AMERICAN BANKRUPTCY INSTITUTE

2021 Virtual Annual Spring Meeting

Litigating Director and Officer Claims in Bankruptcy

Hosted by the Young & New Members and Commercial Fraud Committees

Sponsored by Reid Collins & Tsai LLP

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CONCURRENT SESSION

2021

ABI 2021 ANNUAL SPRING MEETING

LITIGATING DIRECTOR AND OFFICER CLAIMS IN BANKRUPTCY

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IDENTIFYING, PROTECTING, AND PRESERVING POTENTIAL D&O CLAIMS

STRATEGIES AND OPTIONS FOR PROSECUTING D&O CLAIMS

- Review bankruptcy SOFA and schedules, internet and court record searches for pending litigation or claims filed against the debtor.
- Identify, make note of, and calendar critical D&O claim deadlines
- Secure and manage the debtor's records and ESI
- Obtain material records in custody, possession, or control of third parties
- Interview key personnel and former D&Os of the debtor
- Conduct Rule 2004 examinations of key witnesses

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BREACH OF FICUCIARY DUTY AND RELATED CLAIMS

- Breach of Duty of Care
- Breach of Duty of Loyalty or Good Faith
- Other Claims, which may or may not trigger D&O insurance coverage
  - Negligence
  - Fraud
  - Fraudulent Transfers
  - Unlawful Dividend

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MOST COMMON DEFENSES

- Two types of defenses: (1) defenses as to liability and (2) defenses as to the amount of damages
- Common Liability Defenses:
  - Business Judgment Rule and Entire Fairness Standard
  - Exculpation clause
  - Statute of Limitations
  - Lack of Standing
- Common Damages Defenses:
  - Claims against Estate Do Not Exceed Policy Limits or Damages
  - Deepening Insolvency is a Not a Legally Cognizable Claim

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MOST COMMON DEFENSES (cont.)

Business Judgment Rule

- The Business Judgement Rule and the Entire Fairness Standard are *Standards of Review*—they are the lenses through which courts look at director conduct to determine whether there has been a breach of fiduciary duty.
- Creates a presumption in favor of director-approved transactions that their decisions will not be disturbed if they can be attributed to any rational business purpose.
  - To invoke the rule's protections in the context of a *duty of care*, "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them" *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 367 (Del. 1993).
  - If the board fails to inform itself fully and in a deliberative manner then it will "lose the protection of the business rule" and the court is "required to scrutinize the challenged transaction under an entire fairness standard of review." *Id.*

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MOST COMMON DEFENSES (cont.)

Breach of Duty of Loyalty or Good Faith

- The business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders." *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002).
- If a party challenging a decision of the board shows that the directors involved in the decision-making process lacked independence or breached their fiduciary duties (i.e., acted with gross negligence or in bad faith), then the business judgment rule's presumption is overcome and the court will apply the "entire fairness doctrine."
  - As a result, the burden shifts to the corporation to prove that both the decision-making process and the decision reached were fair to the corporation.
  - This is a heavy burden and such allegations usually survive a motion to dismiss.

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MOST COMMON DEFENSES (cont.)

Exculpation (Duty of Care)

- *Pereira v. Farace*, 413 F.3d 330, 341-42 (2d Cir. 2005) (Delaware GCL Section 102(b)(7) "makes it abundantly clear that directors are shielded from liability for breaches of the duty of care.").
- *Nystrom v. Vuppuluri* (*In re Essar Steel Minnesota LLC)* (*In re Essar Steel Minnesota LLC),* 2019 WL 2246712,*8 (Bankr. D. Del. May 23, 2019) ("Minnesota, like Delaware, permits corporations to limit the liability of their managers and governors…. Other courts, addressing substantially identical exculpation provisions in similar circumstances, have held that when an exculpation provision is raised against a duty of care claim 'that is the end of the case.'").

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MOST COMMON DEFENSES (cont.)

Statute of Limitations

- State statutes of limitation for breach of fiduciary duty claims range between 3-6 years.
- Petition tolls the statute of limitations for a period of two years. Section 108 of the Bankruptcy Code provides that, if the applicable statute of limitations has not expired before the petition date, the action may be commenced before the later of (i) the end of such period or (ii) 2 years after the petition date.
- The statute of limitations generally begins to run at the time of the wrongful act; ignorance of a cause of action, absent concealment or fraud, does not stop it. *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1994 U.S. App. LEXIS 4601 (3d Cir. Del. 1994).

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MOST COMMON DEFENSES (cont.)

Standing Defenses

- Debtor-in-Possession or Trustee
- Official Committee of Creditors
- Individual Creditors
- Plan Trustee

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MOST COMMON DEFENSES (cont.)

Standing of Debtor-in-Possession or Trustee

- After the commencement of a case under chapter 11 and before the confirmation of a plan, the standing of the debtor-in-possession or the court-appointed trustee to sue the directors for breach of fiduciary duties is, generally, not seriously questioned.
  - Exception: If the claim being asserted by the DIP belongs to a different entity. *See*, *e.g., Zucker v. Rodriguez*, 919 F.3d 649 (1st Cir. 2019) (holding that FDIC, as failed bank's receiver, rather than plan administrator for bank holding company's Chapter 11 estate, owned claims against holding company's former directors and officers and their insurer for negligence and breach of fiduciary duties owed to holding company based on wholly-owned subsidiary bank's failure).

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MOST COMMON DEFENSES (cont.)

Creditor's Committee Standing

- A creditor's committee appointed under 11 U.S.C. § 1102 may obtain standing to bring actions on the behalf of the corporation if the trustee or the corporate officers fail to pursue litigation that is in the best interests of the estate.
  - *See generally Official Comm. Of Unsecured Creditors v. NewKey Grp., LLC (In re SGK Ventures, LLC),* 521 B.R. 842, 847-48 (Bankr. N.D. Ill. 2014); *Official Comm. of Unsecured Creditors ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) ("[T]he ability to confer derivative standing upon creditors' committees is a straightforward application of bankruptcy courts' equitable powers.").

