The Barton Doctrine: An Examination of Its Past, Present & Future Application in Bankruptcy Matters

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I. Introduction

One hundred and thirty five years ago, the United States Supreme Court in *Barton v. Barbour* (hereinafter, "*Barton*") held that a party seeking to sue a court-appointed receiver outside of the jurisdiction of the appointing court must obtain leave of that court prior to initiating a lawsuit.[1] The Court's rationale for this rule was to ensure that a plaintiff would not be able to enforce a judgment against an estate without regard to other creditors.[2] By retaining exclusive control of the estate, the appointing court could better preserve assets and equitably distribute those assets to creditors.[3] Today, the Supreme Court's rule is referred to as the "Barton doctrine."[4] Although originally ap-

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plied to receivers, the Barton doctrine has been expanded to protect bankruptcy trustees and the trustee's professionals, and in certain instances, creditors and insiders.

There are two exceptions to the Barton doctrine. The first, the *ultra vires* exception created by the Supreme Court in *Barton* permits a suit to proceed without leave of the appointing court where, "by mistake or wrongfully, [a] receiver takes possession of property belonging to another."[5] The second is the statutory exception, now codified as 28 U.S.C.A. § 959(a), that permits a plaintiff to sue court appointed trustees, receivers, or managers without leave of the appointing court for "their acts or transactions in carrying on business connected with such property."[6]

The purpose of this article is to synthesize the case law interpreting the Barton doctrine to provide bankruptcy practitioners with the necessary background to address the numerous issues that may arise in its application to bankruptcy matters. The number of courts that have weighed in on the Barton doctrine is legion and it would be far too ambitious for this article to weigh in on every opinion that has been written on this topic. Instead, this article focuses on appellate court decisions, and on lower court decisions to the extent that those decisions are significant. Although the focus of this article is on the application of the Barton doctrine to bankruptcy matters, it is worth noting that certain state jurisdictions still apply the Barton doctrine to receivers appointed under state law[7] and federal courts apply it in non-bankruptcy matters to suits against receivers appointed by the Securities and Exchange Commission.[8]

This article is organized as follows: Section II provides an overview of the Barton doctrine from its creation in 1881 through the enactment of the Bankruptcy Code. Section III explores the myriad issues generated by the Barton doctrine in more recent years. Section IV discusses the two exceptions to the Barton doctrine based on *ultra vires* conduct or a statutory provision, and the manner in which courts apply these exceptions.

II. History and Evolution of the Barton Doctrine

This Section provides a brief overview and history of the Barton doctrine, beginning with a detailed review of the Supreme Court's decision in *Barton.* Next, it discusses the statutory exception that was enacted after the *Barton* decision and explores how the Barton doctrine has evolved to include bankruptcy matters. Finally, this Section explores how courts have addressed the Barton doctrine following the enactment of the Bankruptcy Code.

A. *Barton v. Barbour*

The foundations of the Barton doctrine begin with the Supreme Court's 1872 decision in *Davis v. Gray.* In *Davis*, the Court considered whether a receiver for a railroad appointed by a state court had the power to sue the governor of Texas and another state official concerning a statute that allegedly impaired a contract between the railroad and Texas.[9] Ultimately, the Court in *Davis* affirmed the receiver's power to sue the state officials, but also declared that the receiver may not be "sued touching the property in his

charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties."[10] The Court's opinion in *Davis* became the basis for its holding in *Barton* nine years later, namely that a receiver cannot be sued without leave of the appointing court.[11]

The *Barton* case arose in 1877 when Frances H. Barton traveled on a train owned by the Washington City, Virginia Midland, and Great Southern Railroad Company (the "Railroad").[12] Due to defective track, the train derailed and Barton's sleeping car overturned into an embankment.[13] At the time of the accident, the Railroad was operating under a receiver, John S. Barbour, who was appointed by a Virginia state court sitting in Alexandria.[14] The Railroad was incorporated in Virginia and had an office in the District of Columbia.[15]

Barton sued the Railroad for negligence in the Supreme Court of the District of Columbia ("D.C. Supreme Court") for her injuries.[16] Barbour sought dismissal on the ground that Barton did not seek leave of the court that appointed him — the Virginia state court — prior to filing the suit in the District of Columbia.[17] The D.C. Supreme Court agreed with Barbour that it lacked jurisdiction and dismissed Barton's complaint.[18] Barton appealed the dismissal to the United States Supreme Court.[19]

In the United States Supreme Court, Barton made three arguments to overturn the decision of the D.C. Supreme Court.[20] First, Barton argued that plaintiffs should be allowed to file suit against receivers without leave of the appointing court provided that the plaintiff did not seek to take possession of property held by the receiver.[21]

The majority opinion, penned by Justice William Burnham Woods, concluded that the rule delineated in *Davis* was not limited to instances where the plaintiffs did not seek to obtain property held by the receiver.[22] The Court expressed skepticism of plaintiffs who seek to sue receivers in jurisdictions outside the appointing court without leave by noting that such plaintiffs do so to "obtain some advantage" over other creditors.[23] Allowing a suit to proceed without leave would permit a plaintiff to enforce a judgment on the property a receiver holds for the benefit of all creditors.[24] If such a judgment were enforced outside of the jurisdiction of the appointing court, the appointing court would have no power to stop the plaintiff.[25] The plaintiff would then be able to obtain satisfaction of the judgment without regard to other creditors or the orders of the court administering the trust.[26] For these reasons, the Court held that the general rule requiring leave of the appointing court applies even when the plaintiff seeks satisfaction of a money judgment or to recover specific property of the trust.[27]

Next, Barton argued that the general rule requiring leave of the appointing court should not apply because the Railroad was operating as a common carrier.[28] The Court rejected the attempt to create an exception of the rule for common carriers because doing so would even allow employees of the com-

mon carrier to sue the receiver without leave of the appointing court.[29] This would result in administrative expenses of the trust being administered by a court that is not the appointing court.[30] This, the Court noted, would be unfair to other claimants and result in expensive and unnecessary litigation.[31]

Third, Barton asserted that the filing of the suit without leave of the court does not deprive the appointing court of jurisdiction.[32] Rather, Barton argued that filing in another court may subject the plaintiff to an injunction or contempt order issued by the appointing court.[33] As there was no jurisdictional issue, Barton contended that the D. C. Supreme Court erred in dismissing the case.[34] The majority disagreed and noted that when a company is in bankruptcy or receivership, the court administering the trust exercises *exclusive* control and jurisdiction over all claims.[35] As a consequence, all claims, even those claims historically entitled to a trial by jury, will be subject to the control of the appointing court.[36] By allowing a suit to proceed outside the exclusive control of the appointing court, the Court observed, "it would become impossible for the [appointing] court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities."[37]

Although the majority opinion did not sustain any of Barton's arguments, it did recognize an *ultra vires* exception to the general rule requiring leave of the appointing court.[38] Under this exception, where the receiver wrongfully or mistakenly takes possession of property of a third party, the receiver may be sued personally.[39] In such instances, the plaintiff would not be required to obtain leave of the appointing court.[40]

Justice Samuel F. Miller wrote a dissenting opinion in which he argued that the majority should have made a distinction between receivers that are liquidating the entity and those that are operating it.[41] Conceding that the general rule requiring the leave of the appointing court is appropriate for receivers solely liquidating the property and distributing funds to creditors, Justice Miller took issue with the rationale for requiring leave to assert claims that arise from a receiver's operation of a business.[42] He saw no basis for treating the receiver differently from other common carriers, particularly in light of the majority's holding that the authority of the equity court administering the trust takes precedence over the rights of the plaintiff to receive a trial by jury.[43]

B. Creation of the Statutory Exception

In 1887, six years after the decision in *Barton*, Congress enacted a statute that addressed the issues raised in Justice Miller's dissent.[44] This provision was codified as section 66 of the Judicial Code:

> Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.[45]

As is stated in the above language, the statute explicitly allowed a plaintiff

to sue a receiver or manager of property without leave of the appointing court for "any act or transaction of his in carrying on the business connected with such property." That provision related to property in the possession or subject to control of the receiver, although it did not clearly specify what it meant by "such property." Significantly, as noted by the second half of the provision, a suit filed in another jurisdiction is subject to the general equity jurisdiction of the appointing court so far as "may be necessary to the ends of justice."

