Understanding D&O and E&O Policy Issues in Bankruptcy

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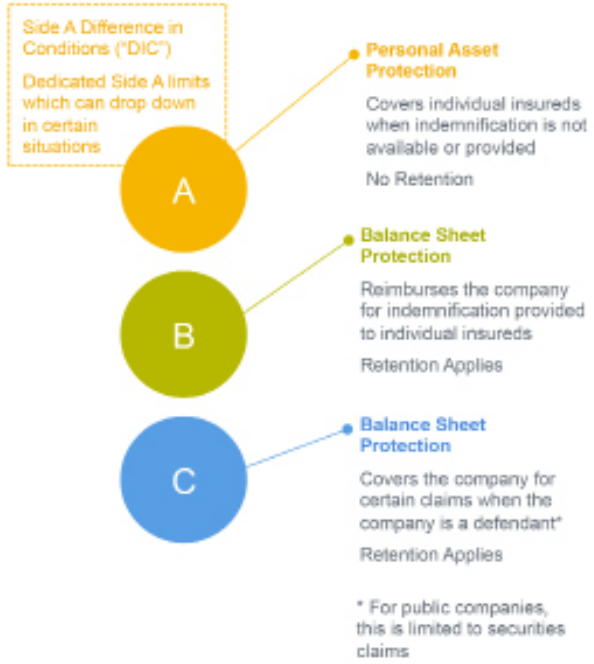
D&O PROGRAM CONSTRUCTION

Notes:

- Traditional policy provides A, B & C coverage subject to an aggregate limit; i.e., limits are shared between the individual insureds and the company
- Side A losses most often result from financial insolvency or the settlement of derivative litigation
- Side A Difference in Conditions ("DIC") limits are not shared with the company and cannot be eroded/exhausted by B & C claims
- Side A DIC policies can drop down when the underlying Side A coverage is more restrictive or the underlying Side A insurer does not pay the loss

Facts:

- ~95% of claims are covered under B & C insuring agreements
- ~90% of public companies supplement a traditional ABC program with Side A DIC limits and this structure is becoming more prevalent for private companies



D&O COVERAGE OVERVIEW

The Insuring Agreements	What is Covered?	Who is Covered?	Typical Exclusions	Claims Reporting
Side A Personal asset protection for individual insureds in situations where indemnification is not available or provided **Side B** Balance sheet protection for the company to reimburse the company for indemnification provided to individual insureds **Side C** Balance sheet protection for the company when named in a covered claim	• "Claim" is broadly defined and generally includes any written demand for monetary or non-monetary damages arising out of a "Wrongful Act" • "Wrongful Act" is generally defined as any action taken (including inaction) or statement made (including omissions) in an insured capacity • Claims generally include allegations of: – Breach of duty (care, loyalty, etc.) – Fraud – Illegal personal profit – Violations of law – Regulatory issues	• Directors and officers • Employees for securities claims • The company, including subsidiaries (>50% owned) • Other individuals or entities scheduled via endorsement	• 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 programs • Claims not noticed in accordance with the policy's reporting requirements • Known claims	• Policies are generally written on a claims made and reported basis, meaning that all claims must be noticed during the policy term in which they are first received by the company • The program in place at the time the claim is made provides coverage; even if the alleged wrongful act predated the program inception date

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PROPERTY OF THE ESTATE

Upon a bankruptcy filing, an "estate" is created consisting of all of the debtor's interests under § 541(a) of the Bankruptcy Code.

Generally, courts have held that D&O ***policies*** are property of the estate.

However, case law differs on whether the ***proceeds*** of a D&O policy are property of the estate or not.

Various courts have found:

When a D&O policy only provides direct coverage to the directors and officers, the proceeds are ***not*** property of the estate.

When a D&O policy only provides direct coverage to the debtor, the proceeds ***are*** property of the estate.

When a D&O policy provides direct coverage to ***both*** the debtor and its directors and officers, courts look to different factors, including:

- Has indemnification occurred or is it hypothetical or speculative
- Whether payment of a particular loss erodes policy proceeds that would otherwise be available to the debtor for other claims
- If depletion of the proceeds would have an adverse effect on the estate
- Priority of payments clause

Nevertheless, courts can still lift the automatic stay to allow D&O policies to fund the defense costs of directors and officers.