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MOST COMMON DEFENSES (cont.)

Standing of Individual Creditors

- An individual creditor may not assert a claim of the debtor after the commencement of a chapter 11 bankruptcy proceeding.
- Once the debtor files for bankruptcy protection, the creditor is precluded from continuing to pursue derivative claims against the directors and officers for breaches of fiduciary duties that could have been enforced before bankruptcy.
  - Exception: Like a creditors committee, an individual creditor may obtain derivative standing to pursue a claim.

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MOST COMMON DEFENSES (cont.)

Plan Trustee Standing

- After the confirmation of a chapter 11 plan, the conclusion about who has the standing or the authority to pursue claims for breaches of fiduciary duties varies depending on the content and the provisions of the plan.
- The plan may create a litigation or liquidating trust and assign the claims belonging to the debtor' estate to the trust, transferring the (exclusive) authority to sue to the litigation or liquidating trustee.
- The trustee asserts a direct, not a derivative claim, as the litigation trust is the new owner of the claim.
  - Question in some jurisdictions about whether a plan trustee can also assert assigned creditor claims.
  - Assigned creditor claims typically are not an issue with D&O claims.

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MOST COMMON DEFENSES (cont.)

Claims Do Not Exceed Limits or Damages

- Defendants/Insurance Carriers often argue that damages must limited to the amount of claims (both of creditors and shareholders) that have been filed against the bankruptcy estate.
- Therefore, if the applicable insurance policy has $20mm of coverage, but the claims against the estate equal $10mm, the defendants/insurance carriers will likely argue that the trustee cannot recover more than $10mm.
  - *See*, *e.g.*, *Giuliano v. Schnable (In re DSI Renal Holdings LLC)*, No. 14-50356, 2020 WL 550987, at *9 (Bankr. D. Del. Feb. 4, 2020) (indicating that the court would limit recovery on breach of fiduciary duty claims to total amount of creditor and shareholder claims against the estate once "the rights and obligations of the Debtors' interest holders vis-à-vis the Defendants should the Trustee succeed on his state law claims are [resolved].").

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MOST COMMON DEFENSES (cont.)

Deepening Insolvency

- Deepening Insolvency is a damages model – not a legally cognizable claim.
- Delaware courts no longer recognize a claim for "deepening insolvency." *In re Midway Games, Inc.*, 428 B.R. 303, 315-16 (Bankr. D. Del. 2010) (citing *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 191 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007)).
- However, Delaware courts have held that deepening insolvency is a valid theory of damages for a breach of fiduciary duty claim. *In re The Brown Schools*, 386 B.R. 37, 48 (Bankr. D. Del. 2008) (citing *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 333 (Bankr. D.D.C. 2006)).

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PROTECTING AND PRESERVING THIRD PARTY CLAIMS

- Common third party claims
  - Malpractice
  - Aiding and Abetting
  - Conspiracy, RICO, etc.
- Most third party claims are susceptible to *in pari delicto* defense (RICO being a notable exception)
- Allegations in D&O complaints may negatively impact ability to recover on third party claims

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D&O INSURANCE

D&O INSURANCE

Traditional D&O Coverage

- Claims-Made
- "Wasting Limits"

Typical types of D&O Coverage

- Insured Person Coverage (Side A)
- Indemnification Coverage (Side B)
- Entity Coverage (Side C)

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D&O INSURANCE

Common D&O Policy Issues

- Imputation and Rescission
- Ordering of Payments
- Insured v. Insured Exclusion
- Conduct Exclusions
- Non-Covered Claims

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D&O INSURANCE

Non-Imputation Clause

*It is agreed by the **Insureds . . .** that the statements in the Application (including the information provided therewith) are their representations, that they are material and that this Policy is issued in reliance upon the truth of such representations; provided, in the event that the Application contains misrepresentations made with the actual intent to deceive, or contains misrepresentations which materially affect either the acceptance of the risk or the hazard assumed by Underwriters under this Policy, this Policy shall be void and have no effect whatsoever with respect to those **Insureds** who made or had knowledge of such misrepresentations.*

No knowledge possessed by any Organization or any Insured Person shall be imputed to another Insured Person.

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D&O INSURANCE

Non-Rescission Clause

Upon payment of the Premium, the Coverage provided by this Section for a Loss under [Side A] shall not be rescinded or deemed void for any reason whatsoever.

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D&O INSURANCE

(Bad) Ordering of Payments Clause

*In the event the **Loss** exceeds the remaining available Limit of Liability for this Coverage Section, the Company shall:*

*(a) First pay such **Loss** for which coverage is provided under [Side A]; then*

*(b) to the extent of any remaining amount of the Limit of Liability available after payment under (a) above, pay such **Loss** for which coverage is provided under any other Insuring Clause of this Coverage Section.*

*Except as otherwise provided in this subsection, the Company may pay a covered **Loss** as it becomes due under this Coverage Section without regard to the potential for other future payment obligations under this Coverage Section.*

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D&O INSURANCE

(Bad) Insured v. Insured Exclusion Endorsement

*[Insured versus Insured Exclusion] shall also not apply to a **Claim** brought against an **Insured Person** by a bankruptcy trustee, receiver, creditors' committee, liquidator, conservator, rehabilitator or similar official, who has been appointed to take control of, supervise, manage or liquidate the **First Named Organization.***

*As used in this endorsement, the term "**First Named Organization**" shall mean the **Organization** first named in the Declarations of the General Terms and Conditions Section of this policy.*

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D&O INSURANCE

Bankruptcy Exclusion (Endorsement)

This Coverage Section shall not cover any **Loss** in connection with any **Claim** alleging, arising out of, based upon or attributable to any **Company** being subject to **a** receivership, liquidation, bankruptcy, dissolution, rehabilitation or any similar proceeding…. including any **Claim** brought by or on behalf of any creditor or debtholder of the **Company**; provided, however, that this Exclusion shall not apply to the payment of **Defense Costs**.

