Unsecured Trade Creditors/Young and New Members

A Road to Recovery: How to Navigate the Twists and Turns of Insider Litigation

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A ROAD TO RECOVERY: HOW TO NAVIGATE THE TWISTS AND TURNS OF INSIDER LITIGATION

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Joint Presentation by
Unsecured Trade Creditors' Committee,
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I. Introduction

Creditors, particularly unsecured creditors, often look to post-confirmation litigation for any meaningful recovery in bankruptcy. The former insiders of a debtor are a frequent target of such litigation. The road to recovery from insiders, however, has a number of twists and turns. Our presentation focuses on how to navigate each stage of this journey: (1) preserving the claims; (2) investigating the claims; (3) litigating the claims; and (4) resolving the claims.

II. Preserving the Claims

A. Avoid overly conclusive statements in early filings

- It can be tempting in the first-day affidavit and other early filings to explain in conclusive terms how and why the debtor failed.
- Those statements can later be used against the estate. For example, a defendant may argue that statements from the first-day affidavit (and disclosure statement) regarding why the debtor had failed made the liquidating trustee's causation allegations implausible under *Twombly* and *Iqbal*.
- You don't want to set up a future causation argument.
- These issues become particularly important in any cases involving fraud, in particular securities fraud. If the fraud committed by debtor's management is imputed to the debtor generally, the debtor and/or a liquidating trust may have a difficult time successfully pursuing D&O claims.

B. Maintain documents and data

- This can be particularly challenging in a liquidating case. Buyers typically want to purchase servers and (perhaps less so in recent years) paper if it is at all conceivable that it will be needed to operate the business. Also, employees who know where the documents and data are located will either become employed by the buyer or terminated altogether.
- Consider whether to make an image of key hard drives/servers, whether to make copies of key documents, and whether to obligate the asset purchaser to preserve documents and data, while providing reasonable access rights. If possible, commit the purchaser to establishing a "point person" with knowledge to field such requests.
- As part of any asset sale, there may be negotiations as to the number of "free" hours of assistance from this point person or "free" access to documents before a debtor or liquidating trust has to start paying for this access. For these reasons, any investigation conducted pre-closing may help limit costs in the future.
- You don't want to set up a future spoliation argument.
- Attorney client privilege issues can be a challenge.
    - Absent a provision in the APA stating otherwise, generally privilege will follow the asset. *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 136, 674 N.E.2d 663 (1996).

- Case law upholds the ability to contract around that result and have privilege stay with the seller. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160 (Del. Ch. 2013); *see also* Russell C. Silberglied, *Who Owns Privileged E–Mails in A S363 Sale Case? Is Ownership Waived When the Debtor's Computer Servers Are Sold?,* 28–Feb. Am. Bankr.Inst. J., 46, 77 (2009).
- Even when an APA provision recites that the debtor/seller retains the privilege, if the debtor gives an entire document server to the purchaser -- which undoubtedly contains countless privileged emails -- there is an argument that privilege has be waived. *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007) ("Disclosing a communication to a third party unquestionably waives the privilege"); *see also Le v. City of Wilmington*, 480 F. App'x 678, 687 (3d Cir. 2012) ("The disclosure rule applies when a client 'shares a privileged communication with a third party;" material in question had been provided to a third party and therefore privilege is waived).
- Can there be a joint privilege between buyer and seller/debtor? Do you have to document this arrangement?

C. Describe the claims in the plan/disclosure statement and/or liquidating trust agreement

- Is a general reservation of claims sufficient?
- Or must the reservation be "specific and unequivocal"?
- You don't want to set up a future standing challenge.
- Caselaw is based on doctrines of waiver and judicial estoppel. So, for example, a Chapter 7 debtor should not receive a discharge in exchange for what it discloses to be all of its assets and then suddenly sue on a cause of action it retained without the creditors' knowledge. *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 320 (3d Cir. 2003); *see also Yetter v. Wise Power Sys., Inc.*, 929 F. Supp. 2d 329, 332 (D. Del. 2013). Doctrine might have less utility if the debtor is not retaining the undisclosed cause of action, but rather the creditors are the sole beneficiary of its proceeds.
- Where types of litigation are generally described, caselaw typically does not provide a windfall to the defendant for the plaintiff's failure to itemize that particular lawsuit.
  -- *e.g.*, disclosing avoidance actions is enough, without naming defendants.
  -- Each circuit typically has different standards concerning the necessary disclosure to maintain litigation claims, with the Fifth Circuit having a fairly high standard.
  -- The debtor's ability "to enforce a claim once held by the estate is limited to that which has been retained in the plan." *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351, 355 (5th Cir. 2008).
  -- Without an effective reservation, "the debtor [or liquidating trust] has no standing to pursue a claim that the estate owned before it was dissolved."

