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CLLA Frank Kroger Memorial Educational Program: Who Killed the Company? Tips and Trends in Litigating Claims and Defenses

Honorable Marvin Isgur, USBC, S.D. Tex. (Moderator)

Panelists:

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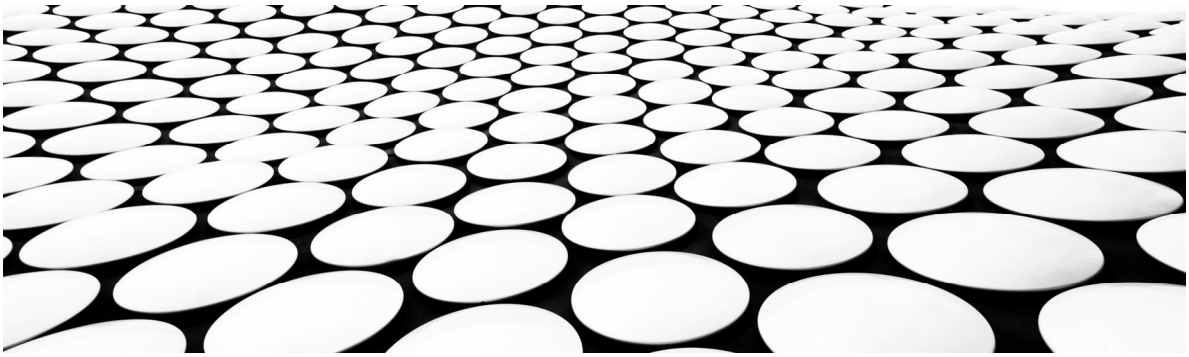
WHO KILLED THE COMPANY?

TIPS & TRENDS IN LITIGATING CLAIMS AND DEFENSES.



WHO KILLED THE COMPANY?

PROGRAM PARTICIPANTS

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PROGRAM OVERVIEW

- Litigation tips and trends when a company dissolves or transfers assets without paying its creditors.
  - What claims can be asserted by the bankruptcy estate as a plaintiff?
  - What defenses can be raised by defendants in those actions?
  - What are the practical and strategic considerations for both plaintiffs and defendants?
  - Panel will discuss D&O claims, professional liability, and issues such as the *in pari delicto* defense, forum *non conveniens*, insurance coverage, and the insured-v-insured exclusion.

PROGRAM AGENDA

PART I: INVESTIGATING THE CLAIMS

- Deadlines
- Plan Limitations
- Investigation Tools
- Inconsistencies
- Preliminary Solvency & Damages Considerations
- Venue Options

PART II: LITIGATING THE CLAIMS

- Director & Officer Claims
- Professional Claims
- Avoidance Actions
- Additional Considerations

INVESTIGATING THE CLAIMS

PART I

INVESTIGATING THE CLAIMS

DEADLINES & PLAN LIMITATIONS

INVESTIGATING THE CLAIMS

Deadlines & Plan Limitations

Determination of Key Deadlines

- DIP Order
- D&O Policies
  - Claims-made deadlines or notice (and relation-back to a pre-existing lawsuit)
  - Options to purchase tail coverage
  - May contain notice of circumstance provisions
    - Insured aware of a circumstance or wrongful act reasonably likely to give rise to a claim.
    - Provides notice of facts or circumstances that may later give rise to a the claim.
    - If claim made after policy period, notice relates back to the date of the circumstance notice.

INVESTIGATING THE CLAIMS

Deadlines & Plan Limitations

Determination of Key Deadlines

- 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.

INVESTIGATING THE CLAIMS

Plan Limitations

Review Disclosure Statement and Plan

- Pre-petition events leading up to filing
- Preservation of claims
  - Courts are divided on the degree of specificity:
    - Specific and unequivocal language
    - Broad reservation of the right to pursue claims is sufficient
- Exculpation and third-party release provisions
- Gatekeeper language
  - *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. Sept. 7, 2022)
    - Provisions of confirmed plan are binding (11 U.S.C. § 1141(a))

INVESTIGATING THE CLAIMS

INVESTIGATION TOOLS

INVESTIGATION TOOLS

INFORMATION SOURCES & TARGETS

- Debtor's Schedules and SOFA
- Debtor's Documents and Emails
- Debtor's Former Employees
- Key Employees and Personnel
- Client-file of Former Counsel
- SEC Filings (For Public Companies)
- File-access Request to SEC

DISCOVERY METHODS

- Informal Investigation & Discovery
  - (e.g., official and ad hoc committees)
- Discovery under Bankruptcy Rule 2004
- Turnover under Section 542 and 543
- Discovery under Section 1782
- Discovery under Chapter 15
- SEC Filings (For Public Companies)
- File-access Request to SEC

