

D&O Newsletter

PRG Resources: The Twilight Zone of Insolvency?

Vice Chancellor Leo Strine's decision in *Production Resources Group, L.L.C. v. NCT Group, Inc.*,¹ may remove a significant arrow from the quiver of creditors' committees and liquidation trusts who routinely file suits against directors and officers after a corporate bankruptcy to obtain recoveries for the estate from the debtor's directors and officers liability insurance. In a clarification of the Chancery Court's oft-cited decision in *Credit Lyonnais Bank Nederland N.V. v. Pathe Communications Corp.*,² Strine cautioned that some commentators and courts have read *Credit Lyonnais* far too expansively, "not to create a shield for directors from stockholder claims, but to expose directors to a new set of fiduciary claims, this time by creditors."³ Strine held that the fact that a corporation has become insolvent does not turn classic derivative type claims for breach of fiduciary duty into direct claims, it simply provides creditors standing to assert them because even if the improper acts occur when the corporation is insolvent, the injury is to the company itself in the first instance. Creditors are injured indirectly to the extent that the improper acts diminish the value of the assets available to satisfy creditor claims. *Production Resources* is also significant in that it holds that the exculpatory provision of a company's certificate of incorporation extends to derivative type claims for breach of the duty of due care against directors even when the company is insolvent.

The Facts

Production Resources Group ("PRG") obtained a \$2 million judgment against NCT Group, Inc. ("NCT") in Connecticut, but was unable to collect payment there. PRG then commenced an action in Delaware Chancery Court to compel appointment of a receiver and to assert claims for breach of fiduciary duty against certain of NCT's directors and officers for general mismanagement of its finances and for giving preferential treatment over other creditors to the wife of a former director of the company, who after advancing millions of dollars became the company's largest creditor and de facto controlling shareholder.⁴ PRG contended that since NCT was insolvent, PRG could assert its claims as direct claims because they were not subject to the exculpatory provisions of NCT's charter.⁵

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Defendants moved to dismiss, alleging that plaintiffs failed to allege facts that would indicate that NCT was insolvent or that would otherwise invoke the court's authority to appoint a receiver. Defendants also argued that plaintiffs failed to plead facts that stated a breach of fiduciary duty claim; at best, plaintiffs had asserted a duty of care claim that is exculpated by NCT's charter provisions.

Holding that plaintiffs more than adequately alleged facts that PRG was insolvent and appointment of a receiver was warranted given the alleged self-dealing in NCT, the court turned to the sustainability of the breach of fiduciary duty claims and the applicability of the exculpatory provision in NCT's charter.

In the Zone

It is well-settled under Delaware law that once a company becomes insolvent,⁶ the directors owe fiduciary duties to the creditors. However, Strine noted, in dicta, that the more difficult issue is “whether there is a zone in which the directors' duties to the [company] fundamentally change and whether creditors can assert fiduciary duty claims...before the [company] becomes insolvent.”⁷ Strine cautioned that such reasoning could lead to situations with two groups of derivative plaintiffs with “starkly different conceptions of what is best for the company.”⁸ Notwithstanding this divergence of interest between equity holders and creditors, Strine “doubt[ed] the wisdom of a judicial endeavor to second-guess good faith director conduct in the so-called zone” giving credence to the protections of the business judgment rule to make good faith prudent decisions.⁹

Corporate law expects that the directors of a corporation will engage in activities that will maximize the value of the “firm’s cash flows primarily for the benefit of the residual-risk bearers, the owners of the firm’s equity capital” while at the same time honoring the legal obligations of the corporation to its creditors.¹⁰ Primarily focused on generating economic returns, the directors may also consider the interests of other constituencies in determining how to manage the company, especially when a risky strategy may render the corporation unable to honor its legal obligations to creditors. Rather than create a new theory of liability for creditors,¹¹ Strine stressed that *Credit Lyonnais* merely reinforced that a corporation’s directors may properly determine to pursue a “less risky business strategy precisely because they feared that a more risky strategy might render the firm unable to meet its legal obligations to creditors and other constituencies.”¹² Thus, *Credit Lyonnais* acknowledged that the directors of a corporation have an obligation “if prudently possible, to maximize the corporation’s value to best satisfy the legitimate claims of all of its constituents, and not simply to pursue the course of action that stockholders might favor as best for them”¹³ and as Strine noted, *Credit Lyonnais* “provided a shield to directors from stockholders who claimed directors had a duty to undertake extreme risk so long as the company would not technically breach any legal obligation.”¹⁴

