Recent Developments in Bankruptcy Law, January 2024

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1.1 Covered Activities

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1.3.a **Attorneys' fees alone constitute actual damages for a stay violation.** The debtor sought attorneys' fees for violation of the automatic stay, even though the debtor did not suffer any damages from the violation other than the fees. Section 362(k) provides "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees." By using the word "including," Congress made clear that it considered attorneys' fees to constitute actual damages, independent of any non-fee damages. Therefore, the court awards the fees. *Healthcare Real Estate P'ners, LLC v. Summit Healthcare REIT, Inc. (In re Healthcare Real Estate P'ners, LLC)*, ___ B.R. ___, 2023 Bankr. LEXIS 2757 (Bankr. D. Del. Nov. 14, 2023).

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Intent of fraudster who controls the debtor's board is imputed to the debtor.** The debtor's founder served as board chair and CEO. The debtor obtained substantial equity and convertible debt investments from venture investors in several rounds. Some of the lead investors had representatives on the board. The debtor tendered for some of its common shares, including those held by the founder, with the proceeds of an investment round. The board approved the tender based on the financial statements and the founder's representations. However, instead of being solvent and successful, the debtor had virtually no revenue. The founder had fabricated the debtor's financial statements and had defrauded the debtor and the board members. Shortly after the tender was consummated, the debtor filed bankruptcy. It confirmed a liquidating plan. The liquidating trustee sued to recover from the shareholders, including some who had designated directors (who were completely unaware of the fraud), the payments for the common shares as intentionally fraudulent transfers. A transfer made with actual intent to hinder, delay, or defraud creditors is avoidable. The only relevant intent is the transferor's, here, the debtor. A corporation acts only through its management and agents, and their actions within the scope of their authority are imputed to the corporation. Where the board takes or approves the action, the intent of the board majority is imputed to the corporation. However, where a separate actor controls the board, the actor's intent is imputed to the corporation, even if the directors did not actually have the same intent. Where a person defrauds the board into acting, the fraudster controls the board, and the fraudster's intent is therefore imputed to the corporation. Therefore, the corporation tendered for its shares with actual fraudulent intent. *Drivetrain, LLC v. DDE P'ners, LLC (In re Cyber Litigation Inc.)*, ___ B.R. ___, 2023 Bankr. LEXIS 2584 (Bankr. D. Del. Oct. 19, 2023).

2.1.b **Securities contract safe harbor is an affirmative defense that applies on a transfer-by-transfer basis.** The debtor was acquired in an LBO. Shortly after the acquisition, the buyer sold three profitable subsidiaries to an affiliate of the buyer for less than reasonably equivalent value, rendering the remaining businesses insolvent. The debtor appointed a bank as paying agent to pay its old shareholders the purchase consideration and arranged for payment of the insiders through its payroll system. The debtor's post-confirmation liquidating trustee sued the debtor's former public shareholders and the former insiders for payments made in connection with the buyout, alleging a constructive fraudulent conveyance. Section 546(e), the "safe harbor," prohibits the trustee from avoiding a settlement payment, or a transfer in connection with a securities contract, made by or to a financial institution. A "financial institution" includes a bank's "customer when [the bank] is acting as agent or custodian for the customer … in connection with a securities

contract." The safe harbor is an affirmative defense; the plaintiff need not plead around it, and the defendant must raise it. By its terms, it applies only to the transaction in which the bank is acting as agent, not to all transfers in connection with a single contract. In this case, the bank acted as the debtor's agent to pay the public shareholders but did not act as agent to pay the insiders for their shares. Viewing the safe harbor on a transfer-by-transfer basis, it protects the payments to the public shareholders, but not the payments to the insiders. *Kirschner v. Robeco Cap. Growth Funds (In re Nine West LBO Sec. Litigation)*, 87 F. 4th 130 (2d Cir. Nov. 27, 2023).

