

## Expansion of the *Barton* Doctrine To Unsecured Creditors' Committees

By Sheryl P. Giugliano

The U.S. Court of Appeals for the Ninth Circuit recently held in *Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090 (9th Cir. 2016), that under *Barton v. Barbour*, 104 U.S. 126 (1881), a plaintiff must obtain a bankruptcy court's permission before commencing a lawsuit in another forum against a member of the committee of unsecured creditors, and that *Stern v. Marshall*, 564 U.S. 462 (2011) does not preclude bankruptcy courts from adjudicating such claims on the merits.

### THE *BARTON* DOCTRINE

"The *Barton* Doctrine, developed from common law by the Supreme Court, provides that a suit may not be brought against a receiver without leave of such receiver's appointing court." *MF Global Holdings Ltd. v. Allied World Assurance Company Ltd. (In re MF Global Holdings, Ltd.)*, 562 B.R. 866 (Bankr. S.D.N.Y. 2017) (quoting *McIntire v. China MediaExpress*

*Holdings, Inc.*, 113 F.Supp.3d 769, 772 (S.D.N.Y. 2015) (citing *Barton v. Barbour*, 104 U.S. 126, 136-37 (1881)). Generally, the *Barton* doctrine has been applied to bar claims against receivers and bankruptcy trustees acting in their official capacities as officers of the court. *Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090, 1094 (9th Cir. 2016) (citing *In re Crown Vantage, Inc.*, 421 F.3d 963, 970-71 (9th Cir. 2005)).

The *Barton* doctrine requires that plaintiffs obtain authorization from the bankruptcy court before bringing actions in another forum "against certain officers appointed by the bankruptcy court for actions the officers have taken in their official capacities." *Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090, 1094 (9th Cir. 2016) (citing *In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005)).

### PRIOR EXPANSIONS OF THE *BARTON* DOCTRINE BY THE SIXTH AND ELEVENTH CIRCUITS

Before the Ninth Circuit's decision in the *Yellowstone* case, no other court of appeals had applied *Barton* to claims against members of unsecured creditors' committees, but other circuits had extended *Barton* to those who were not trustees or receivers, including attorneys for the trustee, and those individuals retained to conduct sales of estate property. *See In*

*re Yellowstone Mountain Club, LLC*, 841 F.3d at 1094-95 (noting the U.S. Court of Appeals for the Sixth Circuit extending *Barton* to trustee's counsel as "functional equivalent" of trustee administering estate, and that the U.S. Court of Appeals for the Eleventh Circuit adopted the "functional equivalent" test for application to retained auctioneer for the estate) (citing *In re DeLorean Motor Co.*, 991 F.2d 1236, 1241 (6th Cir. 1993); *Carter v. Rodgers*, 220 F.3d 1249, 1251 n.4 (11th Cir. 2000)).

### THE NINTH CIRCUIT'S EXPANSION OF THE *BARTON* DOCTRINE

The Ninth Circuit expanded the *Barton* doctrine to bar claims in another forum against members of committees of unsecured creditors acting in their official capacities during the bankruptcy case, without first obtaining the express permission of the bankruptcy court. *Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090, 1095 (9th Cir. 2016).

The Ninth Circuit reasoned that "creditors have interests that are closely aligned with those of a bankruptcy trustee" and, therefore, "there's good reason to treat the two the same for purposes of the *Barton* doctrine." *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1095 (9th Cir. 2016). For example, committees of unsecured creditors, like trustees, maximize recovery by increasing

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the size of the estate. *Id.* To that end, committees investigate the debtor's business and operations, assets and liabilities, participate in plan negotiations, and examine the debtor. *Id.* According to the Ninth Circuit, this "alignment of interests" may explain why committees are authorized under the Bankruptcy Code to seek the appointment of a trustee. *Id.* (citing 11 U.S.C. §1103(c)(4)).

The Ninth Circuit cautioned that denying application of the *Barton* doctrine to the duties imposed upon committees of unsecured creditors could inhibit prospective committee members from participating effectively, and meaningfully discharging their duties. *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1095 (9th Cir. 2016) (citing 2012-2014 Final Report and Recommendations 43 (2014), available at <http://bit.ly/2mjplpf>).

