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Dealing with Directors and Officers

Michael L. Bernstein, Moderator
Arnold & Porter LLP; Washington, D.C.

Hon. Kevin R. Huennekens
U.S. Bankruptcy Court (E.D. Va.); Richmond

Hon. Christopher S. Sontchi
U.S. Bankruptcy Court (D. Del.); Wilmington

Hon. S. Martin Teel, Jr.
U.S. Bankruptcy Court (D. D.C.); Washington, D.C.

Dion W. Hayes, Facilitator
McGuireWoods LLP; Richmond, Va.

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Advising Directors & Officers of Troubled Companies Regarding Fiduciary Duties

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Dion W. Hayes
McGuireWoods LLP

Michael L. Bernstein
Arnold & Porter Kaye Scholer LLP

These materials are based upon an earlier version prepared by Mark D. Collins and Andrew M. Dean of Richards, Layton & Finger, P.A. and Michael L. Bernstein. The authors acknowledge the significant contributions of Messrs. Collins and Dean to these materials.

These materials are intended to provide a general overview of selected issues concerning fiduciary duties in the troubled company context. They do not constitute legal advice nor do they necessarily reflect the views of any of the lawyers or judges who are participating on the panel.

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General Overview of Fiduciary Duties

- The Duty of Care
  - Directors must "act in an informed and deliberate manner in determining whether to approve [a transaction or resolution]." Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).
  - The board must avail itself of all reasonably available material information concerning the subject of its decision.
  - The board should participate in discussions and decision-making actively, and critically evaluate all information received, considering all options available and their advisability.

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General Overview of Fiduciary Duties (Cont.)

- The Duty of Loyalty
  - Requires directors to make decisions based solely on the best interests of the company, in a disinterested manner, and not for personal or other reasons.
  - Directors must be "in a position to base [their] decision on the merits of the issue rather than being governed by extraneous considerations or influences." Kaplan v. Wyatt, 499 A.2d 1184, 1189 (Del. 1985).

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General Overview of Fiduciary Duties (Cont.)

- The Duty of Good Faith
  - The duty of good faith is not "an independent fiduciary duty that stands on the same footing as the duties of care and loyalty." Stone v. Ritter, 911 A.2d. 362, 370 (Del. 2006).
  - Directors should act in what they honestly believe to be the corporation's best interest as opposed to any other, outside interest the directors might have.

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General Overview of Fiduciary Duties (Cont.)

- The Duty to Keep Information Confidential
  - Derives from the duty of loyalty
  - Requires directors to keep confidential:
    - Business and related information
    - Board deliberations
  - Personal liability for violation
    - Confirmed in high profile cases like Walt Disney and Oracle.

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General Overview of Fiduciary Duties (Cont.)

- No Duty to Consider the "Public Interest" or Non-Company Constituencies
  - Delaware law does not recognize a fiduciary duty to consider non-company interests or the "public interest."
    - However, it is at least theoretically possible that in deciding to take certain actions that are so contrary to the public interest or public health and safety, the board possibly could breach its existing fiduciary duties owed to the company.
  - It is permissible to consider non-company interests or the "public interest" to the extent consistent with fiduciary duties owed to the company.

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The Business Judgment Rule

- A judicial presumption that directors are acting independently, in good faith and with due care in making a business decision.
- In evaluating whether a board complied with its fiduciary duties, Courts begin by giving deference to the board's decision and do not re-examine the board's decision unless the presumption can be rebutted by plaintiff.

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The Business Judgment Rule (Cont.)

- Rebutting the Business Judgment Rule
  - Can be rebutted by showing that the directors have breached any of their fiduciary duties.
  - Burden then shifts to the directors to prove that the transaction was "entirely fair."
    - "Entire Fairness" scrutiny is among the highest levels of scrutiny a Delaware court will review a board's actions under.
    - Burden on directors to show (i) fair price and (ii) fair process.
    - Often outcome determinative because the entire fairness burden is difficult (but not impossible) to meet.

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Fiduciary Duties of Solvent Corporations

- Directors owe fiduciary duties to the company.
- Those duties also extend to the stockholders, as the ultimate beneficiaries of the company's growth and increased value.
- Creditors are not owed fiduciary duties.
  - "[C]reditors are usually better able to protect themselves than dispersed shareholders." Big Lots Stores, 922 A.2d 1169, 1180 (Del. Ch. 2006).
- Favoring a creditor over a stockholder of a solvent corporation might constitute a breach of fiduciary duties.