Spicer v. Laguna Madre Oil & Gas II, LLC (In re Tex. Wyo. Drilling, Inc.), 647 F. 3d 547, 550 (5th Cir. 2011). For a reservation to be effective it "must be specific and unequivocal"—blanket reservations of "any and all claims" are insufficient. *In re United Operating, LLC*, 540 F.3d at 355–56 (internal quotation marks omitted). The reservation must, at a minimum, be specific enough to put "creditors on notice of any claim [the debtor or a liquidating trust] wishes to pursue after confirmation." *Id.* at 355. This notice "allows creditors to determine whether a proposed plan resolves matters satisfactorily before they vote to approve it." *Id.* "[A]bsent specific and unequivocal retention language in the plan, creditors lack sufficient information regarding their benefits and potential liabilities to cast an intelligent vote." *In re Tex. Wyo. Drilling, Inc.*, 647 F.3d at 550 (citation omitted). In determining whether a proper reservation has been made, "courts may consult the disclosure statement in addition to the plan to determine whether a post-confirmation debtor has standing." *Id.* at 551.

-- As recently observed by the Fifth Circuit in *In re SI Restructuring Inc.*, 714 F.3d 860, 865 (5th Cir. 2013):

> Neither the Plan nor the disclosure statement references specific state law claims for fraud, breach of fiduciary duty, or any other particular cause of action. Instead, the Plan simply refers to all causes of action, known or unknown. As noted, such a blanket reservation is not sufficient to put creditors on notice. *See In re United Operating, LLC*, 540 F.3d at 356 ("Neither the Plan's blanket reservation of 'any and all claims' arising under the Code, nor its specific reservation of other types of claims under various Code provisions are sufficient to preserve the common-law claims Dynasty now brings for, *inter alia*, fraud, breach of fiduciary duty, and negligence."). We therefore agree with the bankruptcy court's determination that "the plan utterly fails to retain, with any specificity, these types of claims."

- Scrutinize any proposed releases or exculpations in the plan and ensure that they do not impact the prosecution of the potential claims.

D. Understand the DIP Financing Order/Any 363 Sale Order

- A debtor-in-possession financing order will typically propose that the lenders be granted liens on and claims in all assets of a debtor, including "commercial tort claims" and any proceeds thereof. Commercial tort claims may include, among other things, claims against a debtor's directors and officers.
- Did the DIP lenders have a lien on commercial tort claims prepetition? If not, which is typically the case, those claims may be an unencumbered asset and a creditors' committee should attempt to remove that potentially valuable asset from a lenders' collateral package.
- What are the debtors' stipulations? Can they be construed in any way to release the D&Os or potential claims against the D&Os?
- Are the sponsors or equity holders also the lenders? Do the debtors' stipulations and releases of the lenders impact any potential D&O claims? If lenders are being released, the released should be limited to "in their capacity as such" such that any D&O type claims are not impacted.
- Does the DIP order propose a deadline to commence claims against insiders (*i.e.*, the "*Challenge Deadline*")? Is the Challenge Deadline reasonable?
- Does the DIP order grant a creditors' committee standing to pursue the claims, or must a committee be granted derivative standing per court order? In cases where committees are not granted standing, a committee will often negotiate that the filing of a motion for standing automatically tolls the Challenge Deadline until the court rules on such motion.
- Scrutinize the terms of any sale order and APA. Make sure the statements, releases, covenants and representations and warranties do not impact any potential D&O claims. Also, make sure that as part of any sale order, commercial tort claims or other types of claims that may implicate D&O claims are not part of the assets sold. Also make sure that the insurance policies including any recoveries thereunder are not part of the assets sold.

