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Bankruptcy Practice in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

**BANKRUPTCY PRACTICE
IN VIRGINIA**

Fifth Edition

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employment, that is insufficient to meet the involvement in commercial or business activity standard.²⁰

4. Business Activities Includes Winddown. If a business is no longer operational, courts have evaluated whether the principal or the entity itself is eligible based on activities such as winding down the business affairs. This is a fact-specific analysis, but the majority of courts to consider the question have held that business activities are not limited to ongoing business operation activities. At least one court has found that keeping the empty shell of the former business entity open did not qualify as being “engaged” in business activities.²¹ In general, courts apply a totality of the circumstances test to determine whether activities were sufficient commercial or business activities.²² As a result, the term “commercial or business activities” is generally applied in an exceptionally broad manner, including “any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).”²³ Based on this interpretation, winddown activities, such as interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records, constitute sufficient commercial or business activities.²⁴ In individual cases, receipt of a material contribution to the debtor’s income as a part-time independent contractor and rental of her former residence have been held to be within the scope of commercial or business activities.²⁵

C. Conversion or Revocation. Despite the default position of the debtor remaining in possession in subchapter V, the SBRA provided for the situation where a debtor may need to be removed from possession.²⁶ The standard for removal (also referred to as “dispossession”) is “cause” including fraud, dishonesty, incompetence, or gross mismanagement. A removed debtor

²⁰ See, e.g., *In re Rickerson*, 636 B.R. at 429.

²¹ *Id.*

²² *In re Ikalowych*, 629 B.R. at 284-85.

²³ *Id.* at 276.

²⁴ *Id.* at 285-86; see also *In re Offer Space, LLC*, 629 B.R. at 303 (the debtor was not operating as a business and was only attempting to realize value from its assets and pay creditors).

²⁵ *In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021).

²⁶ 11 U.S.C. § 1185(a).