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Fiduciary Duties of Insolvent Corporations

- Status of the "Zone of Insolvency"
  - In a famous footnote, the Chancery Court indicated that when a company is operating in the "vicinity of insolvency, circumstances may arise when the right . . . course to follow for the corporation may diverge from the choice that the stockholders . . . would make if given the opportunity to act." Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. CIV. A. 12150, 1991 WL 277613, at *34 n.55 (Del. Ch. Dec. 30, 1991).
  - Credit Lyonnais was widely read to imply that when a company enters the "zone of insolvency," directors' fiduciary duties "shift" to creditors.

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Fiduciary Duties of Insolvent Corporations (Cont.)

- This concept has continued vitality in some states.
- However, Delaware Courts have clarified that insolvency does not operate to "shift" directors' fiduciary duties to creditors, but instead simply provides creditors derivative standing to enforce the fiduciary duties *owed to the corporation*. See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007); Quadrant Structured Products Co. v. Vertin, 102 A.3d 155, 176 (Del. Ch. 2014).
- Such derivative standing does not materialize upon entering a "zone of insolvency," but only when the corporation is actually insolvent. Gheewalla, 930 A.2d at 101.

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Fiduciary Duties of Insolvent Corporations (Cont.)

- Why Creditor Interests Matter Upon Insolvency
  - Permitting a creditor focus upon insolvency has been justified under two separate conceptualizations:
    - Trust Fund Theory – Directors of an insolvent corporation are akin to a trustee who holds the corporation's assets in trust for the benefit of the creditors. This theory is likely inconsistent with Gheewalla.
    - At Risk Theory – As a corporation approaches insolvency, directors might adopt high-risk strategies to save value for shareholders. Directors might put creditors, who at that point are likely the true residual claimants to and beneficiaries of the corporation, at risk if they were solely charged with maximizing value for stockholders.
    - Famous Las Vegas Analogy – Stockholders would bet the remaining cash on black.

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Fiduciary Duties of Insolvent Corporations (Cont.)

- Enforcing Fiduciary Duties of an Insolvent Limited Liability Company
  - An insolvent limited liability company's creditors lack standing to assert breach of fiduciary duty claims. CML V, LLC v. Bax, 28 A.3d 1037, 1041 (Del. 2011), as corrected (Sept. 6, 2011) (observing that the Delaware Limited Liability Company Act limits derivative standing to members and assignees).
  - A limited liability company may not waive its right to file bankruptcy or give veto power to a creditor over its right to file bankruptcy. In re Intervention Energy Holdings, LLC, 2016 WL 3185576, at *6 (Bankr. D. Del. June 3, 2016).

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Fiduciary Duties of Insolvent Corporations (Cont.)

- The Business Judgment Rule and Insolvency
  - The business judgment rule applies to insolvent companies as well as to solvent ones.
  - The debtor "has a duty to use reasonable care in making decisions, but once those decisions are made, the debtor is protected by the business judgment rule." Lasalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 291 (D. Del. 2000).

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Definition of Insolvency

- A corporation is deemed insolvent for the purposes of determining whether creditors have standing to enforce directors' fiduciary duties in two circumstances:
  - Balance Sheet Insolvency: when a corporation's liabilities are greater than the fair market value of its assets,
  - Equitable (Cash Flow) Insolvency: when a corporation is unable to pay its debts as they come due.
- Failure to meet either test may influence creditors' standing to enforce directors' fiduciary duties.

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Definition of Insolvency (Cont.)

- Balance Sheet Insolvency:
  - A corporation is insolvent if its liabilities exceed the reasonable market value of its assets. Quadrant, 102 A.3d 155, 176 (Del. Ch. 2014.
  - Valuing Assets:
    - Balance Sheet Insolvency is examined using the fair market value of a corporation's assets.
    - Accordingly, a corporation's balance sheet is a "starting point" from which fair market value may be determined. See TWA v. Travellers Int'l AG, 180 B.R. 389, 405 (Bankr. D. Del. 1994).
  - Valuing Liabilities
    - In determining liabilities for the purposes of insolvency, bankruptcy courts look to the face value of the debt, rather than any publicly traded market value of the debt. In re: Trans World Airlines, Inc., 134 F.3d 188, 196-97 (3d Cir. 1998).

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Definition of Insolvency (Cont.)

- Equitable (Cash Flow) Insolvency:
  - A corporation is deemed equitably (cash flow) insolvent "when it is unable to pay its debts as they come due." SV Inc. Partners, LLC v. ThoughtWorks, Inc., 7 A.2d 973, 987 (Del. Ch. 2010), aff'd 37 A.3d 205 (Del. 2011).
  - This test is "forward looking" and a corporation must not only be able to meet its current obligations, but also to pay its future debts as well.
    - This analysis focuses on the Debtor's reasonable belief at the time at which such a determination is made. See Teleglobe USA, Inc. v. BCE, Inc. (In re Teleglobe Comms. Corp.), 392 B.R. 561, 604 (Bankr. D. Del. 2008).
    - However, an open question exists as to how far into the future the debtor must project.