C. Evolution of the Barton Doctrine

Following the enactment of section 66, in 1891 the Supreme Court in *McNulta v. Lochridge* considered whether a receiver could be sued without the permission of the appointing court in light of the new statute.[46] Citing both *Davis* and *Barton*, the Court stated that the requirement to obtain leave of the appointing court is a "general and familiar principle of law" despite the enactment of the section 66.[47] Subsequent to *McNulta*, courts have determined that section 66 and its successors function as a statutory exception to the common law Barton doctrine.[48] For example, the Third Circuit Court of Appeals in *In re VistaCare Group, LLC* articulated this conclusion as follows:

> Congress's creation of what appears to be a statutory exception to a common law rule strongly suggests its acknowledgement and acceptance of the general rule. Mindful that "Congress 'does not, one might say, hide elephants in mouseholes,' '' . . . we believe that had Congress intended to abrogate *Barton* in its entirety, it would have done so explicitly. Especially when viewed in light of Justice Miller's dissent in *Barton*, it is abundantly clear that Congress intended to narrow the scope of the *Barton* doctrine by creating an exception for situations in which the policy rationales underlying the Court's creation of the doctrine were not applicable.[49]

In 1911, section 66 was re-codified as 28 U.S.C.A. § 125.[50] In 1932, the Court of Appeals for the Second Circuit, applying section 125, was the first federal appellate court to apply the Barton doctrine to bankruptcy trustees appointed under the Bankruptcy Act.[51] In *Vass v. Conron Bros. Co.*, Judge Learned Hand, in *Vass*, wrote that "[a] trustee is equally an officer of the court . . . and his possession is protected because it is the court's . . . quite like a receiver's."[52]

In 1948, Congress re-codified section 125 as section 959(a) of title 28, and amended its language by including "trustees" and "debtors in possession" among the parties who may be sued without leave of the appointing court.[53] In addition, Congress added language to the statute providing that a court exercising its equity power could not deprive a litigant of the right to a jury trial.[54] The text of the statute after the 1948 amendment provided:

> 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.[55]

The text of section 959(a) has not been altered since the 1948 amendment despite a revision to section 959(b) in 1978 at the same time that Congress enacted the Bankruptcy Code.

D. Enactment of the Bankruptcy Code

When Congress enacted the Bankruptcy Code in 1978, it significantly restructured the rights and obligations of parties participating in bankruptcy matters.[56] Among other changes, Congress moved the trustee appointment power from bankruptcy courts to the newly created United States Trustee for all but six judicial jurisdictions.[57] In addition, Congress created section 323(b), which provides that a trustee may sue and be sued, but this section is silent on the issue of whether a plaintiff needs to obtain leave of the appointing court prior to initiating a lawsuit.[58] Further, Congress enacted section 362, which stays all enforcement actions against property of an estate and the commencement and continuation of various other actions.[59]

As a result of the enactment of these provisions, some argued that the Barton doctrine had been abrogated and therefore leave was not required prior to initiating a suit.[60] On the other hand, others observed that Congress left the language of section 959(a) intact while it amended the language of section 959(b) of title 28, which generally provides that a trustee, receiver, or manager of property must manage and operate the property in accordance with the valid laws of the state in which property of the estate is situated.[61] Leaving section 959(a) intact suggested that Congress did not intend for the Bankruptcy Code to abrogate the Barton doctrine.[62]

Two appellate courts, the Third and the Eighth Circuits, have reviewed this issue and have held that the Bankruptcy Code did not abrogate the Barton doctrine.[63] In *VistaCare*, for example, the Third Circuit heard an appeal from a district court decision affirming a bankruptcy court's grant of leave to a plaintiff to commence an action in state court against a chapter 7 trustee.[64] The trustee alleged that the district court erred when it did not address the bankruptcy court's decision granting leave to sue the trustee.[65]

The plaintiff argued that the Barton doctrine was abrogated because case trustees are appointed by a United States Trustee, not by the court.[66] While acknowledging that lack of an appointing court, the Third Circuit noted that the bankruptcy court remains solely responsible for authorizing acts of the trustee.[67] Thus, the Third Circuit concluded that a trustee is an officer of the bankruptcy court irrespective of whether it appoints the trustee.[68]

Next, the court considered the issue of whether the enactment of section 362 supported the notion that the Bankruptcy Code abrogated the Barton doctrine.[69] The Third Circuit rejected the plaintiff's argument as unpersuasive because the automatic stay only protects property of the estate against collection attempts.[70] This leaves the trustee exposed to lawsuits, which could impede the trustee's efforts on behalf of creditors.[71] In addition, the Third Circuit rejected the plaintiff's argument that the absence of a leave to sue requirement in section 323(b) demonstrates that the Barton doctrine has

been abrogated.[72] The court noted that because section 323(b) does not address the specific procedures for a trustee to be sued, federal courts have the implicit authority to supply the procedure, which takes the form of the leave to sue requirement.[73]

III. The Barton Doctrine Today

This Section of the article explores the scope and contours of the Barton doctrine including several jurisdictional issues that arise, its discretionary nature, its relationship to immunity, and its application to non-trustees.

A. The Scope of the Barton Doctrine

The Barton doctrine is a jurisdictional rule, and the failure to abide by it will thus lead to dismissal of the action for lack of subject matter jurisdiction.[74] Under the Barton doctrine, absent an applicable statutory exception, a plaintiff must obtain leave of the bankruptcy court overseeing the case before initiating a lawsuit against a trustee in either state or federal court.[75] Leave to sue is not required when filing the suit in the bankruptcy court that has jurisdiction over the case.[76]

i. Jurisdictional Issues

The Barton doctrine's prohibition against filing a suit outside of the bankruptcy court even applies to initiating a suit in a federal district court located in the same federal district in which the bankruptcy court is located.[77] It may appear strange that a district court with its exclusive jurisdiction over civil proceedings arising under title 11, or arising in or related to cases under title 11, as provided by 28 U.S.C.A. § 1334(a), would need permission from the bankruptcy court that it oversees to adjudicate a lawsuit against a trustee; however, one court has explained the rationale:

> [B]ecause each court would qualify as the appointing court by virtue of the jurisdiction conferred upon the district court under 28 U.S.C. § 1334 and the referral of the district court's jurisdiction to the bankruptcy court by way of 28 U.S.C. § 157(a). While it is true that 28 U.S.C. § 157(a) does allow the district court to refer jurisdiction to the bankruptcy court, both courts cannot concurrently preside over the same aspects of the case. Once the district court refers the case to the bankruptcy court, unless the district court withdraws that reference, in whole or in part pursuant to 28 U.S.C. § 157(d), the case is within the subject matter jurisdiction of the bankruptcy court.[78]

It is clear that the jurisdiction of the bankruptcy court in Barton doctrine matters is quite broad. Indeed, the requirement to obtain leave even applies after the bankruptcy court has completed or closed the bankruptcy case according to the First, Seventh, Ninth, and Tenth Circuits.[79] In *In re Linton*, Judge Posner of the Seventh Circuit articulated this rationale:

> 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.[80]

Therefore, to the extent that a bankruptcy case has been closed, a plaintiff seeking to sue a trustee or former trustee of a bankruptcy estate must file a motion to re-open the bankruptcy case and a motion for leave to sue the trustee outside of that bankruptcy court.

ii. The Eleventh Circuit's "Related To" Analysis

The Eleventh Circuit applies a unique "related to" analysis to determine whether it has jurisdiction over a matter under the Barton doctrine. In *Carter v. Rodgers*, the Eleventh Circuit affirmed a district court dismissal of a suit that was filed in the district court without leave of the bankruptcy court.[81] In *Carter*, a chapter 7 debtor sued the trustee and his auctioneer for breach of fiduciary duty arising from the sale of the debtor's assets without seeking leave of the bankruptcy court.[82] The district court for the Northern District of Alabama dismissed the action under the Barton doctrine.[83] On appeal, the debtor argued that the tort claim against the trustee was unrelated to the bankruptcy and therefore urged the Barton doctrine did not apply.[84] The Eleventh Circuit rejected this argument. It noted that the bankruptcy court has jurisdiction over a claim against a trustee when, pursuant to 28 U.S.C.A. § 1334(b), the claim "arises under" the Bankruptcy Code or it "arises in" or is "related to" the Bankruptcy Code.[85] The court determined that the alleged conduct related to the sale of the debtor's assets at an estate auction and that the outcome of the claim would affect the recovery to creditors.[86] Therefore, the district court properly dismissed the action under the Barton doctrine.[87]

In another case, *Lawrence v. Goldberg*, the Eleventh Circuit again employed the related to analysis in determining whether the bankruptcy court had jurisdiction over a claim such that leave was required in order to initiate a suit outside of the bankruptcy court.[88] In this case, the court further articulated this test by adopting the Third Circuit's test from *Pacor Inc. v. Higgins*, a decision wholly unrelated to the Barton doctrine:

