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Trustees Beware: Reviewing the Circuit Split on Bankruptcy Trustee Personal Liability

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Introduction

Imagine that you have been appointed to serve as a trustee in a bankruptcy case. As the "representative of the estate,"[1] one of your responsibilities is to properly manage the estate's assets.[2] You decide to invest the estate's funds in several risky penny stocks, relying on minimal research you performed online. Unfortunately, these investments quickly decrease in value, substantially diminishing the value of the estate. Now, of course, the debtor and his creditors are angry and want to sue you for mismanaging the estate's funds. Can you be held personally liable? In other words, will you have to pay for those losses from your own bank account?

The answer varies according to the jurisdiction in which the case is heard. Unfortunately, the bankruptcy code is silent about when a trustee will be held liable for mistakes or misconduct.[3] Some circuits hold that a trustee is personally liable for mere negligence; one circuit will impose personal liability only for gross negligence; and others will hold a trustee

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[1] 11 U.S.C. § 323(a).

[2] 11 U.S.C. § 704(a)(1) provides that a trustee must "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(2) states that a trustee is "accountable for all property received." Courts have explained that these sections, in conjunction with a trustee's fiduciary obligations to the estate, require the trustee to manage the estate's funds properly. *See, e.g.*, Matter of Accomazzo, 226 B.R. 426, 429 (D. Ariz. 1998).

[3] *See In re* Smyth, 207 F.3d 758, 761 (5th Cir. 2000); *In re* Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 6 (1st Cir. 1999).

personally liable only for intentional misconduct. This memo will discuss a trustee's vulnerability to personal liability and the standards that circuit courts use in determining whether to impose such liability.

Part I of this memo will briefly outline the responsibilities of a bankruptcy trustee. Part II will examine the theory of trustee personal liability and explain why it is significant to aggrieved parties. Part III will discuss the various standards that circuit courts apply to decide whether to impose liability on trustees. It will also explain various policy considerations expressed in favor and against each standard. This memo will conclude that because there is no uniform law of trustee liability, it is important that all parties to a bankruptcy case, especially the trustee, understand the trustee's standards of care imposed by the relevant jurisdiction.

I. The Bankruptcy Trustee's Responsibilities and Duties

A bankruptcy trustee is the central figure in a bankruptcy case, which usually involves multiple parties—creditors, third-parties, and government agencies—all competing for the debtor's limited assets. The trustee is responsible for balancing the interests of all these parties when administering the estate.[4] Courts have called the trustee a "fiduciary"[5] regarding her relationship to the debtor and creditors, often referred to as "beneficiaries" of the estate.[6] As a

[4] *See In re* Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir. 1983) (The trustee "has a duty to treat all creditors fairly . . .").
[5] *See id.* ("A bankruptcy or organization trustee is a fiduciary of each creditor of the estate . . ."). Note that the Bankruptcy Code does not use the term.
[6] *See, e.g.*, *In re* Heinsohn, 231 B.R. 48, 65-66 (Bankr. E.D. Tenn. 1999).

fiduciary, a trustee is charged with many duties, including duties of loyalty and care.[7] The question of liability arises when the trustee violates one or more of these fiduciary duties.[8]

The specific responsibilities of a trustee depend on which chapter the bankruptcy case is under.[9] Some relevant responsibilities of trustees are as follows: in every type of case, to be accountable for all property received[10] and to examine proofs of claims and object to any claim that is improper;[11] in a chapter 7 case, to collect and reduce to money property of the debtor and close the case as expeditiously as possible;[12] in a chapter 11 case, to investigate the debtor and his business and any other matter relevant to the case;[13] in a chapter 13 case, to advise and assist

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[7] *See* Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 156, 172. For a thorough analysis of a chapter 7 trustee's duties (16 in total), *see id.*

