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*649 WAIVERS AND THEIR CONSEQUENCES: AN ANALYSIS OF THE LIMITATION OF FIDUCIARY DUTIES IN DELAWARE LLC BANKRUPTCIES

I. INTRODUCTION

Many bankruptcy professionals may not be aware that a limited liability company ("LLC") formed under Delaware law has the flexibility to eliminate all fiduciary duties owed by its management and members in its operating agreement. Recognizing this flexibility, the Delaware Supreme Court has held that well-established corporate fiduciary law may not always apply to LLCs. This article provides an overview of the structure of these business entities and the fiduciary duties owed in both contexts. From there, the article discusses in detail whether creditor claims for breach of those fiduciary duties may be pursued in bankruptcy cases.

II. LLCS AND CORPORATIONS--SIMILARITIES AND DIFFERENCES

Delaware corporations and LLCs are both commonly-used business entities that offer their equity holders various tax advantages and protections from personal liability. Corporations existed in some form in Delaware dating back to the late eighteenth century when Delaware ratified its first constitution, allowing Delaware corporate law to be shaped by centuries' worth of common law.[1] In contrast, LLCs are a relative newcomer in the business entity space, arriving on the scene in 1992 as a product of statutory creation.[2]

*650 A. STRUCTURE

A Delaware corporation must implement and adhere to numerous corporate formalities. These requirements are set forth in the General Corporation Law of the State of Delaware (the "DGCL").[3] Its structure generally features shareholders, a board of directors, and officers. The rights, duties and restrictions of these parties are governed by the corporation's certificate of incorporation and bylaws. Shareholders acquire ownership interests by purchasing shares of stock in the corporation.[4] Shareholders can be natural persons or entities. While they may provide direction in certain areas of governance and decision-making, such as electing directors to the board, shareholders typically do not have a say in the day-to-day operation of the corporation. The board governs the corporation's affairs and guides the officers who are responsible for daily management of the business. Unlike shareholders, directors and officers must be natural persons.[5]

The rights, duties and restrictions of members, managers and other related parties in an LLC are governed by a certificate of formation and an operating agreement, which provide significant flexibility in how the LLC governs its affairs. An LLC can

have a single member that also manages the company. It can also have two or more members, as well as a non-member manager. It can have members who do not hold any equity interest in the company (unlike a shareholder of the corporation).[6] An LLC can also have one or more members or managers that are entities, rather than natural persons. Despite this freedom to adopt a variety of structures, LLCs may choose to adopt corporate (or corporate-style) formalities. For example, an LLC can opt to have officers whose duties are derived from their corporate counterparts or have a board of managers that resembles a corporate board of directors.

Equity in an LLC is comprised of limited liability company interests, which are similar to shares in a corporation, although typically far less numerous and not publicly traded. Equity holders in LLCs are often referred to as members, but they may go by other titles as set forth in the operating agreement. Unlike a corporation, an LLC may be controlled (and managed) by the same entity that has ownership interest in the company. In other words, an LLC may have a sole member who holds all of the company's limited liability ***651** company interests (similar to the sole shareholder of a corporation) and also has the power to manage the company (similar to a corporation's board of directors).

B. FIDUCIARY DUTIES

Largely due to the differences discussed above, as well as the relatively recent creation of LLCs as a business entity structure, the development of Delaware fiduciary duty law in the LLC context has evolved differently from those duties under corporate law, where the corporate fiduciary duty law is significantly more developed. Indeed, over the years, the concept of fiduciary duties in corporate law has become almost mainstream. Even in non-legal conversations, there is a general awareness of the two fiduciary duties: the duty of loyalty and the duty of care. This section provides a preliminary overview of fiduciary duties for both business models under Delaware law.

1. *General Corporate Fiduciary Duties Owed to Equity Holders*

It is "well established" that the directors of Delaware corporations owe fiduciary duties to the corporation and its shareholders.[7] A fiduciary duty analysis typically considers the duties of loyalty and care.[8] The duty of loyalty requires directors to act in the best interests of the corporation and its stockholders and prohibits self-dealing or self-interested transactions.[9] Generally speaking, the duty of care requires directors to remain reasonably informed in their oversight of the corporation.[10] This duty requires a range of behavior, including involvement in the decision-making process by regularly attending board meetings, engaging experts to advise on transactions, and reading and evaluating reports on the company's financials and business operations.[11] The duty to act in good faith is central to many fiduciary duty analyses.[12] In *Stone v. Ritter*,[13] the Delaware Supreme Court clarified that "although good faith may be described colloquially as part of a 'triad' of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on ***652** the same footing as the duties of care and loyalty."[14]

A relatively recent trend has been to allow a corporation, in its certificate of incorporation, to waive a director's personal liability for breaching a key component of the duty of loyalty as it relates to corporate opportunities.[15] Since 2000, a Delaware corporation's certificate of incorporation and bylaws may expressly allow directors to engage in other business transactions or activities that are competitive with the corporation's business and to deprive the corporation of a corporate opportunity.[16] Similarly, a Delaware corporation's organizational documents may also include exculpatory clauses that shield a director from liability to the corporation and its shareholders for breaches of certain fiduciary duties, or aspects thereof.[17] "The totality of these limitations or exceptions [in § 102(b)(7) of the DGCL] ... is to ... eliminate ... director liability only for 'duty of care' violations."[18] Absent these waivers and exculpatory provisions, however, directors owe traditional fiduciary duties by default[19] and these fiduciary duties may not be fully waived.[20]

2. *General LLC Fiduciary Duties to Members*

Similar to a corporate board of directors, the managers and managing members of Delaware LLCs also owe default fiduciary duties to the company ***653** and toward each other.[21] The Delaware Court of Chancery has long accepted the proposition that managers of a limited liability company owe fiduciary duties to the limited liability company and its members in the absence of modifications to such fiduciary duties in the operating agreement.[22] However, the Delaware Supreme Court was hesitant to

find that traditional fiduciary duties were owed by default in LLCs.[23] In *Auriga Capital Corp v. Gatz Properties, LLC*,[24] then-Chancellor Strine found that an LLC manager had breached his fiduciary duties to the company, and stated that "because the LLC Act provides for principles of equity to apply, because the LLC managers are clearly fiduciaries, and because fiduciaries owe the fiduciary duties of loyalty and care, the LLC Act starts with the default that managers of LLCs owe enforceable fiduciary duties." The Delaware Supreme Court affirmed the Court of Chancery's finding that the LLC manager had breached his fiduciary duties, but criticized its extension of "default" fiduciary duties, declaring that the Court of Chancery's "statutory pronouncements" on this subject were mere dictum.[25] In response to these cases, the Delaware General Assembly enacted legislative amendments codifying the Court of Chancery's dictum as law.[26]

Notwithstanding the amendment establishing default fiduciary duties in LLCs, the LLC Act allows an operating agreement to completely waive default fiduciary duties. Section 18-1101(e) of the LLC Act provides as follows:

> ***654** 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.[27]

Parties to an LLC agreement owe common law fiduciary duties unless such duties are expressly waived in the operating agreement. Such a waiver eliminates any claim for a breach of those duties.[28] However, the implied covenant of good faith and fair dealing can never be waived.[29]

3. *Corporate Fiduciary Duties Owed to Creditors*

Although a corporation's board of directors owes fiduciary duties to shareholders, it ordinarily does not owe any fiduciary duties to the corporation's creditors. This default rule changes when a corporation becomes insolvent.

In *Geyer v. Ingersoll*,[30] the Delaware Court of Chancery stated the "general rule is that directors do not owe creditors duties beyond the relevant contractual terms absent 'special circumstances ... e.g., fraud, insolvency, or a violation of a statute.'"[31] The question, according to the court, was "whether insolvency arises so as to create a fiduciary duty to creditors when insolvency exists in fact or when a party institutes statutory proceedings (e.g. bankruptcy proceedings)."[32] The court concluded that insolvency arises when it exists in fact, meaning the value of its assets are less than its debt.[33]

This line of thinking continued in *Production Resources Group L.L.C. v.* ***655** *NCT Group, Inc.*[34] where the Court of Chancery noted that "the fact of insolvency places the creditors in the shoes normally occupied by the shareholders--that of the residual risk-bearers."[35] While "[t]he fact that the corporation has become insolvent does not turn [derivative] claims into direct creditor claims," the Court of Chancery noted that insolvency "provides creditors with standing to assert those claims."[36] Such standing is derived from § 102(b)(7) of the DGCL, which makes clear that a corporation owns claims that "a director has, by failing to exercise sufficient care, mismanaged the firm and caused a diminution to its economic value."[37] The Court stated:

> The argument that § 102(b)(7) clauses should not bind third parties lacks force because the clauses only restrict third parties to the extent that they seek to enforce rights on behalf of the corporation itself. Any claims that creditors possessed themselves against the firm or its directors--such as claims for breach of contract or for common law or statutory torts like misrepresentation and fraudulent conveyance--would not be barred by the exculpatory charter provision because those claims do not belong to the corporation or its stockholders.[38]

Accordingly, the court concluded that expanding fiduciary duties to account for creditors' interests when a corporation is in the zone of insolvency is not necessary given the availability of strong protections for creditors such as "covenants, liens on assets, and other negotiated contractual provisions."[39] The implied covenant of good faith and fair dealing, which applies to creditors, cannot be disclaimed, and the law of fraudulent conveyance also serves to protect creditors.[40] Despite a hesitancy to expand the potential beneficiaries of fiduciary duties, *Production Resources* held the door open for the possibility that creditors could bring a limited direct claim where no derivative claim was available.[41]

That door closed in *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*,[42] when the Delaware Supreme Court held that a creditor does not have standing to assert a direct breach of fiduciary duty claim against a ***656** director despite the fact that the company is in the zone of insolvency.[43] The court concluded:

