  - E. Accountability
  - F. Competence
  - G. Review claims
  - H. Furnish information
  - I. Candor
  - J. Civility
  - K. Proper preparation and conduct
  - L. Impartiality
  - M. Enforce obligations of parties
  - N. Supervise employees and professionals
  - O. Comply with state and federal law
  - P. Good faith
  - Q. Fair dealing
  - R. To secured creditors
  - S. To the debtor
  - T. To unsecured creditors
  - U. After closing
  - V. DSO notices
  - W. Health care business responsibilities
  - X. Means testing
  - Y. Report crime
  - Z. Oppose discharge
  - AA. Integrity
  - BB. Good moral character
  - CC. Free of prejudice

- DD. Financially trustworthy and responsible
- EE. Refrain from appearance of influence
- FF. Comply with standards of “trustee profession”
- GG. Cooperate with United States Trustee

#### IV. Liability and Removal

##### A. Statutory and Regulatory Framework

1. 28 U.S.C. § 586(d), (e)
2. 11 U.S.C. § 324
3. 11 U.S.C. § 105(a)
4. 11 U.S.C. § 327
5. 11 U.S.C. § 101(14)
6. 28 C.F.R. § 58.6
7. 28 U.S.C. § 959(a)

##### B. Barton Doctrine

1. *Anderson v. United States*, 520 F.2d 1027 (5<sup>th</sup> Cir. 1975).
2. *In re VistaCare Grp. LLC*, 678 F.3d 218 (3<sup>rd</sup> Cir. 2012).
3. *Barton v. Barbour*, 104 U.S. 127 (1881).
4. *Davis v. Gray*, 83 U.S. 203 (1872).
5. James Day and Marc Hirschfield, *The Barton Doctrine: Still Kicking after 130 Years*, 31-Aug. Am. Bankr. Inst. J. 222 (2012).
6. Paul Avron, *Commission's Proposed Expansion of Barton Doctrine is Sound Policy*, 34-Dec. Am. Bankr. Inst. J. 44 (2015).

##### C. Immunity – Qualified or Absolute

1. *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 545 B.R. 91 (Bankr. W.D. Pa. 2015), *aff'd*, 554 B.R. 747 (W.D. Pa. 2016).

##### D. Negligence or Something More?

1. *Mosser v. Darrow*, 341 U.S. 267 (1951).
2. *Dodson v. Huff (In re Smyth)*, 207 F.3d 758 (5<sup>th</sup> Cir. 2000).
3. *Texas Comptroller v. Liuzza (In re Texas Pig Stands, Inc.)*, 610 F.3d 937 (5<sup>th</sup> Cir. 2010).
4. *Liberty Mutual Ins. Co. v. United States (In re Schooler)*, 725 F.3d 498 (5<sup>th</sup> Cir. 2013).
5. Theresa J. Pulley Radwan, *Trustees in Trouble: Holding Bankruptcy Trustees Personally Liable for Professional Negligence*, 35 Conn. L. Rev. 525 (2003).
6. Daniel B. Bogart, *Finding the Still Small Voice: The Liability of Bankruptcy Trustees and the Work of the National Bankruptcy Review Commission*, 102

Dick. L. Rev. 703 (1998).

E. Special Problem Areas

1. Data
2. Trustee as attorney
3. Standing trustees

F. Removal

1. Cause, in the eye of the beholder.
2. Sewer Sponte always stinks.
3. *Morgan v. Goldman (In re Morgan)*, 573 F.3d 615 (8<sup>th</sup> Cir. 2009).
4. *Smith v. Robbins (In re IFS Fin. Corp.)*, 803 F.3d 195 (5<sup>th</sup> Cir. 2015).
5. *In re Drinkwater*, 178 B.R. 590 (Bankr. D. Mass. 1995).
6. *In re CNC Payroll, Inc.*, 491 B.R. 454 (Bankr. S.D. Tex. 2013).
7. *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832 (9<sup>th</sup> Cir. 2008).
8. Kristopher Edward Aungst, *Trying to Remove the Trustee? A Tough Road Ahead*, 56 Fed. Law. 20 (April 2009).
9. Vianey Garza, *Removal of the Trustee from Office Under § 324 of the Bankruptcy Code*, 55 S. Tex. L. Rev. 705 (2014).
10. Sarah Rudolph Cole, *Obligations of the United States Trustee's Office Under the Administrative Procedure Act*, 5 J. Bankr. L. & Prac. 371 (1996).

