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Creditors' Committee Members Are Protected by the *Barton* Doctrine

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An unsecured creditors' committee plays an important role in a Chapter 11 bankruptcy case. The committee is a fiduciary for all general unsecured creditors and has statutory authority to appear and be heard on nearly every aspect of the case. *See* 11 U.S.C. § 1103(c). The committee is usually comprised of several creditors holding the largest unsecured claims, often including labor unions, indenture trustees, and/or the Pension Benefit Guaranty Corporation. These creditors typically have the most at stake and are the most likely to be zealous advocates on behalf of all unsecured creditors. Thus, the last thing anyone should want is to discourage committee members from actively participating in a case.

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It is in this vein that committee members are entitled to immunity from liability for actions they perform within the scope of the committee's authority. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009); *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000). The rationale for such immunity is to protect committee members from wanton actions that might discourage creditors from serving on a committee and/or cause such members to act timidly (and thus not vigorously pursue creditor recovery). A committee member's immunity, however, is not absolute. While courts apply different standards in determining whether a committee member is immune from suit in a particular case, all courts agree that a committee member is not immune from liability for willful misconduct or actions outside the scope of the committee's authority. *See, e.g.*, *PWS Holding Corp.*, 228 F.3d at 246 (holding that Section 1103(c) of the Bankruptcy Code ''limits liability of a committee to willful misconduct or *ultra vires* acts.''); *In re Bigler LP*, 442 B.R. 537, 546 (Bankr. S.D. Tex. 2010) (''Whereas the Committee, its members, and its representatives are eligible for qualified immunity for acts or omissions during the pendency of the Chapter 11 case . . ., such immunity may not include willful or gross misconduct, nor acts outside the scope of their duty, nor may it extend outside the time period of the pendency of the case.'').

In addition, most Chapter 11 plans contain exculpation provisions that relieve the committee's members and professionals from any liability related to the bankruptcy case, except liability based on gross negligence or willful misconduct.

Recently, in *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090 (9th Cir. 2016), the Court of Appeals for the Ninth Circuit ruled (unanimously) that committee members have an additional limited protection from certain lawsuits. The Ninth Circuit is the first court of appeals to hold that the *Barton* doctrine—which requires a plaintiff to obtain authorization from the bankruptcy court before suing certain court-appointed officers in another forum for actions the officers performed in their official capacities—applied to suits against committee members. In so holding, the Ninth Circuit ensured that any lawsuit against a committee member based on acts in the member's official capacity will initially be heard in the bankruptcy court—which is typically protective of appointed officials—unless the bankruptcy court orders otherwise.

The Barton Doctrine

The *Barton* doctrine (otherwise known as the prior-leave requirement), which was established in 1881 by the Supreme Court of the United States in *Barton v. Barbour*, 104 U.S. 126 (1881), holds that before a plaintiff may commence a suit against a receiver, the plaintiff must obtain permission from the court that appointed the receiver. As consistently applied over the years in bankruptcy cases, the *Barton* doctrine stands for the proposition that a plaintiff must obtain authorization from the bankruptcy court to initiate a lawsuit in another forum against court-appointed trustees or other officers for actions they performed in their official capacities.

Courts have articulated several rationales for this doctrine. First, the bankruptcy court has a strong interest in protecting the officer it appointed from unjustified liability for acts within the scope of such officer's official capacity. *See In re Lehal Realty Assocs.*, 101 F.3d 272, 276 (2d Cir. 1996). Second, the bankruptcy court has exclusive jurisdiction over administration of the bankruptcy estate and a judgment against an officer may affect the estate's administration, especially if the judgment must be satisfied out of the estate's assets. *See In re VistaCare Grp., LLC*, 678 F.3d 218, 228 (explaining that ''the requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be either brought in the bankruptcy court or with the permission of the bankruptcy court.''). Third, a lawsuit in another forum challenging an officer's actions will impede the officer's work and interfere with the bankruptcy case. *See Matter of Linton*, 136 F.3d 544, 545 (7th Cir. 1998) (''If [the trustee] 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. . . . Without the requirement [of leave], trusteeship will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as trustees. Trustees will have to pay higher malpractice premiums, and this will make the administration of the bankruptcy laws more expensive. . . . Furthermore, requiring that leave to sue be sought enables bankruptcy judges to monitor the work of the trustees more effectively.'').

There are two exceptions to the *Barton* doctrine. The first is a narrow exception contained in Section 959(a) of Title 28 of the United States Code. That statute permits a plaintiff to sue a trustee, receiver or manager of any property, including a debtor in possession, without obtaining authorization from the appointing court when the action is based on acts the officer performed in connection with operating a debtor's business. *See In re Summit Metals, Inc.*, 477 B.R. 484, 496 (Bankr. D. Del. 2012) (explaining that this ''exception is intended to allow, for example, personal injury suits brought for accidents occurring while the businesses [sic] is operated under the control and management of the trustee during the bankruptcy case.''). The second exception is when the lawsuit relates to an action taken by the officer outside the scope of the officer's authority. *Id*.

