



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2019 Mid-Level Professional Development Program

## Advising a Board

**Jane A. VanLare, Moderator**

*Cleary Gottlieb Steen & Hamilton LLP; New York*

**Patrick J. Bartels, Jr.**

*Redan Advisors LLC; New York*

**James P. Hughes, Jr.**

*Young Conaway Stargatt & Taylor, LLP; Wilmington, Del.*

**James J. Mazza, Jr.**

*Skadden, Arps, Slate, Meagher & Flom LLP; New York*

**“ABI Mid-Level Professional Conference”  
Advising a Board  
November 4, 2019**

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Speakers:

Ron E. Meisler, Skadden, Arps, Slate, Meagher & Flom LLP  
James P. Hughes, Jr., Young Conway Stargatt & Taylor, LLP  
Patrick J. Bartels Jr., Redan Advisors LLC

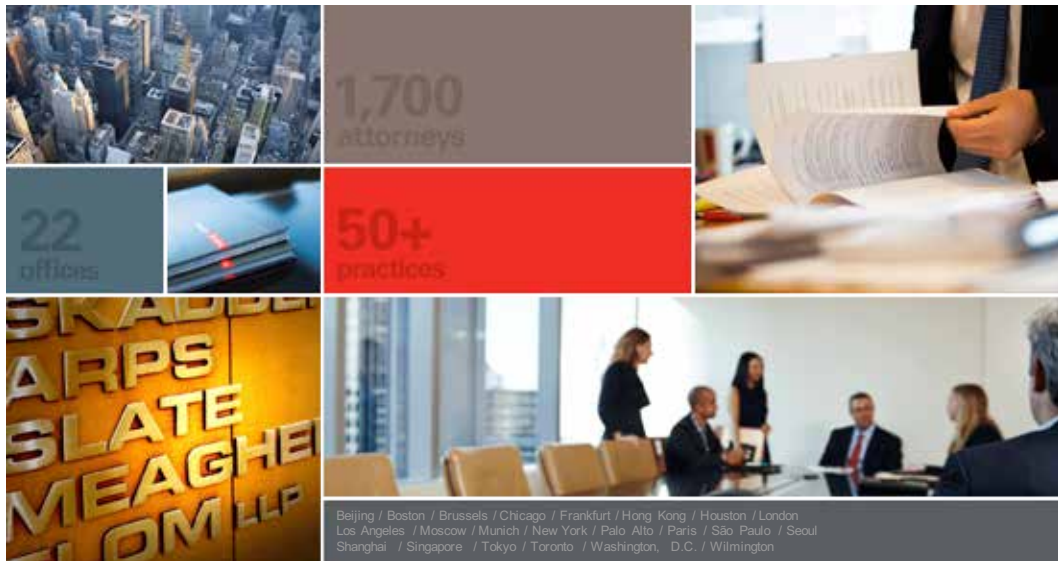
Moderated by: Jane VanLare, Cleary Gottlieb Steen & Hamilton LLP



**Special Committees: Rules of the Road  
ABI Mid-Level Professionals Conference**

November 4, 2019

Ron E. Meisler



## Fiduciary Duties and Standards of Review



- All directors owe fiduciary duties to the corporation and its stockholders
  - *Duty of Care*: Obligation to act on an informed basis and in a considered manner
  - *Duty of Loyalty*: Obligation to act in good faith, without self-interest in a manner believed to be in the best interest of the corporation and its stockholders
- Delaware courts review directors' discharge of duties under different standards, depending on circumstances
  - Business Judgment Rule ("BJR")
    - » Generally applicable standard embodying policy of not second-guessing business decisions of directors, creating a presumption that directors acted in compliance with their fiduciary duties
    - » Burden on plaintiff to show that board did not act in manner consistent with fiduciary duties – if the presumption is not rebutted, directors will not have liability
  - Entire Fairness
    - » Applies if presumption of the BJR is rebutted or in circumstances where BJR is presumed not to apply (e.g., transactions with controlling stockholders, or majority of directors conflicted)
    - » Burden on defendant directors to show that transaction is both procedurally fair ("fair dealing") and substantively fair ("fair price")
    - » Default standard to be applied in transaction with controlling stockholder (absent procedural steps that may modify standard)

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## Entire Fairness Standard of Review