2.2 Preferences

2.2.a **Ear-marking doctrine requires satisfaction of the dominion/control and diminution of the estate tests.** The closely held debtor owed money to an insider on a note that was to receive no payments until a separate series of notes was paid in full. The debtor's principal loaned money to the debtor specifically to make payments on the insider note and the other notes. Upon the debtor's bankruptcy, the trustee sued to avoid and recover the payments on the insider note as preferences and as constructively fraudulent transfers. Both a preference and a fraudulent transfer are transfers of an interest in property of the debtor that meets certain additional conditions. If a new creditor loans money to a debtor to pay an old creditor, the payment might be protected by the ear-marking doctrine, which deems the money not to have been property of the debtor. To satisfy the ear-marking doctrine, the new money must not be subject to the dominion or control of the debtor—that is, the debtor must be under a binding agreement to use the new money to pay the old creditor and not for any other purpose—and the transaction must not result in the diminution of the estate—that is, the reduction in the amount of assets available to pay creditors. The doctrine's application is clearer when the new creditor pays the money directly to the old creditor and the money does not pass through the debtor's account, but that is not required. Here, the new lender (the principal) required the debtor (controlled by the principal) to use the new loan to pay the insider note, so the debtor did not have dominion and control over the funds. Because the principal loaned substantially more to the debtor that was used for the insider note payments, the transaction did not result in a diminution of the estate. Therefore, the transfer was not of property of the debtor and was not avoidable. *Montoya v. Goldstein (In re Chuza Oil Co.)*, 88 F. 4th 849 (10th Cir. 2023).

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.6.a **Trustee may obtain and sell a charging order on debtor's nontransferable LLC interest.** The individual chapter 7 debtor owned an interest in an LLC. The LLC agreement prohibited the transfer of the interest. Instead of seeking to sell the interest outright, the trustee moved for an order under section 544(a)(1) to impose a charging order on the interest and then to sell the charging order. Section 544(a)(1) grants the trustee all the rights and powers of a hypothetical creditor who extended credit to the debtor on the petition date and obtained a judicial lien on the debtor's assets at the same time. A judicial lien is an interest in property obtained through judicial process to secure performance or payment of an obligation. Under applicable state law, a creditor could obtain a charging order on the LLC interest through judicial process. Therefore, a charging order is a judicial lien, which the trustee has from the petition date and which the trustee may sell. *Pettine v. Direct Biologics, LLC (In re Pettine)*, 655 B.R. 196 (10th Cir. B.A.P. Nov. 15, 2023).

2.7 Recovery

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Individual debtor who owned two chapter 7 debtors is ineligible to proceed under subchapter V.** The debtor owned a majority interest in two corporations, which had been chapter 7 debtors for years. The debtor filed his own case under chapter 11, electing to proceed under subchapter V. Under section 1182(1)(B)(i), a debtor is not eligible to proceed under subchapter V if "any member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders)." Under section 101(2), an "affiliate" is a "corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor." Although the two chapter 7 debtor corporations were both controlled by their chapter 7 trustees, the individual debtor still owned their equity securities and the power to vote them. Therefore, they were affiliates, and their chapter 7 cases disqualified the debtor from proceeding under subchapter V. *In re Carter*, ___ B.R. ___ (Bankr. N.D. Ga. Dec. 13, 2023).

4.1.b **Trust created to provide support is not a business trust.** The settlor transferred real property he owned to a trust for the benefit of his son, who had been severely injured. The settlor and related entities operated a recreation facility on the property and on property owned by the other entities. Patrons who were injured obtained judgments against the entities and the trust and filed an involuntary bankruptcy petition against the trust. Under section 109, a trust that is not a business trust is not eligible to be a debtor in a title 11 case. A business trust is one created or maintained for a business purpose. Here, the trust was created to provide support to the settlor's son and was therefore not a business trust. It is not eligible to be a debtor, and the court dismisses the petition. *In re Two Rivers Irrevocable Trust*, 653 B.R. 284 (Bankr. M.D. Ga. 2023).