The coverage provided by this Endorsement for **Defense Costs** is subject to a Sublimit of Liability of $750,000.00.

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D&O INSURANCE

Additional D&O Policy Issues

- Combined coverage limits with Employment Practices Liability coverage.
- Priority of coverage between Professional's D&O/E&O policies versus the Debtors' policies.
- Priority of payments clause providing that losses on pre-petition claims are paid before losses for post-petition claims.

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D&O INSURANCE

Covered Claims

- Breach of duty of care, loyalty or good faith claims are usually covered (both defense costs and indemnification)
- Negligence and unlawful dividend claims typically covered
- Fraudulent transfer claims sometimes covered
- Fraud and aiding & abetting claims typically not indemnified
  - However, insurer often is responsible for defending against the claims, even if criminal conduct is alleged
  - Thorny allocation issues when it comes time to settle both covered and non-covered claims

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D&O INSURANCE

Other Insurance Considerations

- Failure to Timely Notify Insurer of Circumstances
- Failure to Timely Notify Insurer of Claim
- Protecting the Policy Proceeds
- Tail Coverage

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COMPETING CLAIMANTS

- Violation of Automatic Stay
- § 105 Injunction
  - *In re 1031 Tax Grp, LLC*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008) (section 105 "authorizes a bankruptcy court to exercise power outside the bounds of the automatic stay").
  - *Fox v. Picard (In re Madoff),* 848 F.Supp.2d 469, 486 (S.D.N.Y 2012), aff'd, 74 F.3d 81 (2d Cir. 2014) (preliminary injunction is appropriate where the trustee and the third party plaintiffs "target the same limited pool of funds" such that allowing the third party suit to go forward would jeopardize the trustee's ability to recover from the common defendants).
- Threat of Bad Faith Liability
- Bar Order
  - *SEC v. Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (permanent injunction is appropriate where it "limits the number of lawsuits that may be brought against [the debtor's] former directors and officers.")
  - *In re Dreier LLP*, 429 B.R. 112, 133 (Bankr. S.D.N.Y. 2010) (without the power to permanently enjoin suits against third parties, "Trustees [would] be hampered in their ability to pursue and ultimately settle fraudulent transfer claims from a transferee fearful of paying twice for the same transfer.").

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I. IDENTIFYING, PROTECTING, AND PRESERVING POTENTIAL D&O CLAIMS

A. BREACH OF FIDUCIARY DUTY

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (Corporate directors must performed their duties (1) in good faith; (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the directors reasonably believe to be in the best interests of the corporation).

1. Duty of Care

In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996). (corporate directors may be held liable for "a sustained and systemic failure . . . to exercise oversight").

Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 192 (Del. Ch. 2005) (in making an informed decision, directors should inform themselves of "all material information reasonably available to them").

In re USDigital, Inc., 443 B.R. 22, 41 (Bankr. D. Del. 2011) (duty of care requires corporate officers to "act on an informed basis").

2. Duty of Loyalty.

In re Fedders N. Am., Inc., 405 B.R. 527, 540 (Bankr. D. Del. 2009) ("the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder').

In re Trados Inc. S'holder Litig., 2009 WL 2225958, *6, *8 (Del. Ch. July 24, 2009) (at motion to dismiss stage, lack of independence by director can be shown by pleading sufficient facts to indicate director is beholden to controlling shareholder).

In re New England Confectionery Company, Inc., 2019 WL 6528778, *1 (Bankr. E.D. Mass. Dec. 4, 2019) ("the trustee's allegations, if proven at trial, would result in a finding that the [directors] had conflicts of interest arising out of their employment with [sponsor] and as a result failed to act in the best interests of the company and its creditors.")

3. Duty of Good Faith.

In re Crimson Exploration Inc. Stockholder Litig., C.A. No. 8541-VCP, 2014 WL 5449419, at *23 (Del. Ch. Oct. 24, 2014) ("Bad faith is not a light pleading standard. Even gross negligence, without more, does not constitute bad faith.")

In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 64 (Del. 2006) (plaintiff must allege facts showing "an actual intent to do harm" and also an "intentional dereliction of duty.")

4. Parent Generally Owes No Fiduciary Obligations to Subsidiary.

Trenwick Am. Lit. Tr., 906 A.2d 168 at 173, 191 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007) ("Under settled principles of Delaware law, a parent corporation does not owe fiduciary duties to its wholly-owned subsidiaries or their creditors").

In re Hydrogen, L.L.C., 431 B.R. 337, 347-48 (Bankr. S.D.N.Y. 2010) ("[t]he weight of authority around the country holds that the directors of a parent corporation owe no fiduciary duties to a wholly-owned subsidiary").

Aviall, Inc. v. Ryder Sys. Inc., 913 F.Supp. 826, 832 (S.D.N.Y. 1996), *aff'd* 110 F.3d 892 (2nd Cir. 1997)) ("[T]hose who operate the parent company owe no fiduciary duty to the wholly owned subsidiary.").