[8] As stated above, a trustee has a fiduciary relationship only with the beneficiaries of the estate—the debtor and creditors. Therefore, the analysis that follows in this paper applies only to actions brought by those parties. However, regarding actions brought by third-parties—typically breach of contract and tort actions that arise during the trustee's administration of the estate—the trustee will usually not be personally liable. Rather, the estate itself will pay any resulting damages. This rule, commonly known as the *McNulta* rule, states that "[a]ctions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." McNulta v. Lochridge, 141 U.S. 327, 332 (1891). Although *McNulta* involved a receiver, the rule has been applied to trustees. *See* Zeigler v. Pitney, 139 F.2d 595, 596 (2d Cir. 1943); McRanie v. Palmer, 2 F.R.D. 479, 481 (D. Mass. 1942). For thorough analyses of the distinction between the duties and standard of care a trustee owes to third-parties and beneficiaries of the estate, *see* E. Allan Tiller, *Personal Liability of Trustees and Receivers in Bankruptcy*, 53 AM. BANKR. L.J. 75 (1979); Elizabeth H. McCullough, *Bankruptcy Trustee Liability: Is there a Method in the Madness?* 15 LEWIS AND CLARK L. REV. 153, 158 (2011).

[9] *See* 11 U.S.C § 704 (chapter 7), § 1106 (chapter 11), § 1302 (chapter 13).

[10] 11 U.S.C. § 704(a)(2).

[11] 11 U.S.C. § 704(a)(5).

[12] 11 U.S.C. § 704(a)(1).

[13] 11 U.S.C. § 1106(a)(3).

the debtor in performing under the reorganization plan[14] and to insure the debtor makes timely payments under the plan of reorganization.[15]

When parties to the bankruptcy case believe that a trustee has not fulfilled her obligations, they may bring an action against her. Due to the parties' varying interests, the types of claims they bring vary greatly, but the most common allegations are that the trustee

> [Failed] to collect and reduce to money property of the estate as expeditiously and reasonably as possible, to protect assets of the estate, to properly invest funds held by the estate, to bring and defend lawsuits in a timely manner, to protect the environment and pay claims according to the law, or to notice properly those matters which must be brought to the attention of parties in interest to the estate.[16]

Because a trustee stands in the middle of all the competing parties to a bankruptcy case, she is in a uniquely perilous position. The very nature of a bankruptcy case—where there are not enough funds to pay out all parties in full—makes a trustee particularly vulnerable to disgruntled creditors. A trustee's position entails making difficult decisions, some of which may unavoidably harm a party's interests.

The Supreme Court acknowledged that "[t]rustees are often obligated to make difficult business judgments," some of which "may be open to serious criticism by obstreperous creditors."[17] Therefore, the Court explained, "[c]ourts are quite likely to protect trustees against heavy liabilities for disinterested mistakes of business judgment."[18] The breadth and limitations of these protections, however, will depend on the jurisdiction in which the case is heard.

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[14] 11 U.S.C. § 1302(b)(4).
[15] 11 U.S.C. § 1302(b)(5).
[16] *See* MCCULLOUGH, *supra* note 8, at 158.
[17] Mosser v. Darrow, 341 U.S. 267, 273-74 (1951).
[18] *Mosser* at 273-74.

II. Trustee Personal Liability vs. Trustee Liability in Her Official Capacity

Section 323 of the bankruptcy code provides that a trustee may "be sued." What does this mean? To answer this question, we must distinguish a trustee's "personally liability" from "liability in her official capacity." As discussed above, a trustee is a fiduciary who must exercise care when making decisions on behalf of the estate. When a trustee's decision harms another party, whether she will be "personally liable" depends on whether she exercised the jurisdiction's required standard of care. If she breached the standard of care, she may be held "personally liable," the result being that she will have to pay the damages from her funds, not those of the debtor's estate. If, however, the trustee acted with the required standard of care, any harm her actions caused will be charged against the trustee in her "official capacity."[19] Rulings against a trustee in her official capacity are, in reality, rulings against the estate itself.[20] Therefore, when a court finds that a trustee should be liable in her official capacity, the estate itself will pay any damages.

Because different levels of culpability are needed to find the trustee personally liable as opposed to "officially" liable, it is possible that the estate, but not the trustee herself, will pay for damages caused by a trustee's poor decisions. For example, some jurisdictions limit a trustee's personal liability to only willful and deliberate misconduct, but will find the trustee liable in her official capacity for mere negligence.[21] In those jurisdictions, if the trustee is no more than negligent the estate will have to pay the damages for the trustee's decision, but the trustee's personal bank account will be safe. The standard that courts will apply to find a trustee

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[19] *See infra* Part III.

