



AMERICAN
BANKRUPTCY
INSTITUTE

2025 Winter Leadership
Conference

Trustee's Rights in the Debtor's Shoes: *In Pari Delicto, Barton and More*

Robert F. Elgidely

Fox Rothschild LLP | Miami

Hon. Paul R. Hage

U.S. Bankruptcy Court (E.D. Mich.) | Detroit

Ferve E. Khan

BakerHostetler | New York

Cia H. Mackle

Pachulski Stang Ziehl & Jones LLP | Coral Gables, Fla.

CONCURRENT SESSION

2025

ABI WINTER LEADERSHIP CONFERENCE

“Trustee’s Rights in the Debtor’s Shoes: In Pari Delicto, Barton and More”

PRESENTERS:

Robert F. Elgidely, Esq. (Fox Rothschild LLP)
Honorable Paul Hage (U.S. Bankruptcy Court for Eastern District of Michigan)
Ferve E. Khan, Esq. (Baker Hostetler LLP)
Cia H. Mackle, Esq. (Pachulski Stang Ziehl & Jones LLP)

SCENARIO: Your client has been appointed as a fiduciary in a corporate case stemming from fraud or financial crime and she wishes to sue a third party for its role in facilitating and furthering the scheme.

QUESTION: Can she do so or does the company’s unlawful conduct prevent her from suing the third party and obtaining legitimate recoveries for the victim-creditors?

I. BAD ACTOR v. BAD ACTOR? - In Pari Delicto Defense Absolute Bar to Claims

- A. Common-law doctrine “asserts the principle that a participant in illegal, fraudulent or inequitable conduct cannot recover from another participant in that conduct.” *Sender v. Mann*, 423 F.Supp.2d 1155, 1174 (D. Colo. 2006) (citing *PMN, Inc. v. Porter (In re Porter McLeod, Inc.)*, 231 B.R. 786, 793 (D. Colo. 1999).
- B. The doctrine of *in pari delicto* derives from the Latin, *in pari delicto potior est conditio defendentis*. In modern English this means “[i]n a case of equal or mutual fault ... the position of the [defending] party ... is the better one.” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (quoting BLACK’S LAW DICTIONARY 711 (5th Ed. 1979)).
- C. As noted by the Supreme Court in *Bateman Eichler, Hill Richards, Inc. v. Berner*: “The [*in pari delicto*] defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.” 472 U.S. 299, 306 (1985).
- D. “A plague on both your houses!” (a famous line from William Shakespeare’s tragedy *Romeo and Juliet*): a common idiom used to express frustration or criticism toward two rivaling parties, suggesting that both are at fault for a destructive conflict. It signifies a refusal to take sides in a pointless or long-running dispute.
- E. The law of the controlling state will dictate the result.

II. DEBTOR = BAD ACTOR? - IMPUTATION DOCTRINE

- A. Application of the imputation doctrine should not be confused with the application of *in pari delicto*. The question of imputation addresses only whether a plaintiff was at equal fault with a third party target.
- B. The United States Supreme Court has held that state law governs whether an agent's actions may be imputed to a corporation for state law claims. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 84, 85, 87-89, 114 S. Ct. 2048, 2054 (1994).
- C. Where a plaintiff has acted wrongfully through an agent in the scope of the agency, the usual presumption is the wrongful act of the agent is attributed to the principal.
- D. The question becomes whether the actions of the agent should be imputed to the corporate entity, and whether a trustee or receiver should be barred from bringing suit due to wrongful actions in which the trustee or receiver did not participate.

III. TRUSTEES, COMMITTEES, & SIPC TRUSTEE = BAD ACTORS

- A. Section 541(a)(1) provides that property of the estate includes, among other things, "all legal or equitable interests of the debtor in property *as of the commencement of the case*."
- B. Section 541(a)(1) was derived from Section 70a of the Bankruptcy Act of 1898 which provided that a trustee in bankruptcy was vested "by operation of law," as of the petition date, with the title of the bankrupt in specific property, "including rights of action." § 70a(5). Courts interpreted Section 70a as providing that the trustee "stepped into the shoes" of the bankrupt and was "subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the petition." *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966).
- C. The determination of the estate's interests in property is governed by state law, absent some federal interest requiring a different result. *Butner v. United States*, 440 U.S. 48, 55 (1979).
- D. As a result, courts have held that a debtor's claims (and applicable defenses thereto), must be evaluated *as they existed on the petition date*. This means that when wrongful conduct is perpetrated by a debtor which subsequently files for bankruptcy, the defense of *in pari delicto* is available in an action by a bankruptcy trustee against a third party pursuant to or consistent with 11 U.S.C. § 541(a)(1), if the third party could have raised the defense against the debtor.

- *See, e.g., Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (Under the *Wagoner* rule, a trustee in bankruptcy stands in the shoes of the debtor and any claims the trustee brings have the same deficiencies that they would if the debtor brought them. A “claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation.”); *Sender v. Buchanan (In re Hedged-Invs. Assocs.)*, 84 F.3d 1281, 1285 (10th Cir. 1996) (“Congress intended the trustee to stand in the shoes of the debtor and ‘take no greater rights than the debtor himself had.’ . . . Therefore, to the extent [the trustee] must rely on 11 U.S.C. § 541 for his standing in this case, he may not use his status as trustee to insulate the partnership from the wrongdoing of Mr. Donahue and HIA Inc.”); *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 357 (3d Cir. 2001) (unsecured creditors’ committee stands in shoes of debtor and in pari delicto bars the committee’s claims).

- E. Securities Investor Protection Act of 1970 (SIPA Trustee):** The powers of a SIPA trustee are cabined by Title 11. A SIPA liquidation proceeding is typically commenced by SIPC filing an application with a federal district court for a protective decree after being alerted that a firm “is in or is approaching financial difficulty.” 15 U.S.C. § 78eee(a)(1). Thereafter, the district court will issue the protective decree and commence the SIPA liquidation proceeding so long as the debtor consents, does not contest the application or is found to be insolvent or otherwise the subject of ongoing liquidation or receivership proceedings. *Id.* at §78eee(b)(1). If a protective order is issued, the federal district court appoints a SIPA trustee and then refers the SIPA liquidation proceeding to the bankruptcy court in the same judicial district. Morse, Daniel, “When a Securities Brokerage Firm Goes Broke: A Primer on the Securities Investment Protection Act of 1970,” 25 *Amer. Bankr. Inst. J.* 34, 3 (February 2006). Notably, SIPA mandates that a SIPA liquidation proceeding is to be conducted “in accordance with Chapters 1, 3 and 5, and subchapters I and II of Chapter 7 of title 11.” 15 U.S.C. § 78fff(b). The SIPA trustee’s duties and powers are defined in SIPA and essentially mirror the duties and powers of a chapter 7 trustee appointed under the Code. *See* 15 U.S.C. § 78fff-1(b).

**Picard v. HSBC Bank PLC*, 454 B.R. 25 (S.D.N.Y. 2011) (SIPA, like the Bankruptcy Code, does not confer standing on the trustee to pursue common law claims against third parties on behalf of the estate’s creditors).

IV. FEDERAL EQUITY RECEIVERS = BAD ACTORS?

- A. When a bad actor is removed and a receiver is appointed in his place, the corporate entities are no longer the “evil zombies” of the bad actor; they are “[f]reed from his spell” and regain standing to sue third parties for their involvement in the unlawful conduct.