D&O TAIL/RUNOFF/EXTENDED REPORTING PERIOD

A tail extends the reporting period for claims occurring during the term of the underlying D&O policy.

A tail can generally be purchased for any length of time, but a 6-year tail covers all applicable statutes of limitations.

Tails are non-cancellable.

D&O INSURANCE AND THE BANKRUPTCY CASE

- The D&O policy will continue until its expiration date (assuming premiums are paid).
- If the policy expires during the bankruptcy case, a debtor can renew.
- The debtor may need Bankruptcy Court approval to renew, and often will file a first day motion seeking authority to renew insurance policies in the ordinary course of business.
- A debtor can purchase a tail postpetition, but will likely need Bankruptcy Court approval.

INSURANCE OPTIONS POST-EFFECTIVE DATE

- A debtor can purchase a tail as of the Effective Date without further Bankruptcy Court approval if the confirmed plan authorizes it.
- If a liquidating, litigation or distribution trust is created or a plan administrator is appointed (or in the event of a chapter 7 or 11 trustee), a D&O/E&O policy can be placed to protect the trustee during the term of the engagement and a tail can be added to cover any statute of limitations period.

Last in Line

By Scott A. Wolfson and Thomas J. Kelly

MF Global Court Declines D&O Insurance Nanny Role

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Bankruptcy and insurance law intersected in *MF Global*[1] to illustrate a number of important concepts for unsecured creditors and bankruptcy practitioners alike. These concepts included the typical structure of insurance policies for directors and officers (D&Os), the interest of a bankruptcy estate in, and the applicability of the automatic stay to, a D&O insurance policy and its proceeds, and the ability of a bankruptcy court to use its equitable powers to impact a policy.

MF Global's insured D&Os, who were being sued in several cases alleging more than $1 billion in total damages, asked the bankruptcy court presiding over MF Global's bankruptcy to lift the automatic stay to grant them unfettered access to D&O insurance proceeds to fund their defense costs. The court granted the motion, holding that the proceeds were not property of MF Global's estate. The court's analysis focused on the D&O policies themselves, in light of the general principle that a debtor does not have greater rights in property because it filed for bankruptcy.

The *MF Global* court also declined an invitation to use its general equitable powers to serve as an overseer of D&O policy proceeds and D&O defense costs, despite the fact that defense costs of the D&O litigation had already exceeded $48 million before a single deposition had been taken. The court viewed the liquidating trustee, who himself had sued the D&Os for breach of fiduciary duties, to be in no different of a position than any other third party suing a defendant covered by a wasting policy. Therefore, the court refused to "police litigation in other courts that does not directly affect the property of the estates."[2]

Background

MF Global was formed in 2007 when Man Financial, the brokerage division of Man Group PLC, was "spun off in an initial public offering at the height of the boom in derivatives trading."[3] Since its inception, the company had been plagued with financial difficulties.[4] By the time the company filed for chapter 11 protection, allegations of misuse of approximately $1.6 billion of customer funds surrounded the company, and many were blaming the company's former D&Os.[5]

Several lawsuits were filed against MF Global's former D&Os, including former New Jersey governor and MF Global CEO Jon Corzine. The suits were brought by securities holders, commodity customers and other plaintiffs alleging violations of securities laws, the Commodity Exchange Act, the Racketeer Influenced and Corrupt Organizations Act, state consumer protection laws, breach of contract, breach of fiduciary duties and various other torts.[6] To fund their defenses in the suits, the former D&Os sought the proceeds from D&O liability insurance policies (the "D&O policies") and errors and omissions insurance policies (the "E&O policies") issued in favor of MF Global.

The bankruptcy court first addressed whether proceeds of the D&O and E&O policies were property of the estate approximately six months after MF Global filed for relief. During that time, MF Global's former D&Os had sent multiple notices to the company's insurance providers seeking payment under the policies.[7] The insurers sought a court determination that the policies' proceeds were not property of the estate or, in the alternative, relief from the automatic stay to channel the proceeds to the former D&Os.[8] In ruling on the insurers' motion, however, the bankruptcy court held that "it is unnecessary at this time to determine whether policy proceeds are property of the estates."[9] Instead, the court granted relief from the automatic stay for the former D&Os to "receive advancement or reimbursement of reasonable defense costs."[10]