[20] *See* Theresa J. Pulley Radwan, *Trustees in Trouble: Holding Bankruptcy Trustees Personally Liable for Professional Negligence*, 35 CONN. L. REV. 525, n.9 (2003). Because the estate is not a legal entity, it cannot be sued directly. *Id.*

[21] *See infra* Part III.

personally liable is far more forgiving than the standard to find the trustee liable in her official capacity. It should be noted that in certain instances, a court may find that neither the trustee nor the estate should have to pay damages resulting from a trustee's decisions. Courts are unlikely to impose any type of liability for decisions the trustee made as a matter of reasonable business judgment,[22] or if she received approval of her actions by the court.[23]

The difference in holding a trustee personally liable, rather than in her official capacity, is crucial to creditors. Because assets in the estate are never sufficient to pay all the creditors' claims, creditors would benefit if they could collect from an additional source, such as the trustee's personal funds. Consider the example used previously where the trustee makes a poor decision to invest the estate's funds in penny stocks. Let's say the debtor owes a total of $100,000 to unsecured creditors, and the estate is comprised of $50,000 in cash.[24] At that point, before the trustee's investment, the creditors could have expected a payout of about 50% of their claims. After the investment, however, the estate's funds diminished to $10,000. Now, the creditors will only receive 10% of their claims. The creditors can sue the trustee in an attempt to recover the amount they lost, $40,000 in total, due to the trustee's mismanagement. Unfortunately for them, if the court holds the trustee merely liable in her official capacity for her poor investment decision, the estate will be charged for the damages. This will not help the

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[22] *See infra* Part III.

[23] This is true as long as the trustee gave notice of her actions to the court and creditors. *In re* Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 8 (1st Cir. 1999) (adding that "[t]his view has found near-universal favor elsewhere."). This immunity is important because "[a]llowing suits against trustees for executing explicit court orders . . . would create counterproductive tension between bankruptcy judges and trustees." *Id.*

[24] Assume, for simplicity, that there are no secured creditors and that all unsecured creditors are in the same class.

creditors, however, because the estate has been exhausted of all its assets.[25] There is nothing left for the estate to pay them. If, however, the court finds the trustee personally liable, she will have to pay the $40,000 from her personal bank account, and the creditors will collect 50% on their claims as they originally expected. Therefore, the distinction between personal liability and liability in a trustee's official capacity is crucial not only to the trustee but also to the other parties to a case.

III. The Circuit Split

The Supreme Court only once ruled on the issue of trustee personal liability. In *Mosser v. Darrow*,[26] the Court considered whether a trustee could be held personally liable for willfully and deliberately permitting employees of the estate to hold an interest adverse to the estate.[27] The Court answered in the affirmative, but it did not explicitly rule upon whether the trustee would have been personally liable if he was merely negligent.[28] Since *Mosser*, the circuit courts agree that a trustee is subject to personal liability for intentional violations of her fiduciary duties.[29] However, the circuits disagree—often citing *Mosser* to support different conclusions—as to the

[25] Holding the trustee liable in her official capacity is not always useless. Claims for damages awarded against the estate may be deemed administrative claims, so they will be paid out before other classes of claims. *See* Reading v. Brown, 391 U.S. 471, 485 (1968). However, even in those cases, other creditors with lower priority claims will lose out because the estate will be that much more diminished, limiting the amount they will collect.

[26] Mosser v. Darrow, 341 U.S. 267 (1951).

[27] *Id.* at 271. The trustee permitted employees to trade in bonds of the debtor-corporations' subsidiaries. *Id.* at 269.

[28] *Id.*

[29] *See* Connecticut General Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 621 (1st Cir. 1988)

culpability needed to impose personal liability on trustees for actions that are something less than willful and deliberate.[30]

What follows is an outline of the different positions the circuit courts have taken on the issue of trustee personal liability.[31] These positions fall into one of three levels of conduct that, if breached, will subject a trustee to personal liability (listed in order of increasing protection): negligence, gross negligence, and willful and deliberate conduct. Each section will explain the standard of conduct, elucidate the positions of the circuits that follow that standard, and provide the rationale and policy considerations behind the standard.