The Nature of the Claims and the Standing to Assert Them

Analyzing the shift in duties upon insolvency to the creditors and the derivative nature of claims for breach of fiduciary duty, Strine noted that the transformation of the creditor to a residual owner of the corporation (*i.e.*, akin to an equity interest) “does not change the nature of the harm in a typical claim for breach of fiduciary duty,” because such decisions that lead to loss of assets remain harm to the corporation itself, whether or not it is insolvent.¹⁵ Strine reasoned that the “fact of insolvency does not change the primary object of the directors’ duties, which is to the [company] itself. The [company's] insolvency simply makes the creditors the principal constituency injured by any fiduciary breaches that diminish the [company's] value and logically gives them standing to pursue these claims to rectify that injury.”¹⁶ While a claim may be brought by an individual creditor for generalized

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allegations of mismanagement or self-dealing, any monetary recovery would go to the company to be made whole, or, in the event of the bankruptcy, to the estate to be distributed for the benefit of all creditors according to the bankruptcy priorities.

Having found that the creditors of an insolvent corporation have standing to pursue derivative type claims, notwithstanding the fact that any recoveries would flow to all of the creditors generally, Strine turned to the question of whether directors of an insolvent corporation continue to enjoy the insulation from personal liability for breaches of the duty of care that §102(b)(7) of Delaware's Corporation Code authorizes corporations to adopt in their charters. Strine acknowledged the important public policy of encouraging capable persons to sit on boards while providing them with the freedom to make risky good faith business decisions without the fear of personal liability.¹⁷ Since creditors as a group can only assert claims that belong to the corporation, Strine reasoned that such "claims should not be expanded to enable the [company] to hold directors liable for lack of due care simply because the [company] is, or, even worse, has become insolvent."¹⁸ Strine ruled that to hold otherwise would "[hollow] §102(b)(7) of much of its intended utility"¹⁹ and the "creditors would end up as the transferees from the corporation of a broader class of claims than the corporation ever possessed."²⁰ Strine noted that §102(b)(7) only restricted third parties to the extent that they sought to enforce rights on behalf of the corporation itself. The direct claims of the creditors for breach of contract, fraud and misrepresentation would not be subject to the exculpatory provisions because such claims are personal to the individual creditors.²¹ Strine also noted that the statute does not insulate directors for conscious wrongdoing or unfair self-dealing.²² Strine further noted the possibility that "there might possibly exist circumstances in which the directors display such a marked degree of animus toward a particular creditor with a proven entitlement to payment that they expose themselves to a **direct** fiduciary duty claim by that creditor."²³

Conclusion

Whether Strine's decision will help impede the onslaught of claims by creditors' committees, trustees and debtors-in-possession against the directors and officers of troubled companies remains to be seen, but it does clarify certain aspects of directors' liabilities and duties in the face of insolvency and reinforces important protections available to directors of insolvent (or soon to be insolvent) corporations. Perhaps most importantly, Strine dispelled the notion that Credit Lyonnais created a new theory of liability for creditors or otherwise expanded the duties of directors, but was instead intended to provide a shield for corporate managers who might choose to pursue a less risky business model in the interests of the company as whole. In addition, Strine reinforced that while the creditors of an insolvent corporation might have standing to assert derivative type claims, such claims remained the property of corporation and, hence, it was logical to afford the protections of 8 Del.C. § 102(b)(7) to directors for those claims.