4.1.c **Involuntary Petitions**

4.1.d **Dismissal**

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Examiner appointment is mandatory.** The debtor had over $1 billion in debt. Immediately before the chapter 11 filing, the debtor's principal appointed an independent restructuring expert as CEO. The new CEO determined that the debtor's books and records were in a shambles, with a complete failure of corporate controls and a complete absence of reliable financial information. The debtors lacked appropriate corporate governance and a functioning board of directors. The new CEO began an investigation of the multiple failures. Meanwhile, the former CEO was indicted and later convicted of numerous federal crimes in connection with the debtor's operation. Section 1104(c) provides that "on request of a party in interest or the United States trustee …, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate" if unsecured debts exceed $5 million. The use of "shall" makes the appointment mandatory, not discretionary with the bankruptcy court. The phrase "to conduct such an investigation of the debtor as is appropriate" addresses only the nature and scope of the investigation; "as is appropriate" modifies "investigation," not "shall order the appointment." Thus, the bankruptcy court may limit the investigation to prevent tactical delays or duplication of effort

but may not dispense with it altogether. *In re FTX Trading Ltd.*, ___ F. 4th ___, 2024 U.S. App. LEXIS 1279 (3d Cir. Jan. 19, 2024).

5.1.b **Court denies motion to dismiss Texas Two-Step Asbestos Case.** The debtor was created under a Texas divisional merger. It acquired all the asbestos liability and almost none of the assets of its predecessor corporation, while its new affiliate acquired all other liabilities and nearly all the assets. The hopelessly solvent affiliate entered into a conditional funding agreement with the debtor, under which it agreed to fund the costs of the chapter 11 case and asbestos liabilities under a trust created under a chapter 11 plan. The debtor filed a chapter 11 petition shortly after the division. Article I, section 8 of the Constitution grants Congress the power to legislate "on the subject of Bankruptcies." The language does not limit the courts' subject matter jurisdiction to hear and determine bankruptcy cases, nor does it restrict Congress' bankruptcy power to insolvent or financially distressed debtors. Congressional power reaches to furthering distribution of a debtor's assets and discharge of its liabilities. Nor do the Code's eligibility requirements in section 109 create subject matter jurisdiction limits. However, solvency might limit a plan that effectively prevents creditors from opting out of a plan settlement, as it might deprive them of due process and jury trial rights that they otherwise might have. The only basis for dismissal of the case is the good faith filing requirements that nearly all courts have imposed. In the Fourth Circuit, a case is not filed in good faith if reorganization is objectively futile *and* the debtor filed the case in subjective bad faith, that is, with the intent to gain litigation advantage and without the intent to reorganize. Here, because of the funding agreement, the debtor has a means to reorganize, and it has evidenced its intent to do so by negotiating agreements with some of its constituencies on a plan. Therefore, the court denies a motion to dismiss for a bad faith filing. *In re Aldrich Pump LLC*, ___ B.R. ___, 2023 Bankr. LEXIS 3043 (Bankr. W.D.N.C. Dec. 28, 2023).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.4.a **Non-voting class in subchapter V case does not prevent consensual confirmation.** The subchapter V debtor proposed a plan for which three classes of creditors accepted the plan and creditors holding claims in the other three classes did not vote. Section 1191(a) requires plan confirmation if all section 1129(a)'s requirements, other than section 1129(a)(15), are met. If all requirements other than section 1129(a)(8) are met and certain requirements of section 1129(b) are met, the court must confirm the plan, but the effect of confirmation differs. Section 1129(a)(8) requires that all impaired classes have accepted the plan. Section 1126(c) provides that a class has accepted the plan if creditors holding more than 50% of the claims and more than two-thirds of the amount of claims in the class have accepted, counting only claims whose holders have voted. Where no creditors have voted, the denominator in the calculation is zero, yielding an unsolvable equation. Since Congress is presumed not to have intended to require what the laws of mathematics prohibit, the court concludes that nonvoting classes should not be counted. Moreover, a creditor may oppose a plan by voting or by objecting to confirmation. Where the creditor does not object, the court may presume the creditor's acceptance. *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023); *accord In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023).

5.5 Confirmation, Absolute Priority

5.5.a **Court may use Treasury rate as a starting point to determine the appropriate cram down interest rate.** The chapter 12 debtor proposed a plan that would pay its largest secured creditor an interest rate equal to the Treasury bill rate plus 2%. The creditor argued for the prime rate plus 2%. Under *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the Supreme Court approved using a formula approach—a risk free rate plus a risk adjustment—to determine an appropriate cram

down interest rate. It did not require use of a bank prime rate as the risk-free rate, especially since the prime rate includes *some* risk of nonpayment. Which rate to use as the starting point is a question of fact for the bankruptcy court. Here, the bankruptcy court properly calculated the risk-free rate, based on Treasury rates, and the appropriate premium. *Farm Credit Servs. Of Am. v. Topp (In re Topp)*, 75 F. 4th 959 (8th Cir. 2023).