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Fiduciary Duties in the Context of Wholly Owned Subsidiaries

- A wholly owned subsidiary is justified in "tak[ing] action in aid of its parent's business strategy" as long as that action would not "violate legal obligations owed to others," even if those actions make the subsidiary "less valuable as an entity." Trenwick America Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d. 168, 201-02 (Del. Ch. 2006).
- There is some doubt as to the fiduciary duties of directors of insolvent wholly owned subsidiaries, so boards of such corporations should consider the interests of creditors before acting.

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Fiduciary Duties in the Private Equity Context

- Private equity funds invest in companies hoping that those companies benefit from the fund's management and resources. Amy S. Carder, *Managing Conflicting Interests: A Guide for Private Equity Directors on Portfolio Company Boards* (Apr. 14, 2008).
- During the investment period, managers of the PE fund usually sit on the board of directors of the portfolio company. These "private equity directors" may, however, find themselves in a position of conflict because, as directors, they owe fiduciary duties to the portfolio company and all of its shareholders, but as PE fund managers they remain loyal to the PE fund. Id.

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Fiduciary Duties in the Private Equity Context (Cont.)

- Delaware courts have found that directors, in some cases, may be conflicted where they are affiliated with the PE or VC fund:
  - Frederick Hsu Living Trust v. ODN Holding Corp., 2017 WL 1437308 (Del. Ch. April 14, 2017) (declining to dismiss claims against directors because the allegations supported a reasonable inference that they served the PE funds' interests).
  - In re Trados Inc. Shareholder Litig., 73 A.3d 17, 54-55 (Del. Ch. 2013) (plaintiff "prove[d] by a preponderance of evidence that [director] was not disinterested or independent" based on his current and past relationships with venture capital funds).

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Fiduciary Duties in the Private Equity Context (Cont.)

- Other courts have been reluctant to find a conflict absent compelling evidence:
  - Chen v. Howard-Anderson, 87 A.3d 648, 672 (Del. Ch. 2014) (directors affiliated with PE funds were not conflicted).
  - In re Morton's Rest. Gp., Inc. Shareholders Litig., 74 A.3d 656, 665 (Del. Ch. 2013) (rejecting allegation that directors were conflicted because they were affiliated with PE firm).
  - Marvin H. Maurras Revocable Trust v. Bronf, 2013 WL 5348357 (N.D. Ill. Sept. 24, 2013) (allegations that certain directors were affiliated with PE firm did not raise reasonable doubt of independence).

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Fiduciary Duties in the Private Equity Context (Cont.)

- PE fund directors should be careful to distinguish between their role as an employee of the fund and their role as director of a portfolio company. When acting in the director capacity, the director must act in the interests of the portfolio company and its stakeholders.

- It may be preferable for the individuals making decisions on behalf of the PE fund (as shareholder and/or creditor) to be different than the PE fund employees who serve on the portfolio company's board.

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Fiduciary Duties in Considering Potential Transactions, Including Change of Control Transactions

- When a potential transaction will result in a sale or change in corporate control, directors have special fiduciary obligations.
- These obligations, known as "Revlon duties", may arise in at least the following circumstances:
  - A change in control of the company.
  - When a company initiates an active bidding process seeking to sell itself or effect a business reorganization involving a clear break-up of the company.
  - A sale for cash.
  - A transaction resulting in a controlling stockholder.

  Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

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Fiduciary Duties in Considering Potential Transactions (Cont.)

- The sale of all or substantially all of a company's assets.
- A financing transaction involving a change of control or the creation of a controlling shareholder.

- Once Revlon duties arise, directors' actions will be viewed not through the deferential "business judgment rule" standard, but through the "enhanced scrutiny" standard.
- Under enhanced scrutiny, directors generally will bear the burden to show that: (1) their motivations were proper and not selfish in nature; and (2) their actions were reasonable in relation to their legitimate objective.

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Fiduciary Duties in Considering Potential Transactions (Cont.)

- Courts will review the reasonableness of the substantive merits of the board's or special committee's actions.
  - However, if a board or special committee selected one of several reasonable alternatives, it is unlikely that a Court will second-guess their selection.
  - Even under enhanced scrutiny, a Court will not substitute its own business judgment for the directors, so long as the Court can conclude that the directors' decision was within the range of reasonableness.

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Fiduciary Duties in Considering Potential Transactions (Cont.)