E. Understand the D&O Policy

- If the D&O policy is an important asset of the estate and/or causes of action have been filed against the officers and directors (or threatened against the officers and directors), do a thorough review of the D&O policy and understand all of the exclusions.
    - Obtain a copy of the entire policy and make sure you have all policies.
    - Are there bankruptcy related exclusions?
- The policy may provide that it terminates upon the filing of a bankruptcy case.
    - Do you need to purchase tail/extended reporting coverage?
    - Do you need to purchase new coverage?
- Determine whether you need to provide notice to the insurance carrier.
    - When should you provide notice?
    - Why do you provide notice?
    - What needs to be included in the notice?
- Understand the priority of payment issues.

III. Investigating the Claims

A. Funding the investigation

- Make sure the carve-out in the DIP loan budget is sufficient for a full investigation.
- Make sure that DIP loan does not default if a suit is filed.
- Prioritize investigation of claims that will be released under DIP loan; other claims can be pursued without the restraints of the DIP loan after the loan is repaid.
- What if there is no money for an investigation? Does the D&O policy cover costs incurred by a special committee of the board? Can you hire contingency fee counsel?
- To the extent the case contemplates the transfer of D&O claims to a litigation trust, ensure that there is adequate funding for the litigation trust. At a minimum, try to negotiate funding for the trustee, counsel to the trustee/trust and funds necessary for some level of expert or solvency analysis (if relevant). If there is no substantial funding, determine whether the litigation trustee can retain contingency fee counsel to pursue the causes of action.

B. Gather evidence from all sources

- Request turnover of client files from debtor's former counsel
- Make a file access request to the SEC (if applicable)
- Interview former employees (*e.g.*, the controller) and other witnesses
- Identify a "cooperating" witness
- Use Rule 2004 to obtain documents and testimony
- Obtain the report and related papers relating to any investigation done by a special committee of the board.
- The challenges of investigating claims that may involve events overseas.

C. Understand potential claims and defenses

- Is there an exculpation (or "102(b)(7)") clause in the Certificate of incorporation or LLC Agreement? Does it apply only to directors? Or does it apply to officers, too? Almost always, these clauses exculpate any claim of breach of the duty of care -- usually phrased in the negative, *i.e.*, claims are exculpated *unless* they allege a breach of the duty of loyalty, fraud, etc. So, if there is an exculpatory clause, the question is whether a duty of loyalty claim can be established.
- Does the business judgment rule apply? Can it be refuted? Can claims be pleaded outside of the business judgment rule?
    - Recent caselaw, such as *Quadrant Structured Products Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014): the business judgment rule is rebutted when the transactions are with the defendants; but the business judgment rule is *not* rebutted when a decision affects the company's fortunes just because it happens to benefit defendants more than plaintiffs.
        - Whether you file suit in Bankruptcy Court or a state court, like the Delaware Court of Chancery, might well matter. In deciding a motion

to dismiss, the standard for determining whether the plaintiff has overcome the business judgment rule differs between federal courts (including bankruptcy courts) on the one hand and the Delaware Court of Chancery on the other. *See* Russell C. Silberglied, "*Litigating Fiduciary Duty Claims in Bankruptcy Court and Beyond: Theory and Practical Considerations in an Evolving Environment*," 10 J. of Bus. & Tech. Law No. 2 (2015), at 187-88. The Chancery Court requires plaintiffs to plead "with particularity facts showing that the challenged decision was not the result of a valid business judgment." *See In re Tower Air, Inc.*, 416 F.3d 229, 234 (3d Cir. 2005) (internal quotations omitted). In contrast, Federal courts only require the plaintiff to "make out a claim upon which relief can be granted," *i.e.*, notice pleading. On the other hand, Federal courts' plausibility requirement of *Twombley* and *Iqbal* do not apply in the Chancery Court. *See Cambium Ltd. v. Trilantic Capital Partners III L.P.*, 36 A.3d 348 (Del. 2012).

