The Barton Doctrine and Trustee Immunity

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Bankruptcy trustees are often forced to make difficult decisions on short notice with limited or incomplete information available to guide them. Trustees must decide whether to administer or abandon assets, assume or reject leases, pursue litigation, and operate businesses, among many other decisions. Many times, a trustee will not have sufficient funds, debtor cooperation, or time to collect all information that could possibly be relevant to the decision at hand. Thus, trustees must trust their experience and intuition to arrive at what they consider to be the best decision, mindful that they are fiduciaries to the bankruptcy estate. Fortunately, most decisions do not expose a trustee to litigation or additional scrutiny, but whether as a result of a lapse in judgment, mistake, or simply the actions of a disgruntled stakeholder, a trustee may become a defendant in a lawsuit.

A bankruptcy trustee ordinarily is immune from suit for personal liability for acts taken as a matter of the trustee’s business judgment, or in acting in accordance with his statutory duty or pursuant to court order. However, a bankruptcy trustee is not required to obtain prior court approval before acting on behalf of the debtor’s estate. Often, exigent circumstances will make obtaining a protective court order ineffective in preserving the status quo and preserving the value of the assets concerned.

In determining whether a bankruptcy trustee’s actions were within the scope of his authority, courts presume that actions taken by a trustee in his official capacity were a part of the trustee’s duties unless facts demonstrating otherwise are established.

The Barton Doctrine

One shield that a trustee should always first consider is whether the plaintiff satisfied the Barton Doctrine before bringing a claim. Failing to observe the requirements articulated in the Barton Doctrine is grounds for dismissal of a case for lack of jurisdiction. The doctrine originates from *Barton v. Barbour*, 104 U.S. 126 (1881). Barton commenced an action against Barbour for injuries she suffered when she was ejected from a rail car traveling along a railroad for which Barbour served as the court-appointed receiver. The Supreme Court held that in order to maintain an action against a trust estate, a plaintiff must seek permission to sue a trustee in the court appointing the trustee prior to commencing such an action outside of the jurisdiction of the appointing court. The Supreme Court reasoned that allowing suits against the trustee outside of the appointing court would allow the trust to be controlled by “impatient suitors, without regard to the equities of the other claimants and to permit the trust property to be wasted in the costs of unnecessary litigation.” The Barton Doctrine, in its earliest form, required the appointing court’s approval before commencing litigation against an officer appointed by the court. The general concept has remained largely unchanged for over 135 years.

Adaptation of the Barton Doctrine to Bankruptcy Trustees

The Supreme Court held that the Barton Doctrine was not a procedural bar, but a jurisdictional threshold that must be overcome. The Second Circuit was the first circuit court to recognize that the Barton Doctrine applied to bankruptcy trustees. Thereafter, other circuit courts followed suit. The Third Circuit recently observed that even after the overhaul of the Bankruptcy Code in 1978, which included codifying the automatic stay and requiring the United States Trustee, as opposed to the court, to select bankruptcy trustees, the Barton Doctrine remains valid and mandates compliance, even though the trustee has the capacity to sue and be sued, and even where the trustee is alleged to have acted with improper motives. The protections of the Barton Doctrine extend to trustee's counsel as well, as long as counsel is acting under the direction of, or as the functional equivalent of, the trustee. Leave must also be sought even after the bankruptcy case has been closed, so a plaintiff can't simply wait it out.

But, to be clear, the doctrine does not preclude lawsuits against trustees in a non-bankruptcy forum. Rather, it simply imposes a jurisdictional step, and requires the bankruptcy court to determine *where* the suit may be brought, and not *whether* the trustee may be sued, subject to the plaintiff's showing of some foundation for the suit, as described below.

The first hurdle a prospective plaintiff must overcome in seeking to sue a trustee is to make a prima facie case before the bankruptcy court, establishing that the case to be filed by the plaintiff is not without foundation. The "not without foundation" test is typically more flexible than the standard of review a court will apply on a motion to dismiss under Federal Rule 12(b)(6), and does not require the bankruptcy court to conduct an analysis of the immunities and defenses that may be raised by the trustee. In other words, the bankruptcy court is *not* expected to conduct a mini trial on the merits, and its finding will only be reviewed for an abuse of discretion.

Exceptions to the Barton Doctrine

The Barton Doctrine is not absolute, and there are exceptions that must be considered. The first is not necessarily an exception, but a practical effect of the doctrine, and would seem self-evident. It does not prevent a creditor or other litigant from bringing the action in the bankruptcy court. Such actions are permitted inasmuch as the claim against the trustee would remain within the jurisdiction of the appointing court.