- B. *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir.), *cert. denied*, 516 U.S. 1028 (1995) (“[T]he reason [for the in pari delicto defense], of course, is that the wrongdoer must not be allowed to profit from his wrong by recovering property that he had parted with in order to thwart his creditors. That reason falls out now that the [scheme operator] has been ousted from control of and beneficial interest in the corporations. The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the scheme operator’s] evil zombies. Freed from his spell they became entitled to the return of the moneys--for the benefit not of [the scheme operator] but of innocent investors--that [the scheme operator] had made the corporations divert to unauthorized purposes Put differently, the defense of in pari delicto loses its sting when the person who is in pari delicto is eliminated.”).
- C. Receivership followed by Bankruptcy: *See In re Le-Nature’s Inc.*, 2009 WL 3571331, at *6 (W.D. Pa. Sept. 16, 2009); *In re Le-Nature’s Inc.*, 2009 WL 3526569, at *2 (W.D. Pa. Oct. 23, 2009); *In re Le-Nature’s Inc.*, 2012 WL 363981, at *6 (W.D. Pa. Feb. 2, 2012) (*in pari delicto* defense not enforceable against bankruptcy trustee where custodian was appointed by state court to operate business five days prior to filing of involuntary bankruptcy petition); *Mukamal v. BDO Seidman, LLP (In re E.S. Bankest, L.C.)*, 2010 WL 2926203, at *2 (Bankr. S.D. Fla. July 23, 2010) (because receiver was appointed prior to bankruptcy, fraud could not be imputed to the bankruptcy trustee, and the *in pari delicto* defense was not a bar to the trustee’s claims). *But see, Kelley v. BMO Harris Bank, N.A.*, 115 F.4th 901 (8th Cir. 2024) (reversing jury award of \$485 million in compensatory damages and \$80 million in punitive damages).

V. **EXCEPTIONS & EXCEPTIONS TO EXCEPTIONS – In Pari Delicto MAY NOT apply!**

- A. **Adverse Interest Rule**: The genesis of the adverse-interest exception can be found in the basic principles of agency law. Under *respondeat superior*, principals may be held liable for the tortious actions of their agents undertaken during the course and scope of the agent’s employment. However, if the agent was acting solely for his or her own benefit and to the detriment of the corporation, it cannot be said that the agent was acting in the scope of his or her employment.
1. Does the adverse interest exception require:
 - a. The agent’s total abandonment of the entity’s interests, such that **any benefit to the entity** defeats the adverse interest exception?

See Kirschner v. KPMG LLP, 938 N.E.2d 941, 952 (N.Y. 2010); *Breeden v. Kirkpatrick & Lockhart LLP (In re Bennett Funding Grp., Inc.)*, 336

AMERICAN BANKRUPTCY INSTITUTE

F.3d 94, 100 (2d Cir. 2003); *Thabault v. Chait*, 541 F.3d 512, 527 (3d Cir. 2008); *Cobalt Multifamily Investors I, LLC v. Arden*, 2011 U.S. Dist. LEXIS 117097, at *32 (S.D.N.Y. Sept. 9, 2011), *Mag. report and recommendation adopted*, 2011 U.S. Dist. LEXIS 112296 (S.D.N.Y. Sept. 30, 2011); *Cobalt Multifamily Investors I, LLC v. Shapiro*, 2011 U.S. Dist. LEXIS 119346, at *37-38 (S.D.N.Y. Sept. 9, 2011); *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1218-19 (D. Nev. 2011); *Allard v. Arthur Andersen & Co.*, 924 F. Supp. 488, 495 (S.D.N.Y. 1996); *Official Comm. Of Unsecured Creditors of Grumman Olson Indus., Inc. v. McConnell (In re Grumman Olson Indus., Inc.)*, 329 B.R. 411, 426 (Bankr. S.D.N.Y. 2005); *NCP Litig. Trust v. KPMG*, 945 A.2d 132, 147 (N.J. Super. Ct. Law Div. 2007); *Bondi v. Bank of Am. Corp. (In re Parlamat Sec. Litig.)*, 383 F. Supp. 2d 587, 599 (S.D.N.Y. 2005); *Beck v. Deloitte & Touche*, 144 F.3d 732, 737 (11th Cir. 1998).

OR

- b. The agent's subjective intent to benefit only himself, such that **any intent to benefit the entity** defeats the adverse interest exception?

See In re CBI Holding Co., 529 F.3d 432, 448 (2d Cir. 2008); *Cobalt Multifamily Investors I, LLC v. Shapiro*, 2009 U.S. Dist. LEXIS 60481, at *16 (S.D.N.Y. July 15, 2009); *Grede v. McGladrey & Pullen*, 421 B.R. 879, 886 (N.D. Ill. 2009).

OR

- c. No short term benefit to the entity, so that **any short term benefit** defeats the adverse interest exception?

Short term benefit defeats the adverse interest exception: *Cobalt Multifamily Investors I, LLC v. Shapiro*, 2011 U.S. Dist. LEXIS 119346, at *343 (S.D.N.Y. Sept. 9, 2011); *Beck v. Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998); *Kirschner v. Grant Thornton, LLP*, 2009 U.S. Dist. LEXIS 32581, at *21 (S.D.N.Y. Apr. 14, 2009).

Short term benefit does not defeat the adverse interest exception: *CBI Holding Co.*, 529 F.3d 432, 453 (2d Cir. 2008); *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 810 (Minn. Ct. App. 2007); *Grede v. McGladrey & Pullen LLP*, 421 B.R. 879, 888 (N.D. Ill. 2009); *Oppenheimer-Palmieri Fund, L.P. v. Peat Marwick Main & Co. (In re Crazy Eddie Sec. Litig.)*, 802 F. Supp. 804, 817-18 (E.D.N.Y. 1992).

- B. Sole Actor Exception to Adverse Interest Rule:** Under this exception, if the agent is the sole representative of a principal, then that agent's fraudulent conduct will be imputed to the principal regardless of whether the agent's actions were adverse to the principal's interest. *See, e.g., In re NM Holding Co., LLC*, 622 F.3d 613, 620-21 (6th Cir. 2010); *Grassmueck v. Am. Shorthorn Assoc.*, 402 F.2d 833, 838 (8th Cir. 2005) (“[W]here the principal and agent are alter egos, there is no reason to apply an adverse interest exception to the normal rules imputing the agent's knowledge to the principal, because ‘the party that should have been informed [of the fraudulent conduct] was the agent itself albeit in its capacity as principal.’”); *Breeden v. Kirkpatrick & Lockhard LLP (In re Bennett Funding Group)*, 336 F.3d 94, 100 (2d Cir. 2003).
- C. Innocent Insider (Decision Maker) Exception:** The sole actor exception, however, may in turn be limited by the “innocent insider” exception. Under the innocent-insider exception, the sole-actor rule might not apply if there was an innocent decisionmaker within the company that could have stopped the wrongdoing had that decisionmaker known of it. The touchstone of the innocent-insider exception is control. If an innocent person inside the corporation had the power to stop the fraud, the agent and the company are not mere alter egos, so the sole actor rule cannot apply. Keep in mind those with honorary or “ceremonial” titles with the company.

