



TRUSTEE **LAW** HOTWIRE

King's Consumer bankruptcy trustee updates

Hotwire # 001 Feb. 26 2020



BOOKS - WEBINARS - COURSES - CONSULTING



TOPICS

- [BOOKS](#)
- [NEWS - COMMENT & EVENT](#)
- [HOT CASES](#)
- [QUESTIONS - REMARKS - SUGGESTIONS](#)

BOOKS

UPDATE



KING'S DISCHARGING TAXES IN BANKRUPTCY 2019 # 4 UPDATE

(last update for 2019)
101 pages on thumbdrive

(UPDATES KING'S *DISCHARGING TAXES*
In Consumer Bankruptcy Cases)
602 pages thumb or hard copy

Thumb-drive Only \$ 99.95 Hard-copy \$125.00 (when available)

 [Get the Details](#) 


[Click Here](#)
Order Now

Morgan King: Trustee's Fiduciary duties in *Solvent v. Insolvent Cases*

See, also, *Hot Cases*, below.

The basic rule regarding a bankruptcy trustee's fiduciary duties in consumer bankruptcies addresses *insolvent estates* ...

i.e., the typical consumer chapter 7 case that has no non-exempt assets that the trustee can collect and sell per 11 U.S.C. § 704(a), or whose non-exempt assets are insufficient to result in a distribution to the debtor. This applies to over 90% of consumer chapter 7 duties (ABI 97.13%).

11 U.S.C. § 101(32): The term "insolvent" means-

"(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation ... "

In such cases, the trustee owes a "fiduciary duty" to the *creditors* to protect their interests; as a general rule, there is no such duty owed to the *debtors*.

A "*solvent estate*," however, complicates the issue of trustee's fiduciary duties;

A solvent estate means the debtor will have funds coming back to him or her after all unsecured debts and administrative costs are satisfied. This changes trustee's status somewhat in relation to the debtor.

I'm looking at the [U.S. Trustee's Chapter 7 Handbook](#), Part 4(B)(12) (paragraph following paragraph 12), which says -

"The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries - namely, all classes of creditors, including those holding secured, administrative, priority, and non-priority unsecured claims, *as well as the debtor's interest in exemptions and in any possible surplus property*. The duties enumerated under section 704 are specific, but not exhaustive. " (emphasis added)

Case law interpreting the trustee's "fiduciary duty" in connection with a solvent estate is pretty scarce, and when alluded to is typically vague.

The debtor must first be deemed a "party in interest." See, e.g., [Pergament v. Varela](#) (In re Varela), 530 B.R. 573 (Bankr. E.D.N.Y. 2015):

"Upon showing of surplus funds in estate after distribution to creditors, Chapter 7 debtor is a "party in interest" to whom trustee owes a fiduciary duty." [In re Schumann Tire and Battery Company](#), 145 B.R. 104 (Bankr.M.D. Fla. 2005)."

Let's assume the debtor's house has \$50,000 non-exempt equity. Assume the house could be sold and the proceeds used by the trustee to pay unsecured

creditors and administrative costs; assume the debts owed to unsecured creditors *are less than* the liquidation value of the equity in the house, resulting in a surplus to the debtor; Does the trustee owe a fiduciary duty to the debtor?

I have found few cases that adequately address that situation.

But, it is nonetheless clear that if it is apparent that the cash raised from selling the equity would pay all unsecured debt *and leave some for the debtor*, there is a duty owed to the debtor. What is that duty?

From the United States Trustee's [HANDBOOK FOR CHAPTER 7 TRUSTEES](#):

"Section 323(a) provides that the chapter 7 trustee is the representative of the estate. The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries - namely, all classes of creditors, including those holding secured, administrative, priority, and non-priority unsecured claims, *as well as the debtor's interest in exemptions and in any possible surplus property.*" (emphasis added)

From [In Re Christensen](#), 598 B.R. 658 (Bankr. Utah 2019):

"In the case of a chapter 7 trustee and debtor, a fiduciary relationship between the two does not exist until the trustee holds property to which the debtor is entitled either because the debtor has a validly claimed exemption in it or it constitutes a surplus after payment of all claims. The context in which that relationship arises defines the scope of the trustee's duties.

"A debtor's entitlement to exempt or surplus property does not create a vast array of fiduciary duties running from a trustee to a debtor, nor does it oblige a trustee to act broadly in the debtor's best interests. A trustee becomes a fiduciary vis-à-vis a debtor because he holds property that belongs to the debtor by operation of law.

"The scope of his duty, therefore, is strictly limited to safeguarding property of the estate in the trustee's possession or the proceeds from the sale thereof to which the debtor is entitled and ensuring that the debtor receives that property."

The trustee in *Christensen* sought to sell the debtor's home. The debtor's objected based on breach of fiduciary duty, negligence, and civil conspiracy.