INVESTIGATING THE CLAIMS

Investigation Tools

Turnover Provisions:

- Section 542 of the Bankruptcy Code addresses a noncustodian third party's obligations regarding property of the estate
  - Entities in custody or control of property of the estate must deliver to the debtor-in-possession or trustee, and account for, this property or the value of this property
  - Section 542(e) of the Bankruptcy Code requires the turnover and disclosure of records relating to the debtor's property and financial affairs
- Section 543 of the Bankruptcy Code applies when property of the estate is held by a custodian, such as a receiver, trustee, or sheriff
  - Custodian must:
    - Not take any actions regarding the property except under limited circumstances
    - Deliver to the debtor or bankruptcy trustee the property and any proceeds or profits from the property
    - Provide an accounting of the property and its proceeds

INVESTIGATION TOOLS

Investigation Tools

Appointment of Examiner

- Investigation may require appointment of an examiner
  - Includes investigation of alleged fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management
  - Primary focus is to investigate and report to the court, not to take over the management of the debtor
  - Some courts have expanded the examiner's responsibilities in Bankruptcy Code Section 1106(b).
    - *E.g., Schuster v. Dragone*, 266 B.R. 268 (D. Conn. 2001)

INVESTIGATION TOOLS

SECTION 1782 DISCOVERY

- 28 U.S.C. § 1782 authorizes U.S. federal courts to order discovery for use in foreign proceedings.
  - Allows a party in a foreign proceeding to petition a federal court in the U.S. for discovery located in the U.S. court's district.
  - Foreign litigants granted latitude in seeking and obtaining information hosted locally.

INVESTIGATION TOOLS

- 28 U.S.C. § 1782 authorizes U.S. federal courts to order discovery for use in foreign proceedings or contemplated to be filed before foreign or international tribunal.
  - "The district court of the district in which **a person resides or is found** may order him to give his **testimony or statement or to produce a document or other thing** for **use in a proceeding in a foreign or international tribunal**, including criminal investigations conducted before formal accusation.
  - The order may be made pursuant to a letter rogatory issued, or request made, by a **foreign or international** tribunal or upon the application of **any interested person** and may direct the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court." *See* 28 U.S.C. § 1782.
  - Courts have found that 28 U.S.C. § 1782 applies extraterritorially and grants the power to order the production of documents located abroad, as long as the evidence is compelled in accordance with the Federal Rules of Civil Procedure. 28 U.S.C. § 1782 ("To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure").
    - *Sergeeva v. Tripleton Int'l Ltd.*, 2016 WL 4435616 (11th Cir. Aug. 23, 2016) (holding that court may order the production of documents regardless of their physical location).

INVESTIGATING THE CLAIMS

Investigation Tools

- Mandatory Requirements:
  - The request must be made by a **foreign or international tribunal**, or **by any interested person**;
  - The request must **seek evidence**, whether it be the testimony or statement of a person or the production of a document or other thing;
  - The evidence must be **for use** in a **proceeding in a foreign or international tribunal**; and
  - The person from whom discovery is sought **must reside or be found in the district of the district court ruling on the application for assistance**.
  - Seminal case: *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

INVESTIGATION TOOLS

- Evidence must be for use in a proceeding in a foreign or international tribunal
  - U.S. federal courts traditionally recognize foreign bankruptcy courts as tribunals
    - *See, e.g., In re: Application of Joint Stock Co. Raiffeinsenbank*, 2016 WL 6474224, at *3 (N.D. Cal. Nov. 2, 2016) (" '[T]he discovery is for use in a proceeding before a foreign tribunal' because RFB seeks to use the discovery gained from Zubarev in the Russian Proceedings before the Arbitrazh Courts in Russia.").
  - Whether the foreign court will admit the evidence is not relevant.
    - *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012)
  - Once documents are properly obtained under section 1782, documents may be used in other proceedings, including in the United States.
    - *Glock v. Glock Inc.,* 797 F.3d 1002 (11th Cir. 2015)

INVESTIGATING THE CLAIMS

Investigation Tools

Circumstances for Section 1782

- U.S. Corporations or individuals have useful or necessary information to a case (either ongoing or under preparation) in a foreign court or tribunal
- Evidence sought includes documentary evidence (i.e. contracts, financial records, ESI, and correspondence) or testimonial evidence (i.e. depositions and interrogatories)
- Difficult to use a foreign court system to obtain evidence located in the United States.