¹ 863 A.2d 772 (Del. Ch. 2004).

² Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

³ *Production Resources*, 863 A.2d at 789.

⁴ "According to the complaint, public documents describe Salkind as a legal secretary, a position that PRG (rationally) suggest does not generate an income sufficient to account for the millions of dollars in capital she has allegedly provided to NCT in order to become its primary creditor and *de facto* controlling stockholder." *Id.* at 780.

⁵ Section 102(b)(7) of Delaware's Corporation Code authorizes corporations to adopt charter provisions which shield directors from personal liability to the corporation or its stockholders for breach of fiduciary duty as a director, except for: breach of the duty of loyalty, acts or omissions not in good faith, intentional violations of law, or such actions from which the director obtained a personal benefit. 8 DEL. C. §102(b)(7).

⁶ Insolvency may be plead by showing: (1) that a company's liabilities exceed its assets with no reasonable prospect that the business can be continued in the face thereof; or (2) an inability to meet maturing obligations as they fall due in the ordinary course of business.

⁷ *Production Resources*, 863 A.2d at 790, n.56

^{8, 11, 16, 19} *Id.*

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Expanding Liability For Officers and Directors of Financially Distressed Companies: No Zone In New York

In the wake of recent large-scale corporate scandals, courts and legislators are increasing directors' and officers' responsibilities and duties. At least some courts have determined that officers and directors of a financially distressed corporation may have fiduciary duties to creditors when the corporation is in the "zone of insolvency."¹ A recent decision by the New York Supreme Court has held that directors of New York corporations do not owe a fiduciary duty to creditors.

The imposition of fiduciary duties in the "zone of insolvency" has generated much criticism, principally because it is a judicially-created duty without connection to any source or standards.² The "zone of insolvency" was first discussed in the Delaware Chancery Court's decision in *Credit Lyonnais Bank Nederland v. Pathe Communications Corp.*³ Arguably, the presentation of the "zone of insolvency" in the case was unnecessary given the issue before the court, which concerned whether a controlling shareholder breached an agreement with a lender. Moreover, the decision in *Credit Lyonnais* has been criticized for failing to cite any supporting authority.⁴ Indeed, the first officially reported decision using the "zone of insolvency" concept did so "conditionally, hypothetically, and prospectively."⁵ Criticism stems from the fact that it is impossible to create fair and objective standards to determine when a director or officer's fiduciary duty shifts. A recent decision by the New York Supreme Court has held that directors of New York corporations do not owe a fiduciary duty to creditors when a corporation is in the "zone of insolvency."

New York has not extended a fiduciary duty to creditors when a company is in the zone of insolvency. Judge Leonard B. Austin of the New York Supreme Court, Nassau County, in the action styled *Columbia Forest Products v. Firestone Plywood Corp. & Alan Firestone*,⁶ held that, under New York law, a corporate executive does not have a fiduciary duty to corporate creditors.

Columbia Forest Products ("Columbia") manufactured plywood products and sold them to Firestone Plywood Corporation ("Firestone"), a commercial retailer. Alan Firestone was Firestone's sole shareholder, president, and chief executive officer. In early 2002, Firestone encountered financial difficulties, which ultimately resulted in it going out of business. Columbia brought the present action against Mr. Firestone when several checks issued to Columbia by Firestone bounced. Columbia asserted that Mr. Firestone was personally liable for these dishonored checks because in signing the checks Mr. Firestone breached his fiduciary duty to Columbia as a creditor of Firestone and/or committed an actionable fraud by issuing checks with knowledge that there were insufficient funds to cover the checks.⁷