> The . . . test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.[89]

In 2015, in *Coen v. Stutz (In re CDC Corp.)*, the Eleventh Circuit again used the analysis in an unpublished decision by describing its analysis as the "conceivable effect" test.[90] To date, no other circuit court has adopted this test when analyzing issues related to the Barton doctrine.

iii. The Fifth Circuit's Recent Jurisdictional Analysis

In 2015, two panels of the Fifth Circuit Court of Appeals decided cases that shed light on other jurisdictional contours of the Barton doctrine. In *Villegas v. Schmidt*, the Fifth Circuit considered whether the Supreme Court's 2011 decision in *Stern v. Marshall*[91] created an exception to the Barton

doctrine.[92] The *Villegas* case arose following the liquidation of the estate of BFG Investments ("BFG") by its bankruptcy trustee, Michael Schmidt.[93] The bankruptcy court subsequently closed the estate and approved Schmidt's fees.[94] Four year later, BFG and its former president, John Villegas, sued Schmidt in the district court for the Southern District of Texas.[95] The plaintiffs alleged that Schmidt committed gross negligence and breach of fiduciary duty while acting as the trustee for BFG for failing to pursue a cause of action against an insurance carrier.[96] The district court dismissed the action against Schmidt because the plaintiffs had failed to obtain leave from the bankruptcy court.[97]

On appeal to the Fifth Circuit, the plaintiffs argued that the Supreme Court's decision in *Stern* effectively created an exception to the Barton doctrine.[98] In *Stern*, the Supreme Court held that bankruptcy courts lack jurisdiction to enter final judgments on state law counterclaims unless those counterclaims "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[99]

The Fifth Circuit rejected the plaintiffs' argument on two bases. First, the court observed that appellate courts have been directed by the Supreme Court to abstain from concluding that a later case limited or overruled an earlier case. As a result, because the *Stern* ruling did not limit the Barton doctrine, the Fifth Circuit applied the doctrine in affirming the dismissal of the case. Second, the court noted that the Supreme Court's 2014 decision in *Executive Benefits Insurance Agency v. Arkison* suggests that *Stern* did not limit the Barton doctrine because, as the Supreme Court noted, "*Stern* did not . . . decide how bankruptcy or district courts should proceed when a '*Stern* claim' is identified."[100] Following the Fifth Circuit's decision, the Supreme Court denied the plaintiffs' request for a writ of certiorari.[101] Although the Supreme Court's decision not to review the case does not render the issue final, it is clear that in the Fifth Circuit, a plaintiff must obtain leave of the bankruptcy court for matters that, paraphrasing the *Stern* decision, arise from the bankruptcy or may be resolved in the claims allowance process.[102]

Two weeks later, in another case, *Carroll v. Abide*, the Fifth Circuit introduced a corollary to the rule that a district court supervising the bankruptcy court does not have jurisdiction over a suit without leave of the bankruptcy court.[103] In *Carroll*, a closely held corporation and its two principals filed for chapter 7 bankruptcy protection and the same trustee was appointed for each of the estates. The principal's children requested a determination from the bankruptcy court that certain property that had been transferred prepetition was not property of the estate.[104] The trustee, on the other hand, claimed that the transferred property was indeed property of the estate.[105] The district court withdrew the reference to the bankruptcy court due to jurisdictional concerns that arose following the Supreme Court's *Stern* decision.[106] Ultimately, the district court agreed that the transferred property was estate property, but it required the trustee to return a personal computer to the individual debtors.[107] The individual debtors and their daughter sued the trustee in the same district court on the grounds that the trustee violated

their constitutional rights by seizing and accessing the computer.[108] The district court dismissed the lawsuit because the plaintiffs did not obtain the bankruptcy court permission prior to initiating the suit under the Barton doctrine.[109]

On appeal, the Fifth Circuit vacated the district court's dismissal of the lawsuit because the district court had jurisdiction over the suit.[110] The court noted, "when a bankruptcy trustee acts pursuant to an order by the district court, and the trustee's actions pursuant to that order are the basis of the claim, the district court has jurisdiction to entertain a suit with respect to that conduct."[111]

B. Discretionary Nature

Although the Barton doctrine is a jurisdictional rule, courts have long taken the position that they may exercise discretion in determining whether to grant a motion for leave to sue. Some courts, for example, require a movant to establish a prima facie case against that trustee before such leave may be granted.[112] Further, the Ninth Circuit in *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)* identified the following factors that courts should consider when exercising discretion: (i) whether the acts or transactions at issue relate to the carrying on of the business connected with the property of the bankruptcy estate; (ii) whether the claims pertain to actions of the trustee while administering the estate; (iii) whether the claims involve the individual acting within the scope of his or her authority under the statute or court orders; (iv) whether movants are seeking a judgment against the trustee personally; and (v) whether the claims involve the trustee's breaching her fiduciary duty either through negligent or willful misconduct.[113] According to the Bankruptcy Appellate Panel for the Ninth Circuit in *In re Kashani*, which was cited favorably by the Ninth Circuit in *Crown Vantage,* a bankruptcy court may require the party seeking to sue the trustee to file a proposed complaint in order to provide the court with enough information to determine standing.[114]

In addition, a bankruptcy court in the Southern District of New York has created a two-prong analysis when exercising its discretion: (i) whether the proposed complaint states a prima facie case against the Defendants, and (ii) if the complaint does state a prima facie case, a bankruptcy court should examine whether the litigation should proceed in the federal or state court system.[115] On the other hand, the Third Circuit in *VistaCare* held that a bankruptcy court does not need to conduct a trial on the proposed state law claim and that it only need to satisfy itself that the claim is "not without foundation."[116] As the requirements for obtaining leave to sue vary by court, it is critical that practitioners research these prerequisites prior to initiating or responding to a motion for leave to sue.

C. Relationship Between the Barton Doctrine and Immunity

When a court applies the Barton doctrine by dismissing a case that was initiated in a jurisdiction other than the bankruptcy court, the dismissal is not viewed as due to the trustee's immunity from the plaintiff's claim. Rather,

the Barton doctrine deprives the other court of subject matter jurisdiction.[117] In *In re J & S Prop., LLC*, the bankruptcy court for the Western District of Pennsylvania summarized the distinction between the Barton doctrine and immunity:

> The Court reaches this conclusion because the Barton doctrine involves jurisdiction, not substantive law. If a plaintiff wants to bring suit against a bankruptcy trustee in a forum other than the bankruptcy court, the Barton doctrine requires approval of the bankruptcy court in order to proceed in the alternate forum. The scholarship on the Barton doctrine reveals that a common source of confusion springs from misconstruing it as shielding trustees from lawsuits. Such a misunderstanding naturally leads to confusion about whether the Barton doctrine affords trustees immunity. However, that is contrary to the fact that Barton presents a jurisdictional question. Simply stated, the Barton doctrine does not shield trustees from lawsuits. Rather, the doctrine requires the bankruptcy court to determine where the suit may be brought, not whether the trustee may be sued.[118]

With respect to immunity, judges acting in their judicial capacity enjoy absolute immunity from a lawsuit for money damages except when they act in the absence of jurisdiction.[119] Such immunity extends to officials performing quasi-judicial duties where those activities are integral to the judicial process that the actor is considered an arm of the court.[120] Courts will employ a "functional" approach to determine whether the nature of the function being performed is one related to the judicial process.[121] Bankruptcy trustees are typically entitled to quasi-judicial or derivative immunity from suits by third parties for actions taken in their official capacity.[122] On the other hand, if a trustee engages in activities outside of the scope of the court's authority, the trustee may not be entitled to immunity.[123]

D. Application of the Barton Doctrine to Non-Trustees

In addition to applying to trustees, courts have included a range of other parties within the protection of the Barton doctrine and thereby requiring such parties to obtain leave of the bankruptcy court prior to initiating an action in another jurisdiction. The Ninth Circuit, for example, on two occasions has held that the Barton doctrine may apply to chapter 11 post-confirmation liquidating trustees because they are the functional equivalent to a trustee.[124]