> When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.[44]

However, of greatest importance to the focus of this article, the *Gheewalla* court also confirmed that once the corporation is insolvent, then a creditor does have standing to sue a director for breach of a fiduciary duty in a derivative action on behalf of the corporation.[45] When a corporation becomes insolvent, "its creditors take the place of the shareholders as the residual beneficiaries of an increase in value."[46]

4. *LLC Fiduciary Duties to Creditors*

While the *Gheewalla* court's analysis is straightforward in the corporate context, applying it in the LLC context becomes more complicated due to the express language of the LLC Act. Specifically, § 18-1002 of the LLC Act indirectly prohibits creditors from pursuing derivative claims on behalf of a Delaware LLC by stating that:

> In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and:
>
> (1) At the time of the transaction of which the plaintiff complains; or
>
> (2) The plaintiff's status as a member or an assignee of a limited liability company interest had devolved upon the plaintiff by operation of law or pursuant to the terms of a limited liability company agreement from a person who was a member or an assignee of a limited liability company interest at the time of the transaction.[47]

This language does not expressly prohibit creditors of the LLC from assuming derivative standing. Based on this, early cases, relying upon established corporate law, assumed that LLC creditors had standing to bring derivative ***657** breach of fiduciary duty claims.[48] For example, the Delaware Court of Chancery in *Vichi v. Koninklijke Philips Elecs. N.V*[49] did not reach the issue of whether an LLC creditor plaintiff had standing to bring a derivative claim because the creditor's claims were direct.[50] However, in reaching this conclusion, the court "seem[ed] to assume that creditor standing under *Gheewalla* extend[ed] to LLCs."[51]

The Delaware Court of Chancery applied a similar assumption in a limited partnership context in *Bren v. Capital Realty Group. Senior Housing, Inc.*[52] The Delaware Revised Uniform Limited Partnership Act[53] contains derivative standing provisions that are substantively identical to the LLC Act.[54] The creditor in *Bren*, along with other claims, alleged that the partnership breached its fiduciary duty for failing to bring a timely suit to recover on a claim.[55] In reaching its conclusion that the creditor's claim was time barred, the court "assumed that a creditor would acquire standing to sue derivatively once the entity became insolvent, but lacked standing prior to that point."[56]

Both *Vichi* and *Bren* were cited in *CML V, LLC v. Bax*[57] as examples of the lack of clarity on the question of derivative standing for an LLC creditor. In *Bax*, CML V, LLC ("CML") loaned funds to JetDirect Aviation Holdings, LLC ("JetDirect") and brought suit amid suspicion that JetDirect was insolvent because its operating subsidiaries were bankrupt.[58] CML alleged

breaches of the fiduciary duties of loyalty and care and argued that the "policy underlying derivative standing" that applies in the corporate context should also apply to LLCs.[59] The defendants moved to dismiss these claims on the grounds that CML, as a creditor of the company, lacked standing to ***658** bring derivative claims on behalf of JetDirect.[60] The Delaware Court of Chancery granted the defendants' motion, noting that the LLC Act's "limitation might surprise wizened veterans of the debates over corporate creditor standing."[61] On appeal, the Delaware Supreme Court also rejected CML's argument and pointed to the language of the LLC Act that "expressly limited [the right to sue derivatively] to 'member[s]' or 'assignee [s].'"[62] The Delaware Supreme Court also stated that the Delaware General Assembly expressed a "clear intent to allow interested parties to define the contours of their relationships with each other to the maximum extent possible" in the context of LLCs.[63] The Court further noted that the creditor held "ample remed[ies] at law" because Delaware's LLC structure "affords creditors significant contractual flexibility to protect their unique, distinct interests."[64] Much like the Court of Chancery in *Production Resources* and its endorsement of the same in *Gheewalla*, the Court stated that the creditor "could have negotiated for a provision that would convert its interests to that of an 'assignee' in the event of" insolvency.[65]

The Court of Chancery also denied derivative standing to a creditor in *Trusa v. Nepo,*[66] despite what appeared to be the creditor's attempt to obtain such rights by contract. In *Trusa*, an LLC entered into a loan agreement with a creditor that included a provision granting the creditor a power of attorney "to take any action and to execute any instrument which [the creditor] may deem reasonably necessary or advisable in pursuing its remedies set forth herein."[67] The LLC ultimately defaulted on the loan.[68] The creditor argued that the power of attorney provision included the ability to assert derivative claims. The court declined to "read this clause to grant a broad power of attorney that would allow [the creditor] to pursue derivative breach of fiduciary duty claims on behalf of [the debtor LLC]."[69]

IV. BANKRUPTCY ESTATE REPRESENTATIVES

When a bankruptcy is filed, all rights, property and assets of the bankrupt ***659** company vest in the debtor's "bankruptcy estate."[70] The bankruptcy estate is managed either by a trustee or a "debtor in possession." While most of this article focuses on the powers of bankruptcy trustees, this section will also briefly address the representative parties that are routinely involved in chapter 11 cases for completeness.

A. CHAPTER 7 TRUSTEES

When a company files for bankruptcy under chapter 7 of the Bankruptcy Code, an interim trustee is appointed automatically.[71] Unless a trustee is elected at the § 341 meeting, the interim trustee becomes the trustee of the case.[72] The chapter 7 trustee is entitled to reasonable compensation for the services he or she renders to the estate, subject to statutory limitations,[73] and he or she may also employ and compensate professionals who assist the trustee.[74]

The chapter 7 trustee's duties are primarily identified in § 704 of the Bankruptcy Code. Among those powers, the trustee is responsible for (1) collecting and liquidating property of the estate and (2) investigating the financial affairs of the debtor.[75] Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[76] Property of the estate has generally been found to include the debtor's claims against its directors and officers for breaching their fiduciary duties.[77]

A chapter 7 trustee is endowed with expansive powers to fulfill his or her duties to the bankruptcy estate and creditors. For example, the trustee has the power to sue and be sued on behalf of the estate.[78] Additionally, the Bankruptcy Code grants the trustee avoidance powers as set forth in §§ 542-550 of the Bankruptcy Code. Among those powers are the so-called "strong arm" powers of § 544, which permit the trustee to step into the shoes of a hypothetical lien creditor or unsecured creditor to avoid any transfer or obligation ***660** of the debtor that would be voidable by such creditor. These actions are most commonly commenced as fraudulent conveyance claims under state law.[79] When exercising these powers, the trustee recovers the transfers for the benefit of the estate and all its creditors.[80]

B. DEBTORS IN POSSESSION

Unless a chapter 11 trustee is subsequently appointed, the debtor in possession will continued to be managed by the debtor's

pre-bankruptcy management team or restructuring professionals employed to assist in the debtor's reorganization. While the powers of a debtor in possession operating in chapter 11 are largely co-extensive with the powers of a chapter 7 trustee, certain powers are not granted to a chapter 11 debtor in possession under the Bankruptcy Code.[81] Many of these excluded powers are simply not applicable in chapter 11.[82] Others are not applicable to a debtor in possession or the intended chapter 11 purpose of reorganization.[83] Importantly, the debtor in possession is not entitled to compensation for its services, but it can retain professionals to assist it in administering its duties.[84] Like a trustee, the debtor in possession also has the exclusive right to prosecute claims held by, and defend claims against, the debtor's estate.[85]

C. CREDITORS' COMMITTEES

An unsecured creditors' committee comprised of some of the debtor's unsecured creditors may be appointed to oversee the debtor's actions in bankruptcy.[86] Similar to a trustee or debtor in possession, it may employ ***661** professionals to assist the committee in its performance of its duties.[87] In its role representing the unsecured creditors, a committee may investigate the debtor's conduct, transactions, and financial condition, as well as participate in and provide advice related to a plan and any other matters relevant to the reorganization.[88]

V. BREACH OF FIDUCIARY DUTY CLAIMS IN BANKRUPTCY

A. STANDING TO PURSUE CLAIMS GENERALLY

As noted, the chapter 7 trustee[89] has standing to bring any suit that the debtor could have brought outside of bankruptcy.[90] The trustee also has standing to pursue certain creditor claims under § 544 of the Bankruptcy Code. This section examines how limitations on breach of fiduciary duty claims under state law affect the trustee's standing to pursue those claims in bankruptcy.

The first question is whether Delaware state law prohibiting creditors from pursuing claims on behalf of the LLC are binding on a trustee seeking to pursue such claims on behalf of creditors. While very few bankruptcy courts have addressed this issue directly, the court in *In re Pennysaver* held that a trustee could not seek to assert claims on behalf of the creditors of the LLC under Delaware law.[91] Although it was not clear whether the trustee was seeking to assert direct or derivative fiduciary duty claims, the court held that the trustee did not have standing in either scenario.[92] It held that creditors of an LLC are prohibited from pursuing direct claims against LLCs, their members, managers and officers under *Bax*.[93] If the claims were derivative in nature, those claims were also barred because such claims "can only be brought by members or assignees of LLCs."[94] Thus, unless the creditors were also members or assignees, the trustee was prohibited from asserting breach of fiduciary duty claims because "[t]he Trustee does not have standing to sue on behalf of the creditors who themselves have no standing."[95]

In *In re HH Liquidation,* the court reached the same conclusion with ***662** respect to actions filed by a creditors' committee.[96] In that case, the committee asserted a seventy-eight count complaint, which included claims for fraudulent transfer, breach of fiduciary duty and unjust enrichment.[97] Notwithstanding a stipulation granting standing to the committee to pursue derivative claims, the court concluded that the committee's "rights to assert derivative claims are limited to the derivative standing of its members, none of whom have standing as creditors of a Delaware LLC to assert derivative claims of breach of fiduciary duty on behalf of the company."[98] Because creditors do not have the ability to pursue derivative claims on behalf of an LLC, the Court held that the committee also lacked standing to pursue those claims.[99]

The *HH Liquidation* court distinguished its earlier ruling in *In re Golden Guernsey*.[100] In that case, the court determined that a trustee could pursue fiduciary duty claims held by the debtor LLC as the "sole representative of the estate with the authority to sue and be sued."[101] The Trustee has a statutory mandate to pursue the estate's interests, including all direct and derivative claims.[102] Thus, the trustee has standing when he is stepping into the debtor's shoes, asserting a fiduciary duty claim that belonged to the debtor. Likewise, a debtor in possession should have this same ability to pursue a claim held by the debtor for breach of fiduciary duty.