- It is important not to fall into a trap of using terminology that was once widely accepted but now is criticized.
    - For example, for many years, it was common parlance to state that upon insolvency, fiduciary duties are owed directly to creditors. At least in Delaware and the many states that subsequently adopted the recent line of cases, fiduciary duties are never owed directly to creditors. Rather, upon insolvency, fiduciary duties no longer are owed only to stockholders, but rather to the company as a whole. *See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007); *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 791 (Del. Ch. 2004).
    - Similarly, after dictum in a famous 1991 opinion, complaints commonly referred to new duties being owed in the "zone of insolvency." *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 17 Del. J. Corp. L. 1099, 1155 n. 55 (Del. Ch. Dec. 30, 1991).
    - This theory subsequently has been dispelled in Delaware and many other states. *See, e.g., Gheewalla*, 930 A.2d 92 (Del. 2007); *Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1041 (Cal. Ct. App. 2009).
- Understand standing issues. Outside of bankruptcy, creditors and stockholders both have standing to sue derivatively for breach of the duty owed to the company. If a litigation trust is the plaintiff, it likely succeeds to the company's interests, which means the case is not derivative in the first instance. If a creditors' committee is the plaintiff, a *Cybergenics* or *STN* motion will be necessary. *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 538 (3d Cir. 2003); *Unsecured Creditors Comm. of STN Enters., Inc. v. Noyes*, 779 F.2d 901 (2d Cir. 1985).
- Understand the difference between corporations and LLCs. Under *CML v. Bax*, 6 A.3d 238, 243 (Del. Ch. 2010) *aff'd,* 28 A.3d 1037 (Del. 2011), as

corrected (Sept. 6, 2011), creditors of an insolvent LLC cannot obtain standing for breach of fiduciary duty claims. There is an open question whether a Committee can. Russell C. Silberglied, *Can a Creditors' Committee be Granted Standing to Sue for Breach of Fiduciary Duty?*, 30-MAR Am. Bankr. Inst. J. 16 (2011).

- Even if you have standing to sue, if the entity is an LLC or LP, understand whether and the extent to which fiduciary duties have been modified.
- Is the company a wholly owned subsidiary? If so, special fiduciary duty laws might apply. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 203 (Del. Ch. 2006).

D. Solvency Analysis

- Just because a company is in Chapter 11 now does not mean that it was insolvent during the entire period you are investigating. You must analyze whether the company was solvent at the time of each transfer or transaction you are considering.
- Insolvency is an underpinning to claims for: fraudulent transfer, breach of fiduciary duty (unless a stockholder or Chapter 11 or 7 trustee is suing), illegal dividend (more precisely, the related concept of lack of surplus), and preference (though within the 90 day window there is a rebuttable presumption of insolvency).
- Employ a good expert early.
- Know recent developments in the law. Example: the Quadrant decision's rejection of the "no reasonable prospects" overlay to a solvency analysis for fiduciary duty claims. *Quadrant Structured Products Co., Ltd. v. Vertin*, 115 A.3d 535, 558 (Del. Ch. 2015).

E. Recognize Tension Between Certain Claims/Understand the D&O Insurance Coverage

- If you allege that all D&Os engaged in misconduct, it may help establish the *in pari delicto* defense (under sole actor rule) for any claims against the debtor's professionals.
    - The doctrine of *in pari delicto* recognizes that it is an affirmative defense to "prohibit plaintiffs from recovering damages resulting from their own wrongdoing." *USACM Liquidating Trust v. Deloitte & Touche*, 764 F. Supp. 2d 1210, 1229 (D. Nev. 2011); *see Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 252 P.3d 681, 695 (Ne. 2011); *First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.*, 612 F.2d 1164, 1172 (9th Cir. 1980).
    - This doctrine derives from the Latin, *in pari delicto potior est conditio defendentis*: "In case of equal or mutual fault . . . the position of the [defending] party . . . is the better one." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (*quoting Black's Law Dictionary* 711 (5th ed. 1979)).