Similarly, several circuit courts have taken the position that the Barton doctrine applies to the trustee's counsel.[125] For example, the Sixth Circuit in *Allard v. Weitzman (In re DeLorean Motor Co.)* applied the Barton doctrine to counsel for a trustee because counsel "are the functional equivalent of a trustee [when] they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets."[126] The court articulated that the Barton doctrine would be effectively meaningless if a litigant could subject a trustee's counsel to a suit in another jurisdiction.[127] According to the Fourth Circuit in *McDaniel v. Blust*, the Barton doctrine applies to counsel even when the trustee did not direct the counsel to take a specific action that is the target of the plaintiff's complaint as long as counsel's actions

were "in the context" of the trustee's duties.[128] Similarly, courts have applied the Barton doctrine to other court-appointed professionals such as accountants,[129] auctioneers,[130] real estate brokers,[131] and private investigators.[132]

In addition, courts have applied the Barton doctrine to creditors. In *Lawrence v. Goldberg*, the Eleventh Circuit affirmed the dismissal of an action under the Barton doctrine that was initiated by a chapter 7 debtor against, among others defendants, certain creditors of the debtor.[133] The creditors provided the trustee with court-approved financing to cover the costs associated with recovering property of the estate.[134] The Eleventh Circuit found that because the creditors financed the trustee's efforts to find hidden assets that they functioned as the equivalent of court-appointed officers.[135] Further, in *Blixseth v. Brown*, a district court for the District of Montana extended the Barton doctrine to the chairperson of an official committee of unsecured creditors because he was the functional equivalent of a court-approved officer.[136]

The Barton doctrine may also apply to insiders of debtors. In an unpublished decision in *Gordon v. Nick*, the Fourth Circuit affirmed the district court's application of the Barton doctrine to the managing partner of the debtor by citing to cases where courts applied the doctrine to counsel.[137] Recently, in 2015, the Eleventh Circuit in an unpublished opinion in *CDC Corp.*, discussed above regarding the court's jurisdictional analysis, affirmed the dismissal of a suit under the Barton doctrine against an individual formerly serving as general counsel and director of a debtor in possession.[138] The court stated that the former general counsel was protected by the Barton doctrine because the court had approved the former general counsel's executive services agreement during the chapter 11 case.[139] The approval rendered him at least as connected to the estate as an attorney or investigator retained by a trustee.[140] In addition, a bankruptcy court for the Southern District of Florida in *In re W.B. Care Ctr.* applied the Barton doctrine to a court-appointed chief restructuring officer.[141] Thus, for the above courts, if a creditor or insider is potentially a target of suit in another jurisdiction than the bankruptcy court, that creditor or insider could proactively seek an order stating that they are the equivalent to a court-appointed officer. This would effectively impose the requirement on the plaintiff to first seek leave of the bankruptcy court prior to filing the lawsuit against such person in another jurisdiction.

This precautionary step, however, may not be necessary according to one bankruptcy court for the Southern District of New York because the Barton doctrine automatically applies to all fiduciaries of a debtor. In *In re Gen. Growth Props., Inc.*, the bankruptcy court held that the Barton doctrine applied to "any fiduciary of the estate, including a debtor-in-possession . . .."[142] Therefore, the Barton doctrine prevented a breach of fiduciary duty and shareholder derivative suit against the members of the board of directors that was initiated without leave of the court.[143]

In December 2014, the "Commission to Study the Reform of Chapter 11" of the American Bankruptcy Institute, a group composed of bankruptcy

professionals, issued a report that recommended that Congress formally codify the Barton doctrine's scope so that it applies to any trustee, estate neutral and statutory committee and its members.[144] The Commission further recommended that the protection should be extended to any professional retained where such litigation involves the professionals' representation of such party in a fiduciary capacity.[145] According to the Commission, clarification by Congress concerning the scope of the Barton doctrine would (i) allow those parties to perform their fiduciary duties with confidence and focus and (ii) eliminate unnecessary litigation concerning the application of the Barton doctrine and the subject matter jurisdiction of the court where the litigant filed the action.[146]

Although it is unclear whether Congress will take the Commission's invitation to statutorily expand the Barton doctrine to include professionals and other parties, it is clear from the case law that several courts have decided that such protection is appropriate.

IV. Exceptions to the Barton Doctrine

This Section discusses the two exceptions to the Barton doctrine: (i) the *ultra* vires common law exception established by the Supreme Court in *Barton,* and (ii) the carrying on business exception created by Congress under section 959(a). As will be discussed below, courts are generally reluctant to grant these exceptions. For example, Judge Richard Posner in the Seventh Circuit decision in *In re Linton*, although not specifically addressing either exception, articulated strong policy reasons for maintaining the Barton doctrine:

> 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 to sue], 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.[147]

A. The *Ultra Vires* Exception

As discussed in Section II(A) of this article, the Supreme Court in *Barton* stated that when a trustee is acting *ultra vires* then the plaintiff does not require leave from the appointing court to pursue a matter against a trustee.[148] The *ultra vires* exception arises, according to the Court, when, "by mistake or wrongfully," a receiver or trustee takes possession of property belonging to another.[149] Such other person may sue the receiver personally without first obtaining permission from the appointing court.[150]

Courts generally presume that a trustee is acting within his or her official duties unless the plaintiff alleges otherwise.[151] This presumption serves the purpose of preventing a plaintiff from making unsupported allegations against a trustee to defeat federal jurisdiction.[152]

A review of Circuit-level cases reveals that a majority of courts take a

broad view of the type of conduct that falls within the scope of a trustee's official duties. For example, the Sixth Circuit in *Heavrin v. Schilling (In re Triple S Restaurants, Inc.)* affirmed the bankruptcy court's dismissal of a state court action against a chapter 7 trustee who allegedly threatened to report the debtor's former general counsel to the appropriate authorities for criminal prosecution unless he agreed to pay $240,000 to the estate.[153] The Sixth Circuit noted that the trustee was acting within the scope of his duties because the trustee had a statutory duty to report criminal activities and that the alleged negotiations with the former general counsel were in the context of recovering assets for the estate.[154]

Similarly, in *McDaniel v. Blust*, the Fourth Circuit affirmed the dismissal of a state court action that alleged intentional misconduct and fraud by the trustee's attorneys on that grounds that the Barton doctrine applies "regardless of whether there is a claim that the alleged wrongdoing was intentional."[155] In *Satterfield v. Malloy*, the Tenth Circuit affirmed a district court decision to dismiss an action brought by the chapter 7 debtors against the trustee.[156] According to the *Satterfield* court, "claims based on acts that are related to the official duties of the trustee are barred by the *Barton* doctrine even if the debtor alleges such acts were taken with improper motives."[157] The above rulings suggest that mistake or wrongful conduct, which are the two types of activities identified as within the *ultra vires* exception by Supreme Court in *Barton*, are rarely enforced.

Of note, in *Alexander v. Hedback*, the Eighth Circuit affirmed a district court's dismissal of a suit involving tort actions against a trustee because the plaintiff did not obtain bankruptcy court approval before filing a district court action.[158] The Eighth Circuit declined to consider whether the Barton doctrine applies to a trustee's unconstitutional acts because in that case the plaintiff failed to allege a *Bivens* claim, which is a cause of action against a federal official for violations of the Fourth Amendment to the Constitution.[159] Thus, although the Eighth Circuit applied the Barton doctrine, it is unclear whether the Eighth Circuit would rule that the Barton doctrine applies if a party properly alleges a *Bivens* claim.

There appears to be some conflict whether the *ultra vires* exception to the Barton doctrine applies where a trustee seized assets whose ownership was disputed. For example, in 1967 the Ninth Circuit in *Leonard v. Vrooman* considered whether a trustee appointed under the Bankruptcy Act could be sued in state court.[160] The case arose when a husband and wife filed bankruptcy in the Southern District of California.[161] The bankruptcy petition listed certain goods and equipment as assets; however, the trustee also seized the real property where the goods and equipment were located.[162] It was later discovered that the debtors had transferred ownership of the premises to a third party, Carl Vrooman, on the day before the bankruptcy was filed.[163] Vrooman sued the trustee in state court for wrongfully seizing the store.[164] The bankruptcy court, holding for the trustee, concluded that allowing the state court action to proceed would hinder the administration of the bankruptcy estate.[165] This decision was affirmed by the district court.[166]

The Ninth Circuit, however, reversed the district court.[167] The court concluded that the trustee was engaged in forcible entry and possession of Vrooman's real property, which was not listed as an asset of the estate.[168] Although the Ninth Circuit acknowledged that the transfer of the real property on the day before the petition date raised the issue of fraudulent or preferential transfer to Vrooman, it nevertheless held that the trustee should have obtained an order from the court permitting him to seize the real property.[169]

In *Teton Millwork Sales v. Schlossberg*, the Tenth Circuit in an unpublished decision held that the Barton doctrine did not apply where the receiver appointed in a divorce proceeding wrongfully seized assets of a third party.[170] In that case, a West Virginia family court appointed the receiver to collect assets of Michael Palencar, a party in the divorce proceeding.[171] In the course of doing so, the receiver seized assets in Wyoming of a corporation in which Palencar was a twenty-five percent owner without obtaining ancillary jurisdiction from a Wyoming court.[172] The corporation sued the receiver in a Wyoming state court action, which was later removed to the Wyoming federal district court.[173] The Tenth Circuit noted that the receiver was acting outside of the scope of his authority when he seized assets that did not belong to Palencar and thus the Wyoming district court had subject matter jurisdiction over him.[174] Allowing a receiver to seize the assets of a third party, the Tenth Circuit stated, would render the *ultra vires* exception to the Barton doctrine "null and void."[175] Although *Teton* featured a receiver and not a bankruptcy trustee, it is clear from both *Teton* and *Leonard* that the failure to obtain an order prior to seizing assets of a third party may result in the application of the *ultra vires* exception to the Barton doctrine and exposure to a lawsuit outside of the jurisdiction of the bankruptcy court.