VI. EXEMPTIONS - In Pari Delicto does NOT apply!

- A. Hypothetical Judgment Lien Creditor per § 544:** The doctrine of *in pari delicto* only applies to the trustee in her debtor status conveyed upon her by 11 U.S.C. § 541, not in her status as creditor as conveyed upon her by 11 U.S.C. § 544. *See, e.g., PM Denver, Inc. v. Porter (In re Porter McLeod, Inc.)*, 231 B.R. 786, 793-94 (D. Colo. 1999) (*In pari delicto* defense not available because the trustee is acting in his § 544(a) “creditor status.”)
- B. Defendant-insiders of Debtor:** *in pari delicto* does NOT apply to bar claims against corporate insiders. *See, e.g., OHC Liquidation Trust v. Credit Suisse First Boston*, 340 B.R. 510, 536 (Bankr. D. Del. 2006); *Official Committee of Unsecured Creditors v. Austin Fin. Servcs. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 518 (Bankr. S.D.N.Y. 1999); *Goldin v. Primavera Familienstiftung (In re Granite Partners, L.P.)*, 194 B.R. 318, 332 (Bankr. S.D.N.Y. 1996); *Alberts v. Tuft (In re Greater Southeast Community Hosp. Corp.)*, 333 B.R. 506, 538-39 (Bankr. D.C. 2005); *Liquidating Trustee of Amcast Unsecured Trust v. Baker (In re Amcast Indus. Corp.)*, 365 B.R. 91, 123-24 (Bankr. S.D. Ohio 2007).
- C. Assignment of Claims:** A trustee may also acquire standing to assert claims on behalf of the estate if he takes an unconditional assignment of

claims from creditors. *See, e.g., Grede v. Bank of New York Mellon*, 598 F.3d 899 (7th Cir. 2010) (claims belonging to individual creditors assigned to a liquidating trust pursuant to chapter 11 plan could be pursued by the liquidating trustee); *Logan v. JKV Real Estate Servs. (In re Bogdan)*, 414 F.3d 507, 512 (4th Cir. 2005); *Sender v. Mann*, 423 F. Supp. 2d 1155, 1174 (D. Colo. 2006) (unconditional assignment of creditors' claims into opt-in trust defeats *in pari delicto* defense). *Bogdan v. JKV Real Estate Servs.*, 414 F.3d 507, 514 (4th Cir. 2005) (“As assignee, the trustee stands in the shoes of the mortgage lenders, thereby assuming all rights and interests that the mortgage lenders have in the causes of action and becoming subject to all defenses that could have been asserted against the mortgage lenders.”).

VII. OTHER ARGUMENTS

- A. **Equitable Balancing Test:** The *in pari delicto* defense is an equitable doctrine that should not apply where it would frustrate its intended purpose. Proper application of state law in conjunction with § 541 demands that courts conduct an equitable balancing test to determine the effect of an *in pari delicto* defense on a trustee's claims. The question is how a particular state's formulation of the doctrine applies to the trustee under the equities and facts of the case, including post-petition events.
- B. **Post-Petition Events - § 541(a)(7):** Indeed, an estate's claims and interests are subject to change due to post-petition events. § 541(a)(7) provides that “property of the estate” also includes “any interest in property that the estate acquires after the commencement of the case. In other words, at the same time that a debtor's interest becomes property of the estate, the possibility that such interest might change also becomes property of the estate (e.g., contingent property interests that vests during the case, post-petition appreciation in home value, etc.). Thus, courts should consider the effect of a trustee's appointment in determining whether application of the *in pari delicto* defense is equitable.

VIII. Getting Around In Pari Delicto Defense

- A. A postconfirmation or litigation trustee/plan administrator is subject to *in pari delicto* defense if it receives estate causes of action that would also be subject to *in pari delicto* defense.

A litigation trust is a trust created for the benefit of creditors of a debtor to prosecute and distribute the proceeds of certain causes of action belonging to the debtor that are transferred to the litigation trust as part of the bankruptcy plan. Post-confirmation litigation trusts are permitted under section 1123(b)(3)(B) of the Bankruptcy Code. 11 U.S.C. § 1123(b)(3)(B) (“a plan may provide for the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim

or interest”); *see also In re Acequia, Inc.*, 34 F.3d 800, 808 (9th Cir. 1994) (“[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action such as those for previous insider misconduct and mismanagement of the debtor.”).

As a creature of contract, a litigation trust only has standing to bring the causes of action that are expressly transferred to it. Courts have held that a claim may be dismissed based upon a lack of standing if the plan of reorganization and/or litigation trust agreement do not explicitly convey the claim. *Rahl v. Bande*, 328 B.R. 387, 401 (S.D.N.Y. 2005) (holding that plaintiff lacked standing to pursue claim against auditor when litigation trust agreement conveyed only claims against officers and directors). When a litigation trust is only provided with estate causes of action subject to an *in pari delicto* defense, the litigation trust will have no greater ability to withstand the defense than did the bankruptcy trustee. *Nisselson v. Lernout*, 469 F.3d 143 (1st Cir. 2006).

B. Workaround #1: Assignment of individual creditor claims through the plan process. Courts have increasingly permitted creditors to assign their individual claims to a litigation trustee. *Grede v. Bank of New York Mellon*, 598 F.3d 899 (7th Cir. 2010) (Seventh Circuit reversing district court’s dismissal of postconfirmation liquidating trustee’s claims on standing grounds, and finding that the postconfirmation trustee had authority to act on behalf of assigning investors); *Semi-Tech v. Bankers Trust*, 272 F. Supp. 2d at 323-24 (S.D.N.Y. 2003), *aff’d*, 450 F.3d 121, 123 (2d Cir. 2006) (Second Circuit affirming decision that postconfirmation trustee has standing to bring claims assigned by creditors under confirmed plan); *Calvert v. Zions Bancorporation (In re Consol. Meridian Funds)*, 485 B.R. 604 (Bankr. W.D. Wash. 2013) (Western District of Washington bankruptcy court holding that liquidating trustee had standing to pursue claims assigned to it under the plan by investor creditors of a Ponzi scheme); *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495 (D. Del. 2012) (Delaware bankruptcy court finding that trustee of a liquidation trust created by a confirmed plan of reorganization may pursue third-party claims assigned to him arising from debtors’ Ponzi scheme); *Manty v. AMERRA Cap. Mgmt., LLC (In re Pipeline Foods, LLC)*, 2023 Bankr. LEXIS 2508, at *33 (Bankr. D. Del. Oct. 10, 2023) (Delaware bankruptcy court found that postconfirmation liquidating trustee had the authority to pursue assigned claims).

1. Consideration for Assignments:

a. **Share of Funds Recovered:** Consideration for the assignment can be a pro rata share, after payment of litigation fees and expenses, of any recovery from assigned claims.

- b. **“Sweetener” to Increase Claim:** In the 9th Circuit, a common practice is to induce creditors to assign their claims to the trust, with a “sweetener” so that assigning creditors will have a bumped up claim. In *Williams v. California 1st Bank*, 859 F.2d 664, 665 (9th Cir. 1988), a Chapter 7 trustee sought to take on a role very similar to that of a state law liquidating trustee, which is vested by contract with certain rights of action, by moving the bankruptcy court for permission to solicit and accept assignments of direct causes of action from certain creditors. The bankruptcy court approved the motion and the trustee obtained assignments from over one hundred creditors, and then asserted them against a bank for allegedly participating in a Ponzi scheme. The bank challenged the trustee’s standing to assert the creditors’ claims against it, notwithstanding that the creditors formally assigned their claims to the trustee. The Ninth Circuit agreed, placing great weight on the fact that the trustee would distribute the proceeds of the claims only to the assigning creditors and not to all creditors of the estate. It reasoned that the assigning creditors remained the true parties in interest, since only they received the proceeds. The estate realized no benefit from the trustee’s pursuit of assigned claims on behalf of the assigning creditors, and thus the trustee was collecting “money not owed to the estate.” The “con” under this approach is that the economics may not be enticing to creditors to assign their claims.