Recently, a Delaware bankruptcy court extended the rationale of *In re Pennysaver* and *In re HH Liquidation* in recognizing the similarities between the LLC Act and the Delaware Revised Uniform Limited Partnership Act and concluded that the

creditors' committee was not permitted to pursue claims against a Delaware limited partnership.[103] It also threw out the committee's claims against a Wyoming LLC under the Wyoming Limited Liability ***663** Company Act because the Wyoming Supreme Court had followed *Bax* in holding that creditors of a Wyoming LLC were not permitted to bring fiduciary duty claims.[104] Finally, it also dismissed the committee's claims against a North Dakota LLC debtor.[105] While no reported North Dakota cases had addressed this issue, the court found that the language of the North Dakota statute was "sufficiently similar to the Delaware LLC Act" and applied Delaware cases in interpreting North Dakota law.[106] While the claims at issue were ultimately assigned to the liquidation trustee under the debtor's plan, the trustee was not permitted to pursue any of these claims because they were originally commenced by the committee, who lacked standing to bring them in the first place.[107]

B. EFFECT OF A FIDUCIARY WAIVER

While the chapter 7 trustee may have standing to pursue fiduciary duty claims against an LLC as the "sole representative of the estate," the question remains whether the trustee would be permitted to pursue those claims in situations where the LLC's operating agreement specifically eliminated any fiduciary duties. While the authors were unable to locate any bankruptcy decision expressly addressing this question, the authority under Delaware law would clearly bar the LLC from pursuing claims against its managers or members under such a scenario.[108] That was the conclusion reached by the court when faced with a creditor's effort to obtain derivative standing to pursue breach of fiduciary duty claims against the controlling members of the LLC in *In re Optim Energy, LLC*.[109] Although it did not discuss the limitations on a creditor's ability to assert breach of fiduciary duty claims against an LLC's members, the court held that the waiver of fiduciary duties in the LLC's operating agreement barred the assertion of any such claims.[110]

Given the lack of bankruptcy precedent on this issue, it is worth examining other state law limitations on derivative fiduciary duty claims and how they operate in the bankruptcy context. In the more familiar corporate context, a number of state law limitations have been faithfully followed by bankruptcy courts. Among these limitations are: (i) the demand requirement, (ii) the business judgment rule, and (iii) the use of exculpatory clauses.

***664** 1. *The Demand Requirement*

The demand requirement often forces would-be derivative plaintiffs to take an extra procedural step before bringing a derivative action on behalf of the corporation. Stockholders of a Delaware corporation may not bring a derivative claim on behalf of the corporation unless they "either (1) make a presuit demand by presenting the allegations to the corporation's directors, requesting that they bring suit, and showing that they wrongfully refused to do so, or (2) plead facts showing that demand upon the board would have been futile."[111] A pre-suit demand on the board involving a breach of fiduciary duty claim "is futile when the directors upon whom the demand would be made 'are incapable of making an impartial decision regarding such litigation.'"[112] In making its determination of whether a demand would have been futile, the court considers whether the directors who evaluate the shareholder's demand were "disinterested, independent and fully capable of impartially exercising their business judgment."[113]

A similar concept has been applied in bankruptcy cases when a creditor's committee sought to derivatively bring an avoidance action. In *Cybergenics*[114] the Third Circuit reviewed a bankruptcy court's order authorizing a creditor's committee to proceed derivatively on an avoidance action in the context of a United States Supreme Court ruling that may have limited standing for such an action.[115] The creditor's committee wanted the debtor in possession ("Cybergenics") to file an avoidance action for certain allegedly fraudulent transfers it made.[116] The committee petitioned Cybergenics' management to file the avoidance action, but management refused on the grounds that "the costs would likely outweigh the benefits."[117] The committee then petitioned the bankruptcy court for permission to derivatively bring an avoidance action in Cybergenics' name and on its behalf.[118] The bankruptcy court "concluded that management's refusal to act was unreasonable even given the usual judicial deference to business judgment" and authorized the committee to bring a derivative action.[119] The Third Circuit affirmed this decision, concluding ***665** that the bankruptcy court had "acted within its power in conferring derivative standing" on the creditor's committee.[120]

2. *The Business Judgment Rule*

The business judgment rule may also significantly limit breach of fiduciary duty claims. When analyzing such claims, Delaware courts apply one of three standards: the business judgment rule, enhanced scrutiny, or entire fairness.[121] As referenced in *Cybergenics*,[122] "under the business judgment rule, 'the court will defer to the judgments made by the corporation's fiduciaries unless the [transaction] is so extreme as to suggest waste.'"[123] In the context of corporate insolvency, "[i]f the board of an insolvent corporation, acting with due diligence and good faith, pursues a business strategy that it believes will increase the corporation's value, ... it does not become a guarantor of that strategy's success."[124] The business judgment rule is the default standard of review.[125] Thus, a derivative claimant would have the burden "to allege facts sufficient to rebut the presumptions of loyalty and good faith that protect the directors"[126] in order for a heightened standard of enhanced scrutiny or entire fairness to be applied.

Courts have applied the business judgment rule in bankruptcy cases as well. In *In re HH Liquidation*, the creditor's committee brought breach of fiduciary duty claims against the debtor entities' managers and officers.[127] The committee had the burden of showing that the business judgment rule was not applicable.[128] The bankruptcy court found that the committee did not present evidence supporting the imposition of a higher standard of review for the various transactions entered into by the debtor entities' managers, and applied the business judgment rule in concluding that the debtors' managers, directors and officers had not breached their fiduciary duties.[129]

666 3.** ***Exculpatory Clauses

Although Delaware corporations may not entirely disclaim liability for breaches of fiduciary duty, they are permitted to shield directors from liability for certain actions while carving out other actions that are not exempt from liability.[130] For example, an exculpatory clause might provide that a director will not be liable to the corporation or its stockholders for damages resulting from a breach of fiduciary duty as a director, except for liability stemming from a breach of the director's fiduciary duty of loyalty to the corporation or its stockholders, or for acts or omissions not in good faith or involving intentional misconduct.[131]

The Second Circuit has enforced exculpatory clauses in applying Delaware law. In *Pereira v. Farace*[132] the defendant-directors of a Delaware corporation appealed a district court finding that "despite the existence of the exculpatory clause [in the corporation's certificate of incorporation], the Trustee could bring a claim for breach of the duty of care *on behalf of the creditors*, rather than the corporation."[133] The Second Circuit Court of Appeals held that the trustee of a bankrupt entity is in no better position than the corporation itself when asserting a claim for breach of fiduciary duty against the debtor's directors on behalf of the corporation's creditors.[134] The Second Circuit concluded that such claims belonged to the corporation, and therefore the trustee "may only assert claims of the bankrupt corporation, not its creditors."[135] Because the corporation's charter included an exculpatory clause that prevented a duty of care claim seeking monetary awards against the directors, the trustee was precluded from bringing such a claim--whether it was brought on behalf of the creditors or on behalf of the corporation itself.[136]

Application of state corporate law limits by bankruptcy courts provides strong support for also applying a waiver of fiduciary duties contained in an LLC operating agreement in bankruptcy. Indeed, bankruptcy law relies heavily on state law to supplement its principles and fill in any gaps that may ***667** exist in the Bankruptcy Code.[137] Thus, in situations involving a waiver of fiduciary duties in an LLC operating agreement, that waiver will likely operate as a bar to a trustee's pursuit of those claims in bankruptcy.

C. DIRECT VS. DERIVATIVE CLAIMS

The trustee's ability to pursue direct fiduciary duty claims should also be examined. Unlike derivative claims, direct claims are claims held by a particular creditor or equity holder for damages that are unique and distinct from the damages suffered by other similarly situated creditors or equity holders. After discussing the factors that distinguish direct claims from derivative claims, this subsection will analyze the trustee's ability to pursue direct claims for breach of fiduciary duty against the managers or members of an LLC.

1. ***Determining the Difference***

A direct claim can be brought by a shareholder for an injury sustained by that shareholder for which the shareholder is entitled to personal relief. A derivative claim can be brought by a shareholder on behalf of the corporation for an injury sustained by all shareholders due to behavior by the corporation's board of directors that negatively (and primarily) impacted the corporation itself. In derivative claims, the corporation is the claimant, and if the corporation's injury is redressed, by extension, the shareholders' injury is too. Corporate stockholders may bring direct or derivative claims for breach of fiduciary duty.[138] Although creditors effectively step into the shoes of stockholders when a corporation becomes insolvent, they are limited to bringing breach of fiduciary duty claims derivatively rather than directly.[139]

The Delaware Supreme Court has held that a claim is derivative if all shareholders have suffered the same injury and would recover in proportion to their ownership interests.[140] A direct claim requires the plaintiff to demonstrate some harm it has suffered that other stockholders have not suffered. According to the Delaware Supreme Court, the issue turns on "(1) who suffered the alleged harm (the corporation or the suing stockholders, ***668** individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[141]

Policy considerations underlie this distinction between direct and derivative claims. By requiring a derivative, rather than a direct, claim, the system allows for corporate recovery first and foremost, which prioritizes the health of the corporation (including its retention of assets subject to creditors' claims) over a recovery by individual shareholders.[142] Additionally, a shareholder's derivative lawsuit on behalf of the corporation and all shareholders is much simpler, more efficient, and more cost-effective than a multitude of separate shareholder lawsuits.[143]

2. *Limitations on Direct Claims*

Even if the trustee could locate someone with a direct fiduciary duty claim against a manager or member of an LLC, a trustee cannot enforce the claims of creditors.[144] Permitting the trustee to do so would expand "property of the estate" beyond its statutory meaning and would be inconsistent with any independent action that could be pursued by the holder of such claim.[145] Further, the Delaware Supreme Court held in *Gheewalla* that "individual *creditors* of an *insolvent* corporation have *no right to assert direct* claims for breach of fiduciary duty against corporate directors."[146] If creditors cannot bring direct claims against corporations under Delaware law, a court would be hard-pressed to permit creditors of an LLC to pursue direct claims, when those same creditors are barred by statute from even pursuing derivative claims against an LLC.