The court did not initially grant the former D&Os access to the full amount of the policies' proceeds. Rather, the court set a $30 million "soft cap," which was quickly reached.[11] As a result, the former D&Os requested — and the court granted —

1 MF Global Holdings Ltd. and MF Global Finance USA Inc. filed for chapter 11 relief on Oct. 31, 2011. On Dec. 19, 2011, MF Global Capital LLC, MF Global FX Clear LLC and MF Global Market Services LLC also filed for chapter 11 relief, while MF Global Holdings USA Inc. filed on March 2, 2012. The cases are being jointly administered in *In re MF Global Holdings Ltd.*, No. 11-15059 (MG) (collectively, "*MF Global*"). *See* Disclosure Statement for the Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code at 13, *In re MF Global Holdings Ltd.*, No. 11-15059 (MG) (Bankr. S.D.N.Y. Oct. 31, 2011) [Docket No. 1092].

2 *In re MF Global Holdings Ltd.*, 515 B.R. 193, 207 (Bankr. S.D.N.Y. 2014).

3 "Jacob Bunge, MF Global: History from IPO to Bankruptcy," *Wall St. J.* (Oct. 31, 2011), *available at* blogs.wsj.com/deals/2011/10/31/mf-global-history-from-ipo-to-bankruptcy/ (last visited April 3, 2015).

4 For instance, approximately seven months after its formation, "[a] trader in MF Global's Memphis, Tenn., office sustain[ed] a $141.5 million loss after making unauthorized wheat trades, sending shares down 28%." *Id.*

5 Nick Brown, "MF Global Commodity Trader Customers to Get All Their Money Back," Reuters (Nov. 5, 2013), *available at* www.reuters.com/article/2013/11/05/us-mfglobal-bankruptcy-idUSBRE9A41BN20131105 (last visited April 3, 2015).

6 *In re MF Global Holdings Ltd.*, 469 B.R. 177, 181 (Bankr. S.D.N.Y. 2012).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *MF Global*, 515 B.R. at 196.

an increase in the soft cap to $43.8 million.[12] When this cap was reached, the former D&Os brought an action to access all of the proceeds of the D&O, but not the E&O, policies.[13]

D&O Proceeds Are Not Property of the Estate

In determining whether MF Global's D&O policies were property of the estate, the court first held that "it is well-settled that a debtor's liability insurance is considered property of the estate."[14] However, "courts disagree over whether the *proceeds* of a liability insurance policy are property of the estate."[15] When a policy "only provides direct coverage to a debtor, courts generally rule that the proceeds are property of the estate."[16] On the other hand, when a policy covers D&Os exclusively, "courts have generally held that the proceeds are not property of the estate."[17] When a policy covers both D&Os and the company, the Bankruptcy Code provides little guidance. In such situations, courts have held that "the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent [that] the policy actually protects the estate's other assets from diminution."[18]

MF Global's D&O policies covered both the company and the company's former D&Os. The company obtained both a primary D&O policy with coverage of up to $25 million and excess D&O policies providing up to an additional $200 million in coverage before its bankruptcy.[19] All of the policies were in the same format, containing the standard three insuring agreements, known as A-Side, B-Side and C-Side (or entity coverage).[20] A-Side policies provide coverage directly to D&Os when they are personally liable and when indemnification from the company is either not provided for by contract, not permitted by law or not available due to insolvency.[21] B-Side policies are indemnification policies that provide reimbursement to the company after the company indemnifies a D&O.[22] C-Side policies provide coverage directly to the company for its liability for securities claims.[23]

These policies are often combined in a single policy and may provide a priority waterfall in which the insurer will fund different policy components in a pre-established order.[24] MF Global's D&O policies contained such a priority-of-payment provision, providing that the A-Side coverage afforded to the D&Os must be paid before the payment of any loss to debtors for indemnification obligations (B-Side) or for losses resulting from securities claims against debtors (C-Side).[25]

MF Global arguably had a legal or equitable interest in the proceeds of the policies because the company could assert a claim against the D&O policies. This would render the proceeds as property of the estate under 11 U.S.C. § 541, which includes "all legal or equitable interests of the debtor in property as of the commencement of the case." However, MF Global could assert a claim against the D&O policies in only two specific instances: (1) if a party lodged a securities claim against MF Global, or (2) if MF Global was forced to indemnify its D&Os.[26]