- There is no blueprint that a board must follow to fulfill its Revlon duties, and a heated bidding contest is not required.
- To show that it secured the best value reasonably attainable, the board can:
  - Canvass the market (usually by "shopping" the company in advance) to determine whether greater value may have been obtained, and/or
  - Possess a body of reliable evidence upon which to judge the adequacy of the offer they chose to accept.

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Fiduciary Duties in Considering Potential Transactions (Cont.)

- Simply put, the board must act reasonably and on an informed basis in approving a change of control transaction. See, e.g., Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994).
- Examples of what it means to act reasonably and on an informed basis include:
  - Issuing press releases and seriously considering responsive inquiries. In re Fort Howard Corp. Shareholders Litig., 1988 WL 83147, at *13 (Del. Ch. Aug. 8, 1988).

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Fiduciary Duties in Considering Potential Transactions (Cont.)

- Relying on advice of investment advisor coupled with other circumstances. See Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1285–86 (Del. 1989).
- Critically evaluating competing offers. See Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 39 (Del. 1994).
- Challenging self-interested management. See Mills v. Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1281–83 (Del. 1989).
- Insisting on a fiduciary-out coupled with enough time for other offers to materialize (passive market check). See C & J Energy Servs., Inc. v. City of Miami Gen. Employees' Ret. Tr., 107 A.3d 1049, 1070 (Del. 2014).
- Active sales effort where no reliable evidence of the market value. In re Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 195 n.76 (Del. Ch. 2007).

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Fiduciary Duties in Considering Potential Transactions (Cont.)

- A market check that elicits no higher bids provides a basis for directors to conclude that they are obtaining the best value reasonably attainable.
  - The board should effectively probe the market for potential alternative transactions.
  - The board may publicly announce that it will receive alternative offers, and then respond to any inquiries.

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Status of "Deepening Insolvency" in Delaware and Elsewhere

- Delaware courts have rejected notion of fiduciary duty claim for "deepening insolvency."
  - "If the board of an insolvent corporation, acting with due diligence and good faith, pursues a business strategy that it believes will increase the corporation's value, but that also involves the incurrence of additional debt, it does not become a guarantor of that strategy's success. That the strategy results in continued insolvency and an even more insolvent entity does not in itself give rise to a cause of action. Rather, in such a scenario the directors are protected by the business judgment rule. To conclude otherwise would fundamentally transform Delaware law." Trenwick, 906 A.2d 168, 205 (Del. Ch. 2006).

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Status of "Deepening Insolvency" in Delaware (Cont.)

- "Deepening Insolvency" might still exist as a damages model for an independent cause of action.
  - Key issue is causation: is there a causal connection between the breach of fiduciary duty and the deepening of the corporation's insolvency? Thabault v. Chait, 541 F.3d. 512, 521 (2008) ("the damages here are losses incurred on insurance policies that would not have been written but for [defendant's] negligence").
- "Deepening Insolvency" still exists as a valid cause of action in some states. In re Lemington Home for Aged, 659 F.3d 282, 294 n.6 (3d Cir. 2011), as amended (Oct. 20, 2011).

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Balancing Competing Stakeholders' Interests

- When presented with a conflict, directors should "choose a course of action that best serves the entire corporate enterprise rather than any single group interested in the corporation." Geyer v. Ingersoll, 621 A.2d 784, 789 (Del. Ch. 1992).
- Delaware courts rarely second guess the disinterested decision of an informed board in balancing the interests of creditors against those of stockholders.

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Balancing Competing Stakeholders' Interests (Cont.)

- Examples:
  - Blackmore v. Link Energy, 864 A.2d 80 (Del. Ch. 2004) – no breach of fiduciary duty where the board of a corporation with a cash flow crisis determined to sell all of the corporation's assets at a price which would pay its creditors but leave nothing for its stockholders.
  - Odyssey Partners v. Fleming, 735 A.2d 386 (Del. Ch. 1999) – no breach of fiduciary duty where the board chose to allow a foreclosure since it believed that all other options would have resulted in a lower return for the corporation's stockholders.

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Balancing Competing Stakeholders' Interests (Cont.)

- Equity-Linked v. Adams, 705 A.2d 1040 (Del. Ch. 1997) – no breach of fiduciary duty where the board decided take on more debt and attempt long-term growth.
- In re Radnor Holdings, 353 B.R. 820 (Bankr. D. Del. 2006) – no breach of fiduciary duty where the board chose to obtain new financing to build a new plant in an effort to obtain new business.
- Quadrant, 102 A.3d 155 (Del. Ch. 2014) – no breach of fiduciary duty where the board chose to amend its operating guidelines and permit riskier investment to benefit its controlling stockholder.