INVESTIGATION TOOLS

CHAPTER 15 OF THE BANKRUPTCY CODE

- If there is an existing insolvency proceeding that may qualify for recognition under the UNCITRAL Model Law.
  - Foreign Main Proceeding
  - Foreign Non Main Proceeding

INVESTIGATION TOOLS

Benefits of Recognition

- "Automatic stay" - Stay of execution on debtor's assets or on actions against debtor's assets, rights, obligations, or liabilities. 11 U.S.C. §1519 (making 11 U.S.C § 362 applicable).
- Entrust administration of assets to foreign representative. 11 U.S.C. § 1521(a)(5).
- Examination of witnesses and taking evidence on the debtor's assets, affairs, rights, obligations and liabilities. 11 U.S.C § 1521(a)(4).
- Adversary proceedings asserting US law claims against third parties.
- Fraudulent transfer and clawback claims under foreign law. *In re Condor Ins. Ltd*., 601 F.3d 319 (5th Cir. 2010).
- Specialized courts and judges.

INVESTIGATION TOOLS

INCONSISTENCIES

INVESTIGATION TOOLS

Inconsistencies

- Does the policy cover D&Os directly or indirectly, or the entity itself?
- Is the policy the property of the estate or stayed from payouts?
- Does an exclusion (capacity, insured-vs.-insured, etc.) apply to the insurance claim?
- Can a deficit in coverage be overcome in another way?

INVESTIGATION TOOLS

- What are the policy exclusions?
- How broad is the language?
  - *MHS Capital LLC v. Goggin*, C.A. No. 2017-0449-SG (Del. Ch. May. 10, 2018)
  - *Indian Harbor Ins. Co. v. Zucker for Liquidation Tr. of Capitol Bancorp Ltd.*, 860 F.3d 373 (6th Cir. 2017)
  - *The Unencumbered Assets Trust v. JP Morgan Chase Bank (In re Nat'l Century Fin. Enterprises, Inc., Inv. Litig.)*, 604 F. Supp. 2d 1128 (S.D. Ohio 2009)
- D&O claims may trigger an exclusion
- D&O claims may establish an *in pari delicto* and/or causation defense
- Fraudulent transfer claims may establish an in pari delicto defense for the former professionals and other third parties.

Types of D&O Insurance Policies	
Policy	Scope of Coverage
Side A	Insured Person Coverage: Insures individual directors and officers against losses that the company is not legally or financially able to indemnify. This coverage protects the personal assets of directors and officers in the event the company does not pay defense costs or fund indemnification
Side B	Indemnification Coverage: Reimburses the company if it advances legal fees to officers or directors or indemnifies them against losses.
Side C	*Entity Coverage*: Insurance directly to the insured company for certain types of claims. • In D&O policies issued to public companies, Coverage C is almost always limited insurance for "Securities Claims" • In D&O policies issued to private companies, the entity coverage often applies broadly to a wide range of claims against the company arising from wrongful acts by the insured company or its officers or directors.

INVESTIGATION TOOLS

Inconsistencies

- What are the policy exclusions?
- How broad is the language?
  - *MHS Capital LLC v. Goggin*, C.A. No. 2017-0449-SG (Del. Ch. May. 10, 2018)
  - *Indian Harbor Ins. Co. v. Zucker for Liquidation Tr. of Capitol Bancorp Ltd.*, 860 F.3d 373 (6th Cir. 2017)
- D&O claims may trigger an exclusion in the D&O policy
- Fraudulent transfer claims may establish an *in pari delicto* defense for the former professionals and other third parties.

INVESTIGATION TOOLS

Inconsistencies

Relevant Exclusions under D&O Policies

- Insured vs. insured
  - Precludes coverage for claims by companies against their directors and officers
- Conduct Exclusions
  - Intended to preclude coverage for improper personal profits or criminal/fraudulent acts

INVESTIGATION TOOLS

Inconsistencies

Relevant Exclusions under D&O Policies

- Insured v. Insured
  - Intended to prevent collusion and claims by companies against their directors and officers for imprudent business decisions.
  - Check to see if action by trustee is exception to the exclusion
    - Courts split on whether, in the absence of language in the policy, the exclusion applies to claims by a debtor-in- possession
    - Distinction between claims brought by Chapter 7 or 11 trustees vs. debtor in possession:
      - *In re Buckeye Countrymark, Inc.*, 251 B.R. 835, 840-41 (Bankr. S.D. Ohio 2000) (exclusion does not apply to claims brought by Chapter 7 trustee)
      - *In re C.M. Meiers Company, Inc.*, 527 B.R. 388, 404 (Bankr. C.D. Cal. 2015) (exclusion does not apply to claims brought by Chapter 11 trustee)
      - *Biltmore Associates, LLC v. Twin City Fire Insurance Co.*, 572 F.3d 663, 671 (9th Cir. 2009) (holding that a debtor-in-possession constitutes the same entity as the pre-bankruptcy entity)

INVESTIGATION TOOLS

Inconsistencies

Relevant Exclusions under D&O Policies

- Bankruptcy Exclusion
  - Wrongful action led to bankruptcy filing
  - *Ipso facto* clause?