Indeed, in *Lurie v. Blackwell*, in an unpublished decision, a liquidating trustee's obtaining of a writ of execution from a state court prior to seizing disputed assets was dispositive according to the Ninth Circuit Court of Appeals.[176] In *Lurie*, the Ninth Circuit held that a liquidating trustee appointed in a confirmed chapter 11 case was within his authority when he seized plaintiff's assets even though there was disputed ownership of the property.[177] In that case, a liquidating trustee of the bankruptcy estate under the jurisdiction of a Missouri bankruptcy court obtained a judgment and writ of execution from a Montana state court against a former partner of the debtor.[178] Pursuant to a writ of execution, a local sheriff took property from the former partner's residence.[179] The wife of the partner sued the liquidating trustee in federal district court for Montana for wrongfully seizing property that belonged to her without first obtaining leave from the Missouri bankruptcy court.[180] The Ninth Circuit determined that the liquidating trustee was acting lawfully despite seizing disputed property because he had obtained the writ of execution from the Montana state court and therefore the district court had properly dismissed the plaintiff's action under the Barton doctrine.[181]

Therefore, to the extent that a trustee has reason to believe that property ownership may be disputed, a trustee should consider obtaining specific au-

thorization to seize such property. This will ensure that the trustee is acting in accordance with bankruptcy court authority and is therefore protected from suits outside of the bankruptcy court under the Barton doctrine.

B. The Statutory Exception

The second exception to the Barton doctrine occurs under section 959(a) when a trustee engages in "acts or transactions in carrying on business connected with such property."[182] Thus, pursuant to section 959(a), when a trustee is carrying on a business, the exception is triggered and the party does not need to seek leave prior to initiating a suit in another court for claims arising from carrying on business connected with such property.[183] Conversely, if the trustee is not carrying on a business then a person must obtain leave of the bankruptcy court prior to initiating a suit.[184]

Section 959(a) has been described as a narrow exception to the Barton doctrine.[185] In *Vass*, which was the first decision to apply *Barton* to bankruptcy trustees, Judge Learned Hand stated that a trustee does not continue the operations of a business under section 125, the predecessor to section 959(a), when the trustee acts "[m]erely to hold matters in statu quo; to mark time, as it were; to do only what is necessary to hold the assets intact . . .."[186]

In another Second Circuit case, *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, the court stated that "a trustee acting in his official capacity conducts no business connected with the property other than to perform administrative tasks necessarily incident to the consolidation, preservation, and liquidation of assets in the debtor's estate."[187] In *Lehal*, the Second Circuit, noted, "[section 959(a) was] intended to permit actions redressing torts committed in furtherance of the debtor's business, such as the common situation of a negligence claim in a slip and fall case where a bankruptcy trustee, for example, conducted a retail store."[188] The Eleventh Circuit has summarized its view of the scope of section 959(a) by stating, "[s]ection 959(a) does not apply to suits against trustees for administering or liquidating the bankruptcy estate."[189]

Accounting for and selling property, filing tax returns, and paying taxes do not constitute the carrying on a business.[190] Further, a trustee pursuing a fraudulent conveyance action[191] or collecting a judgment[192] that is wholly unrelated to the debtor's former business, does not involve carrying on a business and thus falls outside of the scope of the section 959(a) exception. Similarly, a breach of fiduciary duty does not fall within the section 959(a) exception.[193]

In *CDC Corp.*, discussed above in Section III(A)(ii) of this article, the Eleventh Circuit affirmed the dismissal of a lawsuit against a former general counsel under the Barton doctrine.[194] In the suit, the plaintiff alleged that the former general counsel committed defamation and tortious interference when serving on the board of directors of a company that was owned by the chapter 11 debtor.[195] The court determined that the former general counsel's actions while on the board of directors of that company were in furtherance of the administration of the bankruptcy case and not in the day-to-day operations

of the non-debtor subsidiary such that his conduct would fall under the exception under section 959(a).[196] The fact that a case was filed under chapter 11 does not necessarily result in a finding that an estate is carrying on a business and thus within the section 959(a) exception.

In fact, courts finding the exception to the Barton doctrine under section 959(a) to be available are exceedingly rare. Section 959(a) has been found to apply in only a few cases, most of which arose before the enactment of the Bankruptcy Code. In one example, in 1946 in *Thompson v. Texas Mexican Ry. Co.* the Supreme Court held that a trustee of a railroad that filed a reorganization under the former Bankruptcy Act was carrying on a business because it was continuing to operate trains after the filing of the bankruptcy.[197] Therefore, section 125, the predecessor of section 959(a), authorized the filing of a lawsuit against the railroad without leave of the bankruptcy court.[198] In another case, in 1959 in *Valdes v. Feliciano,* the First Circuit Court of Appeals held that plaintiffs alleging negligence against a trustee that was operating a railroad under chapter X of the former Bankruptcy Act could proceed under the section 959(a) exception without obtaining an authorizing order.[199] The 1984 decision by the bankruptcy court of Eastern District of Michigan in *In re Kish* appears to be an example of a rare instance where section 959(a) was applied after the enactment of the Bankruptcy Code.[200] In *Kish*, the bankruptcy court held that a private citizens group did not need leave from the bankruptcy court when it sued a chapter 11 debtor that was continuing to operate a landfill.[201]

Despite the above examples where courts have found that section 959(a) authorized the plaintiffs to file suits without leave of the bankruptcy court, it appears that the modern trend is for bankruptcy courts to find that most activities in bankruptcy case are administrative in nature and do not relate to carrying on business as that business existed prior to the bankruptcy filing.

V. Conclusion

The Barton doctrine is as relevant today as when it was created in 1881. As discussed in this article, the Barton doctrine is a jurisdictional rule that requires the dismissal of a suit that was filed against a receiver outside of the jurisdiction of the appointing court without leave of that court. Today, the Barton doctrine has been expanded to protect trustees and their professionals, and under some decisions, creditors and insiders as well.

There are two exceptions to the Barton doctrine. In *Barton*, the Supreme Court stated that the requirement to obtain leave from the appointing court is not required when the trustee engages in *ultra vires* actions by mistakenly or wrongfully seizes property of another. Six years after *Barton*, Congress enacted a statutory exception, now codified as section 959(a) of title 28, which does not require leave of the appointing court under certain circumstances where the trustee is operating a business. Despite these two exceptions, it appears that the modern trend is for courts not to allow the trustee to be sued in another jurisdiction even where those exceptions could be triggered. This trend, however, does not immunize the trustee from a suit in the bankruptcy court in which the trustee was appointed.

NOTES:

[1]Barton v. Barbour, 104 U.S. 126, 136, 26 L. Ed. 672, 1881 WL 19839 (1881).

[2]Barton v. Barbour, 104 U.S. 126, 129, 26 L. Ed. 672, 1881 WL 19839 (1881).

[3]Barton v. Barbour, 104 U.S. 126, 134, 26 L. Ed. 672, 1881 WL 19839 (1881).

[4]In re VistaCare Group, LLC, 678 F.3d 218, 222, 56 Bankr. Ct. Dec. (CRR) 111, Bankr. L. Rep. (CCH) P 82263 (3d Cir. 2012).

[5]Barton, 104 U.S. at 134.

[6]In re VistaCare Grp., LLC, 678 F.3d at 226.