- C. **Workaround #2: Class Action (No Litigation Trustee Involvement).** May be necessary where either there has been a challenge to the ability of the trustee to maintain the action or where the “sweetener” consideration does not produce the needed volume of assignments.

- D. Strategic Decision When Assignments Provide Trustee Ability to Sue Third Party Aider and Abetter – Class Action or only Direct Assignments?

IX. **Assignments Appear to be a Viable Workaround, But Significantly Less Efficient Than Trustee Being Able to Bring Claims, Is There A Case for Courts or Congress Permitting Trustees to Bring Aiding and Abetting Claims**

- A. *In pari delicto* is an equitable doctrine, courts could decide not to apply *in pari delicto* as strictly.
- B. If we are left with needing Congress to act to change the Code, has Congress already affirmatively decided not to?

The issue can be traced back to the Supreme Court’s decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972). In *Caplin*, a bankruptcy trustee under the Bankruptcy Act sought to assert claims against an indenture trustee on behalf of the estate’s bondholders. The Court held that the trustee lacked standing to do so for three reasons, including a that there was an *in pari delicto* issue, and no statutory authority that would permit a trustee to assert creditor claims without creditor consent.

Nonetheless, the Supreme Court in *Caplin* invited Congress to consider the issue:

Congress might well decide that reorganizations have not fared badly in the 34 years since [the reorganization chapter] was enacted and that the *status quo* is preferable to inviting new problems by making changes in the system. Or, Congress could determine that the trustee in a reorganization was so well situated for bringing suits against indenture trustees that he should be permitted to do so. In this event, Congress might also determine that the trustee’s action was exclusive, or that it should be brought as a class action on behalf of debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available. Congress would also be able to answer questions regarding subrogation or timing of law suits before these questions arise in the context of litigation. Whatever the decision, it is one that only Congress can make.

Six years later, in enacting the Bankruptcy Code, section 544 was initially drafted to include a subsection (c) to overrule *Caplin*, however, it was deleted before promulgation of the final version of section 544.

X. **HIGHLAND CAP. MGMT., L.P.**

A. **OVERVIEW**

1. One purpose of a chapter 11 plan of reorganization is protect professionals who assisted with the reorganization proceeding from post-petition litigation concerning their conduct during the course of a case. These protections take the form of two key provisions commonly found in chapter 11 plans:
 - (1) a “exculpation provision”: a small group of individuals and entities integral to the restructuring effort—usually estate fiduciaries like a debtor’s directors, officers and advisors and officially appointed bodies such as unsecured committees—are released from suits alleging they committed negligence in the course of the proceeding.

They can still face suit alleging more serious wrongdoing—gross negligence, fraud, and willful misconduct.

- (2) a “gatekeeper provision” : requires the bankruptcy court’s permission before certain parties integral to the reorganization can be sued. Bankruptcy court screens for colorability before allowing the suits to move forward.
 - Protects against frivolous suits
 - Same purpose as *Barton* doctrine (from Supreme Court chestnut decision *Barton v. Barbour*, 104 U.S. 126 (1881))—requires leave of the court before suit is brought against a receiver (in bankruptcy)
- 2. Two decisions by the Fifth Circuit narrow the scope of these two provisions:
 - *In re Highland Cap. Mgmt., L.P. (Highland I)*, 48 F.4th 419 (5th Cir. Sept. 7, 2022): holding that an exculpation provision cannot extend beyond the debtor, trustees, and the creditors’ committee. Relied on **Section 524(e)** of the Bankruptcy Code, which defines the effect of discharge. It held “Section 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code”. *Id.* at 436. It acknowledged that there was a Circuit split and the decision was in the minority.
 - More recently, in *In re Highland Cap. Mgmt., L.P. (Highland II)*, 132 F.4th 353 (5th Cir. Mar. 18, 2025), held that the plan’s exculpation provision “[must] be narrowed coextensively” with the definition of “Exculpated Parties” in the exculpation provision. *Id.* at 362. The court again relied on Section 524(e) and cited SCOTUS’s decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024). It acknowledged again that there was a Circuit split as to the scope of the gatekeeper provision.
 - These decisions affect the risks administrative professionals face when deciding to assist in a chapter 11 plan, and could affect the costs of professional services during a plan.

B. BACKGROUND AND FIFTH CIRCUIT DECISIONS

- Prepetition Dallas-based investment firm Highland Capital Management, L.P. (“Highland”) managed billion-dollar, publicly-traded investment portfolios for nearly three decades. Highland was co-founded by James Dondero.

2025 WINTER LEADERSHIP CONFERENCE

- In 2019, facing several unpaid judgments and liabilities, Highland filed for Chapter 11 bankruptcy. Dondero agreed to step down as a director and officer, and unsecured creditors' committee appointed three independent directors to act as quasi-trustee and govern. During the course of the case, Dondero became increasingly litigious, objecting to settlements and appealing orders. The committee and independent directors agreed to a plan of reorganization, which Dondero objected to.
- In 2021, Highland confirmed a chapter 11 plan of reorganization. In anticipation of Dondero's litigiousness, the plan contained:
 - (1) an exculpation provision, which covered the conduct of the case related to the restructuring proceeding (including filing and administering the plan, negotiating the plan, disclosure statement, and soliciting of votes for the plan, and funding, consummation and implementation of the plan) of the debtor, advisors, independent directors, the creditors' committee, members of the committee, the professionals retained by the debtor and committee in the case, the CEO/CRO and certain related parties (the "Exculpated Parties"), and
 - (2) a plan injunction, which enjoined certain persons or holding claims against or equity interests in Highland entities (the "Enjoined Parties") from taking any actions to interfere with the implementation or consummation of the plan, including suing, enforcing orders, or asserting rights of setoff to recover from the debtor's property, and
 - (3) a gatekeeper provision, prohibiting the Enjoined Parties from pursuing claims against certain "Protected Parties", which was co-extensive with the definition of Exculpated Parties, with the bankruptcy court first determining, after notice and hearing, that such claim is colorable and specifically authorizing the Enjoined Party from bringing the claim.
- The plan was confirmed over the objection of Dondero and two entities he controlled (the "Dondero Parties").
 - Importantly the U.S. Trustee objected to the Exculpation Provision as a impermissible nonconsensual release of non-debtors' claims against other non-debtors.
 - The Dondero Parties directly appealed to the Fifth Circuit.
- In *Highland I*, the Fifth Circuit struck certain parties from the exculpation provision, holding that the exculpation of such parties violated Section 524(e) of the Bankruptcy Code. Under *Highland I*, the exculpation provision applied only to the debtor, the independent directors, the committee, and members of the committee in their official capacity, for conduct within the scope of their duties.
- Subsequently, the bankruptcy court conformed the plan to the Fifth Circuit's decision, on the debtor's motion, but declined to change the gatekeeper provision (to conform the definition of "Protected Parties" to the new scope of the exculpation provision). The Dondero Parties again appealed directly to the Fifth Circuit.