5.5.b **Contribution of 0.5% of claims is not "substantial" new value.** The debtor owed about $5.0 million to its general unsecured creditors, of which about $4.7 million was owed to a competitor under a state court judgment. The debtor proposed a plan to pay creditors its disposable earnings over five years, projected to be about $1.3 million or 27%. The principal would contribute sweat equity, the payment on his prepetition claim of about $49,000, his $35,000 postpetition loan to the debtor, and $25,000 in cash and would retain 100% of the debtor's equity. The general unsecured creditors accepted the plan; the separately classified judgment creditor did not. If one or more classes of claims does not accept the plan, the court may confirm the plan under section 1129(b), under which the absolute priority rule applies to protect the non-accepting class. Under that rule the shareholders may not retain their interests unless senior classes accept the plan or are paid in full, However, the shareholder may retain equity in exchange for substantial new value in money or money's work that is necessary for a successful reorganization and is reasonably equivalent to the value of the stock being retained. Sweat equity and debt forgiveness do not constitute new value, nor is a loan that must be repaid. The cash contribution of $25,000, constituting only 0.5% of the claims and 1.8% of proposed distributions is not substantial. Moreover, permitting the principal to retain 100% equity ownership while paying creditors only 27% of their claims is not fair and equitable. The court denies plan confirmation. *In re Cleary Packaging, LLC*, ___ B.R. ___, 2023 Bankr. LEXIS 2947 (Bankr. D. Md. Dec. 15, 2023).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **In a solvent chapter 7 case, creditors are entitled to interest at the state law rate.** The chapter 7 estate had a surplus over the amount of all allowed claims. Section 726(a)(5) provides that after payment of allowed general and subordinated claims, creditors are entitled to "interest at the legal rate." Case law interpreting this term has construed it to mean the interest rate provided by state law for judgments, here 9%, because in a solvent case, equity requires that creditors be paid their full legal entitlements before the debtor may receive any surplus. *In re Hicks*, 653 B.R. 562 (Bankr. N.D. Ill. 2023).

6.2 Priorities

7. CRIMES

8. DISCHARGE

8.1 General

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Earned rental obligations that are payable only monthly "arise" when due, not when incurred.** The debtor leased aircraft through a broker. The broker's commission was added to the rent. The lease provided that the commission was fully earned upon signing of the lease and the

payment obligation was unconditional, but it was payable only with the regular rent payments to the lessor. After its chapter 11 petition, the debtor did not pay the commission rental payments before rejection, which occurred about two years after the petition date. Section 365(d)(5) requires the debtor in possession to "timely perform all of the obligation of the debtor … first arising … after 60 days after the order for relief." The obligation to make the commission payments under the lease arises when each payment becomes due, even though the parties created an unconditional obligation to make the payments when the lease was signed. Therefore, the DIP was required to make all the commission payments until the lease rejection date. *In re Avianca Holdings S.A.*, ___ B.R. ___, 2023 U.S. Dist. LEXIS 231279 (S.D.N.Y. Dec. 29, 2023).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **Article III constrains bankruptcy courts' authority.** The individual chapter 7 debtor owned an interest in an LLC. The LLC agreement prohibited the transfer of the interest. Instead of seeking to sell the interest outright, the trustee moved for an order under section 544(a)(1) to impose a charging order on the interest and then to sell the charging order. If the court did not grant the motion, the trustee would have had to abandon the interest as of inconsequential value or benefit to the estate. The debtor objected to the motion to impose a charging order. Article III extends federal courts' jurisdiction only to cases or controversies. As such, an Article III court does not have jurisdiction over a dispute by a party that does not have standing. The bankruptcy courts are not Article III courts. The bankruptcy judges in a district are "a unit of the district court." All bankruptcy jurisdiction under 28 U.S.C. § 1334 is vested in the Article III district courts, which may refer bankruptcy cases and proceedings to the bankruptcy judges, whose authority to act is governed by 28 U.S.C. § 157. Because Article III constrains the district courts' jurisdiction and because no statute grants the bankruptcy judges more authority than the district courts refer to them, Article III similarly constrains the bankruptcy judges' authority to act. Therefore, the debtor must have Article III standing to object to the charging order. *Pettine v. Direct Biologics, LLC (In re Pettine)*, 655 B.R. 196 (10th Cir. B.A.P. Nov. 15, 2023).