[7]See, e.g., Considine v. Murphy, 297 Ga. 164, 773 S.E.2d 176, 179 (2015) ("In states like Georgia that treat the [*Barton*] rule as jurisdictional, the prior-leave requirement applies even to a separate lawsuit filed in the same court that appointed the receiver."); PNC Bank, Natl. Assn. v. J & J Slyman, L.L.C., 2015-Ohio-2951, 2015 WL 4506915 (Ohio Ct. App. 8th Dist. Cuyahoga County 2015) ("To this extent, the receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained.").

[8]See, e.g., S.E.C. v. Rubera, 535 Fed. Appx. 553 (9th Cir. 2013), cert. denied, 134 S. Ct. 1875, 188 L. Ed. 2d 917 (2014) (applying the Barton doctrine to a case against a receiver appointed by the Securities and Exchange Commission); Springer v. The Infinity Group Co., 189 F.3d 478 (10th Cir. 1999) (same) (table opinion).

[9]Davis v. Gray, 83 U.S. 203, 216, 21 L. Ed. 447, 1872 WL 15325 (1872).

[10]Davis v. Gray, 83 U.S. 203, 218, 21 L. Ed. 447, 1872 WL 15325 (1872).

[11]Barton, 104 U.S. at 128–29.

[12]Barton, 104 U.S. at 126–27.

[13]Barton, 104 U.S. at 127.

[14]Barton, 104 U.S. at 127.

[15]Barton, 104 U.S. at 127.

[16]Barton, 104 U.S. at 127.

[17]Barton, 104 U.S. at 127.

[18]Barton, 104 U.S. at 127.

[19]Barton, 104 U.S. at 127.

[20]Barton, 104 U.S. at 127–31.

[21]Barton, 104 U.S. at 128–29.

[22]Barton, 104 U.S. at 128–29.

[23]Barton, 104 U.S. at 128–29.

[24]Barton, 104 U.S. at 128–29.

[25]Barton, 104 U.S. at 127.

[26]Barton, 104 U.S. at 129. In support of its viewpoint, the majority opinion cited both Supreme Court and British common law for the propositions that a court must administer a trust independently of any rights owed to third parties. Barton, 104 U.S. at 129.

[27]Barton, 104 U.S. at 129.

[28]Barton, 104 U.S. at 129–30.

[29]Barton, 104 U.S. at 129–30.

[30]Barton, 104 U.S. at 129–30.

[31]Barton, 104 U.S. at 129–30.

[32]Barton, 104 U.S. at 131.

[33]Barton, 104 U.S. at 131.

[34]Barton, 104 U.S. at 131.

[35]Barton, 104 U.S. at 134.

[36]Barton, 104 U.S. at 134. The Court noted that a court administering the trust may, at its discretion, direct another court to aid it in arriving at the "right conclusion" on a particular issue or claim. Barton, 104 U.S. at 134.

[37]Barton, 104 U.S. at 136.

[38]See Barton, 104 U.S. at 134 ("But 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.*") (italics in original).

[39]Barton, 104 U.S. at 134.

[40]Barton, 104 U.S. at 134.

[41]Barton, 104 U.S. at 138.

[42]Barton, 104 U.S. at 138.

[43]Barton, 104 U.S. at 139.

[44]See VistaCare, 678 F.3d at 226 ("This provision, originally enacted in 1887, just six years after *Barton*, seems to have been in direct response to the concerns raised in Justice Miller's dissent in *Barton.*"); Medical Development Intern. v. California Dept. of Corrections and Rehabilitation, 585 F.3d 1211, 1217 (9th Cir. 2009) ("The exception was enacted by Congress to address a concern expressed in a dissent to *Barton* filed by Justice Miller."); James W. Day & Marc E. Hirshfield, The Barton Doctrine: Still Kicking After 130 Years, Am. Bankr. Inst. J. Aug. 2012, at 23 ("[Justice Miller's] concern was addressed six years later with the passage of 28 U.S.C.A. § 959(a) . . ..").

[45]Section 66 was enacted as Act of Congress of March 3, 1887, ch. 373, § 3, 24 Stat. 554.

[46]McNulta v. Lochridge, 141 U.S. 327, 330, 12 S. Ct. 11, 35 L. Ed. 796 (1891); VistaCare, 678 F.3d at 225.

[47]VistaCare, 678 F.3d at 330; see also Porter v. Sabin, 149 U.S. 473, 480, 13 S. Ct. 1008, 37 L. Ed. 815 (1893) ("The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory.")

[48]VistaCare, 678 F.3d at 227; In re Crown Vantage, Inc., 421 F.3d 963, 972, 45 Bankr. Ct. Dec. (CRR) 69, 54 Collier Bankr. Cas. 2d (MB) 1479, Bankr. L. Rep. (CCH) P 80345 (9th Cir. 2005); Muratore v. Darr, 375 F.3d 140, 143, 43 Bankr. Ct. Dec. (CRR) 78, 52 Collier Bankr. Cas. 2d (MB) 834, Bankr. L. Rep. (CCH) P 80131, 59 Fed. R. Serv. 3d 329 (1st Cir. 2004); Carter v. Rodgers, 220 F.3d 1249, 1254, 36 Bankr. Ct. Dec. (CRR) 138, 44 Collier Bankr. Cas. 2d (MB) 943 (11th Cir. 2000); In re Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 5, 35 Bankr. Ct. Dec. (CRR) 182, Bankr. L. Rep. (CCH) P 78028 (1st Cir. 1999); In re DeLorean Motor Co., 991 F.2d 1236, 1240–41, Bankr. L. Rep. (CCH) P 75259 (6th Cir. 1993).

[49]VistaCare, 678 F.3d at 227.

[50]Act of Congress of March 3, 1911, ch. 231, § 66, 36 Stat. 1104.

[51]Vass v. Conron Bros. Co., 59 F.2d 969, 970 (C.C.A. 2d Cir. 1932).

[52]Vass v. Conron Bros. Co., 59 F.2d 969, 970 (C.C.A. 2d Cir. 1932).

[53]VistaCare, 678 F.3d at 226 n.3.

[54]The official notes to section 959(a) state that the requirement for a jury trial was added pursuant to the holding in Vany v. Receiver of Toledo, St. L. & K.C. Ry. Co., 67 F. 379 (C.C.N.D. Ohio 1895). In *Vany*, the court stated:

> But the act of [C]ongress having given a party the right to sue the receiver in a state court, where the right to a trial to jury is guarantied [sic] him unless waived, if the receiver brings that controversy by removal into the federal court, I think the intent and purpose of the act of [C]ongress should be carried out, and that, if he demands it, he should have a trial to a jury in the court to which his case has been removed without his consent.

[55]28 U.S.C. § 959(a).

[56]See VistaCare, 678 F.3d at 227 ("[T]he Bankruptcy Code overhauled the bankruptcy system and replaced many of the bankruptcy statutes . . ..").

[57]VistaCare, 678 F.3d at 229 n.8.

[58]11 U.S.C.A. § 323(b). In 1983, the Supreme Court adopted the Federal Rules of Bankruptcy Procedure including Rule 6009, which states, [w]ith or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal." Fed. R. Bankr. P. 6009.

[59]11 U.S.C.A. § 362.

[60]See, e.g., VistaCare, 678 F.3d at 228; Alexander v. Hedback, 718 F.3d 762, 767 (8th Cir. 2013).

[61]VistaCare, 678 F.3d at 227.

[62]VistaCare, 678 F.3d at 228.

[63]VistaCare, 678 F.3d at 228; Alexander, 718 F.3d at 767.

[64]VistaCare, 678 F.3d at 223.

[65]VistaCare, 678 F.3d at 223.

[66]VistaCare, 678 F.3d at 229.

[67]VistaCare, 678 F.3d at 229.

[68]VistaCare, 678 F.3d at 230.

[69]VistaCare, 678 F.3d at 230.

[70]VistaCare, 678 F.3d at 230.

[71]VistaCare, 678 F.3d at 230.

[72]VistaCare, 678 F.3d at 231–32.

[73]VistaCare, 678 F.3d at 232.

[74]Posin v. Sheehan, 2011 WL 3022305 (N.D. W. Va. 2011).

[75]Lurie v. Blackwell, 211 F.3d 1274, at *1 (9th Cir. 2000) (table decision).