- Generally applies to transactions between corporation and controlling stockholder
- Defendants (controller/directors) have burden of proving
  - Procedural fairness (i.e., fair process): Focuses on board conduct in connection with how transaction was initiated, timed, structured, and negotiated. Did the process replicate an arms'-length negotiation?
  - Substantive fairness (i.e., fair price): Price which a reasonable seller, under the circumstances, would regard as within a range of fair value. Is the price in a range that would be negotiated by parties in an arms'-length process?
- Procedural steps can modify the standard of review
  - Burden of proof under entire fairness standard can be shifted to plaintiffs by use of (1) empowered and effective special committee of independent directors or (2) non-waivable "majority of the minority" condition requiring approval by majority of outstanding shares independent of controlling stockholders
  - Business judgment review can be available through use of both (1) empowered and effective special committee and (2) majority of the minority stockholder approval condition
- If entire fairness standard applies, case will generally go to trial absent prior settlement

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## Committee and Advisor Roles



- Role of Committee
  - Engage financial and legal advisors
  - Obtain appropriate authority
  - Establish process
  - Evaluate the proposal
  - Negotiate terms of proposal
  - Provide recommendation/act
- Role of Financial Advisor
  - Financial “due diligence”
  - Assist committee in analyzing the proposal and considering alternatives
  - Assist committee in negotiations
  - Analyze financial fairness of proposal and provide fairness opinion if appropriate
- Role of Legal Advisor
  - Assist committee in understanding legal duties
  - Assist committee in considering process to be established
  - Assist committee in analyzing the proposal and considering alternatives
  - Assist committee in considering terms of proposal
  - Assist committee in negotiations and documentation

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## Application of Duties in Context of Committee Process



- While transactions may be reviewed under the entire fairness standard, directors serving on a committee will meet their obligations if they act on an informed basis with the requisite care and without conflict in a manner they reasonably believe to be in the best interest of the company
- Regardless of standard of review, the goal should be to seek the best outcome for the company using a process that the committee believes will lead to the best result
- Hallmarks of informed decision-making:
  - Review relevant information
    - » Ask questions and get answers
  - Take adequate time
  - Consider available alternatives
  - Obtain advice from outside financial and legal advisors in addition to management
  - Meet as appropriate, and make decisions at meetings
- Committee should engage in active process oversight
  - Setting the agenda and establishing process
  - Determining to what degree to use management, and overseeing management’s and advisors’ activities
  - Making critical decisions as to whether and how to proceed
  - Making critical decisions on terms and negotiation

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## Observations on Committee Process



- Assess independence of committee members up front
- Provide committee with appropriate authority
  - Establish process and timing
  - Access to information and ability to direct management
  - Hire advisors
  - Evaluate transaction and alternatives
  - Negotiate terms
  - Accept or reject transaction
  - Compensation determined up front
- Active oversight and engagement by committee
- Retention of expert advisors with appropriate compensation structure
- Negotiate on arms'-length seeking best transaction possible to the Company
- Document Committee process through minutes, etc.

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## Ron E. Meisler



**Partner, Chicago**  
*Corporate Restructuring*

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### Education

J.D., The University of Michigan Law School, 1999  
M.B.A., University of Michigan, 1999  
B.A., University of Michigan, 1994

Ron Meisler represents clients in complex transactions involving troubled companies in out-of-court and in-court debt restructurings and recapitalizations, distressed financings (including DIP loans), alternative and special situation investments, including distressed and strategic investors, ad hoc investor groups and troubled company M&A.

Mr. Meisler's company-side representations of note include:

- Atlas Resource Partners, which confirmed a prepackaged Chapter 11 plan of reorganization to restructure its secured and unsecured funded debt. The transaction was one of the first Chapter 11 reorganizations of a master-limited partnership and the first prepack of an MLP;
- Blue Bird Bus Company, one of the world's leading bus manufacturers, in connection with its restructuring;
- Delphi Corporation in connection with the restructuring of more than \$22 billion in liabilities; and in connection with numerous dispositions of billions of dollars of assets;
- Eagle Food Centers, Inc., formerly a regional grocery store chain with \$600 million in revenues, in connection with its Chapter 11 liquidation;
- Globalstar, Inc., a leading satellite telecommunications company, in connection with its out-of-court exchange;
- McLeodUSA Incorporated, a regional multibillion-dollar competitive local exchange carrier, in connection with its Chapter 11 prepack;
- Montgomery Ward & Co., formerly a multibillion-dollar national retailer, in connection with its Chapter 11 liquidation;

- Pennfield Corporation, a regional supplier of animal nutrition and services, in connection with its restructuring;
- RockPile Energy Services LLC, an oil field service provider, in connection with its debt restructuring and its related sale of substantially all of its assets;
- The Singer Company N.V., a leading multibillion-dollar global manufacturer of appliances, including sewing machines, in connection with its restructuring;
- Synergy Pharmaceuticals in connection with its Chapter 11 restructuring; and
- Triangle USA Petroleum Corp., a leading Bakken-based E&P, in connection with its Chapter 11 restructuring.