INVESTIGATION TOOLS

Inconsistencies

Covered vs. Non-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
  - Allocation issues arise from settlement of covered and non-covered claims

INVESTIGATION TOOLS

D&O Policies & Property of the Estate

- Policy language controls whether proceeds of D&O policy are property of estate.
- Courts are in disagreement over whether the proceeds of a liability insurance policy are property of the estate
  - *In re Downey Fin. Corp.*, 428 B.R. 595, 603 (Bankr. D. Del. 2010).

Types of D&O Insurance Policies	
Policy	Property of the Estate
Direct coverage to the Debtor	Yes, proceeds are property of the estate
Direct coverage to the D&Os	No, not property of the estate
Coverage for Debtor & D&O	Yes, if depletion of proceeds has adverse effect on the estate
Indemnification Coverage for Debtor	No, if indemnification has not occurred, is speculative, or hypothetical, the proceeds are not property of the estate

INVESTIGATION TOOLS

PRELIMINARY SOLVENCY & DAMAGES CONSIDERATIONS

INVESTIGATION TOOLS

Preliminary Considerations for Insolvency & Damages

- Applicable standard for insolvency
  - May be different under the law of the debtor's state of incorporation for a fiduciary duty claim
  - State of incorporation of under internal affairs doctrine
- Date of insolvency
  - Relevant to fiduciary duty and fraudulent transfer claims
  - *Off. Comm. of Unsecured Creditors v. Meltzer*, 589 B.R. 6 (D. Me. 2018)
  - *Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155 (Del. Ch. 2014)
- Events or transactions particularly damaging to the debtor
- Damages sustained by the debtor vs. creditors or equity holders

INVESTIGATION TOOLS

INSOLVENCY DEFINED

- 11 U.S.C. § 101(32)(A) defines insolvent as the "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation[.]
- Excludes:
  - Property transferred, concealed or removed with intent to hinder, delay or defraud creditors
  - Certain exempt property under section 522
- Includes contingent assets and liabilities

PRELIMINARY CONSIDERATIONS FOR INSOLVENCY & DAMAGES

METHOD	KEY INPUTS
Comparable Companies Analysis	• Reference companies • Reference financial statistics (eg. EBITDA)
Precedent Transactions Analysis	• Reference transactions • Reference financial statistics (eg. EBITDA)
Discounted Cash Flow Analysis	• Cash flow forecast • WACC (weighted average cost of capital)

INVESTIGATING THE CLAIMS

Preliminary Solvency & Damages Considerations

Date of Insolvency

- *Xonics* formula
  - Multiply the contingent liability and probability of success to calculate the expected value.
  - (L) (P) = (EV)
  - (Face Amount of Liability)(Probability Discount) = Expected Value
  - *In re Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988)

INVESTIGATING THE CLAIMS

Preliminary Solvency & Damages Considerations

Valuation of Contingent Liabilities

- Insolvency required on date of transfer.
  - *In re HH Liquidation, LLC, (Off. Comm. of Unsecured Creditors v. Comvest Group Holdings, LLC)*, 590 B.R. 211 (Bankr. D. Del. 2018)
- Proximately before or immediately after the time of the transfer.
  - *In re HDD Rotary Sales, LLC (Ogle v. JT Miller, Inc.),* 499 B.R. 542 (Bankr. S.D. Tex. 2013)

INVESTIGATING THE CLAIMS

Preliminary Solvency & Damages Considerations

Deepening Insolvency

- New York and Delaware
  - Reject deepening insolvency as an independent cause of action.
  - Accept deepening insolvency as a theory of damages.
    - *Kittay v. Atl. Bank of NY (In re Global Serv. Grp., LLC)*, 316 B.R. 451, 458 (Bankr. S.D.N.Y. 2004)
    - *Miller v. McCown De Leeuw & Co., Inc. (In re Brown Schs.),* 386 B.R. 37, 46-49 (Bankr. D. Del. 2008)