Second, with respect to members of an LLC, a fiduciary waiver would likely include a waiver of claims that the members could assert against each other.[147] If all members have agreed to waive their fiduciary duties to each other and the company, it is hard to imagine a scenario where direct claims ***669** for a breach of those duties would exist. Even if the trustee could pursue such claims, the member would need to forgo the possibility of pursuing claims for its own benefit to avoid the duplicative litigation problems anticipated by the Supreme Court in *Caplin*.[148]

D. EQUITIES OF APPLYING FIDUCIARY WAIVERS TO CREDITORS

This section examines whether equitable considerations demand a different result in bankruptcy when an LLC operating agreement has eliminated all fiduciary duties. Specifically, is it fair to bind creditors to a waiver of claims set forth in an agreement that they did not sign? This subsection begins by examining cases arising in similar scenarios involving arbitration clauses in agreements signed by business entities. It concludes with a close examination of the rationale or justification for the different treatment of fiduciary duty claims asserted by the creditors of corporations versus LLCs.

1. *Arbitration Cases*

Enforceability of arbitration clauses in contracts signed by a debtor provide the closest analogue to the strong policy of freedom of contract for Delaware LLCs. Arbitration clauses present two competing federal policies: the enforceability of contractual arbitration provisions under the Federal Arbitration Act[149] and the centralized resolution of claims and disputes under the Bankruptcy Code.[150] Because Delaware LLC law also places primacy on the parties' freedom of contract, cases analyzing arbitration provisions provide a good barometer when it comes to predicting how bankruptcy courts will rule on waivers of fiduciary duties under state law.

The Supreme Court has held that arbitration provisions should be enforced under the Federal Arbitration Act unless "overridden by a contrary congressional command."[151] These contrary demands may be established through (1) the statutory text, (2) the statute's legislative history or (3) the existence of an "inherent conflict between arbitration and the statute's underlying purposes."[152] When examining whether the Bankruptcy Code creates an exception to the Federal Arbitration Act, courts have focused on the third option.[153]

***670** Courts that have examined the tensions between the Federal Arbitration Act and the Bankruptcy Code have generally agreed that, "in a non-core proceeding, a bankruptcy court does not have the discretion to deny enforcement of an arbitration provision."[154] Nevertheless, when faced with the arbitrability of a core matter, courts are more deeply divided.[155] The Second,[156] Third,[157] and Eleventh[158] Circuits have all found that even core disputes should be subject to contractual arbitration provisions unless the party opposing arbitration can demonstrate an inherent conflict with the bankruptcy statute or policy at issue. On the other hand, the Fourth[159] and Ninth[160] Circuits have refused to enforce arbitration provisions when it would interfere with the debtor's reorganization efforts. Likewise, the Fifth Circuit, in the earliest decision on the subject, held that "at least where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purposes of the Bankruptcy Code, including the goal of centralized resolution of ***671** purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.[161]

While this circuit split may offer trustees some hope that bankruptcy policy may override Delaware's policy of freedom of contract, breach of fiduciary duty claims do not fit neatly within that articulation of bankruptcy policy. First, breach of fiduciary duty claims are non-core claims because they arise under state law, not the Bankruptcy Code. Nevertheless, at least one court has permitted breach of fiduciary duty claims to proceed notwithstanding an arbitration clause.[162] Second, a trustee bringing a breach of duty claim cannot claim that he is relying on any Bankruptcy Code provision in pursuing the claim. Many courts have held that § 544(b) of the Bankruptcy Code cannot be used to bring breach of duty claims.[163] Third, recent rulings from the United States Supreme Court on the reach of the Federal Arbitration Act have weakened the bankruptcy policy argument that centralized claim resolution should render arbitration agreements unenforceable.[164]

2. *Inconsistent Business Justification*

If the bankruptcy policy of centralized administration is insufficient to override the waiver of fiduciary duties in a Delaware LLC's operating agreement, the last potential argument for the trustee is to appeal to equity based on the fact that the creditors of the LLC were not parties to the operating agreement and, therefore, they should not be bound by its terms. To make this argument, the trustee would need to examine *Bax* and its progeny and argue that either (i) routine creditors who extend credit on an unsecured ***672** basis are not able to protect themselves in their commercial dealings or (ii) the *Bax* court erred when it found that the differences between corporations and LLCs justifies a different treatment of fiduciary duty claims once an entity is insolvent.

Delaware law has a longstanding general rule that "directors do not owe creditors duties beyond the relevant contractual terms."[165] Courts reason that creditors have other ways to protect their rights in dealing with debtors, including contractual agreements, fraudulent conveyance laws, implied covenants and other sources of creditors' rights.[166] While the availability of these remedies is undoubtedly true, the level of "protection" they offer appears to be wildly overestimated by the courts. Undoubtedly, the debtor's primary lender and financier will have tremendous leverage over the debtor and can extract significant concessions, including a first priority secured position in all the debtor's assets.[167] The run-of-the-mill unsecured creditor, however, must take whatever business it can get and often must make pricing or other concessions to close a deal with the debtor. Regardless of market realities, a trustee would face an uphill battle in attempting to overturn decades of Delaware law on this issue solely to bring fiduciary duty claims that the equity holders had previously waived.

While business realities are omnipresent in all debtor/creditor relationships, the differences between corporations and LLCs do not, at least on their face, justify a different treatment of a creditor's fiduciary duty claims. Nevertheless, those differences were a significant component of the Delaware Supreme Court's ruling in *Bax*. That case effectively and unambiguously foreclosed any possibility that an LLC creditor has standing to bring derivative breach of fiduciary duty claims, despite a creditor's ability to bring a derivative claim in the corporate context. This outcome was not necessarily intuitive or even

expected.

The idea of treating LLCs and corporations similarly in insolvency, particularly when it comes to creditors, is not outlandish. Indeed, the Delaware Court of Chancery's decision in *Bax* notes that, in two prior cases, the court ***673** assumed, in *dicta*, that a creditor of an LLC would have standing to bring a derivative breach of fiduciary duty claim.[168] Creditors argued in *Bax* that denying an LLC creditor standing to sue derivatively created an "absurd distinction between insolvent corporations, where creditors can sue derivatively, and insolvent LLCs, where they cannot."[169] Moreover, after *Bax,* the court in *Obeid v. Hogan* analogized LLCs to corporations when an LLC agreement, for example, designates a manager to manage the company in lieu of default member management rights,[170] creates a board of directors, and adopts other corporate features.[171] Both before and after *Bax*, the Court of Chancery has found manager-managed LLCs to be "in many ways, analogous to corporations," allowing courts to take more of a corporate law approach when dealing with an LLC with such a management structure.[172] There is, therefore, both contradiction and ambiguity in how the Court of Chancery has treated Delaware corporations and LLCs in analogous situations.

Ultimately, in *Bax,* the Court of Chancery disagreed with the plaintiff creditor's characterization of the divergent treatment of LLC creditors versus their corporate counterparts, stating that "[a]s a threshold matter, there is nothing absurd about different legal principles applying to corporations and LLCs." It went on to highlight the different "conceptual underpinnings" of Delaware's corporate and alternative entity law.[173] These differences, the *Bax* court said, should make courts "wary of uncritically importing requirements from the DGCL into the [alternative entity] context."[174] The Delaware Supreme Court in *Bax* drew a clear line between insolvent corporations and LLCs.[175] For example, the Court stated that "when adjudicating the rights, remedies, and obligations associated with Delaware LLCs, courts must look to the LLC Act because it is the only statute that creates those rights, remedies, and obligations."[176] Although the statute may be supplemented by ***674** the common law, "courts cannot interpret the common law to override the express provisions the General Assembly adopted."[177]

E. SPECIAL CONSIDERATIONS IN CHAPTER 11 CASES

While the foregoing considerations apply equally to a debtor in possession or a trustee, an additional issue must be examined in connection with proposed plans in chapter 11 cases. Specifically, section 1123(a)(5) of the Bankruptcy Code requires a plan to provide sufficient means for the plan's implementation, even if the preemption of non-bankruptcy law is necessary for such implementation. After discussing the cases interpreting this provision, this subsection hypothesizes what a bankruptcy court may do when faced with an effort to override Delaware state law limitations on fiduciary duty claims against LLC managers.