Nystrom v. Vuppuluri (*In re Essar Steel Minnesota LLC),* 2019 WL 2246712, *10 (Bankr. D. Del. May 23, 2019) ("In general, a parent corporation does not owe a fiduciary duty to its wholly-owned subsidiary…. The Trustee suggests this case is exceptional because [parent company] exercised domination and influence over [the debtor]. He cites to various cases that stand for the principle that a controlling shareholder owes a fiduciary duty to the corporation and its other shareholders. Those cases are immediately distinguishable, however, because they address non-wholly-owned subsidiaries. In those scenarios, courts have imposed fiduciary duties on controlling shareholders to protect minority shareholders, who may be vulnerable to potential self-dealing by the entity in control. That principle has no application here, where [the parent company] is the sole shareholder.").

5. Controlling Shareholder.

In re W. Nat'l Corp. S'holders Litig., No. 15927, 2000 Del. Ch. LEXIS 82, at *19 (Del. Ch. May 20, 2000) (a shareholder can be deemed a fiduciary if it owns a majority of the corporation or exercises control over the corporation's "business and affairs")

Superior Vision Servs. v. ReliaStar Life Ins. Co., 2006 Del Ch. LEXIS 160, at *14-18 (Del. Ch. Aug. 25, 2006) ("[T]he plaintiff must establish the actual exercise of control over the corporation's conduct by that otherwise minority stockholder." Minority shareholder may owe a fiduciary duty if it can be viewed "collectively as a 'controlling' stockholder" with others.)

Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989) ("[I]n the absence of controlling stock ownership, a plaintiff must allege domination . . . through actual control of corporate conduct.").

6. Zone of Insolvency.

Quadrant Structured Prods. Co. v. Vertin, 115 A.3d 535 (Del. Ch. 2015) ("there is no legally recognized 'zone of insolvency' with implications for fiduciary duty claims.")

B. MOST COMMON DEFENSES

1. Business Judgment Rule (Duty of Care)

Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (A court "will not substitute its own notions of what is or is not sound business judgment" if "the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[T]o invoke the rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties.")

Cede & Co. v. Technicolor Inc., 634 A.2d 345, 367 (Del. 1993) (In the context of a duty of care, "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them").

Cede & Co. v. Technicolor Inc., 634 A.2d 345, 367 (Del. 1993) (If the board fails to inform itself fully and in a deliberative manner then it will "lose the protection of the business rule" and the court is "required to scrutinize the challenged transaction under an entire fairness standard of review.")

473 Odyssey Partners, L.P. v. Fleming Cos., 735 A.2d 386, 407 (Del. Ch. 1999) (Business judgment rule creates a presumption in favor of director-approved transactions that their decisions will not be disturbed if they can be attributed to any rational business purpose).

Orman v. Cullman, 794 A.2d 5, 22 (Del. Ch. 2002) ("The business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders.").

Smith v. Van Gorkom, 488 A.2d 858, (Del. 1985) ("The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Thus, the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one.")

2. Exculpation (Duty of Care)

Pereira v. Farace, 413 F.3d 330, 341-42 (2d Cir. 2005) (Delaware GCL Section 102(b)(7) "makes it abundantly clear that directors are shielded from liability for breaches of the duty of care.").

Nystrom v. Vuppuluri (*In re Essar Steel Minnesota LLC)* (*In re Essar Steel Minnesota LLC),* 2019 WL 2246712,*8 (Bankr. D. Del. May 23, 2019) ("Minnesota, like Delaware, permits corporations to limit the liability of their managers and governors…. Other courts, addressing substantially identical exculpation provisions in similar circumstances, have held that when an exculpation provision is raised against a duty of care claim 'that is the end of the case.'").

In re New England Confectionary Company, Inc., 2019 WL 6528778, *2 (Bankr. D. Mass. Dec. 4, 2019) ("The claim for breach of the fiduciary duty of care, however, is barred by the exculpatory clause in [debtor's] Certificate of Incorporation, *see McPadden v. Sidhu,* 964 A.2d 1262, 1273-74 (Del. Ch. 2008), and the trustee has failed to dispute the validity of applicability of that clause to the duty of care claim… As noted, the Complaint does not contain facts that suggest the Defendants acted in bad faith or that they breached their duties of loyalty and care. The exculpation clause is therefore appropriate grounds for 12(b)(6) dismissal.")

In re Verestar, Inc., 343 B.R. 444, 475 (Bankr. S.D.N.Y. 2006) (corporate exculpatory clause applies to both directors and officers because "decisions that impose a fiduciary duty on officers of a Delaware corporation hold them to the same standards as a director" and "[n]o reason has been suggested why an officer should be held to a higher standard").

Continuing Creditors' Comm. Of Star Telecomm'ns Inc. v. Edgecomb, 385 F. Supp. 2d 449, 464 (D. Del. 2004) (exculpatory clause that discussed directors also applied to claims asserted against an officer who was also a director).

3. Statute of Limitations.

11 U.S.C. § 108: if the applicable statute of limitations has not expired before the petition date, the action may be commenced before the later of (i) the end of such period or (ii) two years after the petition date.

David B. Lilly Co. v. Fisher, 18 F.3d 1112, 1994 U.S. App. LEXIS 4601 (3d Cir. Del. 1994) (the statute of limitations generally begins to run at the time of the wrongful act; ignorance of a cause of action, absent concealment or fraud, does not stop it).

4. In Pari Delicto Rule.

Feltman v. Kossoff & Kossoff, LLP (*In re TS Employment, Inc.*), 690 B.R. 700, 703 (Bankr. S.D.N.Y. 2019) ("The so-called *Wagoner* rule stands for the well-settled proposition that a bankrupt corporation, and by extension, an entity that stands in

the corporation's shoes, lacks standing to assert claims against third parties for defrauding the corporation where the third parties assisted corporate managers in committing the alleged fraud." [Citations omitted.]... Under the Bankruptcy Code, a trustee "stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 119 (2d Cir. 1991). Because the trustee" stands in the shoes" of the corporation, wrongdoing of the corporation is in-turn imputed to him.").