Mr. Meisler has represented purchasers of and investors in distressed companies, including Zell Credit Opportunities Master Fund, L.P. in the debt-for-equity swap in the Chapter 11 bankruptcy case of Delta Petroleum Corporation.

Mr. Meisler also recently represented Key Safety Systems, Inc. (KSS) in connection with its \$1.6 billion cross-border acquisition of substantially all of the global assets (other than assets related to phase-stabilized ammonium nitrate (PSAN) airbag inflators) and operations of Japan-based Takata Corporation through a complex series of cross-border M&A and restructuring transactions, including Chapter 11 proceedings, a civil rehabilitation bankruptcy proceeding in Japan, and recognition proceedings in the U.S. and Canada; KSS was granted the protection of a channeling injunction to shield KSS from tort claims arising on account of Takata's manufacturing and sale of PSAN airbag inflators; following the transaction, KSS emerged as the world's second-largest airbag manufacturer.

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Ron E. Meisler (cont.)



Mr. Meisler also has extensive experience regarding the intersection of U.K. pension law and U.S. bankruptcy law, and in that regard has advised a Fortune 500 company regarding mitigation of U.K. pension regulatory risk and previously has represented the Reader's Digest U.K. pension trustee and the Visteon U.K. pension trustee, respectively, in each of the Reader's Digest and Visteon Chapter 11 cases. In addition, Mr. Meisler has extensive experience with respect to U.S.-defined benefit pension plans and has solved complex issues and negotiated resolutions with the Pension Benefit Guaranty Corporation (PBGC) in connection with numerous pension plans (both large and small). His experience also includes advising executives and boards in connection with troubled companies, including the representation of Antonio Perez, the former CEO of Kodak, in connection with Kodak's Chapter 11 case. Mr. Meisler also was among the partners leading the representation of the unsecured creditors' committee of AMR Corporation, the parent company of American Airlines, in the company's Chapter 11 case.

Mr. Meisler repeatedly has been selected for inclusion in *Chambers USA* and was selected in *The Best Lawyers in America* in 2015 and 2016. He also was twice named one of the country's "Outstanding Young Restructuring Lawyers" by *Turnarounds & Workouts* magazine.

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**Presentation For ABI Mid-Level Professionals Conference**  
**Independent Directors on Sponsor-Led Boards**

*November 4, 2019*  
*James P. Hughes, Jr.*

## Concerns Around Sponsor-led Boards

- Directors of sponsor-led boards often have conflicting interests. The general gestalt of Delaware corporate law is to the effect that the directors will manage the company toward long-term sustainable profitability. The goal of most sponsor-led enterprises is to plan for an exit strategy as soon as the investment begins. The directors appointed by such sponsors will typically share this short-term view, which can place the directors in a conflict position.
- Such conflicts can also put sponsor-appointed directors at odds with certain bedrock principles of Delaware statutory and corporate law, which anticipate a collaborative and collegial board approach.
- Such principles also mean that corporate boards, regardless of the control or influence of certain directors appointed by significant stockholders, need to be mindful of governance fundamentals, particularly with regard to appropriate notice, regularly scheduled meetings and access to all information necessary to discharge duties.

 YOUNG CONAWAY  
STARGATT & TAYLOR, LLP  
*Attorneys at Law*

## Concerns Around Sponsor-led Boards

- Notice – especially before special meetings, can be a critical factor in the evaluation of a board decision if there is an attempt to give certain directors too little notice in advance of a meeting.
- Information – management may come to feel beholden to certain directors, and share information more freely with certain directors, leading to poorly functioning boards.
- Meetings – regularly scheduled meetings are critical.
- Confidentiality concerns – with whom may such directors share their information.

 YOUNG CONAWAY  
STARGATT & TAYLOR, LLP  
*Attorneys at Law*

## Employing Independent Directors

- Independent directors, although often appointed by a sponsor, can play an important role in balancing a sponsor-led board.
- Key test is whether the sponsor can exercise “actual dominion and control over the directors.” Stated another way, the sponsor’s power must be “so potent that independent directors cannot freely exercise their judgment fearing retribution.”
- Majority of board made of independent directors, or special committee made up of independent directors, may help otherwise conflicted transaction become subject only to business judgment, rather than entire fairness, review.