A. Negligent Conduct

As discussed above, a trustee has many responsibilities throughout the course of a bankruptcy case. In carrying out her obligations, all jurisdictions agree (with only slight variations in phrasing) that a trustee has a duty to exercise the measure of care and diligence that a prudent person would exercise under similar circumstances.[32] By definition, a trustee is negligent when she fails to meet that standard of care.[33]

The following circuits will hold a trustee personally liable for damages she caused by negligently carrying out her duties. In these circuits, then, a trustee who invests the estate's funds

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[30] The statement in *Mosser* that has been subject to differing interpretations is as follows: "liability here is not created by a failure to detect defalcations, in which case negligence might be required to surcharge the trustee, but is a case of a willful and deliberate setting up of an interest in employees adverse to that of the trust." Mosser v. Darrow, 341 U.S. 267, 272 (1951).

[31] Except for the Eight Circuit. According to my research, neither the Court of Appeals for, nor any of the District Courts within, the Eight Circuit has ruled on the issue of trustee personal liability.

[32] *See, e.g.*, *In re* Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir. 1983); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir. 1982); *In re* Johnson, 518 F.2d 246, 251 (10th Cir. 1975).

[33] *See* Black's Law Dictionary (6th ed. 1990) ("The term ['negligence'] refers only to that legal delinquency which results when a man fails to exhibit the care which he ought to exhibit.").

in risky penny stocks, after only minimal research, will likely pay the losses out of her own bank account.[34]

The First Circuit, in *In re* Mailman Steam Carpet Cleaning Corp., stated that "in the absence of deliberate misconduct, negligence suffices for surcharge,"[35] a synonym for personal liability.[36] However, because the trustee in the case acted according to a court order, the Court found that he was immune from any type of liability.[37]

The Second Circuit has stated that personal liability "may attach as the result of negligent, as well as knowing or intentional, breaches" of his fiduciary duties. [38] It is important to note that the Second Circuit has also stated that a trustee cannot be personally liable for damages resulting from sound business judgment.[39]

Although the Court of Appeals for the Third Circuit has not ruled on the standard to find a trustee personally liable, several lower courts in the Circuit have. In *In re* Sturm,[40] the Court held, after analyzing controlling law in the Third Circuit, that "if we found a trustee chargeable

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[34] I think it is safe to assume that a prudent trustee would not have made those investments, especially without first conducting thorough research.

[35] *In re* Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 7 (1st Cir. 1999).

[36] *See* Black's Law Dictionary (6th ed. 1990). Note, however, that several commentators suggest that some courts have misinterpreted the meaning of "surcharge" which has led to confusion. *See* David P. Primack, *Confusion and Solution: Chapter 11 Bankruptcy Trustee's Standard of Care for Personal Liability*, 43 WM. & MARY L. REV. 1297, 1305-07 (2002); MCCULLOUGH, *supra* note 8, at 177-78; TILLER, *supra* note 8, at 99-102. *See also In re* Cochise College Park, Inc., 703 F.2d 1339, n.26 (9th Cir. 1983).

[37] *Id.* at 8. The court noted that a trustee should be immune in such a case because "[a]llowing suits against trustees for executing explicit court orders . . . would create counterproductive tension between bankruptcy judges and trustees." *Id.; See also supra* note 24.

[38] *In re* Gorski, 766 F.2d 723, 727 (2d cir. 1985) (citations omitted).

[39] *See In re* Smith, 645 F.3d 186 (2d. Cir. 2011) ("[A] bankruptcy trustee is immune from suit for personal liability got acts taken as a matter of business judgment in acting in accordance with a statutory or other duty or pursuant to a court order.").

[40] 121 B.R. 443 (Bankr. E.D. Pa. 1990).

with negligence, we would be obliged to impose personal liability upon him."[41] This negligence standard has been adopted by other courts in the Circuit.[42]

The Ninth Circuit also follows the negligence standard for personal liability, holding that a trustee "is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law."[43] However, a trustee is not liable even in his official capacity "for mistakes in judgment where discretion is allowed."[44] Therefore, a trustee enjoys absolute immunity for actions she takes as a matter of her reasonable business judgment.

