

Can a Creditor Step in the Bankruptcy Trustee's Shoes to Collect Assets?

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Scenario: The trustee of a bankruptcy estate fails to bring an action to avoid a particular transfer of the debtor's property. Such an action would benefit the estate because the debtor's assets can be used to pay the debtor's creditors. Thus, can an individual creditor of the bankruptcy estate bring an action to collect the debtor's assets, in the place of the trustee, in order to pursue that creditor's recovery?

Generally speaking, the Bankruptcy Code allows the trustee to bring a cause of action on behalf of the bankruptcy estate, but the Code does not state whether an individual creditor can bring a cause of action in the place of the trustee. *See*, 11 U.S.C. §§ 547, 548. It is therefore necessary to turn to the case law for our answer.

Courts have permitted individual creditors to pursue avoidance actions on behalf of bankruptcy estates under extreme circumstances, such as "when a trustee or debtor-in-possession has unjustifiably failed to act and there is no objective third party, i.e., an official committee." In re Prime Motor Inns, Inc., 135 B.R. 917, 920 (Bankr. S.D. Fla. 1992). Nevertheless, it is still necessary for an individual creditor to seek permission from the court prior to commencing such an action. *Id.* This exception has been recognized by the Middle District of Florida. In re Harrold, 296 B.R. 868, 874 (Bankr. M.D. Fla. 2003). Even the U.S. Supreme Court has given recognition to the practice of allowing a creditor to bring an avoidance action when the trustee fails to do so, despite the fact that the Bankruptcy Code only mentions the trustee's right. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 13 (2000). However, the U.S. Supreme Court in its recognition also stated that it is necessary for the creditor to ask the trustee to pursue payment, in addition to asking the Bankruptcy Court for permission to bring the cause of action in the trustee's place. *Id.*

It is important to mention that there are several policy concerns against allowing an individual creditor to bring a cause of action in the place of the trustee. For example, an individual creditor is not acting in the interest of the other creditors in the bankruptcy estate; rather, it is acting in its own interest. The other creditors might deem it unfair if an individual creditor is allowed to bring a cause of action, pursuing its own interests, to the detriment of the other creditors of the bankruptcy estate. *See*, Harrold, 296 B.R. at 873; *see also*, Prime Motor Inns, Inc., 135 B.R. at 920.

Therefore, some courts do not recognize any exceptions to the Bankruptcy Code and look only at the plain meaning of the Code's language, which states that the trustee has standing to bring an action on behalf of the bankruptcy estate, but does not mention the powers of individual creditors or other interested parties. *See*, 11 U.S.C. § 548. However, even a court that does not allow a creditor to bring an action on behalf of the estate provides a remedy for such a creditor if the trustee fails to bring a cause of action. If the creditor tries to persuade the trustee to bring a cause of action, after giving the trustee all relevant facts in the creditor's possession, and the trustee decides not to pursue the action, then the creditor can either move the court to compel the trustee to act or seek

the trustee's removal for abuse of discretion. Surf N Sun Apts., Inc. v. Dempsey, 253 B.R. 490, 494 (Bankr. M.D. Fla. 1999).

In conclusion, an individual creditor must seek the Bankruptcy Court's permission in order to bring a cause of action on behalf of the estate in the place of the trustee, even if the trustee fails to do so. Alternatively, if that request is denied, the creditor may make a motion to compel the trustee to act or seek the trustee's removal from the case.

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