INVESTIGATING THE CLAIM

Forum & Choice of Law

Choice of Law

- Where the trustee can file suit
  - Jurisdictional and venue considerations
- Where the trustee should file suit
  - Statute-of-limitations and choice-of-law considerations
- D&O policies typically do not contain choice of law provisions.
- Choice of law rules will be governed by the forum state where the action is filed.
  - Courts have looked to the following tests:
    - Place of contract
    - Principal location of the risk
    - Most "significant relationship" test
    - Governmental interest

LITGATING THE CLAIMS

PART II

LITIGATING THE CLAIMS

D&O CLAIMS

LITIGATING THE CLAIMS

D&O Claims

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

LITIGATING THE CLAIMS

D&O Claims

Common Defenses

- Two types of defenses:
  - Defenses as to liability
  - Defenses as to the amount of damages
- Liability defenses:
  - Business judgment rule and entire fairness standard
  - Exculpation
  - Statute of limitations
  - Lack of standing
- Damages defenses:
  - Claims against estate do not exceed policy limits or damages
  - Deepening insolvency is a not a legally cognizable claim

LITIGATING THE CLAIMS

D&O Claims

Business Judgment Rule (Duty of Care)

- Standard of Review
  - Creates a presumption in favor of director-approved transactions
  - Decisions will not be disturbed if they can be attributed to any rational business purpose
  - Directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them
  - 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." *Cede & Co. v. Technicolor Inc*., 634 A.2d 345, 367 (Del. 1993

LITIGATING THE CLAIMS

D&O Claims

Business Judgment Rule

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  - Directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them

LITIGATING THE CLAIMS

D&O Claims

Business Judgment Rule

- Can be rebutted by showing that the directors have breached any of their fiduciary duties.
  - Burden then shifts to the directors to prove that the transaction was "entirely fair"
    - Entire fairness scrutiny is among the highest levels of scrutiny
    - Burden on directors to show (i) fair price and (ii) fair process
    - Outcome determinative

LITIGATING THE CLAIMS

D&O Claims

Claims Do Not Exceed Policy Limits or Damages

- Damages must be limited to the amount of claims that have been filed against the bankruptcy estate
- *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)
- Example:
  - Insurance policy has $40 million of coverage
  - Claims against the estate totals $20 million
  - Argue that the trustee cannot recover more than $20 million

LITIGATING THE CLAIMS

D&O Claims

Exculpation

- Section 102(b)(7) allows a corporation's certificate of incorporation to include a provision exculpating Section 3114(b) officers (including the president, CEO, and CFO) for a breach of the duty of care.

LITIGATING THE CLAIMS

D&O Claims

Statute of Limitations

- State statutes of limitations for breach of fiduciary duty claims range between 3-6 years
  - Petition tolls the statute of limitations for a period of two years.
  - 11 U.S.C. § 108 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.
    - Provision will not toll the claims-made deadline under D&O Policies.

LITIGATING THE CLAIMS

D&O Claims

Deepening Insolvency

- Damages model vs. legally cognizable claim
  - Most jurisdictions no longer recognize a claim for deepening insolvency
  - Some jurisdictions hold that deepening insolvency is a valid theory of damages
    - *In re Midway Games, Inc.*, 428 B.R. 303, 315-16 (Bankr. D. Del. 2010)
    - *In re The Brown Schools*, 386 B.R. 37, 48 (Bankr. D. Del. 2008)

LITIGATING THE CLAIMS

D&O Issues

Insurances Issues

- Claims-Made Deadline
- Navigating Policy Exclusions
- Making Policy Limits Demand
- Dealing with Coverage Denials through Consent Judgments and Claim Assignments
- Dealing with Competing Claims to the Insurance Policies, such as putative class.

LITIGATING THE CLAIMS

PROFESSIONAL MALPRACTICE

LITIGATING THE CLAIMS

Professional Claims

Professional Engagement Letters

- Effect on potential claims
  - Choice-of-law clauses
  - Arbitration and forum-selection clauses
  - Limitation-of-liability clauses

LITIGATING THE CLAIMS

Professional Claims

The Doctrine of *In Pari Delicto*

- Equitable doctrine that prevents a plaintiff who has participated in wrongdoing from recovering damages from the wrongdoing.
- Bars legal remedies when:
  - Plaintiff is at least as culpable as the defendant
  - Barring the suit does not conflict with the purpose of the underlying law or otherwise contravene the public interest
- Most federal courts view the doctrine as an affirmative defense
- Second Circuit views the *in pari delicto* doctrine as an element of a trustee's standing
  - *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991)