[76]Carter, 220 F.3d at 1254 ("Carter must obtain leave of the bankruptcy court in order to sue Defendants in a forum other than the appointing court."); Mailman Steam Carpet, 196 F.3d at 5 ("We hold, therefore, that any negative implication which can be extracted from the language of section 959(a) runs only to cases brought in courts other than the bankruptcy court."); see also In re Kashani, 190 B.R. 875, 885, 35 Collier Bankr. Cas. 2d (MB) 131 (B.A.P. 9th Cir. 1995); In re J & S Properties, LLC, 545 B.R. 91, 99 (Bankr. W.D. Pa. 2015), aff'd, 554 B.R. 747 (W.D. Pa. 2016); In re Lyn, 483 B.R. 440, 449 (Bankr. D. Del. 2012).

[77]Villegas v. Schmidt, 788 F.3d 156, 158, 61 Bankr. Ct. Dec. (CRR) 22, Bankr. L. Rep. (CCH) P 82836 (5th Cir. 2015); Carroll v. Abide, 788 F.3d 502, 505, 61 Bankr. Ct. Dec. (CRR) 33, 73 C.B.C. 1503, Bankr. L. Rep. (CCH) P 82837 (5th Cir. 2015); In re CDC Corp., 610 Fed. Appx. 918, 921 (11th Cir. 2015); Alexander, 718 F.3d at 767–68; Satterfield v. Malloy, 700 F.3d 1231, 1237, 57 Bankr. Ct. Dec. (CRR) 81, Bankr. L. Rep. (CCH) P 82382 (10th Cir. 2012), Muratore v. Darr, 375 F.3d 140, 43 Bankr. Ct. Dec. (CRR) 78, 52 Collier Bankr. Cas. 2d (MB) 834, Bankr. L. Rep. (CCH) P 80131, 59 Fed. R. Serv. 3d 329 (1st Cir. 2004); Carter, 220 F.3d at 1253; see also Posin v. Sheehan, 2011 WL 3022305 (N.D. W. Va. 2011); Blixseth v. Brown, 470 B.R. 562, 566, Bankr. L. Rep. (CCH) P 82223 (D. Mont. 2012) ("[T]he District Court is a different forum than the Bankruptcy Court for purposes of the Barton Doctrine. This is true despite the fact that a bankruptcy court's jurisdiction is derivative of the district court's [under 28 U.S.C.A. §§ 157 and 1334]."); Hutchins v. Shatz, Schwartz and Fentin, P.C., 494 B.R. 108, 116 (D. Mass. 2013).

[78]Kashani, 190 B.R. at 885.

[79]Satterfield, 700 F.3d at 1237; Crown Vantage, 421 F.3d at 972; Muratore, 375 F.3d at 147; Linton, 136 F.3d at 147.

[80]Linton, 136 F.3d at 546.

[81]Carter, 220 F.3d at 1253.

[82]Carter, 220 F.3d at 1251–52.

[83]Carter, 220 F.3d at 1252.

[84]Carter, 220 F.3d at 1253.

[85]Carter, 220 F.3d at 1253 '' 'Arising under' proceedings are matters invoking a substantive right created by the Bankruptcy Code. The 'arising in a case under' category is generally thought to involve administrative-type matters . . .." In re Toledo, 170 F.3d 1340, 1345, 34 Bankr. Ct. Dec. (CRR) 205, Bankr. L. Rep. (CCH) P 77914 (11th Cir. 1999) (internal citations omitted).

[86]Carter, 220 F.3d at 1253–54.

[87]Carter, 220 F.3d at 1254.

[88]Lawrence v. Goldberg, 573 F.3d 1265, 1270–71, 51 Bankr. Ct. Dec. (CRR) 246, 61 Collier Bankr. Cas. 2d (MB) 1827, Bankr. L. Rep. (CCH) P 81576 (11th Cir. 2009).

[89]Lawrence v. Goldberg, 573 F.3d 1265, 1270–71, 51 Bankr. Ct. Dec. (CRR) 246, 61 Collier Bankr. Cas. 2d (MB) 1827, Bankr. L. Rep. (CCH) P 81576 (11th Cir. 2009) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994, 12 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 70002 (3d Cir. 1984)).

[90]CDC Corp., 610 Fed. App'x at 922.

[91]Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011).

[92]Villegas, 788 F.3d at 158.

[93]Villegas, 788 F.3d at 157.

[94]Villegas, 788 F.3d at 157.

[95]Villegas, 788 F.3d at 157.

[96]Villegas, 788 F.3d at 157.

[97]Villegas, 788 F.3d at 157.

[98]Villegas, 788 F.3d at 157.

[99]Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 2618, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011).

[100]Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 2618, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011). The Fifth Circuit also held that a party must obtain leave from the bankruptcy court even when the district court has supervisory authority over the bankruptcy court. Stern v. Marshall, 564 U.S. at 159.

[101]Cert. denied, 136 S. Ct. 588 (2015).

[102]Villegas, 788 F.3d at 158.

[103]Carroll, 788 F. 3d at 507.

[104]Carroll, 788 F. 3d at 503.

[105]Carroll, 788 F. 3d at 503.

[106]Carroll, 788 F. 3d at 503.

[107]Carroll, 788 F. 3d at 504.

[108]Carroll, 788 F. 3d at 504.

[109]Carroll, 788 F.3d at 504.

[110]Carroll, 788 F.3d at 507.

[111]Carroll, 788 F.3d at 507.

[112]See, e.g., In re Lupo, 2014 WL 4653064 (B.A.P. 1st Cir. 2014); Anderson v. U.S., 520 F.2d 1027, 1029 (5th Cir. 1975) ("Before such permission is granted, the prospective plaintiffs must make out a prima facie case against the trustee."); In re National Molding Co., 230 F.2d 69, 71 (3d Cir. 1956) ("We agree that Patco must make a prima facie case against the trustee, showing that its claim is not without foundation."); see also VistaCare, 678 F.3d at 232.

[113]Crown Vantage, 421 F.3d at 970.

[114]Kashani, 190 B.R. at 887 ("We cannot conclude, based upon this record, that the bankruptcy judge committed a clear error of judgment requiring that the Debtors provide at least a copy of the proposed complaint.").

[115]In re Eerie World Entertainment, L.L.C., 2006 WL 1288578 (Bankr. S.D. N.Y. 2006).

[116]VistaCare, 678 F.3d at 232 (quoting Nat'l Molding Co., 230 F.2d at 71).

[117]See, e.g., In re J & S Properties, LLC, 545 B.R. 91, 98 (Bankr. W.D. Pa. 2015), aff'd, 554 B.R. 747 (W.D. Pa. 2016).

[118]In re J & S Properties, LLC, 545 B.R. 91, 98 (Bankr. W.D. Pa. 2015), aff'd, 554 B.R. 747 (W.D. Pa. 2016).

[119]In re McKenzie, 716 F.3d 404, 412, 57 Bankr. Ct. Dec. (CRR) 280 (6th Cir. 2013).

[120]In re McKenzie, 716 F.3d 404, 412, 57 Bankr. Ct. Dec. (CRR) 280 (6th Cir. 2013).

[121]In re McKenzie, 716 F.3d 404, 412, 57 Bankr. Ct. Dec. (CRR) 280 (6th Cir. 2013).

[122]In re McKenzie, 716 F.3d 404, 412, 57 Bankr. Ct. Dec. (CRR) 280 (6th Cir. 2013).

[123]Kashani, 190 B.R. at 883.

[124]Crown Vantage, 421 F.3d at 973; Lurie, 211 F.3d 1274, at *1.

[125]See e.g., McDaniel v. Blust, 668 F.3d 153, 156, 56 Bankr. Ct. Dec. (CRR) 1 (4th Cir. 2012); Lawrence, 573 F.3d at 1270; In re Lowenbraun, 453 F.3d 314, 321, Bankr. L. Rep. (CCH) P 80650, 2006 FED App. 0230P (6th Cir. 2006); DeLorean, 991 F.2d at 1241; see also Hutchins v. Shatz, Schwartz and Fentin, P.C., 494 B.R. 108, 116–17 (D. Mass. 2013); Mammola v. Dwyer, 497 B.R. 1, 2 (D. Mass. 2013); Catholic Bishop of Spokane v. Paine Hamblen, LLP, 2013 WL 11319241 (E.D. Wash. 2013); Matter of Krikava, 217 B.R. 275, 280, 39 Collier Bankr. Cas. 2d (MB) 1145, R.I.C.O. Bus. Disp. Guide (CCH) P 9529 (Bankr. D. Neb. 1998).

[126]DeLorean, 991 F.2d at 1241; see also McKenzie, 716 F.3d at 411.

[127]DeLorean, 991 F.2d at 1241 ("The protection that the leave requirement affords the Trustee and the estate would be meaningless if it could be avoided by simply suing the Trustee's attorneys.").