Peterson v. McGladrey (In re Lancelot Investors Fund, ltd.), 792 F.3d 785 (7th Cir. 2015) (negligence claim against auditor for mutual fund being operated as a Ponzi scheme barred by *in pari delico* defense).

(a) *In Pari Delicto* Rule Does Not Apply to Insiders.

Feltman v. Kossoff & Kossoff, LLP (*In re TS Employment, Inc.*), 603 B.R. 700, 707 (Bankr. S.D.N.Y. 2019) ("The *Wagoner* rule does not apply to insiders. *In re Optimal U.S. Litig.*, 813 F. Supp. 2d 383, 400 (S.D.N.Y. 2011) ('*[I]n pari delicto* does not apply to the actions of fiduciaries who are insiders in the sense that they are on the board or in management, or in some other way control the corporation.' (internal citations omitted)); *see also In re Madoff Sec.*, 987 F. Supp. 2d 311, 322 (S.D.N.Y. 2013).").

5. Standing.

(a) Standing of Debtor-in Possession or Trustee.

Under 11 U.S.C. § 541(a)(1), all the debtor's property, including all the legal or equitable interests belonging to him, becomes property of the estate.

After the commencement of a case under chapter 11 and before the confirmation of a plan, the standing of the debtor-in-possession or the court-appointed trustee to sue the directors for breach of fiduciary duties is, generally, not seriously questioned.

Exception: If the claim being asserted by the debtor-in-possession actually belong to a different entity. *See*, *e.g., Zucker v. Rodriguez*, 919 F.3d 649 (1st Cir. 2019) (holding that FDIC, as failed bank's receiver, rather than plan administrator for bank holding company's Chapter 11 estate, owned claims against holding company's former directors and officers for negligence and breach of fiduciary duties owed to holding company based on wholly-owned subsidiary bank's failure).

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 428 (1972) (the Bankruptcy Code does not authorize a trustee to "collect money not owed to the estate" and accordingly prohibits a trustee from suing on behalf of the estate's creditors).

(b) Standing of Official Committee of Creditors.

A creditor's committee appointed under 11 U.S.C. § 1102 may obtain standing to bring actions on the behalf of the corporation if the trustee or the corporate officers fail to pursue litigation that is in the best interests of the estate.

Official Comm. of Unsecured Creditors ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 568 (3d Cir. 2003) ("[T]he ability to confer derivative standing upon creditors' committees is a straightforward application of bankruptcy courts' equitable powers.").

Official Comm. of Unsecured Creditors v. NewKey Grp., LLC (In re SGK Ventures, LLC), 521 B.R. 842, 847-48 (Bankr. N.D. Ill. 2014) (committee may be given standing to pursue claims against officers and directors).

(c) Standing of Individual Creditors.

Quadrant Structured Prods. Co., Ltd. v. Vertin, 115 A.3d 535, 556 (Del. Ch. 2015) (creditors have standing to assert fiduciary duty claims as residual beneficiaries when corporation is either balance sheet insolvent or cash flow insolvent).

N. Am. Catholic Edu. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (creditors of an insolvent corporation have standing as the residual beneficiaries of the corporation to assert claims on behalf of the corporation for breaches of fiduciary duty against directors of the corporation).

iXL Enters. v. GE Capital Corp., 167 F. App'x 824, 826-27 (2d Cir. 2006) (once the debtor files for bankruptcy protection, the creditor is precluded from continuing to pursue derivative claims against the directors and officers for breaches of fiduciary duties that could have been enforced before bankruptcy).. *See,*

Koch Ref. v. Farmers Union Cent. Exch., 831 F.2d 1339, 1343 (7th Cir. 1987) ("[R]ights of action against officers, directors and shareholders of a corporation for breaches of fiduciary duties, which can be enforced by either the corporation directly or the shareholders derivatively before bankruptcy, become property of the estate which the trustee alone has the right to pursue after the filing of a bankruptcy petition.").

Mitchell Excavators, Inc. ex rel. Mitchell v. Mitchell, 734 F.2d 129, 131 (2d Cir. 1984) ("Under 11 U.S.C. § 541, the rights of action of the debtor pass to the estate created by the commencement of the bankruptcy proceeding, not directly to the trustee. Those rights, however, are still normally vindicated by the trustee.").

Exception: *Fogel v. Zell*, 221 F.3d 955, 965-966 (7th Cir. 2000) ("If a trustee unjustifiably refuses a demand to bring an action to enforce a colorable claim of a creditor, the creditor may obtain the permission of the bankruptcy court to bring the action in place of, and in the name of, the trustee."); *Can. Pac. Forest*

Prods. v. J.D. Irving, Ltd. (In re Gibson Grp., Inc.), 66 F.3d 1436, 1441-42 (6th Cir. 1995) (same).

(d) Standing of Plan Trustee.

After the confirmation of a chapter 11 plan, the conclusion about who has the standing or the authority to pursue claims for breaches of fiduciary duties varies depending on the content and the provisions of the plan.

The plan may create a litigation or liquidating trust and assign the claims belonging to the debtor' estate to the trust, transferring the (exclusive) authority to sue to the litigation or liquidating trustee.

The trustee asserts a direct, not a derivative claim, as the litigation trust is the new owner of the claim.

Grede v. Bank of New York Mellon (In re Sentinel Management Group, Inc.), 598 F.3d (7th Cir. 2010) (trustee of plan liquidation trust may pursue creditor claims that have been assigned to it under plan).

Williams v. Cal. 1st Bank, 859 F.2d 664, 666 (9th Cir. 1988) (trustee cannot bring claims on behalf of the estate's creditors, even when they have expressly "assigned their claims to the Trustee.").