LITIGATING THE CLAIMS

Professional Claims

Scope of *In Pari Delicto* Doctrine

- Bars claims against professionals or other third parties
  - Outside counsel
  - Auditors or other accountants
  - Financial advisors
  - Underwriters
- Insiders, fiduciaries, and defendants who exercise control over the company typically cannot use *in pari delicto* as a defense

LITIGATING THE CLAIMS

Professional Claims

Exceptions to the *In Pari Delicto* Doctrine

- Adverse interest exception
- Innocent decision maker
- *Wagoner* rule
  - *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991)
  - Imputed debtor's bad acts to trustee bringing actions against third parties, and applied *in pari delicto* defense to limit standing of debtor (or trustee) to seek recovery from third parties

LITIGATING THE CLAIMS

Professional Claims

Public Policy Concerns

- *In pari delico* is an equitable defense
  - Calls for consideration of public policy concerns
    - Courts may disallow the *in pari delicto* defense if equity requires
      - *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985)
      - *Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1155 (11th Cir. 2006)
      - *Anderson v. Morgan Keegan & Co., Inc. (In re Infinity Business Group, Inc.)*, 31 F.4th 294 (4th Cir. 2022)
      - *Stewart v. Wilmington Trust SP Servs., Inc.*, 126 A.3d 271 (Del. Ch. 2015)
      - *Stewart v. Wilmington Trust SP Servs., Inc.*, 126 A.3d 1115 (Del. 2015)
      - *Hill v. Day (In re Today's Destiny, Inc.)*, 388 B.R. 737 (Bankr. S.D. Tex. 2008)

LITIGATING THE CLAIMS

Professional Malpractice

Plaintiff's Subject to the *In Pari Delicto* Doctrine

- Most federal circuit courts have held that *in pari delicto* can be asserted against a trustee or official committee
  - Successor to the debtor's interest in the estate under section 541
- Trustees in Securities Investor Protection Act (SIPA) liquidations referred to the bankruptcy court are subject to the *in pari delicto* defense.
- SIPA provides that the trustee is vested with the same powers as a trustee under the Bankruptcy Code (15 U.S.C. § 78fff-1(a))

LITIGATING THE CLAIMS

Professional Malpractice

Plaintiff's Not Subject to the *In Pari Delicto* Doctrine

- *In pari delicto* generally does not apply to:
  - Trustees or official committees bringing avoidance actions under section 544(a)
    - Trustees assert avoidance actions on behalf of creditors, not the debtor
    - *In re Skyway Communications Holding Corp*., 389 B.R. 801 (Bankr. M.D. Fla. 2008).
  - Trustees that take an unconditional assignment of creditors' causes of action
  - Receivers
    - Corporation is cleansed by the appointment.
    - *Fed. Trade Comm'n v. Life Mgmt. Servs. of Orange Cnty., LLC*, 2020 WL 13094593, at *7 (M.D. Fla. Nov. 30, 2020).

LITIGATING THE CLAIMS

Professional Malpractice

Assignment for Benefit Creditors

- Florida has eliminated the defense against a claim brought by an assignee or by his or her initial assignee
- Fla. Stat. § 727.108(1)(b): "In an action in any court by the assignee or the first immediate transferee of the assignee, other than an affiliate or insider of the assignor, against a defendant to assert a claim or chose in action of the estate, the claim is not subject to, and any remedy may not be limited by, a defense based on the assignor's acquiescence, cooperation, or participation in the wrongful act by the defendant which forms the basis of the claim or chose in action."

LITIGATING THE CLAIMS

FRAUDULENT TRANSFERS

LITIGATING THE CLAIMS

Fraudulent Transfers

- 11 U.S.C. §§ 544, 548, 549, and 550
- Under these provisions, estate representatives possess broad powers to avoid and unwind transactions to recover value for the estate's creditors.
  - Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act
  - Uniform Voidable Transactions Act
- As the volume of cross-border transactions increases with globalization, the issue whether these provisions apply to such transactions becomes increasingly important

LITIGATING THE CLAIMS

Fraudulent Transfers in Chapter 15

- 11 U.S.C. § 1521(a)(7)
  - Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including— (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).
  - U.S. Bankruptcy Courts have jurisdiction to hear fraudulent transfer actions under Chapter 15 if based on applicable foreign law
    - *In re Condor Ins. Ltd.*, 601 F.3d 319 (5th Cir. 2010)
    - *But see Laspro Consultores LTDA v. Alinia Corp. (In re Massa Falida do Banco Cruzeiro do Sul S.A.)*, 567 B.R. 212, 221-25 (Bankr. S.D. Fla. 2017) (allowing foreign representative to assert avoidance actions under state and foreign law)