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Limitations on Director Liability

- Section 102(b)(7) of the Delaware General Corporation Law permits corporations to limit the personal liability of directors for breaches of the duty of care. 8 Del. Code § 102(b)(7).
  - Section 102(b)(7) does not allow a corporation to limit the personal liability of directors for breaches of the duty of loyalty.
  - Exculpation provisions can be a basis for a director's motion to dismiss. Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins, 2004 WL 1949290, *9 n.38 (Del. Ch. 2004) ("A defense under § 102(b)(7) may be considered in the context of a motion to dismiss.").
- Moreover, Section 141(e) of the Delaware General Corporation Law provides that directors are "fully protected" for their good faith reliance upon a corporation's records in addition to information, opinions, reports and statements provided by its officers, employees and professional advisors. 8 Del. C. § 141(b).

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Limitations on Director Liability (Cont.)

- Default fiduciary duties also exist for alternative entities, such as LLC's. See 6 Del. Code § 18-1104 (enacted in 2013, and settling a long debate over whether default fiduciary duties applied to limited liability companies in the absence of being contracted for).
- Limited liability company agreements and limited partnership agreements may be written to restrict default fiduciary duties. 6 Del. Code §§ 17-1101(d), 18-1101(c). But this does not apply to the duty of good faith and the duty of fair dealing.

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D & O Insurance Coverage

- **Unlike typical professional liability insurance policies, which provide coverage for both the insured professional organization and its employees, D&O policies are designed to:**
    i. Protect directors and officers from Claims made against them during the Policy Period for alleged Wrongful Acts;
    ii. Claims are usually considered "written demands for money, civil, criminal, regulatory, or administrative proceedings, securities claims, shareholder derivative demands, claims for breach of fiduciary duties, and government investigations;"
    iii. Wrongful Acts are breaches of duty, neglect, errors, misstatements, misleading statements, omissions, or acts in their capacity as officers or directors.

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D & O Insurance Coverage (Cont.)

- **The ABC's of D&O Coverage:**
  - Side A – Insured-Person Coverage: directly covers directors and officers against personal liability in the absence of indemnification by the entity for allegedly wrongful act claims that were committed by them in their capacity as directors and officers.
  - Side B – Indemnification Coverage: reimburses the entity when it indemnifies its directors and officers.
  - Side C – Entity Coverage: directly covers the entity for its own wrongful-act claims (but is often limited to securities claims).

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D & O Insurance Coverage (Cont.)

- **What's covered?**
  - **Side A: "claim"**
    - Claims directly against the officers and directors for which they are not indemnified by the insured company.
  - **Side B: "claim"**
    - Claims for which the insured company is indemnifying the officers and directors (the Policy usually presumes that there is indemnity to the extent permitted by law).
  - **Side C: "claim"**
    - Claim against the insured company for Wrongful Acts as a company.

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D & O Insurance Coverage (Cont.)

- **Priority-of-Payment Provisions:**
    i. Some policies provide that Side A Claims must be paid before the payment of any loss to debtor for indemnification (Side B) or direct losses (such as resulting from securities claims) (Side C).
        1. See, e.g., In re MF Global Holdings, Ltd., 515 B.R. 193, 196 (Bankr. S.D.N.Y. 2014) (holding that even if the bankruptcy estates had a contractual claim to the D&O proceeds, 'that claim would be subject to the D & O Policies' priority of payment provision,' which 'requires that the Individual Insureds be advanced defense costs before other payments under the D&O Policies are satisfied").

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D & O Insurance Coverage (Cont.)

- **Typical Exclusions**
    - Finally adjudicated fraud or illegal personal profit.
    - Matters covered under other types of insurance (e.g., errors & omissions, pollution, property damage, bodily injury, etc.).
    - Matters related to notices provided to prior D&O insurance program.
    - Claims not noticed in accordance with the policy's reporting requirements.
    - Insured v. Insured exclusion

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D & O Insurance Coverage (Cont.)

- **The Course of a Claim**
  1. Notice to the insurer.
  2. Assigned to adjuster or claims handler.
  3. Investigation.
  4. Initial coverage determination.
  5. Final coverage determination for D&O claims.

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D & O Insurance Coverage (Cont.)

- **Notice Requirements – D&O Policies are "Claims Made" policies**
  - They require notice of claim as soon as practicable and usually within 90 days of the end of the policy period when claim is made.
  - They allow "circumstance notice" if the insured becomes aware of a "circumstance" or Wrongful Act reasonably likely to give rise to a Claim. Then if the Claim is made after the Policy Period, notice of that Claim relates back to the date of the "circumstance notice" and the Claim is covered under the Policy.

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D & O Insurance Coverage (Cont.)