6. Filed Claims against the Estate Do Not Exceed Policy Limits or Damages

Giuliano v. Schnable (In re DSI Renal Holdings LLC), No. 14-50356, 2020 WL 550987, at *9 (Bankr. D. Del. Feb. 4, 2020) (indicating that the court would limit recovery on breach of fiduciary duty claims to total amount of creditor and shareholder claims against the estate once "the rights and obligations of the Debtors' interest holders vis-à-vis the Defendants should the Trustee succeed on his state law claims are [resolved].").

7. Deepening Insolvency is a Damage Model Not a Legally Cognizable Claim

Trenwick Am. Litig. *Tr. v. Ernst & Young, L.L.P.,* 906 A. 2d 168, ____ (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007) ("The concept of deepening insolvency has been discussed at length in federal jurisprudence, perhaps because the term has the kind of stentorious academic ring that tends to dull the mind to concept's ultimate emptiness . . ..[T]he fact of insolvency does not render the concept of" deepening insolvency" a more logical one than the concept of "shallowing profitability." That is, the mere fact that a business in the red gets redder when a business decision goes wrong and a business in the black gets paler does not explain why the law should recognize an independent cause of action based upon the decline in enterprise value in the crimson setting and not the darker one.. ").

In re Midway Games, Inc., 428 B.R. 303, 315-16 (Bankr. D. Del. 2010) (Delaware courts no longer recognize a claim for "deepening insolvency", citing *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 191 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007)).

In re The Brown Schools, 386 B.R. 37, 48 (Bankr. D. Del. 2008) (deepening insolvency is a valid theory of damages for a breach of fiduciary duty claim, citing *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 333 (Bankr. D.D.C. 2006)).

II. PROTECTING AND PRESERVING THIRD PARTY CLAIMS

A. Malpractice.

Kirschner v. KPMG, LLP, 626 F.3d 673 (2d Cir. 2010) (*in pari delicto* defense barred negligence and aiding and abetting claims against debtor's outside auditors and lawyers)

In re MF Global Holdings Ltd. Inv. Litig., 998 F.Supp.2d 157 (S.D.N.Y. 2014) (claims against auditor for alleged professional negligence barred by *in pari delicto* doctrine).

Peterson v. McGladrey (In re Lancelot Investors Fund, ltd.), 792 F.3d 785 (7th Cir. 2015) (negligence claim against auditor for mutual fund being operated as a Ponzi scheme barred by *in pari delico* defense).

(a) In Pari Delicto Does not Apply to *De Facto* Insiders.

Feltman v. Kossoff & Kossoff, LLP (*In re TS Employment, Inc.*), 603 B.R. 700, 707 (Bankr. S.D.N.Y. 2019) (complaint sufficiently alleged that outside accountants exercised such decision-making authority over debtor's financial matters that they may be considered *de facto* insiders).

B. Aiding and Abetting

NHB Assignments LLC v. Gen. Atl. LLC (In re PMTS Liquidating Corp.), 526 B.R. 536 (D. Del. 2014) (claim against a third party for aiding and abetting a breach of fiduciary duty survives a motion to dismiss if complaint alleges underlying breach of fiduciary duty, knowing participation by third party, and damages).

In re BJ's Wholesale Club S'holders Litig., 2013 Del. Ch. LEXIS 28, at *54-55 (A plaintiff "must allege facts that [a defendant] directly 'sought to induce the breach of a fiduciary duty' or 'make factual allegations from which knowing participation may be inferred"), quoting *In re Telecomms., Inc. S'holders Litig.*, No. 16470-NC, 2003 Del. Ch. LEXIS 78, at *10 (Del. Ch. July 7, 2003)).

Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co., No. 9250-VCG, 2017 Del. Ch. LEXIS 126, at *24-25 (Del. Ch. July 24, 2017) "the element of knowing participation requires that the secondary actor have provided substantial assistance

to the primary violator," quoting *In re Dole Food Co., S'holder Litig.*, No. 8703-VCL, 2015 Del. Ch. LEXIS 223, at *138 (Del. Ch. Aug. 27, 2015).

C. Conspiracy, RICO, etc.

III. COMPETING CLAIMANTS

A. Property of the Estate and the Automatic Stay

The filing of a bankruptcy petition creates an estate that is comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The phrase "all legal or equitable interests of the debtor in property" has been construed broadly, and includes "rights of action" such as claims based on state or federal law. *In re Bernard L. Madoff Inv. Securities LLC*, 740 F.3d 81, 88 (2d Cir. 2014); *In re Seven Seas Petroleum, Inc.*, 522 F.3d 577, 584 (5th Cir. 2008). If a claim is property of the estate, then the bankruptcy trustee has exclusive standing to assert it.

Section 362(a)(3) provides that the filing of a petition "operates as a[n] [automatic stay] applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate." Section 362(a)(3) thus implements a stay of any action, whether against the debtor or third parties, that seeks to obtain, or exercise control over, the property of the debtor. *In re S.I. Acquisition*, 817 F.2d 1142, 1143 (5th Cir. 1987). Once a company is in bankruptcy, "creditors lack standing to assert claims that are property of the estate[, which] . . . includes all legal or equitable interests of the debtor in property as of the commencement of the case." *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014).

1. The Test to Determine Whether Actions Against Third Parties are Property of a Debtor's Estate

A state-law claim is property of a bankruptcy estate when (1) under applicable state law, the debtor could have raised the claim as of the commencement of the case; and (2) the "cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor) and the debtor could have raised a claim for its direct injury under the applicable law." *In re Mortgage America Corp.*, 714 F.2d 1266 (5th Cir. 1983); *In re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987); *In re Educators Group Health Trust*, 25 F.3d 1281 (5th Cir. 1994); and *In re Seven Seas Petroleum, Inc.*, 522 F.3d 577 (5th Cir. 2008); *Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164 (3d Cir. 2002); *In re Icarus Holding, LLC*, 391 F.3d 1315, 1321 (11th Cir. 2004); *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 463 (7th Cir. 1991).