1. *The Section 1123(a)(5) Framework*

Section 1123(a)(5) of the Bankruptcy Code provides, in relevant part,

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--
>
> ...
>
> (5) provide adequate means for the plan's implementation, such as--
>
> (A) retention by the debtor of all or any part of the property of the estate;
>
> (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

> (C) merger or consolidation of the debtor with one or more persons;
>
> (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;
>
> ...
>
> (I) amendment of the debtor's charter; or
>
> ...[178]

Most, if not all, courts that have interpreted this statutory language have held that it provides for the express preemption of nonbankruptcy law.[179] ***675** Nevertheless, courts generally agree that the preemption of nonbankruptcy law in § 1123(a)(5) is not unlimited.[180] The limits primarily arise from the so-called "presumption against preemption," which recognizes that "Congress does not undertake lightly to preempt state law, particularly in areas of traditional state regulation."[181] This "strong presumption" applies in bankruptcy as well.[182] "The presumption may be overcome, however, where 'a clear Congressional purpose to preempt ... is clear and manifest.'"[183]

Many of the cases interpreting the preemptive scope of § 1123(a)(5) involve anti-assignment provisions in insurance contracts that the debtor has assigned to an asbestos trust under § 524(g).[184] One of those cases, *Federal-Mogul*, discussed the statutory language, the legislative history and public policy in confirming that the insurance policies could be transferred pursuant to § 1123(a)(5), notwithstanding the anti-assignment language contained in the insurance contracts.[185] In reaching its conclusion, the Third Circuit determined that the phrase "nonbankruptcy law" necessarily encompassed private contracts as well as governmental enactments.[186] It also determined that applying preemption on these facts "furthers the purposes of the Bankruptcy Code," including § 524(g) in particular.[187] Finally, the court distinguished the Ninth Circuit's ruling in *Pacific Gas and Electric*, which limited preemption under § 1123(a)(5) to laws related to the debtor's financial condition.[188] In rejecting the Ninth Circuit's view, the Third Circuit found that neither prior bankruptcy practice nor the "thin and vague legislative history" behind § 1123(a)(5) "overcome the plain and unambiguous meaning of the words Congress chose."[189]

In *Federal-Mogul,* the Third Circuit expressly noted that the scope of ***676** preemption under § 1123(a)(5) is not unlimited.[190] Indeed, the court noted that it "would find problematic attempts under § 1123(a) to disregard large swaths of state and federal regulatory schemes."[191] Nonbankruptcy laws that relate to public health, safety, and welfare, in particular, are not preempted by § 1123(a).[192]

Following *Federal-Mogul*, courts have continued to place limits on the scope of express preemption in § 1123(a)(5). In *Irving Tanning,* the First Circuit Bankruptcy Appellate Panel addressed this issue when the terms of a debtor's plan intentionally violated state law.[193] The debtor's plan contemplated replacing workers' compensation laws in three states with self-insurance funds for the purpose of distributing those funds and obtaining a channeling injunction that benefitted third party guarantors of the funds.[194] Although the panel agreed with *Federal-Mogul* that preemption was required, it applied three limitations on the scope of the express preemption, all of which prevented the debtor from obtaining the relief it sought.[195] Those three limitations were (1) the preemption must be sufficient for the implementation of the plan, but nothing more than is required; (2) "section 1123(a) does not preempt otherwise applicable nonbankruptcy laws that are concerned with protecting public health, safety, and welfare"; and (3) the preemption "cannot extend to laws defining and protecting the property rights of

third parties."[196]

2. ***Using Section 1123(a) to Preempt a Fiduciary Waiver***

While courts have unanimously held that a chapter 11 debtor may use § 1123(a)(5) to preempt state law limitations in furtherance of a plan, no reported cases have involved a debtor's attempt to use § 1123(a)(5) to eliminate a fiduciary duty waiver in an LLC's operating agreement. Besides the fact that LLC fiduciary waivers are a relatively recent development in the law, the next most likely reason for this dearth of case law is a practical one: the managers of an LLC debtor in possession are highly unlikely to propose a plan that would permit claims against themselves.[197] While a creditors' committee may be ready and willing to pursue such claims, it is unlikely it would have standing to do so. To date, only one court has addressed this issue and it held that the committee lacked standing because creditors generally cannot ***677** bring fiduciary claims on behalf of an LLC, regardless of any waiver.[198] Because the committee lacks standing to bring such claims and the debtor in possession is generally unwilling to voluntarily expose its managers to breach of duty claims, a committee has little leverage in forcing the debtor to include a provision overriding a fiduciary duty waiver in the plan. While the committee or another creditor could perhaps seek the appointment of a chapter 11 trustee to add such a provision in the plan, the appointment of a chapter 11 trustee constitutes extraordinary relief that is difficult to obtain.[199]

Even if the plan contains a provision seeking to vitiate the waiver of fiduciary duties under § 1123(a)(5), a bankruptcy court would need to clear several hurdles before approving the plan. First, the presumption against preemption carries great weight in the area of corporate governance given the internal affairs doctrine.[200] Congress has always left the regulation of business entities to state law, and most state courts accept that the law of the entity's state of formation applies to governance issues.[201] A general statement regarding means for a plan's implementation may not constitute the "clear and manifest" Congressional intent to preempt the deeply rooted corporate affairs doctrine.[202]

Second, applying the exceptions to preemption articulated in *Irving Tanning*, the bankruptcy court would need to establish that the elimination of the fiduciary duty waiver is necessary to the implementation of the plan.[203] If the plan proposes a liquidation, like the plan in *Irving Tanning*, the provision may not be enforceable. When faced with this issue, the *Irving Tanning* court stated:

> ***678** A liquidating plan need only liquidate and distribute the assets of the Debtors' estates, whatever they are, *and subject to their state law limitations*. Creditors can have no legitimate expectation of anything more. A plan need not enhance those assets by augmenting the Debtors' property rights at the expense of third parties.[204]

Admittedly, the court found the challenged provision in *Irving Tanning* to be unacceptable for other reasons as well,[205] but this rationale could persuade a court considering the elimination of the fiduciary waiver.

In a plan of reorganization, the necessity of the provision may be stronger, especially in a situation where the reorganized debtor will be managed by a different entity or management team. If the prior managers are no longer needed to run the LLC post-emergence, then the LLC's new stakeholders (via plan sale, merger or otherwise) may be willing to trade the elimination of the fiduciary duty waiver for something it desires (most likely a release). Because derivative fiduciary duty claims are unquestionably property of the debtor's estate,[206] the transfer of these claims to a litigation trust to fund distribution to creditors would likely be necessary to the plan, as the *Irving Tanning* court acknowledged. Nevertheless, if those claims did not exist prepetition due to the operation of state law, the propriety of permitting a plan to essentially create these "new" claims would likely face a fair amount of skepticism from the reviewing court. The Fifth Circuit refused to grant a liquidating trustee leave to amend its fiduciary duty complaint because it was simply attempting to "repackage creditor claims against the Directors that are defunct under Delaware law after *Gheewalla*."[207] While this holding predates the LLC developments discussed herein, if *Gheewalla* continues to apply after the application of § 1123(a)(5), then *Bax* and the LLC Act should continue to apply as well.

Third, a court interpreting a plan provision to eliminate a fiduciary duty waiver would need to consider the same issues regarding the limits on a chapter 7 trustee's ability to pursue previously waived claims. While the effect of § 1123(a)(5) arguably alters this analysis, any argument in favor of eliminating the fiduciary duty waiver would likely center around increasing distributions ***679** to creditors, consistent with bankruptcy policy. Permitting these claims to go forward in a

chapter 11 case, but not in a chapter 7 case, where creditors are likely to receive even less, would arguably result in an inconsistent application of bankruptcy law.

Finally, significant slippery slope concerns exist in permitting a chapter 11 plan to vitiate the terms of an LLC's operating agreement. If Delaware statutes and case law can be eliminated using § 1123(a)(5), then the same provision could arguably be used to limit the application of *Gheewalla* as well. Likewise, a liquidating trustee operating post-plan could argue that it should not be bound by well-established corporate doctrines, such as the business judgment rule and widely-accepted exculpation provisions in corporate charters. Because bankruptcy courts routinely apply these doctrines in corporate bankruptcy cases, they should not lightly seek to permit state law to be preempted in the LLC context as well.

VI. CONCLUSION

Unlike well-established fiduciary duties in the corporate law context, fiduciary duties under Delaware LLC law are significantly more fluid and can be completely eliminated in the LLC's operating agreement. Trustees, debtors in possession and their bankruptcy professionals may not be fully aware of these limitations given their recent vintage. Moreover, these limitations are likely to bind the debtor's bankruptcy estate in much the same way that the business judgment rule and related corporate law doctrines continue to apply in bankruptcy. While it may seem inequitable to bind creditors of an insolvent LLC to the terms of a contract to which they are not a party, Delaware courts have consistently noted that creditors have their own panoply of rights that they can assert or negotiate for in their dealings with debtors. These rights may be somewhat overstated, but absent a change in underlying state law, creditors and the trustees appointed to represent them in bankruptcy are likely powerless to pursue fiduciary duty claims against the managers and members of a Delaware LLC where the LLC's operating agreement expressly waives all fiduciary duties.

Footnotes

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[1] The corporate form has existed in Delaware since 1792. *See* CML V, LLC v. Bax, 28 A.3d 1037, 1045 (Del. 2011).

[2] *See* DEL. CODE ANN. tit. 6, §§ 18-101 to 18-1208 (2019) (the "LLC Act").

[3] *See* DEL. CODE ANN. tit. 8, §§ 101-398 (2019).

[4] Nonstock corporations, which are typically owned by members instead of shareholders, also exist, but they will be ignored for purposes of this article.

[5] *See* DEL. CODE ANN. tit. 8, § 141(b).

[6] Although a shareholder must own stock to be considered a shareholder of a corporation, it is possible to hold limited liability company interest in an LLC without being a member, and to be a member of an LLC without holding any limited liability company interest. *See* DEL. CODE ANN. tit. 6, §§ 18-702, 18-704(a), 18-301(d).