- Tail coverage lengthens the period to assert a claim after the policy has expired. Id.
- Exclusions:
  - Insured v. Insured Exclusion: precludes coverage for claims by companies against their directors and officers. Courts split on whether, in the absence of language in the policy, this exclusion applies to claims by a debtor-in-possession.
  - Conduct Exclusions: precludes coverage for certain acts such as criminal or fraudulent acts or acts to obtain personal profit.

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D & O Insurance Coverage (Cont.)

- It is policy language-dependent whether proceeds of D&O policy are property of the estate.
  - "Courts are in disagreement over whether the proceeds of a liability insurance policy are property of the estate." In re Downey Fin. Corp., 428 B.R. 595, 603 (Bankr. D. Del. 2010).
  - "When an insurance policy only provides direct coverage to a debtor, courts generally rule that the proceeds are property of the estate . . . However, when an insurance policy provides exclusive coverage to directors and officers, courts have generally held that the proceeds are not property of the estate." In re MF Global Holdings Ltd., 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012).

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D & O Insurance Coverage (Cont.)

- Are D&O insurance policies and proceeds property of the estate? (Four General Rules)
  - Direct coverage to the Debtor = property of the estate
  - Direct coverage to the D&Os = not property of the estate
  - Coverage for both Debtor & D&O = property of the estate if depletion of proceeds would have an adverse effect on the estate
  - Indemnification Coverage for the Debtor = if indemnification has not occurred, is speculative, or hypothetical, the proceeds are not property of the estate

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D & O Insurance Coverage (Cont.)

- **The Effect of the Automatic Stay on Advancing Defense Costs**
  - The automatic stay, in most instances, does not prevent the initiation or continuation of litigation against the directors and officers of a corporation. Therefore, directors and officers may find themselves incurring defense costs and damage payments after the corporation has filed for bankruptcy.
  - To allow insurers to advance defense costs to directors and officers during the bankruptcy proceeding, some courts have modified the automatic stay for the limited purpose of paying defense costs from policy proceeds.
  - Even if a court holds that insurance proceeds are property of the estate, it may still grant relief from the automatic stay under Section 362(d)(1) of the Bankruptcy Code because the "[d]ebtor purchased the [p]olicy for the purpose, in large part, of insulating its directors and officers from personal liability for the costs they incurred in defending actions." In re Beach First National Bancshares, Inc., 451 B.R. 406, 410 (Bankr. D. S.C. 2011).

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D & O Insurance Coverage (Cont.)

- Bankruptcy courts are divided on whether directors and officers should submit for review a fee application for each request to advance defense costs.

Yes	No
In re Arter & Hadden, L.L.P., 335 B.R. 666 (Bankr N.D. Ohio 2005) (directors and officers must submit applications for payment of defense costs for review). ADPT DFW Holdings LLC, Case No. 17-31432 (SGJ), ECF No. 540 (Motion for Certain Current and Former Officers and Directors of the Debtors Authorizing The Payment and/or Advancement of Defense Costs Under the Debtors' Directors and Officers Liability Insurance Policy).	In re Cybermedica, Inc., 280 B.R. 12 (Bankr. D. Mass. 2002) (declining to require submission of applications for defense costs for review by the court). In re MF Global Holdings Ltd., 469 B.R. 177 (Bankr. S.D.N.Y. 2012) (rejecting request for continued court oversight over insurance proceed distribution and defense costs and holding the parties had not identified case law or plain language that permitted continued court oversight of the D&O policy proceeds).

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D & O Insurance Coverage (Cont.)

- Third-party releases and bar orders in D&O settlements may be essential to the terms of the settlement.
  - E.g., settlement for breach of fiduciary duty claims involving payment from D&O insurer included a third-party bar order. Brophy v. Salkin, 2015 WL 5604438 (S.D. Fla. Sept. 24, 2015).

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Breach of Duty Cases – Beyond D&Os

- Control over a corporation can give rise to fiduciary duty claims:
  - A creditor is only a fiduciary when it "exercises such control over the decision-making processes of the debtor as amounts to a domination of its will." Matter of Teltronics Servs., Inc., 29 B.R. 139, 170 (Bankr. E.D.N.Y. 1983).
  - Subsidiary may exercise control over parent company sufficient to create a fiduciary relationship that gives rise to fiduciary duties. In re Advance Nanotech, Inc., 2014 WL 1320145 (Bankr. D. Del. Apr. 2, 2014).
  - Breach of duty claims sometimes brought against lenders.
    - Even if lender liability does not rise to breach of fiduciary duty, it may result in subordination of claims. In re SGK Ventures, LLC, 2015 WL 7755525 (Bankr. N.D. Ill. Nov. 30, 2015), aff'd in relevant part, 2017 WL 2683686 (N.D. Ill. June 20, 2017), appeal filed, Case No. 17-2374 (7th Cir. July 6, 2017).