The *Christensen* case is a fairly thorough exploration of the concept of a trustee's fiduciary duty, alluding to a number of issues, including -

- Is the debtor a "party in interest?"
- Will there be surplus funds payable to the debtor?
- Is there a "fiduciary relationship?"
- Is the trustee's attorney also subject to a fiduciary duty?
- What is the appropriate venue (state, federal, or bankruptcy)?
- Will the court grant leave to sue in a court other than bankruptcy court?
- Was the trustee's conduct "ultra vires?"
- Is a "carve-out" to pay trustee's fees and costs allowable?
- Is there immunity (i.e., *the Barton doctrine*)?*
- what is "qualified immunity?"

* Bankruptcy courts have held that the [Barton doctrine](#) "precludes suit against a bankruptcy trustee for claims based on alleged misconduct in the discharge of a trustee's official duties absent approval from the appointing bankruptcy court."



HOT CASES

Symbol "¶" references corresponding sections of

[King's Guide to Bankruptcy Trustees' Powers & Duties](#)

Symbol "§" refers to the Bankruptcy Code or other statutes

HELD: Trustees and their attorneys are entitled to absolute immunity (derivative trustee immunity and independent attorney immunity) for all actions taken pursuant to a court order. Numerous sister circuits have held that trustees have qualified immunity for personal harms caused by actions taken within the scope of their official duties.

Only ultra vires actions - actions that fall outside the scope of their duties as trustees - are not entitled to immunity.

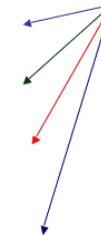
[Baron v. Sherman](#) (In re Ondova Ltd. Co.), 914 F.3d 990 (5th Cir. 2019) citing [Ondova v. Trustee](#) adversary case # 14-03121-SGJ (2017)

Jeffrey Baron appeals the district court's dismissal of his bankruptcy "adversary proceeding" against Daniel J. Sherman, the trustee responsible for administering the bankruptcy estate of Ondova Limited Company.

The Fifth Circuit affirmed the district court's dismissal of Jeffrey Baron's bankruptcy adversary proceeding under Rule 12(b)(6) against the trustee responsible for administering the bankruptcy estate. The court held that the trustee was entitled to absolute immunity for all actions taken pursuant to a court order, and entitled to qualified immunity for all other acts within the scope of his trustee duties.

Furthermore, claims against the trustee's attorneys also failed because the attorneys were covered by both derivative trustee immunity and independent attorney immunity; the breach of fiduciary duty claim failed because Baron did not plausibly plead gross negligence; and Baron failed to raise the new causes of action contained within his proposed amended complaint in his briefs or argue that the district court erred in finding these claims unsuccessful.

DEVELOPMENTS
IN CONSUMER
BANKRUPTCY
LAW



HELD: The bankruptcy trustee is the real party in interest with respect to claims falling within the bankruptcy estate and has exclusive standing to assert claims that fall within the bankruptcy estate. 11 U.S.C. § 323; see also, e.g., *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014) (discussing undisclosed claims); *Croft*, 737 F.3d at 375; *Douglas v. Delp*, 987 S.W.2d 879, 882 (Tex. 1999).

To determine whether a debtor had a property interest in the causes of action at the time the debtor filed for bankruptcy, courts must determine when the debtor's causes of action accrued under state law.

" ... whenever one person may sue another, a cause of action has accrued. See Swift, 129 F.3d at 795 (citing *Luling Oil & Gas Co. v. Humble Oil & Refining Co.*, 191 S.W.2d 716, 721 (Tex. 1946)); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (cause of action accrues when wrongful act causes an injury, regardless of when plaintiff learns of that injury or whether resulting damages have yet to occur)."

A person suffers injury from faulty professional advice when the advice is taken.

"Once an asset becomes a part of the estate, the debtor's rights in the asset are extinguished unless the trustee abandons the asset pursuant to section 554 of the United State Bankruptcy Code. See 11 U.S.C. § 554.23 There is nothing in the record to show that the Chapter 7 Trustee abandoned the claims for professional negligence, breach of fiduciary duty, or breach of the implied covenant of good faith and fair dealing against Gordon, Hynds & Gordon, or McNees.

Further, in the settlement and compromise agreement, the Chapter 7 Trustee released any and all claims that were the property of the bankruptcy estate that were asserted or could have been asserted in the adversary proceeding."

Section 554 of the Bankruptcy Code states, *inter alia*:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.



HELD: Under certain circumstances an aggrieved debtor may sue the chapter 7 trustee in bankruptcy court for breach of fiduciary duty, but not in state or district court.

HELD: As Trustee of the Debtor's bankruptcy estate, the Trustee stands in the shoes of the Debtor and assumes causes of actions that belong to the Debtor.

HELD: the Trustee also stands in the shoes of judgment creditors

[Keats v. Cogan](#) (In re Bullitt Utilities, Inc.) (Bankr. W.D. Ky. 2020)

Trustee's claim of breach of fiduciary duty denied for lack of evidence.

HELD: Trustee's suit based on breach of fiduciary duties is granted in part, denied in part.