If a plaintiff commences a lawsuit against a bankruptcy court-appointed officer outside of the bankruptcy court without first obtaining permission from the bankruptcy court—assuming neither exception applies—the non-bankruptcy court should dismiss the lawsuit for lack of subject matter jurisdiction. Whether such lawsuit should be dismissed with or without prejudice is unclear. Indeed, in the *Yellowstone Mountain Club* case, the district court dismissed the plaintiff's complaint without prejudice because the plaintiff did not obtain permission from the bankruptcy court to bring the claims in the district court. The plaintiff then filed a motion with the bankruptcy court seeking permission to recommence the action in the district court, as discussed further below. In another case, however, the plaintiff's failure to obtain permission before commencing a lawsuit outside of the bankruptcy court resulted in dismissal of the plaintiff's claims with prejudice. *See In re Summit Metals, Inc.*, 477 B.R. at 496.

Courts of appeals have held that the *Barton* doctrine applies to lawsuits against bankruptcy trustees and court-appointed ''functional equivalents of a trustee'' which administer or protect the bankruptcy estate's assets, such as a trustee's counsel and an auctioneer selling the debtor's assets. *See, e.g.*, *Carter v. Rogers*, 220 F.3d 1249, 1252 n.4 (11th Cir. 2000); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1241 (6th Cir. 1993). Prior to the *Yellowstone Mountain Club* decision, however, no court of appeals had held that the *Barton* doctrine applied to lawsuits against committee members.

The Yellowstone Mountain Club Case

In the late 1990's, Timothy and Edra Blixseth founded Yellowstone Club, an exclusive ski and golf resort in Montana. To develop the resort, Yellowstone's business entities borrowed $375 million from Credit Suisse, but Mr. Blixseth used some of the proceeds to pay personal debts. When Yellowstone's shareholders learned of this, they sued Mr. Blixseth. Mr. Blixseth claimed that his lawyer, Stephen Brown, advised him that Mr. Blixseth's actions were legal. Mr. Blixseth, allegedly on Mr. Brown's advice, ultimately settled with the shareholders.

Mr. Blixseth and Edra later divorced. Mr. Blixseth, represented by Mr. Brown, agreed via a marital settlement agreement to give the Yellowstone entities to Edra. This transfer was later successfully attacked as a fraudulent conveyance. In November 2008, Edra filed bankruptcy petitions on behalf of the Yellowstone entities in the United States Bankruptcy Court for the District of Montana. The Office of the United States Trustee formed a committee of unsecured creditors comprised of nine members, one of whom was Mr. Brown. Mr. Brown was elected the chairman of the committee.

Several years later Mr. Blixseth sued Mr. Brown in the United States District Court for the District of Montana alleging that Mr. Brown committed misconduct

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both prior to and during Yellowstone's bankruptcy proceedings. Mr. Blixseth claimed that Mr. Brown committed legal malpractice prior to the bankruptcy filing by providing poor representation and overlooking key defenses in connection with Mr. Blixseth's use of the Credit Suisse loan, the ensuing shareholder lawsuit, and the divorce proceedings. Mr. Blixseth also alleged that Mr. Brown breached his fiduciary duties to Mr. Blixseth in Mr. Brown's position as committee chairman during the bankruptcy proceedings by disclosing and using confidential information he had learned as Mr. Blixseth's former lawyer.

The district court held that it did not have jurisdiction to hear Mr. Blixseth's lawsuit because he had failed to obtain the bankruptcy court's permission to bring the lawsuit as required by the *Barton* doctrine. The district court explained that although the Barton doctrine typically applies to lawsuits against receivers and bankruptcy trustees, the broader purpose of the doctrine is to ''centralize bankruptcy litigation'' and ''keep a watchful eye'' on court-appointed officers, including committee members. The district court then found that all of Mr. Blixseth's claims against Mr. Brown were based on Mr. Blixseth's alleged misconduct as chairman of the Committee, to which the *Barton* doctrine applied. Accordingly, the district court dismissed Mr. Blixseth's lawsuit.