However, "[w]hen creditors . . . have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so." *In re Bernard L. Madoff Inv. Securities LLC*, 740 F.3d 81, 88 (2d Cir. 2014) citing *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1093 (2d Cir. 1995); *In re Emoral, Inc.*, 740 F.3d 875 (3d Cir. 2014); *Harrison v. Soroof International, Inc.*, 320 F.Supp.3d 602 (D. Del. 2018);

Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994); *In re Bane*, 426 B.R. 152, 158-59 (Bankr. W.D. Pa. 2010).

2. Claims Against the Debtor's Officers and Directors for Breach of Fiduciary Duties are Property of the Estate.

Because officers and directors owe their fiduciary duties to the company, claims for breach of corporate fiduciary duties belong to the company and its bankruptcy estate. Accordingly, the trustee (or other estate representative) has exclusive standing to bring such claims. *In re Ionosphere Clubs, Inc.*, 17 F. 3d. 600, 607 (2d Cir. 1994); *In re SemCrude, LLP*, 796 F. 3d. 310, 312, 322 (3d Cir. 2015); *Kennedy v Venrock Assoc.,* 348 F. 3d. 584, 589 (7th Cir. 2003); *In re Torch Liquating Trust*, 561 F.3d 377, 386 (5th Cir. 2009); *Artesanias Hacienda Real S.A. de C.V. v. North Mill Capital LLC*, 607 B.R. 189, 206 (E.D. Pa. 2019) citing *In re Bruno*, 553 B.R. at 286 n. 39, citing *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007) (looking to Delaware law to hold "creditors of an insolvent corporation are precluded from asserting direct claims against the corporate directors for a breach of their fiduciary duties. Instead, creditors may pursue derivative claims on behalf of the insolvent corporation or they may asset any nonfiduciary claims").

3. Claims Assertable by Creditors can be Property of the Estate if the Debtor Also has the Right to Bring the Claim

The fact that creditors can "assert," "bring," or "prosecute" a cause of action, does *not* mean that the action "belongs" to them. In fact, certain actions (like a denuding claim) can most properly be thought of as "belonging" to the corporation though they are virtually always "asserted" by creditors. *In re Mortgage America*, 714 F.2d at 1276 and 1276 n. 9.

4. A Bankruptcy Estate and Creditor Can Each Have Claims Against a Third Party Relative to the Same Facts, Conduct or Events

It is entirely possible for bankruptcy estate and a creditor to each have separate claims against a third party arising out of same general series of events and broad course of conduct, and thus the existence of common parties and shared facts between the debtor's bankruptcy and the creditor's cause of action does not necessarily mean that the claims asserted by the creditor are property of the estate. *In re FoodServiceWarehouse.com, LLC*, 601 B.R. 396 (E.D. La. 2019); *see also In re Seven Seas*, 522 F.3d at 587. However, the creditor must be able to state independent state law claim against third party *see In re Phar-Mor, Inc., Securities Litigation*, 166 B.R. 57, 62 (W.D. Pa. 1994).

By contrast, the mere fact that a successful outcome may increase the amount available for distribution to creditors does not transform a claim that otherwise belongs to the corporation into one that can be separately maintained by each creditor. *In re Bruno*, 553 B.R. 280, 286 (Bankr. W.D. Pa. 2016).

5. Disguised Claims

If the claims pled by creditor are in fact derivative claims in disguise, they fall within the scope of the automatic stay. *See Picard v. Fairfield Greenwich Ltd.*, 762 F.3d 199, 208 (5th Cir. 2014); *Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81, 94 (2d Cir. 2014) citing *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 67 (2d Cir. 2008); *Fox v. Picard (In re Madoff)*, 848 F.Supp.2d 469, 482 (S.D.N.Y 2012), aff'd, 74 F.3d 81 (2d Cir. 2014); *In re Buccaneer Resources, LLC*, 912 F.3d 219 (5th Cir. 2019); citing *In re Dexterity Surgical, Inc.*, 365 B.R. 690, 702 (Bankr. S.D. Tex. 2007); *In re Emoral, Inc.*, 740 F.3d at 879.

But see Cumberland Oil Corp. v. Thropp, 791 F.2d 1037 (2d Cir.), cert. denied, 479 U.S. 950, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986), one complaint is not duplicative of another solely because it recites some or all of the same facts.

6. No Merits Review in the Fifth Circuit

The Fifth Circuit has held that the issue of whether the creditor's claims will ultimately prove to be legally or factually valid does not factor into the analysis of whether the claim belongs to the estate or to the creditor. *In re Buccaneer Resources, LLC*, 912 F.3d at 295, citing *Seven Seas*, 522 F.3d at 585.

7. Creditors' Derivative Standing Exception: Creditor's Committee

At least in the Chapter 11 context, the bankruptcy court may authorize a creditors' committee to exercise derivative standing if a debtor-in-possession unreasonably refuses to pursue a claim. *Artesanias Hacienda Real S.A. de C.V. v. North Mill Capital LLC*, 607 B.R. 189, 209 (E.D. Pa. 2019) citing *Official Comm. Of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 553 (3d Cir. 2003).

B. Bankruptcy Court Jurisdiction and Authority Permitting the Enjoining of Competing Creditor Claims

To the extent other related competing claims against third parties are not found to be estate property, a bankruptcy court may still enjoin such claims. Bankruptcy courts have jurisdiction over any suit that "might have any 'conceivable effect' on the bankruptcy estate." *Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.), Inc.*, 676 F.3d 45, 57 (2d Cir. 2012) quoting *Publicker Indus. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992), cert. denied 133 S.Ct. 2849 (2013).