Lastly, the Eleventh Circuit has noted, in dicta, that "[a] bankruptcy trustee is liable for wrongful conduct or negligence, and he may be surcharged."[45]

One argument for imposing personal liability on trustees for negligence is that the standard "serves as a balance between protection of creditors and protections of the trustee."[46] It encourages the trustee to responsibly carry out her duties, without "making the trustee an insurer for all creditors."[47] There are critics, however, who contend that this standard is too harsh. A bankruptcy court in the First Circuit expressed its disagreement with "those courts which apply a simple negligence standard to the acts of a trustee," because they "underestimate the role of a trustee under the Bankruptcy Code and the difficulty associated with a trustee's duties."[48]

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41 *In re* Sturm, 121 B.R. 443, 448 (Bankr. E.D. Pa. 1990).

42 *See, e.g.*, *In re* Tri-State Hoists, Inc., 80-02909S, 1991 WL 193733 at *4 (Bankr. E.D. Pa. Sept. 26, 1991); *In re* Louis Rosenberg Auto Parts, Inc., 209 B.R. 668, 673 (Bankr. W.D. Pa. 1997).

43 *In re* Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir. 1983).

44 *Id.*

45 Red Carpet Corp. of Panama City Beach v. Miller, 708 F.2d 1576, 1578 (11th Cir. 1983).

46 RADWAN, *supra* note 20, at 555.

47 *Id.*

48 *In re* J.F.D. Enterprises, Inc., 223 B.R. 610, 627 (Bankr. D. Mass. 1998). Note, however, that the First Circuit has since made clear that they apply a negligence standard. *See supra* note 35 and accompanying text.

B. Grossly Negligent Conduct

The Fifth Circuit is the only circuit court that imposes personal liability on a trustee for gross negligence. In *In re Smyth*, the court first acknowledged that the other circuit courts were split—between negligence and willful and deliberate conduct—on the level of culpability needed to impose personal liability on a trustee. [49] It then affirmed the District Court's decision to apply a grossly negligent standard, an intermediate approach.[50] The Court defined gross negligence as:

> The intentional failure to perform a manifest duty in reckless disregard of the consequences . . . . It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected.[51]

This standard provides a trustee with significant protections. For example, the trustee who mismanaged the estate's funds by investing in penny stocks may be shielded from personal liability. The Court would have to decide whether the trustee's investment decisions rose to the extreme level of negligence required in the Circuit. Indeed, one of the criticisms of the gross negligence standard is in its close "proximity on the scale of culpability to an intent standard."[52]

In reaching their decision to adopt a gross negligence standard, the Fifth Circuit found persuasive the policy considerations discussed in the Final Report of the National Bankruptcy Review Commission.[53] One concern was that "too little protection might expose a trustee to

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[49] *In re* Smyth, 207 F.3d 758, 761 (5th Cir. 2000).
[50] *Id.*
[51] *Id.* at 762.
[52] RADWAN, *supra* note 20, at 552. Radwan adds that "[b]ecause of the difficulties in defining gross negligence, it sometimes evolves into a standard so difficult to meet that only intentional, or at least knowing, acts will satisfy the test." *Id.*
[53] The NBRC was an independent commission established pursuant to the Bankruptcy Reform Act of 1994 that ceased to exist in 1997. The role of the commission was, among other things, to investigate and study issues relating to bankruptcy law. *See* Nat'l Bankr. Rev Comm'n, http://govinfo.library.unt.edu/nbrc/facts.html. The Commission recommended that courts adopt a gross negligence standard for trustee personal liability in Chapter 7, 12, and 13 cases. *See* PRIMACK, *supra* note 36, at 1312-15.

excessive personal liability and dissuade capable people from becoming trustees, while too much protection would jeopardize the goal of responsible estate management.[54] Professor McCullough argues, in a recent article about trustee liability, that gross negligence is the correct approach because it "provide[s] a more balanced approach than subjecting trustees to potential personal liability for mere negligent conduct or solely for intentional acts or omissions."[55]

C. Willful and Deliberate Conduct

The following Circuit Courts hold that a trustee can only be held personally liable if she willfully and deliberately violated her duties. This standard, of course, provides the highest level of protection for bankruptcy trustees. In the following jurisdictions, the trustee who, as in our example, mismanages the estate's funds by investing them in risky penny stocks will not be personally liable because she did not intend to lose the estate's assets.