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Are Breach of Fiduciary Duty Claims Core or Non-Core?

- Breach of duty claims arise under state law and exist independent of a bankruptcy case or the Bankruptcy Code.
  - In re Allied Sys. Holdings, Inc., 524 B.R. 598 (Bankr. D. Del. 2015) (breach of fiduciary duty claims asserted by unsecured creditors' committee against debtor's former CEO were not "core" claims).
- But, non-core claims may be treated as core when they are related to, or intertwined with, core matters.
  - In re Iridium Operating L.L.C., 285 B.R. 822, 832 (S.D.N.Y. 2002) (breach of fiduciary duty claims are "[t]raditionally labeled non-core" but would be treated as core, for purposes of a motion to withdraw the reference, when arising out of the same transaction, and logically connected to, core claims).
  - CDX Liquidating Trust v. Venrock Assocs., 2005 WL 3953895, at *2 (N.D. Ill. Aug. 10, 2005) (claims for breach of fiduciary duty and aiding and abetting breach of duty would be treated as core claims, for purposes of analysis for withdrawal of the reference, because they were "intertwined" and "enmeshed" with claim for equitable subordination, which was core).

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Are Breach of Duty Claims Core or Non-Core? (Cont.)

- Does filing a proof of claim transform a non-core fiduciary duty claim into a core claim?
  - "Traditionally non-core claims against a creditor in an adversary proceeding will be considered core if: (1) the claim arises out of the same transaction as the creditor's proofs of claim or setoff claim, or (2) the adjudication of the adversary proceeding claim would require consideration of the issues raised by the proofs of claim or setoff claim such that the two claims are logically connected." In re Iridium Operating LLC, 285 B.R. at 832.
  - "While [creditor] has filed a proof of claim in this case, there is no indication here that the claims against [creditor] are related to [creditor's] proof of claim such that they could only be brought in the context of bankruptcy … at least one court … has held that breach of contract claims, even when related to a creditor's proof of claim, are considered non-core where they could be brought independent of the bankruptcy…." In re K & R Express Sys., Inc., 382 B.R. 443, 447 (N.D. Ill. 2007).

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Some Recent Delaware Fiduciary Duty Decisions

- RBC Capital Mkts. LLC v. Jervis, 2015 WL 7721882 (Del. Nov. 30, 2015) (affirming judgment for aiding and abetting breaches of fiduciary duty by board).
- In re Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014) (investment banker was liable for aiding and abetting breach of fiduciary duty by board in sale of company).
- In re El Paso Pipeline Partners, L.P. Derivative Litig., 2015 WL 1815846 (Del. Ch. Apr. 20, 2015) (breach of fiduciary duty case analyzing subjective good faith of conflicts committee).
- Quadrant Structured Products Co., Ltd. v. Vertin, 115 A.3d 535 (Del. Ch. 2015) (Delaware law does not impose a "continuous insolvency" requirement for creditor standing).

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Some Recent Delaware Fiduciary Duty Decisions (Cont.)

- In re Simplexity, 2017 WL 65069 (Bankr. D. Del. Jan. 5, 2017) (rejecting argument that fiduciary duty claims were really deepening insolvency claims and noting that Delaware law does not impose absolute obligation to liquidate company unable to pay bills).
- In re Chelsea Therapeutics Int'l Ltd. Stockholders Litig., 2016 WL 3044721 (Del. Ch. May 20, 2016) (directors' decision to disregard speculative projections did not constitute bad faith).
- Sandys v. Pincus, 152 A.3d 124 (Del. 2016) (directors were not independent due to close personal and professional connections to CEO and controlling stockholder).

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Some Recent Delaware Fiduciary Duty Decisions (Cont.)

- *Corwin* and its progeny:
  - Corwin v. KKR Financial Holdings LLC, 125 A.3d 304 (Del. 2015) (business judgment rule applies where a transaction not subject to entire fairness standard is approved by "fully informed, uncoerced majority of the disinterested stockholders").
  - City of Miami General Employees v. Comstock, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016) (applying business judgment rule under Corwin).
  - Larkin v. Shah, 2016 WL 4485447 (Del. Ch. Aug. 25 2016) (Corwin protects directors as long as there is no "looming" controlling stockholder).
  - In re Solera Holdings, Inc. Stockholder Litig., 2017 WL 57839 (Del. Ch. Jan. 5, 2017) (in Corwin analysis of whether vote was fully informed, plaintiff bears burden of proving disclosure deficiencies).

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Some Recent Delaware Fiduciary Duty Decisions (Cont.)