G. Expenses of Liability or Removal

1. Insurance issues
2. When judge is prosecutor
3. When trustee “wins” or only loses a little
4. Role of United States Trustee

H. Current Affairs: *In re Chapter 13 Plan Administration in the Brownsville, Corpus Christi and McAllen Divisions*, Misc. No. 15-701, 2016 WL 2772099 (Bankr. S.D. Tex. May 6, 2016).

Treatise References: Norton Bankruptcy Law and Practice 3d, Chapter 28  
 General Reference: 28 USC § 586  
 Rule References: 2007.1, 5002  
 West's Key Number Digest, Bankruptcy ☞3003

### **11 USC § 322. Qualification of trustee**

(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before seven days after such selection, and before beginning of official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.

(b) (1) The United States trustee qualifies wherever such trustee serves as trustee in a case under this title.

(2) The United States trustee shall determine—

(A) the amount of a bond required to be filed under subsection (a) of this section; and

(B) the sufficiency of the surety on such bond.

(c) A trustee is not liable personally or on such trustee's bond in favor of the United States for any penalty or forfeiture incurred by the debtor.

(d) A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged.

Treatise References: Norton Bankruptcy Law and Practice 3d, Chapter 28  
 Rule Reference: 2008, 2010  
 West's Key Number Digest, Bankruptcy ☞3006

### **11 USC § 323. Role and capacity of trustee**

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

Treatise References: Norton Bankruptcy Law and Practice 3d, Chapter 28  
 Rule References: 2012(a), 6009  
 West's Key Number Digest, Bankruptcy ☞3008.1-3009

### **11 USC § 324. Removal of trustee or examiner**

(a) The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.

(b) Whenever the court removes a trustee or examiner under subsection (a) in a case under this title, such trustee or examiner shall thereby be removed in all other cases under this title in which such trustee or examiner is then serving unless the court orders otherwise.

Treatise References: Norton Bankruptcy Law and Practice 3d, Chapter 28  
 Rule Reference: 2012  
 West's Key Number Digest, Bankruptcy ☞3007

### **11 USC § 325. Effect of vacancy**

A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding.

Treatise References: Norton Bankruptcy Law and Practice 3d, Chapter 28  
 Rule Reference: 2012  
 West's Key Number Digest, Bankruptcy ☞3007

this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe:

(6) make such reports as the Attorney General directs, including the results of audits performed under section 603(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005;

(7) in each of such small business cases —

(A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11, at which time the United States trustee shall —

(i) begin to investigate the debtor's viability;

(ii) inquire about the debtor's business plan;

(iii) explain the debtor's obligations to file monthly operating reports and other required reports;

(iv) attempt to develop an agreed scheduling order; and

(v) inform the debtor of other obligations;

(B) if determined to be appropriate and advisable, visit the appropriate business premises of the debtor, ascertain the state of the debtor's books and records, and verify that the debtor has filed its tax returns; and

(C) review and monitor diligently the debtor's activities, to determine as promptly as possible whether the debtor will be unable to confirm a plan; and

(8) in any case in which the United States trustee finds material grounds for any relief under section 1112 of title 11, apply promptly after making that finding to the court for relief.

(b) If the number of cases under chapter 12 or 13 of title 11 commenced in a particular region so warrants, the United States trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee, or designate one or more assistant United States trustees to serve in cases under such chapter. The United States trustee for such region shall supervise any such individual appointed as standing trustee in the performance of the duties of standing trustee.

(c) Each United States trustee shall be under the general supervision of the Attorney General, who shall provide general coordination and assistance to the United States trustees.

(d) (1) The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph (a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11. The Attorney General may not require that an individual be an attorney in order to qualify for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11.

(2) A trustee whose appointment under subsection (a)(1) or under subsection (b) is terminated or who ceases to be assigned to cases filed under title 11, United States Code, may obtain judicial review of the final agency decision by commencing an action in the district court of the United States for the district for which the panel to which the trustee is appointed under subsection (a)(1), or in the district court of the United States for the district in which the trustee is appointed under subsection (b) resides, after first exhausting all available administrative remedies, which if the trustee so elects, shall also include an administrative hearing on the record. Unless the trustee elects to have an administrative hearing on the record, the trustee shall be deemed to have exhausted all administrative remedies for purposes of this paragraph if the agency fails to make a final agency decision within 90 days after the trustee requests administrative remedies. The Attorney General shall prescribe procedures to implement this paragraph. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency.

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