11.1.b **Individual debtor has standing to object to charging order on his LLC interest.** The individual chapter 7 debtor owned an interest in an LLC. The LLC agreement prohibited the transfer of the interest. Instead of seeking to sell the interest outright, the trustee moved for an order under section 544(a)(1) to impose a charging order on the interest and then to sell the charging order. If the court did not grant the motion, the trustee would have had to abandon the interest as of inconsequential value or benefit to the estate. The debtor objected to the motion to impose a charging order. Standing requires the party to have suffered an injury in fact that is fairly traceable to the challenged conduct and that is likely to be redressed by a favorable decision. The debtor would suffer injury in fact if the court granted the charging order, because otherwise, the trustee would have to abandon the LLC interest, which would revert to the debtor, would have value, and would have less value to the debtor if subject to a charging order. The debtor's potential injury is fairly traceable to the trustee's motion to obtain the charging order, and a decision denying the motion would redress that injury. Therefore, the debtor has standing to

object to the motion. *Pettine v. Direct Biologics, LLC (In re Pettine)*, 655 B.R. 196 (10th Cir. B.A.P. Nov. 15, 2023).

11.1.c **A remote witness may not be compelled to testify by video transmission.** The trustee sued an investor in a Ponzi scheme. The investor had lived and worked in the debtor's city but had since moved to a distant location. The trustee issued a subpoena to compel the investor to testify at trial by contemporaneous video transmission. F.R.C.P. 45(c), made applicable in bankruptcy cases by Bankruptcy Rule 9016, permits a subpoena for testimony only at a place within 100 miles of the witness's residence or place of employment. F.R.C.P. 43(a), made applicable by Bankruptcy Rule 9017, requires a court to take trial testimony in open court, but "for good cause and in compelling circumstances, may permit testimony in open court by contemporaneous transmission from a different location." Rule 45 specifies who may be compelled to attend trial and testify; Rule 43 specifies how the testimony may be taken. Rule 43 addresses a different issue and does not override Rule 45's 100-mile limitation nor mean the place of testimony is wherever the witness is located. Otherwise, Rule 45's limitation and Rule 43's requirement that testimony be taken in open court would be effectively repealed. *Kirkland v. United States Bankr. Court for the Cent. Dist. of Cal. (In re Kirkland)*, 75 F. 4th 1030 (9th Cir. 2023).

11.1.d **28 U.S.C. § 1961 applies in adversary proceedings.** The bankruptcy court awarded damages in an adversary proceeding. 28 U.S.C. § 1961(a) provides "interest shall be allowed on any money judgment in a civil case recovered in a district court." Because the bankruptcy court is a unit of the district court and exercises jurisdiction "as part of and at the sufferance of supervising district courts," the section applies to the bankruptcy court. Bankruptcy Rule 7001 defines adversary proceedings as actions to recover money or property, among other things, and provides they are commenced by the filing of a complaint, the same as a civil action under the Federal Rules of Civil Procedure. Therefore, they are "civil actions' for the purposes of section 1961. Accordingly, a prevailing party in an adversary proceeding in the bankruptcy court is entitled to post-judgment interest under section 1961. *Carmichael v. Balke (In re Imperial Petro. Recovery Corp.)*, 84 F. 4th 264 (5th Cir. Oct. 6, 2023).