- *Corwin* and its progeny (cont.):
  - In re Volcano Corp. Stockholder Litig., 143 A.3d 727 (Del. Ch. 2016), aff'd, No. 372 (Del. Feb. 9, 2017) (applying Corwin because shareholder acceptance of tender offer has same "cleansing effect" as vote for transaction).
  - In re Saba Software, Inc. Stockholder Litig., 2017 WL 1201108 (Del. Ch. Mar. 31, 2017) (declining to extend Corwin's "cleansing effect" of a stockholder vote to the extent it was neither fully informed nor uncoerced).
  - In re Massey Energy Co. Derivative & Class Action Litig., 160 A.3d 484 (Del. Ch. 2017) (to invoke the Corwin "cleansing effect," there must be a proximate relationship between transaction and the nature of claims to be "cleansed").

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The *In Pari Delicto* Defense and the *Wagoner* Rule

- *In pari delicto* defense, meaning "at equal fault": Courts will not interject themselves into disputes between two wrongdoers. The defense prevents a plaintiff who has participated in wrongdoing from recovering damages resulting from the wrongdoing.
- Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2d Cir. 1991): Imputed debtor's bad acts to trustee bringing actions against third parties, and applied *in pari delicto* defense to limit standing of debtor (or trustee) to seek recovery from third parties.
- Adverse interest exception: Where an agent of the corporation is acting entirely for his own purposes and abandons his principal's interests, the agent's actions will not be imputed to the corporation.

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The *In Pari Delicto* Defense: Recent Developments

- Three Circuits rejected the *Wagoner* application of *in pari delicto* to a trustee's standing:
  - Moratzka v. Morris (In re Senior Cottages of Am., LLC), 482 F.3d 997, 1003 (8th Cir. 2007): Refusing to follow Wagoner and declining to "conflate the constitutional standing doctrine with the *in pari delicto* defense."
  - Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1149–50 (11th Cir. 2006): Debtor's wrongdoing did not deprive trustee of standing.
  - Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 346 (3d Cir. 2001): "An analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*."

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The *In Pari Delicto* Defense: Recent Developments (Cont.)

- Another Circuit rejects the *Wagoner* application of *in pari delicto* to a trustee's standing:
  - Bash v. Textron Fin. Corp. (In re Fair Finance Co.), 834 F.3d 651 (6th Cir. 2016): The Sixth Circuit refused to follow *Wagoner* – citing to the 11th, 8th and 3rd Circuit – because it "appears to conflate the affirmative *in pari delicto* defense with the issue of standing."

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The *In Pari Delicto* Defense: Recent Developments (Cont.)

- In re Liberty State Benefits of Delaware, Inc., 541 B.R. 219 (Bankr. Del. 2015) *(in pari delicto* barred claims in part, but certain claims allowed to proceed on basis of "adverse interest exception" to the *in pari delicto* doctrine).
- Flaxer v. Gifford (In re Lehr Construction Corp.), 666 Fed. Appx. 66 (2d Cir. 2016) (*in pari delicto* doctrine barred trustee's faithless servant claim under New York law).
- Peterson v. McGladrey LLP, 792 F.3d 785 (7th Cir. July 7, 2015) (affirming dismissal of trustee's malpractice claim on basis of *in pari delicto*).
- Uecker v. Zentil, 244 Cal. App. 4th 789 (Cal Ct. App. 2016) (rejecting argument that *in pari delicto* doctrine did not apply).
- In re Stanwich Fin. Servs. Corp., 488 BR 829 (D. Conn. 2013) (trustee had standing to pursue certain fraud transfer claims notwithstanding the Wagoner rule).
- Bearing Fund v. PricewaterhouseCoopers, 611 Fed. App'x 34 (2d Cir. May 22, 2015) (holding district court properly dismissed customer claims on grounds of *in pari delicto*).

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The *In Pari Delicto* Defense: Recent Developments (Cont.)

- In re Mortgage Fund '08 LLC, 527 B.R. 351 (N.D. Calif. 2015) (liquidating trustee's claim against a bank that supposedly aided and abetted corporate wrongdoers was barred by the doctrine of *in pari delicto*).
- Stewart v. Wilmington Trust SP Services, Inc., 112 A.3d 271 (Del. Ch. 2015), aff'd 126 A.3d 1115 (Table) (Del. 2015) (Delaware law recognizes fiduciary duty exception to *in pari delicto* doctrine because faithless directors and officers must be held accountable).
- Brickley v. Scantech Identification Beam Systems, LLC, 566 B.R. 815 (W.D. Tex. 2017) (*in pari delicto* doctrine barred claims that insider-attorney breached fiduciary duties by aiding officers and directors in defrauding a third party).

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