Section 105(a) of the Bankruptcy Code empowers a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Note, however, that "a § 105 injunction must be consistent with the rest of the Bankruptcy Code ("[T]he powers granted by that statute must be exercised in a manner that is consistent with the Bankruptcy Code."). A § 105 injunction cannot alter another provision of the code." *Matter of Zale Corp.*, 62 F.3d 746, 759-760 (5th Cir. 1995).

"[T]hose cases in which courts have upheld 'related to' jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate." *Matter of Zale Corp.*, 62 F.3d 746, 752, 753-754 (5th Cir. 1995); *see also In re Munford, Inc.*, 97 F.3d 449, 453 (11th Cir. 1996); *Apps v. Morrison (In re Superior Homes & Invs.)*, 521 Fed.Appx. 895, 898 (11th Cir. 2013); *Romagosa v. Thomas (In re Van Diepen, P.A.)*, 236 Fed.Appx. 498, 503 (11th Cir. 2007)); *In re Quigley Co., Inc.*, 676 F.3d 45, 53, 57 (2d Cir. 2012); *Nev. Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 409 n. 20 (S.D.N.Y. 2007) ("Courts consistently have found that § 105 may be used to stay actions against non-debtors even where § 362 otherwise would not provide such relief, recognizing that section 105 grants broader authority than section 362."); *In re 1031 Tax Grp, LLC*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008).

1. Temporary Injunctions

A preliminary injunction is appropriate where the trustee and the third party plaintiffs "target the same limited pool of funds" such that allowing the third party suit to go forward would jeopardize the trustee's ability to recover from the common defendants, *Fox v. Picard (In re Madoff)*, 848 F.Supp.2d 469, 486 (S.D.N.Y 2012), aff'd, 74 F.3d 81 (2d Cir. 2014) quoting *Fisher v. Apostolou*, 155 F.3d 876 (7th Cir. 1998)); *In re Quigley Co., Inc.*, 676 F.3d 45, 53, 57 (2d Cir. 2012); *In re Dreier LLP*, 429 B.R. 112, 113 (Bankr. S.D.N.Y. 2010) ("Absent that power [to enjoin third party suits], the Trustee [ ]will be hampered in [his] ability to pursue and ultimately settle fraudulent transfer claims from a transferee fearful of paying twice for the same transfer - once on the Trustee's claim and a second time on the derivative claim."); *Caesars Entm't Operating Co. v. BOKF, N.A. (In re Caesars Entm't Operating Co.)*, 808 F.3d 1186, 1190-91 (7th Cir. 2015) (vacating order denying injunction of third-party guaranty claims against a non-debtor entity that was the target of a fraudulent conveyance suit by estate, holding that § 105(a) did not foreclose such a procedure, and remanding to the bankruptcy court for further proceedings to determine whether such relief would be appropriate); *Levey v. Sys. Div. (In re Teknek, LLC)*, 563 F.3d 639, 648-51 (7th Cir. 2009) (affirming district court's order vacating preliminary injunction entered by bankruptcy court, but citing favorably *Fisher v. Apostolou*, 155 F.3d 876 (7th Cir. 1998) where the court affirmed an injunction when, "even though the investor-creditors' fraud claims were personal and distinct from claims that could be brought by other creditors, they were so related to the bankruptcy proceeding that, if not temporarily enjoined, they would have derailed those proceedings' efforts to recover from the class of creditors as a whole."); *In re Lancelot Investors Fund, L.P.*, 408 B.R. 167, 174-175 (Bankr. N.D. Ill. 2009) (citing *Fisher*, and holding that, even if the claims that the debtor's investors asserted against the debtor's auditor were not general claims that belonged to the bankruptcy estate, there was sufficient basis, pursuant to § 105, to enjoin the investors' claims against the debtor's auditors until such time as the trustee's claims against the auditors "based on the same underlying transactions" had concluded.)

In *Stahl v. Picard (In re Bernard L. Madoff Investment Securities, LLC)*, the Second Circuit held that the preliminary injunction "was a proper exercise of the equitable power afforded to the bankruptcy court under § 105(a)" in order to stop the third-party actions from impeding the SIPA liquidation.

However, in the next two decisions, that court declined to enjoin third-party actions where the plaintiffs were asserting direct claims and against the non-debtor defendants; rather than claims derivative of those belonging to the estate. *See Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC (Picard v. Fairfield Greenwich Limited, et al)*, 490 B.R. 59 (S.D.N.Y.); *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC (Picard v. Schneiderman, et al)*, 491 B.R. 27 (S.D. N.Y. 2013).

2. Permanent Injunctions/Bar Orders

Bar orders are frequently negotiated as a line item in Trustee settlements with the Debtor's officers and directors. In *In re Bernard L. Madoff Inv. Securities LLC*, 740 F.3d 81, 87 (2d Cir. 2014), the Bankruptcy Court approved a settlement agreement containing the following permanent injunction:

> [A]ny BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees *that is duplicative or derivative of the claims brought by the Trustee*, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees . . ..

A permanent injunction is appropriate where it "limits the number of lawsuits that may be brought against [the debtor's] former directors and officers." *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *In re Dreier LLP*, 429 B.R. 112, 133 (Bankr. S.D.N.Y. 2010).

But see *In re Grove Instruments, Inc.*, 573 B.R. 307 (Bankr. D. Mass. 2017) where the bankruptcy court held that even assuming that bankruptcy court, as an essential part of settlement of Chapter 7 trustee's fraudulent transfer and breach of fiduciary duty claims against corporate debtor's officers and directors, had authority to enter bar order to prevent non-debtor third parties from pursuing claims against officers and directors, court would not exercise its authority to issue bar order. Note that Courts may also require party seeking injunction to satisfy the criteria for same under federal procedural law.

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