 YOUNG CONWAY  
STARGATT & TAYLOR, LLP  
Attorneys at Law

## Employing Independent Directors

- Chief Justice Strine in *Puda Coal*: Delaware does not want or tolerate “dummy directors.” So, sponsors are well advised to search for independent directors early in the process and to find directors who have skill sets that align with the business.
- Boards are typically populated by CEOs of other companies, but increasingly, expertise in cybersecurity, HR, IT, can align with the push against “dummy directors.”
- Consider adopting board committees, especially audit and compensation committees, chaired by independent directors. Consider appointing independent director as board chair.

 YOUNG CONWAY  
STARGATT & TAYLOR, LLP  
Attorneys at Law



## Attributes of Independence

- Securities - Does the director hold a material amount of preferred stock or debt so that the director may be tempted to make a decision to benefit the interests of those holders over the common stockholders;
- Employment – Does the director receive employment by the company or another interested party after the transaction;
- Liquidation payments – Will the director receive a payout through a management incentive plan or liquidation payment;
- Social and business relationships - Does the director have significant past relationships with any other director or the sponsor;
- Other board directorships – Does the director sit on any other sponsor boards or with any other sponsor-appointed directors.

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**ABI Mid-Level Professionals Conference**  
**Using Independent Directors at Subsidiaries of Public Companies**

Redan Advisors LLC  
Patrick J. Bartels Jr.

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November 4, 2019

## *Using Independent Directors at Subsidiaries of Public Companies*

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### ▪ **Independent Director Duties**

- The subsidiary's directors are responsible for managing the Company, even though the Subsidiary can be wholly or partially owned by a Parent company.
- Subsidiary directors must make decisions based on the best interests of the subsidiary, not the Parent.
- Subsidiary directors are subject to the same corporate laws and regulations as any board of directors.

### ➤ **Key Reasons for Subsidiary Directors**

- Transactions between Parent Company and Subsidiary
- Corporate Reorganizations
- Formation of New Corporate Entities
- Commercial Agreements and Dispute Resolutions between Subsidiaries owned by Parent Company
- Capital Markets Transactions
- Liability Management
- Asset Dispositions
- Local Law or Regulations require Independent Directors

## *About Redan Advisors LLC*

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### ▪ **Patrick J. Bartels Jr. -- Managing Member**



- Patrick J. Bartels, Jr. is a senior investment professional with 20 years of experience and currently serves as the Managing Member of Redan Advisors LLC. His professional experience includes investing in complex financial restructurings and process intensive situations in North America, Asia and Europe in a broad universe of industries. Mr. Bartels has led creditors' committees and served as a director on numerous public and private boards of directors with an extensive track-record of driving value added returns for all stakeholders through governance, incentive alignment, capital markets transactions and mergers and acquisitions.
- Mr. Bartels was previously a Managing Principal of Monarch Alternative Capital LP in New York, a private investment firm that focuses primarily on distressed companies. Prior to joining Monarch Alternative Capital LP, Mr. Bartels was a high-yield investments analyst at Invesco Ltd. He began his career at PricewaterhouseCoopers LLP, where he was a Certified Public Accountant. Mr. Bartels received a Bachelor of Science in Accounting with a concentration in Finance from Bucknell University. He also holds the Chartered Financial Analyst designation.

### ▪ **Representative Board Experience**

- Arch Coal, Inc. – Member of Board of Directors (Compensation and Nominating)
- Hexion Inc. – Member of Board of Directors (Audit, Nominating and Listing)
- Parker Drilling Company – Member of Board of Directors (Audit, Nominating and Strategy)
- Monitronics International, Inc. – Member of Board of Directors (Audit, Nominating and Strategy)
- Grizzly Energy, LLC – Chairperson of Board of Directors (Compensation, Nominating and Strategy)
- B. Riley Principal Merger Corp. – Member of Board of Directors (Audit and Nominating)
- Alta Mesa Holdings GP, LLC – Member of Board of Directors
- Payless Holdings, LLC – Member of Board of Directors
- Aegean Marine Litigation Trust Advisory Board – Member of Board of Directors
- Sungard Availability Services – Member of Board of Directors (Audit, Restructuring and Investigation)
- WCI Communities, Inc. – Member of Board of Directors (Compensation, Land and Nominating)
- TOUSA Liquidation Trust – Member of Board of Directors
- JL French Automotive Castings – Member of Board of Directors (Compensation and Audit)
- MLSF QIF Plc – Member of Board of Directors
- Motor Coach Industries – Member of Board of Directors (Compensation and Audit)