As for the first instance, no party had instituted a "securities claim," as defined in the D&O policies, against MF Global and the statute of limitations to assert that such a claim had expired, meaning that it was extremely unlikely that MF Global would seek coverage under its C-Side policy.[27] As for the second instance, several former D&Os had sought indemnification from MF Global. The company could assert a $13.06 million claim against the B-Side policy if it were forced to indemnify these individuals.[28] However, the company had not indemnified any individual D&Os and did not intend to do so in the future.[29] Further, any indemnification would be subject to the priority-of-payment provision, meaning that MF Global would only be entitled to proceeds from the policy after the individual D&Os received their defense costs. By the time that MF Global sought indemnification, there likely would not be any funds left to reimburse the company.

Despite these observations, the court withheld the amount of MF Global's potential claim for indemnification against the D&O policies. The court held that "it is premature to label a payout [as] purely hypothetical," and that the former D&Os would "not be prejudiced by establishing a $13.06 million reserve in light of the substantial unused amounts available under the D&O Policies."[30] Accordingly, the court granted the former D&Os access to all but $13.06 million of the D&O policies.

Court Declines to Oversee D&O Proceeds and Defense Costs

Whether the D&O policies' proceeds were property of the estate was not seriously in dispute. MF Global's plan administrator conceded that the former D&Os were "entitled to pay for the adequate defense of their interests."[31] The real concern stemmed from the rate at which the former D&Os were consuming the proceeds, with more than $48 million in defense costs and expenses having been incurred without a single deposition.[32] To curb the rate at which the proceeds were being used, MF Global's plan administrator and other interested parties asked the court to continue to exercise oversight of the proceeds. In support of their request, the parties relied on 11 U.S.C. § 105(a), which permits a court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[33] The court rejected this request, holding that the parties had not identified case law or plan language that permitted — much

12 *Id.*
13 The former D&Os sought only the proceeds of the D&O policies because the D&O policies, unlike the E&O policies, contained a priority-of-payment provision. *Id.* at 202. Further, MF Global had pending claims against the E&O policies but only hypothetical or speculative claims against the D&O policies. *Id.* Although the former D&Os likely had some interests in the proceeds of the E&O policies, their interests in the proceeds of the D&O policies was much clearer.
14 *Id.* (citations omitted).
15 *Id.* (citations omitted) (emphasis added).
16 *Id.* (citations omitted).
17 *Id.* (citations omitted).
18 *Id.* at 203 (citations omitted).
19 *Id.* at 198.
20 *Id.*
21 Richard L. Epling, Brandon R. Johnson and Kerry A. Brennan, "Intersections of Bankruptcy Law and Insurance Coverage Litigation," 21 *Norton J. Bankr. L. & Prac.* 103, 108 (2012).
22 *Id.*
23 *Id.*
24 *Id.*
25 *In re MF Global Holdings Ltd.*, 515 B.R. at 198.
26 *Id.* at 199.
27 *Id.* at 199, 203.
28 *Id.* at 203.
29 *Id.*
30 *Id.*
31 *Id.* at 200.
32 *Id.* at 196.
33 *Id.* at 204.

continued on page 56

Last in Line: MF Global *Court Declines D&O Insurance Nanny Role*

from page 31

less compelled — continued court oversight of the D&O policy proceeds.[34]

In reaching its conclusion, the court noted that while § 105(a) is broadly construed, it does not give a court the authority to create substantive rights that are otherwise unavailable under applicable law.[35] Further, a court can only issue an order under § 105(a) that would enforce or carry out the Code's provisions, and there is no specific Code provision that ongoing oversight of the D&O proceeds would enforce.[36] Therefore, the court held that "[i]t would be fundamentally unfair to allow the litigation to proceed while denying the [D&Os] coverage for defense costs."[37]

The court also dismissed the movants' argument that continued court oversight of the D&O insurance proceeds was appropriate because the payment of defense costs reduces potential recoveries in the underlying lawsuits, including by the liquidating trustee. In so holding, the court stated that the "[t]rustee is no different than any third party suing defendants covered by a wasting policy. No one has suggested that such a plaintiff would be entitled to an order limiting the covered defendants' rights to reimbursement of their defense costs."[38] Accordingly, "the Court [did] not believe [that] the law supports the placing of the bankruptcy court as the overseer of defense costs."[39]

34 *Id.* at 207-08.
35 *Id.* at 204.
36 *Id.*
37 *Id.* at 205.
38 *Id.* (quoting *In re Allied Digital Techs. Corp.*, 306 B.R 505, 512-13 (Bankr. D. Del. 2004) (authorizing payment-of-defense costs under D&O policy over objection of trustee who sought to preserve policy proceeds to satisfy his own claims against insureds)).
39 *Id.* at 207.