- In *Highland II*, the Fifth Circuit held that the scope of the gatekeeper provision should also exclude those parties excluded by *Highland I* from the gatekeeper provisions.
- The debtor petitioned for writ of certiorari in July 2025 and on October 14, 2025, the Supreme Court invited the Solicitor General to file a brief expressing the United States' views.

XI. TRUSTEE'S RIGHTS IN THE DEBTOR'S SHOES: IN PARI DELICTO, BARTON AND MORE: THE BARTON DOCTRINE¹

A. Introduction

The Barton doctrine, first articulated by the Supreme Court in 1881, requires a party to obtain leave from the appointing court before suing a court-appointed officer in another court for actions taken in their official capacity.² The purpose of the doctrine is to prevent the suing party from obtaining an advantage over the other claimants while the court-appointed officer is in control of the estate.³

Under the doctrine, failure to seek permission from the appointing court deprives the second court of subject matter jurisdiction. Thus, any proceeding commenced without leave must be dismissed otherwise it would constitute a “usurpation of the powers and duties” reserved to the appointing court.⁴ The Barton doctrine does not prevent suits against court-appointed officers; but rather, requires that permission be granted by the appointing court before a suit can proceed elsewhere.

¹ Prepared by Hon. Paul R. Hage & Katherine Held, U.S. Bankruptcy Court for the Eastern District of Michigan. Katherine Held is a third-year law student at the Michigan State University College of Law and is an intern for Judge Hage at the United States Bankruptcy Court for the Eastern District of Michigan.

² *Barton v. Barbour*, 104 U.S. 126, 136–37 (1881).

³ *Id.* at 128.

⁴ *Id.*

Though originally applied to receivers, nearly all federal circuits—except the D.C. Circuit—have held that the Barton doctrine applies in bankruptcy proceedings.⁵ While a bankruptcy case is ongoing, a suit filed against a bankruptcy trustee or similar officer in another court without prior permission must be dismissed, although the same suit can be brought directly in the bankruptcy court itself.⁶

B. *Barton v. Barbour*

In *Barton v. Barbour*, the plaintiff, Ms. Barton, was a passenger who was injured in a railway accident. Barbour had previously been appointed as receiver for the railroad company and was operating the railroad for the benefit of creditors at the time of the accident.⁷ Ms. Barton sued Mr. Barbour in the District of Columbia, seeking \$5,000 for her injuries. He responded that he could not be sued there because the plaintiff had not obtained leave from the Virginia state court that had appointed him to serve as the receiver. The District of Columbia court agreed and dismissed the case. The plaintiff appealed to the United States Supreme Court, which affirmed, creating what is now known as the Barton doctrine.

The Supreme Court stated that “[i]t is a general rule that before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained.”⁸ The Court stated

⁵ See, e.g., *Alexander v. Hedback*, 718 F.3d 762, 767 (8th Cir. 2013); *Satterfield v. Malloy*, 700 F.3d 1231, 1234–35 (10th Cir. 2012); *McDaniel v. Blust*, 668 F.3d 153, 156–57 (4th Cir. 2012); *In re VistaCare Group, LLC*, 678 F.3d 218, 224 (3d Cir. 2012); *Lawrence v. Goldberg*, 573 F.3d 1265, 1269 (11th Cir. 2009); *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 970 (9th Cir. 2005); *Muratore v. Darr*, 375 F.3d 140, 147 (1st Cir. 2004); *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998); *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996); *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Anderson v. United States*, 520 F.2d 1027, 1029 (5th Cir. 1975).

⁶ For an excellent discussion of the Barton doctrine and the cases interpreting it, see Spinner, Ronald A., *Breaking Down the Gate—Changes to the Barton “Gate Keeper” Role in the Eleventh Circuit*, 2022 No. 5 Norton Bankr. L. Adviser NL 1 (May 2022).

⁷ *Barton*, 104 U.S. at 136–37.

⁸ *Id.* at 127–28.

that any suit against a receiver necessarily involves an attempt to obtain receivership property. In fact, the Court suggested that the main reason a person would sue a receiver is to obtain a position ahead of other creditors. The Court also reasoned that, to enforce the judgment, the plaintiff would need to levy against property already in the hands of another court—the one that had appointed the receiver. The Court stated that it could not allow this outcome as it would undermine the power of the appointing court. The Court concluded that the court administering the receivership should act as a gatekeeper, determining whether a claim has enough merit to proceed, whether in front of it or in another venue. This prevents estate assets from being “wasted in the costs of unnecessary litigation.”⁹

The Court did note an exception to its rule, though—“[I]f one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrong-doer in an action at law for its recovery.”¹⁰ Comparing the receiver to “an assignee in bankruptcy,” the Court observed that if “by mistake or wrongfully, the receiver takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting ultra vires.”¹¹ But when the receiver is acting within the scope of his or her authority, then the matter must be handled with the blessing of the appointing court.

C. 28 U.S.C § 959

Congress enacted legislation in the wake of *Barton* to address the concern that operating trustees and receivers were improperly being shielded from legitimate actions while running a

⁹ *Id.* at 130.

¹⁰ *Id.* at 134.

¹¹ *Id.*

business. This legislation has been amended many times but is now codified at 28 U.S.C. § 959.

That section provides:

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959. In addition to requiring that trustees, receivers and debtors and possession comply with non-bankruptcy law, the statute prohibits a court from using its equity jurisdiction to deprive a person of a right to a jury trial.

D. The Barton Doctrine Protects Court-Appointed Fiduciaries in Bankruptcy

As noted, substantially all circuit courts of appeal have held that the Barton doctrine applies in bankruptcy. The Barton doctrine protects not just trustees but all officers appointed by the bankruptcy court when they act in their official capacity.¹² This includes receivers, attorneys for trustees and officers acting under the trustee/receiver's direction or serving in a functionally equivalent role.¹³ The Barton doctrine has in recent years been expanded to cover trustees appointed pursuant to a plan of reorganization and other court-appointed roles.¹⁴

¹² *In re Yellowstone Mt. Club*, 841 F.3d 1090, 1094 (9th Cir. 2016).

¹³ *In re Nathurst*, 207 B.R. 755, 758 (Bankr. M.D. Fla. 1997).