LITIGATING THE CLAIMS

Fraudulent Transfer Claims

Plenary Proceedings

- 11 U.S.C. § 1520(c) allows a foreign representative to commence a plenary Chapter 11 or Chapter 7 case
  - Allows foreign representative to pursue avoidance actions for the recovery of U.S. assets outside of the jurisdiction and control of the foreign main proceeding.
  - 11 U.S.C. § 1523(a) states that upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a)

LITIGATING THE CLAIMS

Fraudulent Transfer Claims

Golden Creditor Rule

- 11 U.S.C. § 544(b)(1) vests a trustee or debtor in possession with avoidance powers arising under applicable law
  - Available to any creditor holding an allowable claim
    - Provided that the trustee can demonstrate the existence of such a creditor
    - Often referred to as the "golden creditor" or the "triggering creditor"
  - 26 U.S.C. § 6502 authorizes the Internal Revenue Service to collect a tax assessment within ***ten years*** of the assessment in question.
  - Majority of courts hold that the Internal Revenue Service may serve as the golden creditor.
    - *Compare Gordon v. Webster (In re Webster)*, 629 B.R. 654 (Bankr. N.D. Ga. 2021) (holding that the Trustee may use the Internal Revenue Service as a Golden Creditor, dismissing the complaint, without prejudice to amend)
    - *With In re Republic Windows & Doors*, 2011 WL 5975256, *11 (Bankr. N.D. Ill. Oct. 17, 2011) (a chapter 7 trustee could not take advantage of the IRC's 10-year statute of limitations because the IRS had not filed a proof of claim in the case);

LITIGATING THE CLAIMS

Fraudulent Transfer Claims

Statute of Limitations

- 11 U.S.C. § 546(a)
  - The action must be commenced no later than two years after the order for relief (or one year after a trustee is elected or appointed if such election or appointment occurs before the expiration of such two-year period) and before the bankruptcy case is closed.

Leyza F. Blanco

- Leyza F. Blanco, a shareholder at Sequor Law, has devoted her practice to a wide range of litigation and insolvency matters, with a focus on asset recovery and cross-border bankruptcy and commercial litigation matters. Leyza has also served in several roles including examiner, receiver and special master in federal and state court proceedings and has served as a neutral arbiter in an arbitration proceeding.
- Leyza received her Juris Doctor degree magna cum laude from the University of Miami Law School and is Board Certified in International Litigation and Arbitration. She is a Fellow of the American College of Bankruptcy and presently serves as immediate past chair of the International Women's Insolvency and Restructuring Confederation (IWIRC) and the Florida Bar's Business Law Section as well as Co-Chair for the American Bankruptcy Institute's Asset Sales Committee. Leyza is also a past-president of the Bankruptcy Bar of the Southern District of Florida. Leyza has been recognized in Chambers and Partners, U.S.A. with the highest ranking of Band 1.

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BIOGRAPHY

Marc E. Hirschfield, recognized by Best Lawyers for Bankruptcy Litigation for the fifth consecutive year and by New York SuperLawyers since 2011, focuses his practice on bankruptcy, business restructuring, creditors' rights, litigation, and debt finance. With 30 years of experience as an attorney, Marc regularly represents parties in bankruptcy proceedings and related litigation throughout the country. Marc is also a court-certified mediator and is appointed to mediation panels formed by the United States Bankruptcy Courts for the District of Delaware and for the Southern and Eastern Districts of New York. He is a member of the American Bankruptcy Institute and a member of the Turnaround Management Association. Marc serves on the Board of Directors of the Turnaround Management Association's New York Chapter.

Marc is also an accomplished debt finance attorney where he regularly represents lenders and borrowers in a variety of debt finance transactions including secured, unsecured, unitranche, first lien/second lien and senior/mezzanine structures, in the forms of term loans, revolving facilities and asset-backed loan facilities.

Marc serves as pro bono general counsel to and serves as Captain of the Chappaqua Volunteer Ambulance Corps (CVAC), as well as being CVAC's First Lieutenant and member of its Board of Directors. He is a New York State Certified Emergency Medical Technician and is included in the National Registry of Emergency Medical Technicians. Marc is a member of the Ski Patrol at Ski Butternut in Massachusetts. He teaches people to become ski patrollers and Emergency medical technicians (EMTs).