Conclusion

MF Global is a big loss for the typical unsecured creditor, but the decision is likely consistent with the Bankruptcy Code. Section 541(a)(1) provides that property of the estate must consist of "all legal or equitable interests of the debtor in property as of the commencement of the case." Most courts agree that "[i]nsurance policies and debtors' rights under insurance policies ... are property of the estate,"[40] but a debtor has no greater rights under a contract in bankruptcy than outside of bankruptcy.[41] If the proceeds of an insurance policy cannot flow to the debtor, or can only flow to the debtor in limited circumstances, most, if not all, of the proceeds are not properly considered estate property.

Whether proceeds of an insurance policy flow to the debtor depends on the policy's language. *MF Global* does not stand for the proposition that D&O insurance policy proceeds are never property of the estate; that determination depends on the language of the policy. Therefore, an unsecured creditor's strategy in handling a D&O policy issue will be dependent on the facts of each case. In cases such as *MF Global*, where a company and its D&Os are covered by a wasting insurance policy, unsecured creditors may be incentivized to settle quickly to prevent D&Os from consuming insurance proceeds to the detriment of the bankruptcy estate. abi

40 5 *Collier on Bankruptcy* ¶ 541.10 (Alan N. Resnick and Henry J. Sommer eds., 16th ed.).
41 *See, e.g., White Motor Corp. v. Nashville White Trucks Inc. (In re Nashville White Trucks Inc.)*, 5 B.R. 112, 117 (Bankr. M.D. Tenn. 1980) ("The Code does not, however, grant the debtor in bankruptcy greater rights and powers under the contract than he had outside of bankruptcy.").

D&O Fiduciary Duties
by Marc J. Carmel and Mike Lin

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Introduction to Fiduciary Duties

- Directors and officers of a company owe obligations to the company as a result of their positions
- Specific obligations depend on state law and form of entity
- Generally
  - Duty of Care
  - Duty of Loyalty

Duty of Care and Duty of Loyalty

- Duty of Care - Obligation to:
  - Exercise the same degree of care that an ordinarily careful and prudent person would use in the same or similar circumstances,
  - While acting rationally,
  - After pursuing a deliberate investigation of all material information that is reasonably available at the time, and
  - Carefully considering the information and reasonable alternatives available at the time
- Duty of Loyalty - Obligation to:
  - Act in the best interests of the company without engaging in self-dealing and not acting for personal benefit

Other Duties

- Other duties are sometimes recognized, but they typically are incorporated into the Duty of Care or Duty of Loyalty
  - Duty of good faith
  - Duty to obey the law
  - Duty of oversight
  - Duty of disclosure
  - Others

Fiduciary Duties with Insolvent Corporation

- Generally, nature of fiduciary duties do not change as corporation approaches insolvency or becomes insolvent
  - At least in Delaware, but check state of organization for corporate entity because that is the relevant state law
  - Solvency/insolvency may, however, change which parties can sue for breaches of fiduciary duties
  - Note: fiduciary duty law continues to develop—inquiries are fact-intensive—and new cases continue to test boundaries

Tests to Determine if Corporation is Insolvent

- Generally, under Delaware law, a corporation is only solvent if it satisfies both of two tests:
  - "balance sheet" test and
  - "cash flow" test

Parties Who Can Enforce Breaches of Fiduciary Duties

- Depends on if the corporation is solvent or insolvent
- If corporation solvent:
  - Corporation
  - Equity holders may seek derivative standing to sue directors and officers on behalf of corporation
- If corporation insolvent:
  - Corporation
  - Creditors may be able to seek derivative standing to sue directors and officers on behalf of corporation
- "Zone of Insolvency" - concept that fiduciary duties are affected as corporation approaches insolvency has mostly been abandoned by courts (at least in Delaware)