11.1.e **Bankruptcy court may not award EAJA fees on denial of U.S. trustee's motion to dismiss case.** The debtor filed a chapter 7 case. The U.S. trustee filed a motion under section 707(b) to dismiss for substantial abuse. After litigation, the U.S. trustee withdrew the motion. The debtor sought fees from the United States under the Equal Access to Justice Act, which authorizes federal courts to award prevailing parties fees and costs incurred "in any civil action … brought by or against the United States." Because it allows claims against the United States, EAJA is a partial waiver of sovereign immunity. Such a waiver must be narrowly construed, with any ambiguity determined in favor of the United States. Here, "civil action" has a well-defined meaning, as used in the Federal Rules of Civil Procedure. A motion to dismiss a case is not itself a civil action but only one step in the action. Therefore, EAJA does not apply, and the debtor is not entitled to fees. *Teter v. Baumgart (In re Teter)*, ___ F. 4th ___, 2024 U.S. Ap.. LEXIS 92 (6th Cir. Jan. 3, 2024).

11.2 Sanctions

11.3 Appeals

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Bankruptcy Code preempts any state law provision that deprives a debtor of an LLC interest upon a bankruptcy filing.** The debtor held a 25% interest in a Delaware LLC and had

the right under the LLC agreement to designate two of the five board members. Upon its bankruptcy filing, the other LLC members amended the LLC agreement to remove the debtor's management rights, relying on Del. Corp. Code § 18-304(1)(b), which provides that upon an LLC member's bankruptcy filing, the member ceases to be a member of the LLC. Under section 541(a)(1), all the debtor's interests in property become property of the estate upon the filing of the petition. Section 541(c)(1)(B) negates any applicable nonbankruptcy law that prohibits or restricts a transfer to the estate of a debtor's interest in property. Parties may not contract around these provisions, and states may not legislate them away. Section 541 does not distinguish between economic interests or management rights, all of which are interests in property. Therefore, the Delaware statute does not prevent the debtor's full LLC interest from becoming property of the estate, and the other members' attempt to amend the LLC agreement to provide otherwise is ineffective and violates the automatic stay. *In re Envision Healthcare Corp.*, 655 B.R. 701 (Bankr. S.D. Tex. 2023).

12.2 Turnover

12.3 Sales

12.3.a **A debtor in possession may assign preference actions in a plan.** As part of a settlement among the debtor and secured creditors, the plan provided that a major preference action would be sold to one of the secured creditors, who could keep any litigation proceeds, even if in excess of the amount of its claim. Section 363(b) permits sale of property of the estate outside of a plan, and section 1123(a)(5) permits transfer of property of the estate under a plan. Under section 541(a)(1), "property of the estate" "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983). Preference claims, which are created by the Code on the filing of the petition, make recovered preferences available to the estate. Therefore, they are property of the estate. In addition, section 541(a)(7) includes in property of the estate any property that the estate acquires during the case. It is all-embracing to ensure that later-created property interests become property of the estate, including the right to pursue preferences. Because preference claims are property of the estate, whether under section 541(a)(1) or (7), they may be sold under section 363(b) or transferred under a plan. *Briar Cap. Working Fund Cap., L.L.C. v. Remmert (In re S. Coast Supply Co.)*, ___ F. 4th ___, 2024 U.S. App. LEXIS 1417 (5th Cir. Jan. 22, 2024).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a ***Barton v. Barber* applies to a trustee's administration of the estate; 28 U.S.C. § 959 does not.** After his appointment, the trustee employed a management consultant to perform management services. The consultant bilked the estate. After plan confirmation, the court allowed the trustee's final fee application but denied the consultant's and required disgorgement. The debtor claimed to learn after confirmation that the trustee knew of the consultant's conflicts and improper payments and sued the trustee in state court. The debtor then filed a *Barton* motion for leave to proceed with the action. Under *Barton*, the court should consider whether the acts relate to carrying on the business, involved administration of the estate, were within the scope of the trustee's duties and authority, and involve a breach of fiduciary duty and whether the plaintiff is seeking to surcharge the trustee personally. By contrast, 28 U.S.C. § 959(a), which permits actions against a trustee without leave of the bankruptcy court, applies only to claims arising out of the ordinary operation of the business. Here the claims all relate to the trustee's administration of the estate, not the actual operation of the debtor's business. Because of the court's prior approval of the trustee's fee application, the court concludes that the plaintiff has not stated a prima facie case against the trustee sufficient to permit the plaintiff to bring an action. Therefore, the court denies the motion for leave to sue the trustee. *In re E. Coast Foods*, 652 B.R. 910 (9th Cir. B.A. P. 2023).