HONORS

Best Lawyers in America, Litigation – Bankruptcy, 2018-2023

Chambers USA, Bankruptcy/ Restructuring, 2010 -2014

New York Super Lawyers, 2011-Present

EDUCATION

J.D., *magna cum laude*, State University of New York at Buffalo School of Law, 1992

- *Buffalo Law Review*, Editor
- Moot Court Board, Member

B.A., Phi Beta Kappa, Outstanding Academic Achievement Honors, State University of New York at Binghamton, 1989

ADMISSIONS

New York
U.S. District Court for the Eastern District of New York
U.S. District Court for the Southern District of New York
U.S. District Court for the Western District of New York Second Circuit Court of Appeals
Connecticut

Marvin Isgur
United States Bankruptcy Court for the Southern District of Texas

Marvin Isgur has been a United States Bankruptcy Judge since February 1, 2004. He was appointed to a second term as a Bankruptcy Judge, which began on February 1, 2018. Chief Justice John Roberts, Jr. has appointed Judge Isgur to two terms as the sole bankruptcy judge on the Judicial Conference Committee on Court Administration and Case Management. Judge Isgur currently presides over more than 3,000 bankruptcy cases. He has been instrumental in reforming consumer bankruptcy practices and rules both in the Southern District of Texas and nationally.

For several years, Judge Isgur was one of two judges who was assigned complex bankruptcy cases in the Southern District of Texas. In that capacity, he presided over multiple bankruptcy cases with liabilities exceeding one billion dollars. Effective January 1, 2023, Judge Isgur chose to stop accepting new complex cases. He has retained all of his existing complex cases and is being assigned a full docket of all other cases.

In 1974, Judge Isgur received his bachelor's degree from the University of Houston. In 1978 he received his MBA, with honors, from Stanford University. After earning his MBA, Judge Isgur served as an executive with a large real estate development company in Houston. In 1987, Judge Isgur returned to the University of Houston to attend law school. Judge Isgur was awarded his law degree, with high honors, in 1990 and began representing debtors and trustees in chapter 11 and 7 bankruptcy cases until his appointment as a Bankruptcy Judge. Judge Isgur is also one of a handful of attorneys in the nation with experience representing various parties in chapter 9 bankruptcy cases.

Judge Isgur has written over 500 memorandum opinions. He was one of the first judges to issue opinions interpreting the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. Judge Isgur was a founding member and served on the board of directors for the Houston Urban Debate League, a non-profit organization that works in partnership with local schools to bring policy debate to high school students. He is a frequent speaker at continuing legal education programs.

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Eric D. Madden | Partner

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Education:
University of Kansas School of Law (J.D., 1999)
Order of the Coif
Editor-in-Chief, Kansas Law Review

University of Kansas (B.A., with honors, 1996)
Phi Beta Kappa
Honors Thesis

Admitted to Practice:

- ❑ Texas
- ❑ New York
- ❑ U.S. Court of Appeals, 3rd Circuit
- ❑ U.S. Court of Appeals, 5th Circuit
- ❑ U.S. Court of Appeals, 10th Circuit
- ❑ U.S. Supreme Court

Areas of Practice:

- ❑ Complex Commercial Litigation
- ❑ Financial Litigation
- ❑ Insolvency Litigation
- ❑ Professional Liability Litigation

Eric Madden is a partner in the Dallas office of Reid Collins & Tsai LLP. His practice is focused on complex business and insolvency-related litigation. He has represented trustees, receivers, creditor and bondholder committees, and defrauded investors in a number of major cases throughout the country. These cases often involve Ponzi schemes, financial fraud, and/or significant fraudulent transfers.

His work has earned the recognition and respect of his peers, including:

- ❑ Named to the Lawdragon 500 Leading Lawyers in America (2019-2023);
- ❑ Ranked as a leading lawyer in Chambers USA (2019-2023);
- ❑ Listed in The Best Lawyers in America (2016-2023);
- ❑ Named a “Future Litigation Star” by Benchmark Litigation (2019-2023);
- ❑ Appointed as a fellow in Litigation Counsel of America (2022-2023);
- ❑ Named a “Super Lawyer” by Thomson Reuters (2014-2023); and
- ❑ Earned an AV Preeminent rating by Martindale-Hubbell (2012-2023).

Eric was selected as the 2023 “Lawyer of the Year” for litigation-bankruptcy work in the Dallas/Fort Worth area by Best Lawyers in America.

He has served in leadership positions within several organizations, including as:

- ❑ Member of ABI Board of Directors;
- ❑ Programming Co-Chair of ABA Bankruptcy & Insolvency Litigation Committee;
- ❑ Co-Chair of ABI Commercial Fraud Committee; and
- ❑ Co-Chair of ABI Bankruptcy Litigation Committee.

Eric also frequently serves as an author and speaker regarding corporate governance, legal ethics, and trial strategy.