Balance Sheet Test

- Corporation is solvent if the aggregate value of assets exceeds aggregate value of liabilities
  - Courts consider fair market value of assets, including the cost of liquidating assets
  - Liabilities calculated based on amount necessary to satisfy all liabilities, whether on- or off-balance sheet and whether matured, contingent, or unliquidated
    - » Courts differ on how they account for contingent liabilities:
      - Some consider total potential exposure
      - Some calculate expected potential exposure factoring in probability of liability

Cash Flow Test

- Corporation is solvent if it is able to pay its debts as they come due
  - Courts consider proceeds generated from operations and the sale of assets, as well as potential capital raises
  - Courts are not consistent on the time frame the corporation has to have sufficient capital to satisfy test

Ways for D&Os to Limit Liability Based on Breaches of Fiduciary Duties

- Act in a manner that reduces likelihood that breaches of fiduciary duties occur
- Get the benefit of "business judgment rule"
- Ensure corporate formation documents have certain provisions (i.e., exculpation)
- Contract with other parties to satisfy claims for breaches of fiduciary duties (i.e., indemnification or D&O insurance)
- Negotiate for releases and injunctions

Act in a Manner that Reduces Breaches of Fiduciary Duties

- Request and review financial and legal information
- Consider all reasonably available alternatives
- Ask questions of management and advisors
- Avoid actual or constructive fraudulent transfers
- Disclose actual and potential conflicts to the Board and recuse when appropriate
- Deliberate and be prepared to satisfy the "entire fairness" standard for transactions with insiders
- Maintain appropriate minutes of all meetings
- Seek advice from experienced advisors
- Communicate with constituencies

Business Judgment Rule

- Protects D&Os in decision-making process
- When the "business judgment rule" applies, a court will not second-guess actions of the board that are rational, as long as the directors:
  - Acted on an informed basis
  - Acted in the honest belief that the actions were taken in the best interest of the corporation
  - Did not have a personal interest in the transaction
- When the business judgment rule does not apply, must demonstrate "entire fairness" of action; fair process and fair result

Exculpation

- Prospectively limits the ability of parties to bring claims for breaches of fiduciary duties
- Exonerates or excuses, in advance, directors from civil liability for certain breaches of the duty of care
  - Note: Under Delaware law, exculpatory clause may not apply to officers
- While state law varies, an exculpatory clause generally does not offer protection against:
  - Claims for breaches of the duty of loyalty
  - Intentional misconduct
  - Knowing violations of law
  - Actions not taken in good faith
- See Appendix – Sample language for a Delaware Certificate of Incorporation

Contract with Others to Satisfy Claims for Breaches of Fiduciary Duties

- Indemnification by Corporation
  - Delaware law requires corporation to indemnify D&Os for expenses if D&O successful in defense
  - Delaware law permits corporation to indemnify D&Os for losses incurred as a result of position
  - Generally not apply if D&O failed to act in good faith or in manner in best interest of corporation
- Advancement of Defense Costs – incurred in connection with legal proceedings
- See Appendix – Sample language for a Delaware Certificate of Incorporation

Considerations for LLCs

- In Delaware and many other jurisdictions, fiduciary duties of members, managers, and officers of LLCs can be modified or waived to a much greater extent than for corporations
  - An LLC agreement may modify or even eliminate fiduciary duties (except for the duty to act in good faith)
  - See Appendix – Delaware Statute § 18-1101
- Special care should be taken when crafting such provisions, as they must be clear and unambiguous to be respected by a court
  - Important to seek advice from experienced counsel
  - Modifications of the fiduciary duties can take several different forms
  - See Appendix – Sample language for Delaware LLC Agreements
- As a general matter, in the absence of provisions to the contrary in LLC agreement, managers and officers likely owe duties to the LLC
  - Note: Delaware Supreme Court has not clearly spoken on this issue

Appendix

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Sample language for Delaware Certificate of Incorporation

Waiver of Liability. To the fullest extent permitted by the General Corporation Law of the State of Delaware, as the same exists or as may hereafter be amended, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. No amendment to, modification of or repeal of this section shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with respect to any acts or omissions of such director occurring prior to such amendment.

Indemnification. The Corporation shall indemnify to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he or she or his or her testator or intestate was a director or officer of the Corporation or any predecessor of the Corporation, or serves or served at any other enterprise as a director or officer at the request of the Corporation or any predecessor to the Corporation, against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such person.

