

# How to Get Your Own 'Free' Private Investigator in Bankruptcy

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September 27, 2023



**Subchapter V of Chapter 11 of the Bankruptcy Code, which turned three earlier this year, created a more streamlined and less expensive Chapter 11 reorganization path for small business debtors.**

It also created a new position player in the reorganization game – the Subchapter V Trustee. The primary role of the Subchapter V Trustee is to facilitate a consensual plan of reorganization. In other words, to be a mediator between the debtor and its creditors.

In certain cases, however, a Subchapter V Trustee's role can be expanded from facilitator to investigator. This can occur when there is a reasonable suspicion of bad behavior by the debtor. The standard is "cause," a little word with an expansive definition. Depending on the case, it can mean mismanagement by the debtor or the debtor's insiders or principals, failure to provide documents or accounting records, failure to account for assets, criminal charges against the debtor or a principal of the debtor, squandering of estate assets, potential insider or intercompany claims, or significant questions about the debtor's true financial condition.

If the Bankruptcy Court finds cause, then it can order a Subchapter V Trustee 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.

Related to the investigation, the Trustee must file a statement of any investigation, 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.

The Court can enhance the Trustee's powers on its own. A creditor also can move the Court to turn the Trustee into a private investigator. As a general rule, the debtor pays the fees and expenses of the Trustee, so the debtor could find itself paying to be investigated. This is not a remedy available in every case. But where a creditor believes the debtor is not being honest, it can be a powerful weapon. In some cases, the mere threat of a motion might cause a debtor to be more cooperative and transparent about its affairs.

This article is based on a presentation Mr. Martin gave at the 2023 National Association of Bankruptcy Trustees in Washington, DC.

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