Next, in the event that a trustee is actually operating an enterprise, rather than simply administering and liquidating assets, a trustee may be subject to suit with respect to any of their acts or transactions in carrying on business connected with the property. This exception was created by Congress and necessitates that a trustee committed a tort in the course of operating the enterprise. Courts have interpreted the statute to restrict the Barton Doctrine's application under such circumstances and to permit actions that address torts committed in furtherance of the debtor's business, e.g., a negligence claim in a slip-and-fall case where a bankruptcy trustee was operating a retail store.

The third exception arises when a trustee takes or retains possession of property that is not an asset of the estate and is acting ultra vires. If the trustee is acting outside the scope of the trustee's authority, he can be personally liable for any breach or tort. Courts have adopted a presumption that acts were a part of the trustee's duties unless the plaintiff initially alleges facts that demonstrate the trustee acted ultra vires. The presumption survives unless facts demonstrating otherwise are clearly established. For example, one Circuit Court sided with a trustee in a case where the plaintiffs, having been sued by the trustee for contempt, filed an action in state court seeking damages against the trustee for libel, slander and other related offenses. Further, bare allegations that the trustee's actions were prompted by improper motives are similarly insufficient to overcome that presumption.

'Swope' Decision

The Third Circuit recently decided a case in which trustee immunity and the Barton Doctrine were implicated, in *Phoenician Mediterranean Villa v. Swope (In re J&S Properties)*, 872 B.R. 138 (3d Cir. 2017).

Through a series of events set in motion by the debtor's tenant's failure to follow clear instructions regarding the heating of the debtor's property, Swope, as Chapter 7 trustee, took steps to secure and repair damage to the property to preserve its value. The non-debtor tenant argued that the trustee's actions in locking the tenant out of the property (a) violated its Fourth Amendment and due process rights, and (b) were ultra vires and, thus, exposed the trustee to personal liability. Accordingly, the tenant argued, the trustee did not enjoy immunity from suit. The Bankruptcy Court concluded, and the District Court agreed, that the trustee properly exercised her business judgment in taking the steps necessary to protect bankruptcy estate property. Because the trustee's actions fell within her statutory duties, she was entitled to immunity for such actions.

On appeal, the Third Circuit reviewed whether qualified immunity applied to discretionary actions taken by a trustee to preserve the bankruptcy estate's assets, and whether that immunity protected the Trustee's conduct. In affirming the decisions of the courts below, the Third Circuit held that the trustee's conduct was immune from suit because she exercised reasonable care under the circumstances and did not clearly violate any established law.

In so holding, the court relied on the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982), which stated that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The court found a Chapter 7 trustee to be a "government official" who could enjoy these protections as long as they did not act contrary to clearly established law.

The Third Circuit Court went on to say that, when properly applied, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Swope*, at 142. In order to pierce through this veil of immunity, a plaintiff must establish that the official violated a statutory or constitutional right, which is "clearly established" at the time of the conduct. A right is clearly established when it is supported by sufficient and robust judicial precedent. The court concluded that the trustee was not incompetent, and did not violate any clearly established law.

Rather, the court focused on the trustee's duties, as set out in Section 704 of the Bankruptcy Code, specifically to "safeguard, liquidate and administer the estate's property for the benefit of creditors." *Id.* at 143. The court agreed that, under the circumstances, "the imminent damage to the estate's largest asset would reasonably lead a trustee in Swope's position to believe that taking control of the property," including changing the locks, "was not only permissible, but statutorily required." *Id.* at 144.

On a final note, the Third Circuit quickly disposed of the plaintiff's argument that post hoc court action by the trustee to seek court approval of actions she had taken should be interpreted as an admission by the trustee that she would need a court order before locking the plaintiff out of the premises. The court countered that bankruptcy trustees often seek post hoc court approval for actions taken under exigent circumstances. Indeed, the court stated that if it were "to interpret this practice as an admission of wrongful behavior, it would upend years of custom and impair the ability of trustees to protect estates or encourage them to refrain from seeking court supervision of their actions. We eschew such undesirable results." *Id.* at 146.

When faced with a suit for actions taken in the course of a trustee's appointment, the trustee should first consider whether the plaintiff complied with the Barton Doctrine. Absent compliance, the court hearing the suit will have no jurisdiction to consider the case unless one of the aforementioned exceptions applies. The Barton Doctrine essentially acts as a gatekeeper, preventing oftentimes frivolous suits against a trustee in distant and sometimes unfriendly courts. To the extent that a trustee faces a decision that may implicate his personal liability, immunity is preserved where the trustee acts within his statutory duties, and does not violate any clearly established law.

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