The Fourth Circuit articulated a clear rule, addressing when a trustee will be held personally liable and when she will only be liable in her official capacity:

> The general rule is that . . . . [w]hen acting within the discretionary bounds of [his] authority, it is settled that the trustee may not be held liable for any mistake of judgment; that his liability personally is "only for acts determined to be willful and deliberate in violation of his duties" and specifically that he is liable solely "in his official capacity, for acts of negligence.[56]

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[54] *In re* Smyth, 207 F.3d 758, 761-62 (5th Cir. 2000) (citations omitted).

[55] MCCULLOUGH, *supra* note 8, at 182.

[56] United States v. Sapp., 641 F.2d 182, 184-85 (4th Cir. 1981). The court made a distinction between a trustee's actions that are within the scope of her authority and actions taken outside of her authority. Only in the former instance does a trustee enjoy immunity from personal liability. If the trustee acts outside of her authority, she may be held personally liable. *See* Yadkin Valley Bank & Trust Co. v. McGee, 819 F.2d 74, 76 (4th Cir. 1987) ("The immunity of the trustee is not absolute. As *Sapp* illustrates, if a trustee is acting under the direct orders of the court, there is immunity. In the absence of an explicit court order, however, a factual issue may arise regarding whether the trustee has acted within her authority."). For a discussion of a trustee's liability for acting outside of her authority, *See* MCCULLOUGH, *supra* note 8, at 172-174.

The Court unequivocally stated that a trustee will not be personally liable for anything less than willful and deliberate conduct, so long as the conduct was in the scope of her authority.[57] When a trustee's conduct falls below that standard, creditors will only be able to collect damages from the estate itself.

Similarly, the Sixth Circuit has held that a trustee will be "liable personally only for acts willfully and deliberately in violation of his fiduciary duties."[58] To find a trustee liable in her official capacity, however, the Court need only find negligence, [59] except for "mistakes in judgment," which cannot be the basis for any type of liability.[60]

The Seventh Circuit did not provide as much detail as the previous two circuits, stating only that "in this circuit [a trustee] is personally liable only if he willfully and deliberately violated his fiduciary duties."[61]

The Tenth Circuit has articulated three clear rules regarding a trustee's liability: "a trustee . . . in bankruptcy is (a) not liable, in any manner, for mistake in judgment where discretion is allowed, (b) liable personally only for acts determined to be willful and deliberate in violation of his duties and (c) liable, in his official capacity, for acts of negligence."[62]

The rationale behind limiting liability to only willful and deliberate acts is that liability for anything less will discourage competent individuals from becoming trustees. As discussed

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[57] *See supra* note 56.

[58] *See Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 462 (6th Cir. 1982).

[59] *See Id.* at 461. According to the Court, negligence occurs when a trustee fails to exercise the "care, diligence and skill . . . of 'an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view.'" *Id.*

[60] *Id.* ("Mistakes in judgment cannot be the basis of a trustee's liability in his official capacity").

[61] Maxwell v. KPMG, LLP, 2008 WL 6140730 at *4 (7th Cir. Aug. 19, 2008).

[62] Sherr v. Winkler, 552 F.2d 1367, 1375 (10th Cir. 1977). The court used the term "surcharge"—a synonym for personal liability—when it stated that "A trustee in bankruptcy may be held liable in his official capacity and thus surcharged if he fails to exercise that degree of care required of an ordinarily prudent person serving in such capacity." *Id.* For this reason, commentators argue that the court misinterpreted the term. *See supra* note 39.

above, bankruptcy cases are fertile ground for disgruntled creditors to seek damages from the trustee. For this reason, proponents of the willful and deliberate standard contend that absolute immunity is necessary to promote trustees to participate in bankruptcy cases.

Critics, however, argue that we should expect more from a trustee. One court asserted that "[i]f trustees were liable only for intentional breaches of their duties, the goal of expeditious and efficient administration of bankruptcy estates would be jeopardized."[63]

Conclusion

As the central figure with significant responsibilities in bankruptcy proceedings, a trustee is in a unique position of vulnerability to claims against her. Courts are sensitive to this reality and provide trustees with certain levels of immunity. Because the law on trustee personal liability depends on the jurisdiction where the case is heard, all parties to a bankruptcy case, especially the trustee, should make sure that they understand the correct standards to which the trustee will be held accountable.

[63] *In re* J.F.D. Enterprises, Inc., 223 B.R. 610, 627 (Bankr. D. Mass. 1998).