Delaware LLC Fiduciary Duty Statute

Under these Delaware state law provisions, the fiduciary duties of members, managers, and officers of LLCs can be modified or waived to a much greater extent than for corporations

§ 18-1101 Construction and application of chapter and limited liability company agreement.

(c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

(e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

Sample language for Delaware LLC Agreement

"Affiliate" of any particular Person means any other Person controlling, controlled by or under common control with such particular Person, where "control" means the possession, directly or indirectly, of the power to direct the management and policies of a Person whether through the ownership of voting securities, by contract or otherwise.

"Agreement" means this Limited Liability Company Agreement, as executed and as it may be amended, modified, supplemented or restated from time to time, as provided herein.

"Board" means the Board of Managers of the Company, which shall have the power and authority described in this Agreement.

"Covered Person" shall mean (i) each Member; (ii) each officer, director, stockholder, partner, member, Affiliate, employee, agent or representative of each Member, and each of their Affiliates; and (iii) each Officer, employee, agent or representative of the Company.

"Delaware Act" means the Delaware Limited Liability Company Act, 6 Del. L. § 18-101, et seq., as it may be amended from time to time, and any successor thereto.

"Member" means (a) [the members of the Company] and (b) each Person who is hereafter admitted as a Member in accordance with the terms of this Agreement and the Delaware Act. The Members shall constitute the "members" (as defined in the Delaware Act) of the Company.

"Manager" means a current member of the Board, who, for purposes of the Delaware Act, will be deemed a "manager" (as defined in the Delaware Act), but will be subject to the rights, obligations and limitations set forth in this Agreement.

"Officers" means each person designated as an officer of the Company to whom authority and duties have been delegated by the Board in accordance with this Agreement.

"Person" means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, association or other entity or a governmental entity.

Sample language for Delaware LLC Agreement

"Subsidiary" means, with respect to any Person, any corporation, limited liability company, partnership, association or business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association or other business entity (other than a corporation), a majority of partnership or other similar ownership interests thereof is at the time owned or controlled, directly or indirectly, by any Person or one or more Subsidiaries of that Person or a combination thereof. For purposes hereof and without limitation, a Person or Persons shall be deemed to have a majority ownership interest in a limited liability company, partnership, association or other business entity (other than a corporation) if such Person or Persons shall be allocated a majority of limited liability company, partnership, association or other business entity gains or losses or shall be or control the manager, managing member, managing director (or a board comprised of any of the foregoing) or general partner of such limited liability company, partnership, association or other business entity. For purposes hereof, references to a "Subsidiary" of any Person shall be given effect only at such times that such Person has one or more Subsidiaries, and, unless otherwise indicated, the term "Subsidiary" refers to a Subsidiary of the Company.

Sample language for Delaware LLC Agreement

(1) No Duties. To the extent that, at law or in equity, a Member, Manager, or Officer in each case, in their capacity as such, has any duty (including any fiduciary duty) to the Company, a Member or any other Person that is party to or otherwise bound by this Agreement, all such duties are hereby eliminated, and each of the Company, Members and such other Persons hereby waives such duties (including any fiduciary duties), to the fullest extent permitted by the Delaware Act and all other applicable law. In addition, each of the Members and any other Person that is party to or otherwise bound by this Agreement acknowledges and agrees that (a) it shall not (and shall not assist any Person attempting to), directly or indirectly, derivatively or otherwise, make any claim with respect to or seek to enforce any duty (including any fiduciary duty) which any Person may have to any Subsidiary of the Company in their capacity as a director, manager, officer or equity holder of such Subsidiary and (b) the Company, acting directly or indirectly through its control of any Subsidiary, shall have the sole and exclusive right to make any such claim or seek any such enforcement.