Mr. Blixseth then filed a motion with the bankruptcy court, requesting permission to sue Mr. Brown in the district court. Mr. Blixseth argued that the *Barton* doctrine did not apply to his claims related to Mr. Brown's misconduct before the bankruptcy filing because they were not related to Mr. Brown's actions on the committee. The bankruptcy court denied Mr. Blixseth's motion, reasoning that Mr. Brown's alleged misconduct occurring prior to the bankruptcy filing was so intertwined with his alleged misconduct during the bankruptcy case as a committee member that they were impossible to separate. The bankruptcy court then dismissed Mr. Blixseth's claims on the merits, holding that Mr. Brown was entitled to immunity from liability for actions taken as chair of the committee. Mr. Blixseth appealed, but the district court agreed with the bankruptcy court's ruling. Mr. Blixseth then appealed again to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit first considered whether the *Barton* doctrine applied to committee members. The Court concluded that it did. It found that, like receivers and bankruptcy trustees—the actions of whom are protected by the *Barton* doctrine—committee members have an interest in maximizing the value of the bankruptcy estate. In addition, committee members are obligated to perform tasks related to the estate's administration. A lawsuit outside of the bankruptcy court—in a court unfamiliar with the proceedings of the bankruptcy case—challenging committee members' official actions could seriously interfere with the bankruptcy case. Moreover, the Court recognized that the fear of such a lawsuit may cause committee members to act timidly in performing their obligations in order to avoid potential lawsuits. Therefore, the Court held that the *Barton* doctrine applied to committee members' actions performed in their official capacities. In reaching this conclusion, the Ninth Circuit noted and cited to a report by the ABI Commission to Study the Reform of Chapter 11, which recommended extending the *Barton* doctrine to ''estate neutrals, and statutory committees and their members, as well as professionals retained to represent any of the foregoing parties in their fiduciary capacity.'' Am. Bankr. Inst., Comm'n to Study the Reform of Chapter 11, *2012–2014 Final Report and Recommendations* 43 (2014), *available at* https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h.

The Ninth Circuit, however, disagreed with the bankruptcy court's conclusion that the *Barton* doctrine applied to all of Mr. Blixseth's claims. The bankruptcy court's conclusion was based on its finding that Mr. Brown's alleged misconduct occurring prior to the bankruptcy case could not be separated from his alleged misconduct during the case as a committee member. Rather, the Ninth Circuit held that Mr. Blixseth's pre-bankruptcy claims—including allegations of Mr. Brown's legal malpractice—had nothing to do with Mr. Brown's activities on the committee. Thus, Mr. Blixseth did not need the bankruptcy court's permission to bring these claims in the district court. Mr. Blixseth's remaining claims relating to Mr. Brown's actions on the committee, however, challenged Mr. Brown's actions within his authority as an officer of the bankruptcy court. To be able to bring these claims in the district court, Mr. Blixseth needed the bankruptcy court's permission.

The Ninth Circuit then addressed whether the bankruptcy court erred in denying Mr. Blixseth's motion for permission to sue Mr. Brown in the district court. The court explained that bankruptcy courts should apply a five factor test in determining whether to grant such a motion: (1) whether the acts complained of relate to the carrying on of the business connected with the property of the bankruptcy estate, (2) whether the claims concern the actions of the officer while administering the estate, (3) whether the officer is entitled to quasi-judicial or derived judicial immunity, (4) whether the plaintiff seeks a personal judgment against the officer and (5) whether the claims seek relief for breach of fiduciary duty, through either negligent or willful conduct.

The Ninth Circuit held that although Mr. Blixseth was seeking a personal judgment against Mr. Brown, thereby satisfying the fourth factor, the bankruptcy court did not abuse its discretion in denying Mr. Blixseth's motion to bring his post-bankruptcy claims against Mr. Brown in district court.

The Ninth Circuit also rejected Mr. Blixseth's argument that the bankruptcy court lacked authority under *Stern v. Marshall*, 564 U.S. 462 (2011) to adjudicate his claims against Mr. Brown on the merits. The Ninth Circuit explained that while *Stern v. Marshall* precludes bankruptcy courts from deciding common law claims with no connection to the bankruptcy estate except for the fact that the claims happen to be assets of the estate, *Barton* claims concern actions an officer undertook within the officer's official capacity and, therefore, necessarily stem from the bankruptcy case itself and could not exist independently of the bankruptcy case. Thus, the Ninth Circuit held that *Stern v. Marshall* does not preclude bankruptcy courts from deciding *Barton* claims.

Finally, the Ninth Circuit considered whether the bankruptcy court properly dismissed Mr. Blixseth's claims against Mr. Brown relating to Mr. Brown's actions as the chairman of the committee on the ground that Mr. Brown was entitled to immunity from liability for those actions. The Ninth Circuit recognized that Mr. Brown was not entitled to immunity for *all* actions as a committee member. Rather, he was only entitled to immunity for acts within the scope of his authority and for which the debtor had notice. In addition, Mr. Brown's proposed acts must have been candidly disclosed to, and approved by, the bankruptcy court. Because these issues were not addressed by the bankruptcy court, the Ninth Circuit could not determine whether Mr. Brown was entitled to immunity from Mr. Blixseth's claims based on Mr. Brown's alleged misconduct as the committee's chairman. Accordingly, the Ninth Circuit remanded these claims to the bankruptcy court for further proceedings to determine whether Mr. Brown was entitled to such immunity.

Conclusion

The *Yellowstone Mountain Club* decision shores up the bankruptcy court's jurisdiction by clarifying that plaintiffs cannot circumvent the bankruptcy court's authority over the activities of committee members simply by commencing a lawsuit in another forum. In holding that the *Barton* doctrine applies to committee members, the Ninth Circuit ensured that the bankruptcy court will have the first opportunity to determine whether a lawsuit against a committee member should be permitted to proceed or dismissed based on a committee member's limited immunity, which is consistent with the notion of exclusive bankruptcy court oversight of case administration.

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