¹⁴ *In re Swan Transportation Co.*, 596 B.R. 127, at *13 (Bankr. D. Del. 2018) (Barton doctrine applied to actions against future claims trustee and is intended to protect liquidating trustees and other court appointees); *Lankford v. Wagner*, 853 F.3d 1119, 1122 (10th Cir. 2017) (extending Barton doctrine to trustee's counsel where counsel acts under the direction of, or as the

The ABI Commission to Study the Reform of Chapter 11 recently proposed an amendment to the Bankruptcy Code that expressly adopts and expands the Barton doctrine. The proposed amendment would expand the scope of the Barton doctrine to the following persons in chapter 11 reorganization cases: chapter 11 trustees, estate neutrals/examiners and statutory committees and their members, as well as professionals retained by each of the foregoing. According to the Commission’s Final Report, the proposed expansion reflects the Commissioners’ beliefs that it “would (i) allow any trustee, estate neutral, and statutory committee and its members to perform their fiduciary duties with confidence and focus, and (ii) eliminate unnecessary litigation concerning the application of the Barton doctrine and whether the court in which a litigant files the action has subject matter jurisdiction over the action.”¹⁵

E. A Circuit Split Exists Regarding Whether the Barton Doctrine Remains Applicable Once a Bankruptcy Case is Closed

The question of whether the Barton doctrine continues to apply after a bankruptcy case has closed has resulted in a 5–1 circuit split. Circuits holding that the Barton doctrine continues to apply after a case has closed reason that it is necessary to protect court-appointed officers. The bankruptcy court that approves a professional’s employment can hold them accountable, but the professional can be confident that if the bankruptcy court blesses what they have done, they do

functional equivalent of, the trustee); *In re MF Global Holdings Ltd.*, 562 B.R. 866, 869 (Bankr. S.D.N.Y. 2017) (enjoining action commenced by insurers against foreign provisional liquidator in chapter 15 proceeding); *In re Yellowstone Mt. Club*, 841 F.3d at 1094 (applying doctrine to members of creditors’ committee); *In re Circuit City Stores, Inc.*, 557 B.R. 443, 449 (Bankr. E.D. Va. 2016) (Barton doctrine applied to enjoin compliance with subpoena by liquidating trustee); *In re East Coast Foods, Inc.*, 652 B.R. 910, 921 (B.A.P. 9th Cir. 2023) (Barton doctrine extended to post-confirmation chapter 11 trustee); *In re PH Dip, Inc.*, 2023 WL 158879, at *1 (C.D. Cal. 2023) (chief restructuring officer is entitled to quasi-judicial immunity when he is acting within the scope of his authority).

¹⁵ Final Report of the ABI Commission to Study the Reform of Chapter 11, Vol. IV § 5 (Proposed Recommendations: Commencing the Case, Estate Fiduciaries), at 44 (2015).

not have to worry about nettlesome litigation elsewhere. In this way, application of the Barton doctrine increases the likelihood that parties will be interested and willing to serve as estate fiduciaries. As one court noted, “the court that appointed the trustee has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties.”¹⁶

Despite the policy merits of such an approach, the Eleventh Circuit has held that extension of the doctrine after a case is closed is unwarranted because bankruptcy courts lack in rem jurisdiction once a case is closed. Separately, the Eleventh Circuit has suggested that judicial immunity provides fairly strong protection for court-appointed officers.

1. Circuits that Support the Barton Doctrine’s Extension

Seventh Circuit: In *In re Linton*,¹⁷ the Seventh Circuit held that the Barton doctrine continues to apply after a bankruptcy case is closed. In that case, a chapter 7 trustee commenced a fraudulent transfer action against the debtor, her husband and their sons. The trustee later dismissed the action, and the bankruptcy proceeding was closed. Eleven months later, the debtor and her husband sought leave from the bankruptcy court to file a malicious prosecution suit against the trustee in state court, arguing that the adversary proceeding was meritless. They had already filed the suit without waiting for the court’s permission, and it remained dormant pending the court’s decision. The bankruptcy court denied their motion, and the district court affirmed this decision.

¹⁶ *Lebovitz v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996).

¹⁷ *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998).

The Seventh Circuit held that the Barton doctrine continued to apply notwithstanding the fact that the bankruptcy case had closed. Acknowledging that *Barton* was a bankruptcy case, not a receivership case, the Seventh Circuit stated:

Just like an equity receiver, a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code. If he is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded.¹⁸

The court stated that the trustee's burden of defending against suits by litigants is most concerning while the bankruptcy proceeding is ongoing. "The threat of his being distracted or intimidated is then very great."¹⁹

Nevertheless, the court stated, the doctrine should be continued after the bankruptcy "had been wound up."²⁰ Without the doctrine, "trusteeship will become a more irksome duty," and it will be more difficult for courts to appoint competent trustees.²¹ The court continued that the expense of bankruptcy administration—already a source of considerable concern—will become even more expensive because trustees will need to pay higher malpractice premiums.²² Moreover, the court reasoned, "requiring that leave to sue be sought enables bankruptcy judges to monitor the work of the trustees more effectively. It does this by compelling suits growing out of that work to be as it were prefiled before the bankruptcy judge that made the appointment; this helps the judge decide whether to approve this trustee in a subsequent case."²³

¹⁸ *Id.* at 545.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

Finally, the court expressed concern for the integrity of bankruptcy jurisdiction absent extension of the doctrine:

If debtors, creditors, defendants in adversary proceedings, and other parties to a bankruptcy proceeding could sue the trustee in state court for damages arising out of the conduct of the proceeding, that court would have the practical power to turn bankruptcy losers into bankruptcy winners, and vice versa. A creditor who had gotten nothing in the bankruptcy proceeding might sue the trustee for negligence in failing to maximize the assets available to creditors, or to the particular creditor. A debtor who had failed to obtain a discharge might through a suit against the trustee obtain the funds necessary to pay the debt that had not been discharged.²⁴

First Circuit: Similarly, in *Muratore v. Darr*,²⁵ the owner of a corporate debtor sued the chapter 11 trustee in the district court, asserting claims for alleged misfeasance or malfeasance, abuse of process, negligence and violations of RICO while administering the bankruptcy estate. Specifically, the owner claimed that the trustee had failed to pay taxes, improperly sold properties and allowed the purchase of property with illegal funds, among other allegations. The district court granted the trustee's motion to dismiss for lack of subject matter jurisdiction based on the Barton doctrine because such suit was brought without the prior permission of the bankruptcy court. The owner appealed.

The First Circuit affirmed the district court's dismissal, concluding that the Barton doctrine did apply and that the owner's claims did not fall under the exception provided by 28 U.S.C. § 959(a), which allows trustees to be sued without leave for acts in carrying on business connected with the estate. The court found that the owner's allegations pertained to the trustee's administrative duties as a trustee rather than acts in furtherance of the debtor's business. The court held that merely taking actions to preserve the estate—holding, collecting, liquidating or

²⁴ *Id.* at 546.

²⁵ *Muratore v. Darr*, 375 F.3d 140, 143 (1st Cir. 2004).

maintaining property—did not constitute “carrying on business.”²⁶ Rather, the statute is intended to permit redress for torts committed while operating a business.

The court specifically rejected the owner’s argument that the Barton doctrine should not apply because the bankruptcy case was closed, noting that the doctrine serves purposes beyond protecting estate assets, such as ensuring competent trustees and effective monitoring by bankruptcy judges.²⁷

Ninth Circuit: In *In re Crown Vantage, Inc.*,²⁸ the Ninth Circuit held that the Barton doctrine applied notwithstanding the fact that a plan had been confirmed and therefore a bankruptcy estate no longer existed. The court required plaintiffs pursuing claims against a post-confirmation liquidating trustee to obtain leave from the bankruptcy court before filing suit in Delaware.

The court observed that if leave of the bankruptcy court were not first obtained, then the other forum lacked subject matter jurisdiction over the suit. The court noted that “[t]he Barton doctrine applies in bankruptcy, because ‘[t]he trustee in bankruptcy is a statutory successor to the equity receiver,’ and ‘[j]ust like the equity receiver, a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court’s control by virtue of the Bankruptcy Code.’”²⁹

The court explained:

Indeed, the policies underlying the Barton doctrine apply with greater force to bankruptcy proceedings than to other proceedings involving receivers. The filing of a bankruptcy petition creates a bankruptcy estate, consisting of all of the debtor’s legal or equitable interests in property “wherever located and by whomever held.” 11 U.S.C. § 541(a). Thus, “[t]he district court in which the

²⁶ *Id.* at 144–45.