(2) Waiver of Liability. No present or former Member, Manager or Officer or any of their respective Affiliates or any equity holder, partner, director, manager, officer, employees, agents or representatives of any of the foregoing shall be liable to the Company or any of its Subsidiaries or to any Member for any act or omission performed or omitted by such Member, Manager or Officer in their capacity as such; provided that (a) such limitation of liability shall not apply to the extent the act or omission was attributable to such Person's fraud, bad faith or knowing violation of law (in each case, as determined by a final judgment, order or decree of an arbitrator or a court of competent jurisdiction (which is not appealable or with respect to which the time for appeal therefrom has expired and no appeal has been perfected)) and (b) for the avoidance of doubt, such limitation of liability shall not apply with respect to any breaches of any representations, warranties or covenants by any such Person contained herein or in any other agreement with the Company or any of its Subsidiaries. With respect to any action taken or decision or determination made by any Manager, the Board or any Officer in their capacity as such, it shall be presumed that such Manager, the Board or such Officer acted in good faith and in compliance with this Agreement and the Delaware Act, and any Person bringing, pleading or prosecuting any claim with respect to any action taken or decision or determination made by any Manager, the Board or any Officer in their capacity as such shall have the burden of overcoming such presumption by clear and convincing evidence; provided that, for the avoidance of doubt, this sentence shall not be deemed to increase or place any duty (including any fiduciary duty) on any Manager, the Board or any Officer.

Sample language for Delaware LLC Agreement

(3) Indemnification. The Company hereby agrees to indemnify and hold harmless any Person (each an "Indemnified Person") to the fullest extent permitted under the Delaware Act, as the same now exists or may hereafter be amended, substituted or replaced (but, in the case of any such amendment, substitution or replacement only to the extent that such amendment, substitution or replacement permits the Company to provide broader indemnification rights than the Company is providing immediately prior to such amendment, substitution or replacement), against all proceedings, claims, actions, liabilities, losses, damages, costs or expenses (including reasonable attorney fees and expenses, judgments, fines, excise taxes or penalties) incurred or suffered by such Person by reason of the fact that such Person is or was a Member or is or was serving as a Manager or Officer of the Company or is or was serving at the request of the Company as a managing member, manager, officer, director, principal, member, employee, agent or representative of another Person; provided that no Indemnified Person shall be indemnified (a) with respect to proceedings, claims or actions (i) initiated or brought voluntarily by or on behalf of such Indemnified Person and not by way of defense or (ii) brought against such Indemnified Person in response to a proceeding, claim or action initiated or brought voluntarily by or on behalf of such Indemnified Person against the Company or any of its Subsidiaries, (b) for any amounts paid in settlement of an action effected without the prior written consent of the Company to such settlement, (c) to the extent such proceedings, claims, actions, liabilities, losses, damages, costs or expenses arise from such Person's fraud, bad faith or knowing violation of law as determined by a final judgment, order or decree of an arbitrator or a court of competent jurisdiction (which is not appealable or with respect to which the time for appeal therefrom has expired and no appeal has been perfected) or (d) for the avoidance of doubt, with respect to any present or former breaches of any representations, warranties or covenants by any such Person contained herein or in any other Contract with the Company or any of its Subsidiaries. Expenses, including reasonable attorneys' fees and expenses, incurred by any such Indemnified Person in defending a proceeding may be paid by the Company in advance of the final disposition of such proceeding, including any appeal therefrom, upon approval of the Board and receipt of an undertaking by or on behalf of such Indemnified Person (in form and substance acceptable to the Board) to repay such amount if it shall ultimately be determined that such Indemnified Person is not entitled to be indemnified by the Company. If this section or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Company shall nevertheless indemnify and hold harmless each Indemnified Person pursuant to this section to the fullest extent permitted by any applicable portion of this section that shall not have been invalidated.

Sample language for Delaware LLC Agreement

(4) Exculpation of Covered Persons. No Covered Person shall be liable to the Company or any other Covered Person for any loss, damage or claim incurred by reason of any action taken or omitted to be taken by such Covered Person in good faith reliance on the provisions of this Agreement, so long as such action or omission does not constitute fraud, gross negligence, willful misconduct or a material breach of this Agreement by such Covered Person or is not made in knowing violation of the provisions of this Agreement. A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements of the following Persons or groups: (i) another Member; (ii) one or more Officers or employees of the Company; (iii) any attorney, independent accountant, appraiser or other expert or professional employed or engaged by or on behalf of the Company; or (iv) any other Person selected in good faith by or on behalf of the Company, in each case as to matters that such relying Person reasonably believes to be within such other Person's professional or expert competence. The preceding sentence shall in no way limit any Person's right to rely on information to the extent provided in § 18-406 of the Delaware Act.