[Murphy v. Acas, LLC](#) (In re New England Confectionery Co.) (Bankr. Mass. 2020)

The trustee plausibly alleges that Mr. McGee breached his duty of loyalty to NECCO Candy by terminating an insider lease with NECCO Realty as to which no rent payments were expected to be made and replacing it with a third-party lease with Atlantic as to which rent payments would be required and which imposed a near-term relocation obligation at significant expense to NECCO Candy.

The plausible allegations in the complaint further support a determination that Mr. McGee, in his dual capacity as director of NECCO Candy and manager of NECCO Realty, acted for the benefit of ACAS/Ares and to the detriment of NECCO Candy and its creditors while it was insolvent. The trustee's claim for breach of the duty of loyalty as to Mr. McGee, therefore, will proceed to trial.

Trustee's powers to recover fraudulent transfers

[Brick v. Ring](#) (In re Nat'l Risk Assessment Inc.) (Bankr. W.D. N.Y. 2020)

In this action to avoid allegedly fraudulent conveyances, the trustee seeks to recover numerous transfers to the debtor's principal owner and three of his relatives. The case's many complex issues include the choice of law regarding the applicable "look back" period, and whether the debtor's financial statements provide adequate proof of insolvency.

The trustee alleges that "from August 15, 2008, to August 15, 2014, Joseph directed NRA to pay personal expenses and to make other payments on his behalf in the total amount of \$1,089,572.81." He further claims that John III received \$35,687.12 from the debtor between March 23, 2011, and April 16, 2013; and that John Ring, Jr., and Nora Ring received \$41,450 from NRA between July 7, 2010, and April 5, 2011. The trustee now seeks to recover these sums.

HELD: Party need not seek bankruptcy court approval to sue a trustee in bankruptcy court

The majority rule is that a plaintiff need not seek approval before suing a bankruptcy trustee in his appointing bankruptcy court. "leave of the bankruptcy court is not necessary for the Debtors to sue the trustee in the bankruptcy court appointing the trustee.

The Barton doctrine protects receivers and trustees from "irksome" litigation in foreign courts seeking to hold them personally liable for alleged wrongful conduct committed during estate administration.

Permission is needed to sue trustees in foreign courts (which includes the district court), but not to bring claims in the appointing bankruptcy court.

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.

This "[Barton doctrine](#)," *i.e.*, that a receiver cannot be sued in another jurisdiction without leave of the appointing court, has been held to apply to lawsuits against bankruptcy trustees. See, e.g., *Lankford v. Wagner*, 853 F.3d 1119, 1122 (10th Cir. 2017) (citing *Satterfield v. Malloy*, 700 F.3d 1231 (10th Cir. 2012), the Tenth Circuit held that the Barton doctrine precluded a suit against a bankruptcy trustee in district court absent approval from the appointing bankruptcy court, for all claims except those alleging breach of fiduciary duty, trustees have absolute quasi-judicial immunity from personal liability if they acted within the scope of their authority).

ed. note: the Horton case addressed another issue, *i.e.*, the difference between suing *in rem* versus *in personam*.

QUESTIONS - REMARKS - SUGGESTIONS

[CLICK HERE TO](#)

[SUBMIT YOUR QUESTIONS - REMARKS - SUGGESTIONS](#)

Questions of law - procedure - process - case handling etc.

ABOUT CONSUMER BANKRUPTCY TRUSTEES



- [1. Abusive Credit Reporting](#)
- [2. Discharging Taxes in Bankruptcy](#)
- [3. Abusive Debt Collection](#)
- [4. IRS Collection Due Process](#)
- [5. Trustee's Powers & Duties \(pending\)](#)
- [6. Discharging Student Loans](#)
- [7. IRS Offers-In-Compromise](#)
- [8. Fundamentals of Bankruptcy Law & Practice](#)
- [9. The Means Test](#)
- [10. Avoiding & Stripping Liens](#)
- [11. Fees & Ethics](#)
- [12. 3-Vol. Tax Practice Library](#)
- [13. The Total Tax Practice Library](#)
- [14. 12-Book Bankruptcy Library](#)
- [15. 12-CD Bankruptcy Library](#)
- [16. \[reserved\]](#)
- [17. King's Tax Article Library](#)
- [18. Bankruptcy Checklist Library](#)
- [19. IRS Innocent Spouse](#)
- [20. \[reserved\]](#)
- [21. Consumer Rights Library](#)

CONTACT

The King Law Letter is published by King Law Media, dba KingLawPublishing.com. It has four formats - the Bulletin (product & event announcements), the Law Letter (news and updates), the Bankruptcy Letter, and The TaxHotwire.com.

Also see *King Law Reporter* on the Fastcase site, *NACBA and Consumer Bankruptcy Journal*. The Morgan King Company, Box 2952 Dublin, CA. Morgan@morganking.com. 925 829-6460.

Morgan@MorganKing.com



The King Trustee Law Hotwire # 1 Feb. 26 2020

© Morgan D. King. All Rights Reserved.

TaxHotwire.com