#### **THE *BARTON* DOCTRINE ONLY APPLIES TO ACTS TAKEN IN AN OFFICIAL CAPACITY**

The Ninth Circuit distinguished the plaintiff's prepetition claims against the defendant (sounding in tort and contract for prepetition legal advice), which were not barred by the *Barton* doctrine and, therefore, did not require permission to pursue in another forum, from the plaintiff's post-petition claims against the defendant in his capacity as chairman of the committee of unsecured creditors, which were barred by the *Barton* doctrine and, therefore, required permission from the bankruptcy court to pursue in another forum. *Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090, 1095 (9th Cir. 2016).

#### ***STERN V. MARSHALL* DOES NOT PRECLUDE BANKRUPTCY COURTS FROM ADJUDICATING *BARTON* CLAIMS**

After concluding that the bankruptcy court should retain jurisdiction over

the claims covered under the *Barton* doctrine (relying upon a five-factor test to determine whether to grant leave to file the claims in another forum), the Ninth Circuit held that *Stern v. Marshall* does not preclude a bankruptcy court from adjudicating *Barton* claims that "could not 'exist independently of [a] bankruptcy case.'" *In re Yellowstone Mountain Club, LLC*, 841 F.3d at 1097 (quoting *In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005)).

According to the Ninth Circuit, *Stern* "precludes bankruptcy courts from deciding common law claims that have no connection to the bankruptcy estate other than that they happen to be assets of the estate." *Id.* Claims covered by the *Barton* doctrine are different, however, because "they concern actions taken in a trustee's or officer's official capacity." *Id.*

#### **BANKRUPTCY COURTS FOLLOW THE NINTH CIRCUIT'S LEAD**

In January 2017, just two months after the Ninth Circuit's decision, the United States Bankruptcy Court for the Southern District of New York, in *MF Global Holdings Ltd. v. Allied World Assurance Company Ltd. (In re MF Global Holdings, Ltd.)*, 562 B.R. 866 (Bankr. S.D.N.Y. 2017), held that the *Barton* doctrine applied to protect both a post-confirmation court-appointed plan administrator and the assignee of the debtor's rights under policies in their court-appointed efforts to marshal and liquidate estate assets. They further held that certain Bermuda insurers violated the *Barton* doctrine by attempting to compel the plan administrator and assignee to arbitrate policy claims in Bermuda without first obtaining bankruptcy court permission.

In *MF Global Holdings Ltd. v. Allied World Assurance Company Ltd. (In re MF Global Holdings, Ltd.)*, 562 B.R. 866 (Bankr. S.D.N.Y. 2017), the bankruptcy court noted that the U.S. Court of Appeals for the Second Circuit has

not yet articulated a test for determining whether to apply the *Barton* doctrine to parties beyond trustees and receivers, but noted that at least one district court confirmed that the protections extend to the trustee and the trustee's counsel. *Id.* (citing *Peia v. Coan*, 2006 WL 798873, at \*2 (D. Conn. Mar. 23, 2006)).

The bankruptcy court essentially adopted the "functional equivalent" test adopted by the Sixth and Eleventh Circuits to "broadly apply" the *Barton* doctrine, noting that the assignee of the debtor's rights under the policies was "functionally advancing the efforts of" the plan administrator. *Id.* ("By marshaling and liquidating assets for the benefit of creditors, [the assignee and the plan administrator] were pursuing goals substantially similar to those of a bankruptcy trustee ...").

#### **CONCLUSION**

It appears to be a significant trend to broadly apply the *Barton* doctrine to preclude lawsuits against court-appointed actors in a variety of contexts, as long as those actors are actually or "functionally advancing the efforts of" the trustee. Accordingly plaintiffs seeking to pursue claims against any court-appointed actors, not just trustees, receivers, or even committee members, should be wary of violating the *Barton* doctrine and seek permission from the bankruptcy court before moving forward.

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