[7] N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) (citing Guth v. Loft, 5 A.2d 503, 510 (Del.1939) (noting that while corporate directors are not technically trustees, they stand in a fiduciary relationship to the corporation and its shareholders)).

[8] *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 755 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

[9] *See In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 32 (Del. Ch. 2014).

[10] *In re Walt Disney Co.*, 907 A.2d at 750.

[11] *See id.*; *see also* S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co., No. 4729-CC, 2011 WL 863007, at *13-14 (Del. Ch. Mar. 9, 2011); Smith v. Van Gorkom, 488 A.2d 858, 872, 882-85 (Del. 1985).

[12] *See, e.g., In re* Walt Disney Co. Derivative Litig., 907 A.2d at 755; *see also* Stone *ex rel.* AmSouth Bancorp. v. Ritter (Stone v. Ritter), 911 A.2d 362, 369-70 (Del. 2006) (adopting the *Caremark* standard for director oversight liability).

[13] *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

[14] *Id.* at 370.

[15] *See* DEL. CODE ANN. tit. 8, § 122(17) (2019) ("Every corporation created under this chapter shall have power to: Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders."); *see also* Wayne Cty. Emps.' Ret. Sys. v. Corti, No. 3534-CC, 2009 WL 2219260, at *17 (Del. Ch. July 24, 2009) ("It is conceded that 8 *Del. C.* § 122(17) permits a corporation to renounce in its certificate of incorporation any interest or expectancy in a corporate opportunity.").

[16] *See* Alarm.com Holdings, Inc. v. ABS Capital Partners Inc., No. CV 2017-0583-JTL, 2018 WL 3006118, at *8 n.46 (Del. Ch. June 15, 2018), *aff'd,* No. 360, 2018, 2019 WL 479205 (Del. Feb. 7, 2019).

[17] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) ("The certificate of incorporation shall set forth: ... A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit ...."); *see also In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 32 (Del. Ch. 2014).

[18] *In re Orchard Enters.,* 88 A.3d at 32 (citing 1 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 6.02[7] at 6-18 (2013)).

[19] *See* Miller v. HCP & Co., No. CV 2017-0291-SG, 2018 WL 656378, at *2 (Del. Ch. Feb. 1, 2018), *aff'd sub nom*. Miller v. HCP Trumpet Invs., LLC, 194 A.3d 908 (Del. 2018), *reargument denied* (Oct. 9, 2018) (noting the "common-law protections available with the corporate form" and its "common-law fiduciary duties").

[20] *In re Orchard Enters.*, 88 A.3d at 32.

[21] CMS Inv. Holdings, LLC v. Castle, No. CV 9468-VCP, 2015 WL 3894021, at *18 (Del. Ch. June 23, 2015) ("In the absence of language in an LLC agreement to the contrary, the managers of an LLC owe traditional fiduciary duties of care and loyalty.") (internal citations omitted)); 2009 Caiola Family Trust v. PWA, LLC, No. 8028-VCP, 2014 WL 7232276, at *8 (Del. Ch. Dec. 18, 2014) ("As a default rule, however, managing members of LLCs owe traditional fiduciary duties of loyalty and care.").

[22] *See, e.g.*, Feeley v. NHAOG, LLC, 62 A.3d 649, 660 n.1 (Del. Ch. 2012) (citing numerous cases over the years supporting this

proposition and noting that "[d]rafters of an LLC agreement 'must make their intent to eliminate fiduciary duties plain and unambiguous.'") (quoting Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, No. 3658-VCS, 2009 WL 1124451, at *8 (Del. Ch. Apr. 20, 2009)); *see also* Kelly v. Blum, No. 4516-VCP, 2010 WL 629850, at *11 (Del.Ch. Feb. 24, 1010) (noting that contractual alterations of traditional fiduciary duties must be explicit).

23 *See Kelly*, 2010 WL 629850, at *10 ("Section 18-1101(c) does not specify a statutory default provision as do other sections of the LLC Act; rather, it implies that some default fiduciary duties may exist 'at law or in equity,' inviting Delaware courts to make an important policy decision and determine the default level of those duties."). *Compare* Auriga Capital Corp. v. Gatz Props., LLC (Auriga), 40 A.3d 839, 851 (Del. Ch. 2012), *with* Gatz Props., LLC v. Auriga Capital Corp. (Gatz), 59 A.3d 1206, 1218 (Del. 2012).

24 Auriga Capital Corp v. Gatz Props., LLC, 40 A.3d 839, 851 (Del. Ch. 2012).

25 Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1218 (Del. 2012).

26 *See* DEL. CODE ANN. tit. 6, § 18-1104 (2019) ("In any case not provided for in this chapter, the rules of law and equity, *including the rules of law and equity relating to fiduciary duties* and the law merchant, shall govern.") (emphasis added). Section 18-1104 was amended effective as of August 1, 2013 to add "the rules of law and equity relating to fiduciary duties and."

27 DEL. CODE ANN. tit. 6, § 18-1101(e); *See also* DEL. CODE ANN. tit. 6, § 17-1101(f) ("[A] partnership 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").

28 Wiggs v. Summit Midstream Partners, LLC, No. 7801-VCN, 2013 WL 1286180, at *10 (Del. Ch. Mar. 28, 2013) (noting that, where an operating agreement expressly stated that an LLC manager had no duties, including fiduciary duties, to the LLC or its members or other managers, "[t]his unambiguous language precludes any fiduciary duty claim against" the LLC's managing member).

29 *Id.*; *see also* Kelly v. Blum, No. 4516-VCP, 2010 WL 629850, at *13 (Del. Ch. Feb. 24, 2010) (holding that under the LLC Act, "the contracting parties to an LLC agreement may not waive the implied covenant of good faith and fair dealing").

30 Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784 (Del. Ch. 1992).

31 *Id.* at 787 (internal citations omitted).

32 *Id.*

33 *See id.* at 790.

34 Prod. Res. Grp. L.L.C. v. NCT Grp., Inc., 863 A.2d 772 (Del. Ch. 2004).

35 *Id.* at 791.

36 *Id.* at 776.

37 *Id.* at 793.

38 *Id.* at 794.

39 *Id.* at 790.

40 *See id.*

41 *Id.* at 801.

42 N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

43 *Id.* at 94.

44 *Id.* at 101.

45 *Id.* at 101-02.

46 *Id.*

47 DEL. CODE ANN. tit. 6, § 18-1002 (2019); *see also* CML V, LLC v. Bax, 28 A.3d 1037, 1039 (Del. 2011).

48 CML V, LLC v. Bax, 6 A.3d 238, 244 (Del. Ch. 2010).

49 Vichi v. Koninklijke Philips Elecs. N.V., No. 2578-VCP, 2009 WL 4345724 (Del. Ch. Dec. 1, 2009).

50 *See id.* at *20.

51 *Bax*, 6 A.3d at 238.

52 *See id.* (citing Bren v. Capital Realty Grp. Senior Housing, Inc., No. Civ.A. 19902-NC, 2004 WL 370214 (Del. Ch. Feb. 27, 2004)).

53 DEL. CODE ANN. tit. 6, §§ 17-101 to 17-1208 (2019).

54 *See* DEL. CODE ANN. tit. 6, § 17-1101(f) ("A partnership 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 partner or other person to a limited partnership or to another partner or to an other person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership 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.").

55 *Bren*, 2004 WL 370214 at *4.

56 *Bax*, 6 A.3d at 243; *see also Bren*, 2004 WL 370214 at *6.

57 *Bax*, 6 A.3d at 244.

58 *Id.* ("[T]wo decisions of this Court have assumed, implicitly, that a creditor of an insolvent alternative entity can sue derivatively for breach of fiduciary duty.").

59 CML V, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011).

60 CML V, LLC v. Bax, 6 A.3d 238, 244 (Del. Ch. 2010).

61 *Id.*

62 *Bax*, 28 A.3d at 1046.

63 *Id.* at 1043.

64 *Id.* at 1043, 1046.

65 *Id.* at 1046; *see also* N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) ("While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights.").

66 Trusa v. Nepo, No. 12071-VCMR, 2017 WL 1379594 (Del. Ch. Apr. 13, 2017).

67 *Id.* at *6 (internal quotations omitted).

68 *Id.* at *3.

69 *Id.* at *6.

70 *See* 11 U.S.C. § 541(a) (2018) (noting that the filing of a bankruptcy petition creates an estate consisting of most of the debtor's property).

71 11 U.S.C. §§ 321, 701(a).

72 *Id.* § 702(d).

73 *Id.* § 326.

74 *Id.* § 327.

75 *Id.* § 704(a)(1), (4).

[76] *Id.* § 541(a)(1).

[77] *See, e.g.*, Pereira v. Farace, 413 F.3d 330, 342 (2d Cir. 2005) ("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."); Brandt v. Hicks, Muse & Co. (*In re* Healthco Int'l, Inc.), 208 B.R. 288, 300 (Bankr. D. Mass. 1997) ("The Trustee can bring any suit Healthco could have brought, including suits against directors and controlling shareholders for breach of fiduciary duty.").

[78] 11 U.S.C. § 323.

[79] *Id.* § 544(a).

[80] *See* Buncher Co. v. Off. Comm. of Unsecured Creditors of GenFarm Ltd. P'Ship IV, 229 F.3d 245, 250 (3d Cir. 2010) ("When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer."); Off. Comm. of Unsecured Creditors v. Chinery (*In re* Cybergenics Corp.), 226 F.3d 237, 244 (3d Cir. 2000) ("[E]mpowering the trustee or debtor in possession to avoid a transaction by pursuing an individual creditor's cause of action is a method of forcing that creditor to share its valuable right with other unsecured creditors.").

[81] *See* 11 U.S.C. §§ 1107(a) (2018) ("[A] debtor in possession shall have all the rights, other than the right to compensation under § 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in § 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter."); 1106(a)(1) (excluding the powers listed in § 704(a)(1) and (4) from the list of powers granted to a chapter 11 trustee).