²⁷ *Id.* at 147.

²⁸ *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 971 (9th Cir. 2005).

²⁹ *Id.* at 971

bankruptcy case is commenced obtains exclusive in rem jurisdiction over all of the property in the estate.” The court’s exercise of in rem bankruptcy jurisdiction “essentially creates a fiction that the property—regardless of actual location—is legally located within the jurisdictional boundaries of the district in which the court sits.” Thus, the jurisdiction of the bankruptcy court exceeds that of any other court-appointed receiver. The requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court.³⁰

The First Circuit held that the bankruptcy court’s in rem jurisdiction continues post-confirmation.³¹ The court agreed “with the analysis of [its] sister circuits that ‘the doctrine serves additional purposes even after the bankruptcy case has been closed and the assets are no longer in the trustee’s hands.’”³² If there were any objections to anything regarding the estate, the court stated, the objections should have been registered before confirmation. If a party fails to timely object, the party cannot later complain about a specific provision, even if the provision is inconsistent with the Bankruptcy Code. To raise identical issues in a second court “is an impermissible collateral attack.”³³

Tenth Circuit: In *Satterfield v. Malloy*,³⁴ the debtor brought an action against the chapter 7 trustee of his bankruptcy estate based on the trustee’s allegedly wrongful actions in his capacity as trustee. The debtor argued that the trustee’s actions were ultra vires, meaning beyond his legal power or authority, and thus not protected by the Barton doctrine. The debtor also contended that his action was authorized by 28 U.S.C. § 959, which allows trustees to be sued without leave of the appointing court for acts or transactions in carrying on business connected

³⁰ *Id.*

³¹ *Id.* at 972.

³² *Id.*

³³ *Id.* at 973.

³⁴ *Satterfield v. Malloy*, 700 F.3d 1231, 1236 (10th Cir. 2012).

with the estate. Finally, the debtor argued that the Barton doctrine was inapplicable because his bankruptcy proceedings had concluded.

The court rejected all of these arguments. Regarding the debtor's last argument related to applicability of the Barton doctrine after the case was closed, the Tenth Circuit stated:

“Consistent with the holdings of other circuits, we reject this proposition... [T]he Barton doctrine continues to serve important purposes even after a bankruptcy is complete.”³⁵ The court continued:

The Barton doctrine exists to ensure other courts do not intervene in the bankruptcy court's administration of an estate without permission. A holding that [the trustee] acted ultra vires simply because he allegedly discharged his duties as trustee with improper motives would severely undermine this important judicial goal. We conclude that [the trustee's] actions fell within the scope of his court-appointed authority as trustee because each of the alleged actions was related to his trusteeship duties. Accordingly, [the debtor] was required to obtain leave of the bankruptcy court before filing suit in the district court.³⁶

Fifth Circuit: In *In re Foster*,³⁷ the chapter 7 debtor listed three properties as assets in her bankruptcy case, but her husband claimed these properties were his separate property. The trustee initiated a case against the debtor's husband to determine if the properties were part of the bankruptcy estate and intervened in the divorce proceedings to protect the estate's interest. Ultimately, the bankruptcy court determined that the properties were part of the bankruptcy estate and authorized their sale by the trustee. Thereafter, the bankruptcy case was closed.

Almost ten months later, the debtor filed a motion to reopen the bankruptcy case to sue the trustee and vacate the judgment for lack of subject matter jurisdiction, which was denied. She then filed a complaint in Texas state court against the trustee, the trustee's lawyers and others

³⁵ *Id.* (citing *In re Linton*, 136 F.3d at 545).

³⁶ *Id.* at 1237.

³⁷ *Foster v. Aurzada (In re Foster)*, 2023 WL 20872, at *2 (5th Cir. Jan. 3, 2023).

asserting that they acted in an ultra vires manner, without obtaining permission from the bankruptcy court. The trustee moved to reopen the bankruptcy case to remove the action, dismiss the complaint and impose sanctions. The bankruptcy court granted that motion and ultimately dismissed the complaint. The debtor appealed the bankruptcy court's decisions, but the district court affirmed.

The Fifth Circuit held that the bankruptcy court properly applied the Barton doctrine. Acknowledging that the Barton doctrine does not apply to acts outside the scope of the trustee's official duties, the court noted that such exception is applied narrowly and only "to the actual wrongful seizure of property by a trustee."³⁸ The court found that such exception was inapplicable because all the alleged acts by the defendants occurred in their official capacity. The court affirmed dismissal of the complaint pursuant to the Barton doctrine notwithstanding the fact that the bankruptcy case had been closed when the complaint was filed. But, in doing so, it did not discuss the impact of closure of the case.

2. *The Eleventh Circuit Does Not Support the Barton Doctrine's Extension*

Eleventh Circuit: In *Tufts v. Hay*,³⁹ Mr. Hay and his law firm represented a debtor in a chapter 11 case in North Carolina. Mr. Tufts and his firm were representing the debtor in various cases in Florida when the bankruptcy case began. Hay told Tufts that there was a court order approving Tufts's continued representation of the debtor. Relying on those representations, Tufts did extensive legal work for the debtor. There was no court authorization for Tufts to do this work, however. Because the work was done without authorization, the bankruptcy court ordered

³⁸ *In re Foster*, 2023 WL 20872 at *5 (citing *In re McKenzie*, 716 F.3d 404, 415 (6th Cir. 2013); *Leonard v. Vrooman*, 383 F.2d 556, 560 (9th Cir. 1967)).

³⁹ *Tufts v. Hay*, 977 F.3d 1204, 1209 (11th Cir. 2020).

Tufts to disgorge the funds collected and held him in contempt when he failed to do so. The underlying bankruptcy case itself was ultimately dismissed by consent order. After dismissal, Tufts sued Hay in district court without first seeking leave from the bankruptcy court. The district court dismissed the suit based on the Barton doctrine. Tufts appealed.

The Eleventh Circuit held that the Barton doctrine does not extend beyond a bankruptcy case's closure because bankruptcy courts have in rem jurisdiction over the estate. Once the assets of the estate were distributed, nothing that happened later would have any effect on the assets of the estate. Thus, there was no longer subject matter jurisdiction. The court stated:

[U]nder the “conceivable effects” test for section 1334(b), the Bankruptcy Court did not have jurisdiction to consider Tufts’s action, and Tufts counsel were not required to obtain leave from that court before filing this action in the District Court. The Barton doctrine did not therefore deprive the District Court of subject matter jurisdiction over this case. We expressly note that our holding here creates no categorical rule that the Barton doctrine can never apply once a bankruptcy case ends. We address this case only, and here these parties agreed this action could have no conceivable effect on the bankruptcy estate. On this record, the Bankruptcy Court lacked jurisdiction, and the Barton doctrine does not apply.⁴⁰

The Eleventh Circuit concluded by stating: “We expressly note that our holding here creates no categorical rule that the Barton doctrine can never apply once a bankruptcy case ends.”⁴¹

The Eleventh Circuit revisited this issue in *Chua v. Ekonomou*.⁴² Chua ran a solo medical practice in Georgia. In 2005, a pre-med student moved into Chua’s home with him. Chua began prescribing medications to treat symptoms the student was displaying until, one day, Chua came home to find the student dead from an apparent drug overdose. Chua asserted that a conspiracy arose to “pin the blame” for the student’s death on him. The conspiracy included a judge, a receiver appointed in a forfeiture action against him, the receiver’s attorney and others.