[128]McDaniel, 668 F. 3d at 157.

[129]In re W.B. Care Center, LLC, 497 B.R. 604, 611 (Bankr. S.D. Fla. 2013).

[130]Carter, 220 F.3d at 1252–53 (applying doctrine to antique company); Equipment Leasing, LLC v. Three Deuces, Inc., 2011 WL 6141443 (E.D. La. 2011) (applying doctrine to auctioneer).

[131]See, e.g., In re Brownsville Property Corp., Inc., 473 B.R. 89, 91–92, 56 Bankr. Ct. Dec. (CRR) 172 (Bankr. W.D. Pa. 2012).

[132]See, e.g., Lawrence, 573 F.3d at 1270.

[133]Lawrence, 573 F.3d at 1270.

[134]Lawrence, 573 F.3d at 1270.

[135]Lawrence, 573 F.3d at 1270.

[136]Blixseth, 470 B.R. at 567.

[137]Gordon v. Nick, 162 F.3d 1155 (4th Cir. 1998) (table decision).

[138]CDC Corp., 610 Fed. App'x at 921.

[139]CDC Corp., 610 Fed. App'x at 921.

[140]CDC Corp., 610 Fed. App'x at 922.

[141]W.B. Care, 497 B.R. at 611.

[142]In re General Growth Properties, Inc., 426 B.R. 71, 75, 63 Collier Bankr. Cas. 2d (MB) 1010 (Bankr. S.D. N.Y. 2010).

[143]In re General Growth Properties, Inc., 426 B.R. 71, 75, 63 Collier Bankr. Cas. 2d (MB) 1010 (Bankr. S.D. N.Y. 2010).

[144]Am. Bankr. Institute, "Commission to Study the Reform of Chapter 11," at 44.

[145]Am. Bankr. Institute, "Commission to Study the Reform of Chapter 11," at 44.

[146]Am. Bankr. Institute, "Commission to Study the Reform of Chapter 11," at 44.

[147]Linton, 136 F.3d at 545; see also McDaniel, 668 F.3d at 157 (stating that the Barton doctrine enables bankruptcy courts to monitor the trustees so that courts may be fully informed on future appointments).

[148]Barton, 104 U.S. at 134.

[149]Barton, 104 U.S. at 134.

[150]Barton, 104 U.S. at 134.

[151]See, e.g., McDaniel, 668 F.3d at 157; Lowenbraun, 453 F.3d at 322.

[152]Lowenbraun, 453 F.3d at 322.

[153]In re Triple S Restaurants, Inc., 519 F.3d 575, 578, 49 Bankr. Ct. Dec. (CRR) 178, Bankr. L. Rep. (CCH) P 81126 (6th Cir. 2008).

[154]In re Triple S Restaurants, Inc., 519 F.3d 575, 578, 49 Bankr. Ct. Dec. (CRR) 178, Bankr. L. Rep. (CCH) P 81126 (6th Cir. 2008).

[155]McDaniel, 668 F.3d at 158.

[156]Satterfield, 700 F.3d at 1238.

[157]Satterfield, 700 F.3d at 1236.

[158]Alexander, 718 F.3d at 768.

[159]Alexander, 718 F.3d at 768 n.5.

[160]Leonard v. Vrooman, 383 F.2d 556, 560 (9th Cir. 1967).

[161]Leonard v. Vrooman, 383 F.2d 556, 557 (9th Cir. 1967).

[162]Leonard v. Vrooman, 383 F.2d 556, 558 (9th Cir. 1967).

[163]Leonard v. Vrooman, 383 F.2d 556, 558 (9th Cir. 1967).

[164]Leonard v. Vrooman, 383 F.2d 556, 559 (9th Cir. 1967).

[165]Leonard v. Vrooman, 383 F.2d 556, 560 (9th Cir. 1967).

[166]Leonard, 383 F.2d at 560.

[167]Leonard, 383 F.2d at 561.

[168]Leonard, 383 F.2d at 560.

[169]Leonard, 383 F.2d at 560–61.

[170]Teton Millwork Sales v. Schlossberg, 311 Fed. Appx. 145, 148–49 (10th Cir. 2009).

[171]Teton Millwork Sales v. Schlossberg, 311 Fed. Appx. 145, 146–47 (10th Cir. 2009).

[172]Teton Millwork Sales v. Schlossberg, 311 Fed. Appx. 145, 147 (10th Cir. 2009)

[173]Teton Millwork Sales v. Schlossberg, 311 Fed. Appx. 145, 147 (10th Cir. 2009).

[174]Teton Millwork Sales v. Schlossberg, 311 Fed. Appx. 145, 148 (10th Cir. 2009).

[175]Teton Millwork Sales v. Schlossberg, 311 Fed. Appx. 145, 148 (10th Cir. 2009).

[176]Lurie, 211 F.3d 1274, at *2.

[177]Lurie, 211 F.3d 1274, at *2.

[178]Lurie, 211 F.3d 1274, at *1.

[179]Lurie, 211 F.3d 1274, at *1.

[180]Lurie, 211 F.3d 1274, at *1.

[181]Lurie, 211 F.3d 1274, at *2. The Ninth Circuit also found that the Barton doctrine applied because the liquidating trustee was not carrying on business and was merely liquidating the estate. Lurie, 211 F.3d 1274, at *2.

[182]11 U.S.C.A. § 959(a).

[183]11 U.S.C.A. § 959(a).

[184]See 11 U.S.C.A. § 959(a).

[185]See In re Balboa Improvements, Ltd., 99 B.R. 966, 970, 21 Collier Bankr. Cas. 2d (MB) 12 (B.A.P. 9th Cir. 1989) (holding that a breach of fiduciary duty claim does not fall within the "narrow parameters of § 959(a)").

[186]Vass, 59 F.2d at 971.

[187]In re Lehal Realty Associates, 101 F.3d 272, 276, 29 Bankr. Ct. Dec. (CRR) 1326, Bankr. L. Rep. (CCH) P 77185 (2d Cir. 1996).

[188]In re Lehal Realty Associates, 101 F.3d 272, 276, 29 Bankr. Ct. Dec. (CRR) 1326, Bankr. L. Rep. (CCH) P 77185 (2d Cir. 1996).

[189]Carter, 220 F.3d at 1254.

[190]Muratore, 375 F.3d at 145; Satterfield, 700 F.3d at 1238; VistaCare, 678 F.3d at 227 n.5.

[191]McKenzie, 716 F.3d at 416; DeLorean, 991 F.2d at 1241.

[192]Lurie, 211 F.3d 1274, at *1.

[193]See e.g., Carter, 220 F.3d at 1254 ("Because the alleged breaches [of fiduciary duty] attributed to Defendants are not premised on an act or transaction of a fiduciary in carrying out Carter's business operations, section 959(a) is not applicable."); Lehal Realty, 101 F.3d at 276 ("This section is not intended to apply to a breach of a fiduciary duty in the administration of a bankruptcy estate."); Kashani, 190 B.R. at 884 ("[B]reach of fiduciary duty in the administration of the estate does not fall within the exception provided by 28 U.S.C.A. § 959(a)."); Balboa Improvements, 99 B.R. at 970 ("[Section 959] was not intended to apply to a breach of a fiduciary duty in the administration of a bankruptcy estate.").

[194]CDC Corp., 60 Fed. App'x at 922.

[195]CDC Corp., 60 Fed. App'x at 919–20.

[196]CDC Corp., 60 Fed. App'x at 922.

[197]Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 138, 66 S. Ct. 937, 90 L. Ed. 1132 (1946).

[198]Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 138, 66 S. Ct. 937, 90 L. Ed. 1132 (1946). ("Operation of the trains is plainly a part of the trustee's functions.").

[199]Valdes v. Feliciano, 267 F.2d 91, 94–95 (1st Cir. 1959); see also Haberern v. Lehigh & N. E. Ry. Co., 554 F.2d 581, 585 (3d Cir. 1977) ("Directing overwork and withholding a pension are clearly acts of the receiver 'in carrying on the business' of the railroad and, thus, come within the permission to sue granted by 28 U.S.C.A. § 959(a).").

[200]In re Kish, 41 B.R. 620, 620, 12 Bankr. Ct. Dec. (CRR) 446, 11 Collier Bankr. Cas. 2d (MB) 888 (Bankr. E.D. Mich. 1984).

[201]In re Kish, 41 B.R. 620, 620, 12 Bankr. Ct. Dec. (CRR) 446, 11 Collier Bankr. Cas. 2d (MB) 888 (Bankr. E.D. Mich. 1984).