[82] *See, e.g., id.* § 704(a)(3) (ensuring the debtor performs its election to retain or surrender property).

[83] *See, e.g., id.* §§ 704(a)(1) (requiring the trustee to "reduce to money the property of the estate); 704(a)(6) (opposing the discharge of the debtor); 1106(a)(3) (examining the financial affairs of the debtor and its business).

[84] *Id.* § 1107(a).

[85] *See* FED. R. BANK. P. 6009 (permitting both a trustee and a debtor in possession to prosecute, defend and enter an appearance in any proceeding by, against or on behalf of the estate).

[86] 11 U.S.C. §1102(a)(1).

[87] *Id.* §1103(a)

[88] *Id.* §1103(c).

[89] This analysis also applies to a debtor in possession, but this article, like the Bankruptcy Code itself, refers to trustees for convenience except where otherwise noted.

[90] *See supra* note 78.

[91] Beskrone v. OpenGate Capital Grp. (*In re* Pennysaver USA Publ'g, LLC), 587 B.R. 445, 466-67 (Bankr. D. Del. 2018).

92 *Id.* (citing CML V, LLC v. Bax, 28 A.3d 1037, 1039 (Del. 2011)).

93 *Id.* ("Creditors cannot seek direct claims for breach of fiduciary duty against LLCs and their officers or directors.").

94 *Id.* at 467 (citing N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101-02 (Del. 2007) and Trusa v. Nepo, 2017 WL 1379594, at *4-*5 (Del. Ch. Apr. 13, 2017)).

95 *Id.*

96 Off. Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Grp. Holdings, LLC (*In re* HH Liquidation, LLC), Case No. 15-11874, 2018 WL 4191580 (Bankr. D. Del. Jan. 26, 2018).

97 *Id.* at *1.

98 *Id.* In reaching this conclusion, Judge Gross relied upon cases holding that standing is not waivable and that an order granting standing does not act as a bar to waiving standing issues. *Id.* Nevertheless, it is unclear whether this decision would be altered had the committee acquired derivative standing in a contested matter rather than through a stipulation with an express reservation of rights. The extent of a committee's powers when pursuing derivative claims on behalf of the estate is beyond the scope of this article.

99 *Id.*

100 Stanziale v. MILK072011, LLC (*In re* Golden Guernsey Dairy, LLC), 548 B.R. 410 (Bankr. D. Del. 2015).

101 *Id.* at 413 (quoting *In re* USDigital, 443 B.R. 22, 43 (Bankr. D. Del. 2011)); *see also* Pepper v. Litton, 308 U.S. 295, 307 (1939) ("While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of the bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation--creditors as well as stockholders.").

102 *In re Golden Guernsey Dairy, LLC*, 548 B.R. at 413.

103 *See generally* Gavin/Solmonese LLC v. Citadel Energy Partners, LLC (*In re* Citadel Watford City Disposal Partners, L.P.), Case No. 17-50024 (KJC), 2019 WL 3381734, at *4 (Bankr. D. Del. May 3, 2019).

104 *Id.* at *5.

105 *Id.* at *5.

106 *Id.* at *6.

107 *Id.*

108 DEL. CODE ANN. tit. 6, § 18-1101(c), (e) (2019); *see also supra* Section II.B.2.

109 *In re* Optim Energy, LLC, Case No. 14-10262, 2014 WL 1924908, at *6 (Bankr. D. Del. May 13, 2014).

110 *Id.*

111 *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 120 (Del. Ch. 2009) (internal citations omitted).

112 Feuer *on behalf of* CBS Corp. v. Redstone, No. CV 12575-CB, 2018 WL 1870074, at *8 (Del. Ch. Apr. 19, 2018), *judgment entered sub nom*. Feuer v. Redstone (Del. Ch. 2018) (citing Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993)).

113 Tilden v. Cunningham, No. CV 2017-0837-JRS, 2018 WL 5307706, at *13 (Del. Ch. Oct. 26, 2018).

114 The Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003).

115 *Id.* at 552.

116 *Id.* at 558.

117 *Id.*

118 *Id.*

119 *Id.* at 558-59.

120 *Id.* at 569. The Third Circuit also quoted a Seventh Circuit case stating that "[i]f 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." *Id.* at 566-67 (citing Fogel v. Zell, 221 F.3d 955, 965-66 (7th Cir. 2000)).

121 Off. Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Grp. Holdings, LLC (*In re* HH Liquidation, LLC), Case No. 15-11874, 2018 WL 4191580 (Bankr. D. Del. Jan. 26, 2018).

122 Off. Comm. of Unsecured Creds. of Cybergenics Corp. v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003) (finding the debtor company's management unreasonable in its actions despite giving the "usual judicial deference to business judgment").

123 Olenik v. Lodzinski, No. CV 2017-0414-JRS, 2018 WL 3493092, at *24 (Del. Ch. July 20, 2018) (internal citations omitted).

124 Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 171, 174 (Del. Ch. 2006).

125 *In re HH Liquidation, LLC*, 2018 WL 4191580, at *47.

126 Quadrant Structured Prod. Co. v. Vertin, 102 A.3d 155, 194 (Del. Ch. 2014).

127 *In re HH Liquidation, LLC*, 2018 WL 4191580, at *48.

128 *See id.* at *47.

129 *See id.* at *51-*56.

130 *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2019) ("The certificate of incorporation shall set forth: ... A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit ....").

131 *Id.*

132 Pereira v. Farace, 413 F.3d 330 (2d. Cir. 2005).

133 *Id.* at 341 (emphasis added).

134 *Id.* at 342.

135 *Id.* (citing Prod. Res. Grp. L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 795 (Del. Ch. 2004)).

136 *See id.*

137 *See* Butner v. United States, 440 U.S. 48, 54-55 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

138 I.A.T.S.E. Local No. One Pension Fund v. Gen. Elec. Co., No. 11893-VCG, 2016 WL 7100493 (Del. Ch. Dec. 6, 2016) (noting that stockholders have two types of direct claims against fiduciaries: personal and non-personal) (internal citations omitted).

139 N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007).

140 Feldman v. Cutaia, 951 A.2d 727, 733 (Del. 2008) ("Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature.").

141 Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004).

142 *See id.* at 1036.

143 Caplin v. Marine Midland Grace Trust Co. of NY, 406 U.S. 416, 431-32 (1972) (discussing issues with the binding nature of any judgment obtained by the trustee as well as any settlement of such claims).

144 *Id.* at 434.

145 *Id.* at 429-32.

146 N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007) (emphasis in original).

147 DEL. CODE ANN. tit. 6, § 18-1101(c), (e) (2019) ("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 ... 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 ...").

148 *See Caplin*, 406 U.S. at 431-32 (discussing issues with the binding nature of any judgment obtained by the trustee as well as any settlement of such claims).

149 The Federal Arbitration Act is found at 9 U.S.C. §§ 1-307 (2018).

150 *See* Glassman, Edwards, Wyatt, Tuttle & Cox P.C. v. Wade (*In re* Wade), 523 B.R. 594, 598 (Bankr. W.D. Tenn. 2014) (finding that the bankruptcy process provides parties in interest with "a wider latitude than is provided outside of bankruptcy in that a centralized forum is available to analyze and address *all* the factors and issues and concomitantly to make the most just, speedy, and economic decisions").

151 Shearson/Am. Express v. McMahon, 482 U.S. 220, 226 (1987).

152 *Id.* at 227 (internal citations omitted).

153 Michael J. Lichtenstein & Sara A. Michaloski, *The Enforcement of Arbitration Agreements in Bankruptcy Proceedings*, 2017 EMERGING ISSUES ANALYSIS 7551, at 2, available at https://www.shulmanrogers.com/wp-content/uploads/2017/05/Lichtenstein-The-Enforcement-of-Arbitration-Agreements-in-Bankruptcy-May-2017.pdf (last accessed Jan. 22, 2019); *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (May 21, 2018) (holding that the language of a statute must be "clear and manifest" before a federal court could disregard an arbitration agreement). *But see In re Wade*, 523 B.R. at 605 (finding that the bankruptcy court's exclusive jurisdiction over property of the estate under 28 U.S.C. § 1334(e)(1) provided statutory language in direct conflict with the Federal Arbitration Act and that such language "was intended by Congress to exclude any adjudicators other than the bankruptcy court from exercising control over property of the estate ....").

154 Lichtenstein & Michaloski, *supra* note 153, at 12.

155 Lichtenstein & Michaloski, *supra* note 153, at 12.

156 *See* MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (ruling that, even in core proceedings, the arbitration agreement controls in the absence of a conflict between the Federal Arbitration Act and the provisions of the Bankruptcy Code at issue or evidence that arbitration would "'necessarily jeopardize' the objectives of the Bankruptcy Code").

157 *See* Mintze v. Am. Gen. Fin. Servs., Inc., 434 F.3d 222, 231 (3d Cir. 2006) (holding that a bankruptcy court lacks discretion to deny arbitration unless contrary congressional intent is established).

158 *See* Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc., 479 F.3d 791, 798-99 (11th Cir. 2007) (finding, likely as dicta,

that even if the turnover action at issue was core, the court below failed to assess "whether enforcing the parties' arbitration agreement would inherently conflict with the underlying purposes of the Bankruptcy Code").

159 *See* Moses v. CashCall, Inc., 781 F.3d 63 (4th Cir. 2015) (ruling that sending a core claim to arbitration would substantially interfere with the debtor's reorganization plans); *In re* White Mountain Mining Co., LLC, 403 F.3d 164, 169 (4th Cir. 2005) (holding, in a recharacterization dispute, that "[a]rbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the bankruptcy judge assigned to hear the case").