⁴⁰ *Id.* at 1210–11.

⁴¹ *Id.*

⁴² *Chua v. Ekonomou*, 1 F.4th 948, 954 (11th Cir. 2021).

A jury found Chua guilty of felony murder and other offenses. Years later, Chua was released from prison, and he sued various defendants in district court, including the receiver, his attorney and his attorneys' law firm. The district court dismissed the claims against the receiver and related defendants for lack of subject matter jurisdiction under the Barton doctrine because Chua had not sought leave from the court that had appointed the receiver.

On appeal, the court noted that Barton had only been discussed a few times in the Eleventh Circuit.⁴³ The circuit court reiterated its holding in *Tufts v. Hay* that “the Barton doctrine has no application when jurisdiction over a matter no longer exists in the bankruptcy court.” The court explained that the policy arguments of the Seventh Circuit might be legitimate, but those concerns overlook subject matter jurisdiction. In any event, the Eleventh Circuit stated, there was no need to base Barton on policy grounds “because court-appointed receivers enjoy judicial immunity for acts taken within the scope of their authority.”⁴⁴ The court concluded, “[r]eceptors do not need the Barton doctrine to provide an additional layer of protection for the performance of their duties” once the jurisdiction of the court that appointed the receiver comes to an end.⁴⁵ That immunity applies even if a trustee’s acts were malicious or in error. Ultimately, the Eleventh Circuit vacated the district court’s dismissal of claims against the receiver and related defendants based on the Barton doctrine and remanded with instructions to dismiss the claims against these defendants based on judicial immunity.

F. Conclusion

The Barton doctrine plays an important role in protecting court-appointed bankruptcy fiduciaries during the case. In that context, the doctrine has near universal approval. While most

⁴³ *Id.* at 953.

⁴⁴ *Id.* at 954–55.

⁴⁵ *Id.* at 955.

circuits extend the doctrine past a bankruptcy case's closure for policy reasons, the Eleventh Circuit's jurisdictional analysis presents a strong argument that the doctrine should not be extended once the bankruptcy court no longer retains authority over a bankruptcy estate.

Faculty

Robert F. Elgidely is a partner with Fox Rothschild LLP in Miami and New York, where he focuses his practice on complex bankruptcy disputes and commercial litigation matters. In his bankruptcy practice, he regularly represents court-appointed fiduciaries in connection with chapter 7 and 11 cases stemming from fraud and financial crimes. He also regularly represents debtors, creditors, creditors' committees and liquidating trustees. Mr. Elgidely has handled business, real estate, aviation, admiralty, sports and entertainment, motor vehicle and ERISA/employee benefits disputes. He prosecuted avoidance claims seeking more than \$84 million in recoveries in a chapter 7 bankruptcy case stemming from a massive check-kiting scheme, served as special counsel to the chapter 7 trustee in a bankruptcy case involving a \$350 million international Ponzi scheme in which 7,000 victim-creditors obtained significant recoveries, represented the chapter 11 trustee of a law firm that collapsed following the revelation of a \$1.2 billion Ponzi scheme perpetrated by the firm's principal and secured recoveries that contributed to a 100 percent distribution to victim-creditors, and represented several Italian professional tennis players in connection with a suit against the ATP concerning provisions of the official rulebook for the sport. Prior to joining Fox Rothschild, Mr. Elgidely was a partner in the bankruptcy law and litigation practice of a Florida boutique law firm. Before he became a lawyer, he served in the U.S. Army National Guard and U.S. Army Reserve; he completed Basic Combat Training at Fort Leonard Wood, Mo., in 1989 and Advanced Individual Training as a medic at Fort Sam Houston, Texas, in 1990. Mr. Elgidely received his B.A. from Siena College in 1993, his J.D. in 1996 from Nova Southeastern University Shepard Broad College of Law and his LL.M. in taxation in 1997 from the University of Miami School of Law.

Hon. Paul R. Hage is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, sworn in on Sept. 30, 2024. Prior to his appointment to the bench, he was co-chair of the bankruptcy group at Taft, Stettinius & Hollister, LLP, where he practiced for 18 years. Judge Hage serves on ABI's Executive Committee as Secretary and as an Executive Editor of the *ABI Journal*. He is a Fellow in the American College of Bankruptcy and serves as co-director of the Conrad B. Duberstein National Bankruptcy Moot Court Competition. In 2017, Judge Hage was selected as a member of ABI's inaugural "40 Under 40" class. He received his bachelor's degree from James Madison College at Michigan State University, his J.D. from Loyola University Chicago School of Law and his LL.M. in bankruptcy from St. John's University School of Law.

Ferve E. Khan is a restructuring counsel in the New York office of BakerHostetler LLP, where she counsels clients nationwide on all aspects of distressed and insolvency-related situations, representing unsecured creditors, unsecured creditor committees, and trustees in chapter 11 proceedings and handling both plaintiff- and defense-side litigation and transactional work. She has particular experience in fraudulent transfer litigation in New York and Delaware bankruptcy proceedings, UCC Article 9, financial fraud and mass tort matters. She also routinely counsels borrowers and secured lenders on bankruptcy issues in debt finance and real estate transactions nationwide, and works across the financial services, energy and health care industries. Ms. Khan was honored as one of ABI's "40 Under 40" in 2020, is an active member of ABI's Mid-Atlantic Bankruptcy Workshop Advisory Board, has served as co-chair of ABI's Bankruptcy Litigation and Legislative Committees, and was an *ABI Journal* column editor and contributor, as well as editor-in-chief of ABI's *Bankruptcy Litiga-*

tion Manual. She also is an author of the bankruptcy chapter of the *PLI Digital Assets Treatise* (2025) and is a Fellow of the American Bar Foundation. Ms. Khan previously clerked for Chief Judge Martin Glenn of the U.S. Bankruptcy Court for the Southern District of New York. She received her B.A. in political science *magna cum laude* in 2005 from Brown University and her J.D. in 2008 from Cornell University Law School, where she served as articles editor for the *Cornell International Law Journal* and managing editor of the *Legal Information Institute Bulletin*.

Cia H. Mackle is an attorney with Pachulski Stang Ziehl & Jones in Coral Gables, Fla., and represents debtors in possession, chapter 11 trustees, creditors' committees and other constituencies in complex domestic and international reorganizations and high-profile chapter 11 cases, including Party City, Cineworld, Chinos Holdings (J. Crew), Neiman Marcus and Ascena (Ann Taylor). She has more than 15 years of experience handling financial-fraud and Ponzi-related matters, such as Professional Financial Investors Inc. and Woodbridge Financial, and she has prosecuted and defended numerous multimillion-dollar fraudulent-transfer and breach-of-fiduciary-duty actions. Experienced in e-discovery and the presentation of electronic evidence, Ms. Mackle has managed dozens of large-scale document reviews and productions. She has been listed several times in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law and Litigation — Bankruptcy. Ms. Mackle received her A.B. in 2003 from Duke University and her J.D. in 2006 from the University of Southern California, where she was a member of the *Southern California Law Review*.