  - *In pari delicto* only applies where the plaintiff is "an active, voluntary participant in the unlawful activity that is the subject of the suit." *Pinter v. Dahl*, 486 U.S. 622, 636 (1988).
  - "Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant." *Id.*
  - The doctrine is designed to prevent one wrongdoer from recovering from another wrongdoer who served as an equally culpable co-conspirator or accomplice in the same wrongdoing." *See id.*; *Memorex Corp. v. Int'l Bus. Mach. Corp*., 555 F.2d 1379, 1382 (9th Cir. 1977) ("*in pari delicto* refers to the plaintiff's participation in the same wrongdoing as the defendant"); *In re AMERCO Derivative Litig*., 252 P.3d at 694 (corporations should not be permitted to "sue their coconspirators").
  - An auditor "cannot assert the *in pari delicto* defense [if the auditor] states it was not part of any fraudulent scheme." *See, In re E.S. Bankest, L.C.*, 2010 WL 1417732, at *7 (Bankr. S.D. Fla. Apr. 6, 2010); *see also In re Sunpoint Sec., Inc.*, 377 B.R. 513, 567-68 (Bankr. E.D. Tex. 2007) (auditor could not utilize *in pari delicto* defense where it "failed to discover independently the misappropriation of funds . . . by [company officers]"; "[w]hile the corrupt officers . . . obviously did not disclose to the auditors that the thefts were taking place, neither was the auditors' failure to adhere to the proper standard of care . . . a result of any misrepresentation or act of concealment by [the officers]"; *NCP Litig. Trust v. KPMG LLP*, 901 A.2d 871, 873 (N.J. 2006) (imputation doctrine would not prevent the litigation trustee from pursuing a corporation's claims against an auditor because the auditor had an independent contractual duty to detect the fraud).
  - Generally, a corporate officer's actions are imputed to the corporation when taken "in the course of [his or her] employment and with the scope of [his or her] authority." *USACM Liquidating Trust v. Deloitte & Touche, LLP*, 2008 WL 4790112, at *2 (D. Nev. Oct. 24, 2008). "An agent's knowledge will not be imputed to the corporation when the agent is acting on his own behalf and not on behalf of the corporation." *USACM Liquidating Trust v. Deloitte & Touche, LLP*, 764 F. Supp. 2d at 1218. This "adverse interest exception" applies when the agent's actions are "completely and totally adverse to the corporation," such as when the agent engages in "theft or looting or embezzlement." *In re AMERCO Derivative Litig.*, 252 P.3d at 695.
- If you allege an "actual intent" fraudulent transfer claim, it may help establish the *in pari delicto* defense (through imputation of ill-intent to the debtor) for any claims against the debtor's professionals. *See, In re National Century Fin. Enters., Inc. Inv. Litig.*, 604 F. Supp. 2d 1128, 1162 (S.D. Ohio 2009). (noting tension between trustee's arguments for imputation with respect to "actual Intent" fraudulent transfer claim, but against imputation with respect to other claims and *in pari delicto* defense).

- If you allege entirely intentional acts by the D&Os (to avoid exculpation), it may trigger denial of coverage under any D&O policy (based on an "intentional acts" exclusion).
- "Insured versus insured" exception to coverage.

F. **Establishing Damages**

- A breach of fiduciary duty claim is only as good as your ability to prove up damages.
- Deepening insolvency as a measure of damages.
    - Some cases have permitted deepening insolvency as a measure of damages for an independent tort and some have not. *Compare In re CitX Corp., Inc.*, 448 F.3d 672, 677 (3d Cir. 2006) (not a valid damages model for a malpractice claim) *to In re the Brown Schs.*, 386 B.R. 37, 48 (Bankr. D. Del. 2008) (permitting such a damages model for an independent tort); *In re Greater Se. Cmty. Hosp. Corp.*, 363 B.R. 324, 338 (Bankr. D. D.C. 2006) (same); *In re Global Serv. Grp., LLC*, 316 B.R. 451, 458 (Bankr. S.D.N.Y. 2004) (same).
    - The key appears to be whether the independent tort had nexus with the causes of the insolvency becoming deepened. *See* Silberglied, "*Litigating Fiduciary Duty Claims*", 10 J. of Bus. & Tech. Law No. 2 at 212 (*citing Thabault v. Chait*, 541 F.3d 512, 523 (3d Cir. 2008)).