160 *See* Cont'l Ins. Co. v. Thorpe Insulation Co., 671 F.3d 1011, 1015 (9th Cir. 2012) (finding that the arbitration provision in an asbestos settlement would conflict with the purposes of the § 524(g) channeling injunction). Nevertheless, the Ninth Circuit noted that the "core/non-core distinction [was] not dispositive" under *McMahon*. *Id.* at 1021.

161 *In re* Nat'l Gypsum Co., 118 F.3d 1056, 1069 (5th Cir. 1997).

162 Glassman, Edwards, Wyatt, Tuttle & Cox P.C. v. Wade (*In re* Wade), 523 B.R. 594, 609 (Bankr. W.D. Tenn. 2014) (declining to enforce an arbitration provision where law firm alleged that a former member breached fiduciary duties owed to the firm by operating a shadow law firm because those issues were "so intertwined" with the dischargeability complaint filed by the law firm that separating the issues would not be feasible). The facts in *Wade* are so unique that they provide little assistance to the trustee in more traditional derivative fiduciary duty litigation.

163 *See, e.g.,* Savage & Assocs., P.C. v. BLR Servs. SAS (In re Teligent, Inc.), 307 B.R. 744, 748-49 (Bankr. S.D.N.Y. 2004) (estate representative may not rely on § 544(b) to pursue a breach of fiduciary duty claim against debtor's former officer/director); In re Bliss Techs., Inc., 307 B.R. 598, 608 (Bankr. E.D. Mich. 2004) (holding that § 544(b)(1) does not apply to claims of alleged breach of fiduciary duty).

164 *See* Henry Schein Inc. v. Archer & White Sales Inc., 139 S. Ct. 524 (2019) (holding, in a unanimous opinion, that the so-called "wholly groundless exception" to enforcement of an arbitration provision cannot be used to prevent a court from deciding arbitrability of the dispute where the parties expressly agreed by contract to have an arbitrator decide that issue); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (holding that the language of a statute must be "clear and manifest" before a federal court could disregard an arbitration agreement). For an excellent discussion of the potential ramification of these two decisions on bankruptcy practice, see Bill Rochelle, *Supreme Court Decision on Arbitration Has Ominous Implications for Bankruptcy*, ROCHELLE'S DAILY WIRE (Jan. 14, 2018), available at https://www.abi.org/news-room/daily-wire/supreme-court-decision-on-arbitration-has-ominous-implications-for-bankruptcy (last accessed Jan. 23, 2019).

165 N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) (quoting Simons v. Cogan, 549 A.2d 300, 304 (Del. 1988)).

166 *Id.*

167 The fear of a lender wielding too much leverage in this context is a primary consideration behind the "golden share" opinions that have been authored in recent years. *See, e.g., In re* Intervention Energy Holdings, LLC, 553 B.R. 258, 265 n.25 (Bankr. D. Del. 2016) (establishing that a lender's contracting for a provision solely to afford it, by way of a token equity unit, control over the debtor LLC's bankruptcy filing, violates federal public policy); *In re* Lake Michigan Beach Pottawattamie Resort LLC, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (finding that a provision in the LLC Agreement of a Michigan limited liability company that required the consent of a non-economic member, which was also a lender to the limited liability company, to authorize the filing of a voluntary bankruptcy petition and that also purported to eliminate such person's duties to consider the interests of the limited liability company was unenforceable under state law and federal bankruptcy law).

168 *See, e.g.*, CML V, LLC v. Bax, 6 A.3d 238, 243-44 (Del. Ch. 2010) (citing Vichi v. Koninklijke Philips Elecs. N.V., No.

2578-VCP, 2009 WL 4345724 (Del. Ch. Dec. 1, 2009)); Bren v. Capital Realty Grp. Senior Housing, Inc., No. Civ.A. 19902-NC, 2004 WL 370214 (Del. Ch. Feb. 27, 2004)).

169 *Bax*, 6 A.3d at 249.

170 DEL. CODE ANN. tit. 6, § 18-402 (2019) ("Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members[.]").

171 *See* Obeid v. Hogan, No. CV 11900-VCL, 2016 WL 3356851, at *6 (Del. Ch. June 10, 2016), *judgment entered* (Del. Ch. 2016). *Obeid* does caution against using analogies to other entities "too broadly or without close analysis," however. *Id.* at *13.

172 *See, e.g.*, Kelly v. Blum, C.A. No. 4516-VCP, slip op. at 32 n.73 (Del. Ch. Feb. 24, 2010).

173 *Bax*, 6 A.3d at 249-50.

174 *Id.* (citing Twin Bridges Ltd. P'ship v. Draper, No. Civ.A. 2351-VCP, 2007 WL 2744609, at *19 (Del. Ch. Sept. 14, 2007) (discussing limited partnership)).

175 CML V, LLC v. Bax, 28 A.3d 1037, 1039 (Del. 2011).

176 *Id.* at 1045.

177 *Id.*

178 11 U.S.C. § 1123(a)(5) (2018) (emphasis added).

179 *See, e.g., In re* Federal-Mogul Global, Inc., 684 F.3d 355, 369 (3d Cir. 2012) ("The plain language of § 1123(a) evinces Congress's clear intent to preempt state law."); Pac. Gas & Elec. Co. v. California. 350 F.3d 932, 937 (9th Cir. 2003) ("We agree with the district court that a reorganization plan under Chapter 11 of the Bankruptcy Code expressly preempts otherwise applicable non-bankruptcy laws."); Universal Coops., Inc. v. FCX, Inc. (*In re* FCX, Inc.), 853 F.2d 1149, 1155 (4th Cir. 1988) (finding that § 1123(a)(5) "is an empowering statute" that "enlarges the scope of [the debtor's pre-bankruptcy rights], thus enhancing the ability of a trustee or debtor in possession to deal with property of the estate").

180 *See, e.g., Federal-Mogul*, 684 F.3d at 381 ("[T]he scope of preemption under § 1123(a) is not unlimited, and our holding does not suggest otherwise."); *Pac. Gas & Elec.*, 350 F.3d at 937 (limiting preemption to laws that "relate to financial condition"); Irving Tanning Co. v. Maine Superintendent of Ins., 496 B.R. 644, 663-64 (B.A.P. 1st Cir. 2013) (providing "at least three limits to the preemptive reach of § 1123(a)(5) ....").

181 *Pac. Gas & Elec.*, 350 F.3d at 943.

182 *Federal-Mogul*, 684 F.3d at 365.

183 *Id.* (quoting Farina v. Nokia, Inc. 625 F.3d 97, 117 (3d Cir. 2010)).

184 *See Irving Tanning*, 496 B.R. at 663 (collecting cases).

185 *See generally Federal-Mogul*, 684 F.3d 355.

186 *Id.* at 370-71.

187 *Id.* at 378-79.

188 *Id.* at 375-77; *Pac. Gas & Elec.*, 350 F.3d at 937.

189 *Federal-Mogul*, 684 F.3d at 377.

190 *Id.* at 381.

191 *Id.*

192 *Id.* at 382.

193 Irving Tanning Co. v. Maine Superintendent of Ins., 496 B.R. 644 (B.A.P. 1st Cir. 2013).

194 *Id.* at 647-48.

195 *Id.* at 664-66.

196 *Id.* at 664.

197 Off. Comm. of Unsecured Creds. of Cybergenics Corp. v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003) (noting the potential conflicts of interest facing management of the debtor in possession).

198 Off. Comm. of Unsecured Creds. of HH Liquidation, LLC v. Comvest Grp. Holdings, LLC (*In re* HH Liquidation, LLC), Case No. 15-11874, 2018 WL 4191580, at *57 (Bankr. D. Del. Jan. 26, 2018).

199 *In re* Ionosphere Clubs, Inc., 113 B.R. 164, 167 (Bankr. S.D.N.Y. 1990).

200 *See, e.g.*, McDermott Inc. v. Lewis, 531 A.2d 206, 215 (Del. 1987) ("The internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs."); *see also* Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d 1074, 1081 (Del. 2011) ("The term 'internal affairs' encompasses 'those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.' The doctrine requires that the law of the state [ ] of incorporation must govern those relationships."); Newcastle Partners, L.P. v. Vesta Ins. Grp., Inc., 887 A.2d 975, 982 (Del. Ch.), *aff'd,* 906 A.2d 807 (Del. 2005) ("There are, of course, some circumstances in which a state's governance of internal corporate affairs is preempted by federal law, but those instances are rare, and occur only when the law of the state of incorporation is 'inconsistent with a national policy on foreign or interstate commerce.'") (citing Vantagepoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("[O]nly the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs.")).

201 *See* cases cited *supra* note 200; *Vantagepoint Venture Partners 1996,* 871 A.2d at 1113 ("Under the Commerce Clause, a state 'has

no interest in regulating the internal affairs of foreign corporations."') (internal citations omitted).

202 *In re* Federal-Mogul Global, Inc., 684 F.3d 355, 365 (3d Cir. 2012).

203 Irving Tanning Co. v. Maine Superintendent of Ins., 496 B.R. 644, 665 (B.A.P. 1st Cir. 2013).

204 *Id.* (emphasis added).

205 *Id.* at 665-66 (finding that the provision violated health and safety laws and would violate the property rights of the creditors in possession of the funds at issue).

206 Torch Liquidating Trust *ex rel* Bridge Assocs. L.L.C. v. Stockstill, 561 F.3d 377, 386 (5th Cir. 2009) ("By definition then, a cause of action for breach of fiduciary duty owed to the corporation that is property of the corporation at commencement of the chapter 11 case becomes property of the debtor's estate, regardless of whether outside of bankruptcy the case was more likely to be brought by a shareholder or creditor through a derivative suit.").

207 *Id.* at 391.

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