IV. Litigating the Claims

A. Be aware of deadlines and timing issues

- What is the section 108/546 deadline?
- What is the claims-made deadline under any D&O policy? If that deadline has passed, is there any argument for "relation back" based on a prior notice of claim or circumstances?
- Are there competing claims for the D&O proceeds (*e.g.*, by a shareholder class action, separate third party claims against officers and directors or by officers and directors for defense costs)?

B. Identify and monitor sources of recovery

- D&O policy — Is it a wasting policy? How many sets of lawyers are depleting that policy?
- What type of D&O policies are in place (*e.g.*, Side A or C coverage)?
- Is the D&O policy and/or its proceeds property of the estate?
    - D&O policies are property of the estate. *See In re Hoku Corp.*, 2014 WL 1246884, at *3 (Bankr. D. Idaho); *In re MF Global Holdings Ltd.*, 515 B.R. 193, 202 (Bankr. S.D.N.Y. 2014); *In re Eastwind Group, Inc.*, 303 B.R. 743, 746 (Bankr. E.D. Pa. 2004) (citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986)); *In re MILA, Inc.*, 423 B.R. 537, 542 (9th BAP 2010) (citing *Minoco Group of Cos., Ltd. v. First State Underwriters Agency of New Engl. Reins. Corp.*, 799 F.2d 517, 519 (9th Cir. 1986)).

  - Are the D&O policy proceeds property of the estate? Where a liability insurance policy provides both direct coverage to the directors and officers and direct entity coverage, courts have found the proceeds of such policy may be payable to a debtor and are therefore property of the debtor's estate. *See In re Pasquinelli Homebuilding, LLC*, 463 B.R. 468, 472 (Bankr. N.D. Ill. 2012); *see also In re Allied Digital Technologies, Corp.*, 306 B.R. 505, 509-10 (Bankr. D. Del. 2004).
- Is there any way to prevent the depletion of the policy? Can you enjoin the use of the policy and its proceeds? Can you or the Court require some sort of reporting/monitoring as to ongoing defense costs?
- Personal assets — Do the D&Os have significant personal assets? Should you consider seeking a pre-judgment writ of attachment?
- Should tail insurance be purchased?

C. Experts

- Are experts "professionals" that need to be retained?
- Pluses and minuses of using a retained financial advisor as an expert witness.
- What would the scope of the expert's role be?
- Privilege issues.

D. Pleading the Claim

- Pleading alternative theories of recovery to maximize the ability to access the D&O insurance proceeds.
- Understand the governing law on the duty of care standard of culpability.
- If you are pursuing claims against officers, directors, auditors, and others, make sure your pleadings are consistent and one of the pleadings does not impact your other case.
- Understand the D&O insurance exclusions.

V. <u>Resolving the Claims</u>

A. Consider making an early policy-limits demand on the D&O policy

- Understand the governing law and how to trigger a bad-faith risk for the carrier.
- Who is in the best position to make this demand?

B. Use of Mediation to Resolve D&O Claims

- Mediation can be useful if there are multiple parties looking to recover from a wasting policy.
- Can the bankruptcy court order such a mediation?
- Mediation allows for resolution of the claim and any coverage issues.
- Avoids multiple years of litigation – for the plaintiff and the insurance carrier.
- If there are multiple layers of coverage, can you mediate with all insurance carriers at once?
- Selecting a mediator.

C. Structure of the Settlement

- Settlement of coverage issues/buyback of policy.
- Exchange of global releases and injunctions.
- Settlement with only one insurance carrier – exhaustion issues.
- Risks of settling with some but not all officer and directors.
- The necessity/appropriateness of bar orders. What are bar orders? What are the risks of including bar orders? Or not including bar orders?
- Protections to the settling officers and directors.
- Can a creditors' committee settle estate claims? *See In re Smart World Technologies*, 423 F.3d 166 (2d Cir. 2005) (holding that absent rare circumstances, only a debtor can move for approval of a settlement under Bankruptcy Rule 9019).

D. **Approval of the Settlement**

- By the bankruptcy court? District court (if a class action is involved)? By both?
- Confidentiality of agreement.

VI. Conclusion / Q&A