In addressing fiduciary liability, the court held that Columbia's assertion that Mr. Firestone breached his fiduciary duty to Firestone's creditors was without merit. Columbia based its claim upon the Delaware Chancery Court's holding in *Geyer v. Ingersoll Publications Co.*,⁸ which held that a director of a Delaware corporation has a fiduciary duty to creditors when the corporation becomes insolvent. Judge Austin noted that in New York, the fiduciary duty of corporate directors and officers extends only to the corporation and its shareholders,⁹ and that New York has not extended the fiduciary duty of a director or officer to creditors. Since Firestone was a New York corporation and therefore governed by New York law, the court held that Mr. Firestone did not have a fiduciary duty to Columbia. The court added that any expansion of a director or officer's fiduciary duties should be

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effected only by the legislature and not by judicial fiat.¹⁰ The court then found that Mr. Firestone did not commit fraud by issuing the bounced checks because the record reflected that Mr. Firestone did not know the balance of Firestone's checking account at the time the checks were issued and granted Mr. Firestone's summary judgment motion.¹¹

¹ See Morton G. Rosen & M. Jonathan Hayes, *The Expanding Liability of Corporate Directors & Officers: Now You Have To Worry About "In The Vicinity of Insolvency," A Judicially Created Gun for Creditors*, 27 CAL. BANKR. J. 108, 125 (2004).

² Civ. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

³ See also a casenote herein discussing a recent Delaware decision that seeks to clarify the holding in *Credit Lyonnais*.

⁴ See *supra* Rosen at 128. See also *Weaver v. Kellogg*, 216 B.R. 563 (S.D. Tex. 1997).

⁵ No. 4545/02, 2004 WL 2672267 (N.Y. Sup. Ct. Nov. 23, 2004).

⁶ 621 A.2d 784 (Del. Chan. 1992).

⁷ *Columbia Forest*, 2004 WL 2672267, at *1 (citing *Linder Fund, Inc. v. Waldbaum, Inc.*, 82 N.Y.2d 219 (1993)).

⁸ *Columbia Forest*, 2004 WL 2672267, at *2.

Directors & Officers Department

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This issue presents case comments on Delaware, New York and circuit court decisions addressing the duties of directors and officers in the zone of insolvency and the protections provided by the business judgment rule and the exculpatory provisions of the Delaware Corporations Law and corporate charter.

If you would like further information regarding the D&O Group's capabilities or any of the information presented herein, please contact any of the following individuals: Jeff Gaylord or Richard George of our New York office at 212.232.1300; Robert Lewis or Jana Lubert of our Los Angeles office at 213.250.1800.

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⁹ *Id.* at 790 n.57

¹⁰ *Id.* at 787.

¹² *Id.* at 788.

¹³ *Id.* (citing *Credit Lyonnais*, 1991 WL 277613, *34 & n.55).

¹⁴ *Production Resources*, 863 A.2d at 788.

¹⁵ *Id.* at 792.

¹⁷ *Id.* at 777.

¹⁸ *Id.* at 794.

²⁰ *Id.* at 795.

²¹ *Id.* at 794.

²² *Id.* at 794-95.

²³ *Id.* at 798.

PROCEDURE & PROCESS: Loss of the Business Judgment Presumption in Federal Court & Irrationality/Inattention in the Boardroom

The United States Third Circuit's decision in *In re Tower Air, Inc.*,¹ which reversed the district court's dismissal of a suit brought by the bankruptcy trustee of Tower Air against its directors and officers, has garnered substantial commentary and criticism as essentially eviscerating the protections of the business judgment rule at the pleading stages in favor of the more liberal federal pleading standards of Rule 8 of the Federal Rules of Civil Procedure. Perhaps the most strident criticism of the Third Circuit's decision has come from Judge Kent Jordan, the judge who originally dismissed the Tower Air suit, in his decision in the IT Group litigation wherein he reluctantly acknowledged the binding authority of the Third Circuit's Tower Air ruling, but nonetheless expressed his disagreement with the same, noting that that the business judgment rule represents "substantive Delaware law, not a procedural peccadillo."² The Tower Air decision also echoes other recent decisions which address a director's duty to implement and participate in a good faith decision-making process as well as the prospect of personal liability if that process is marked by inattention or irrationality even if the ultimate decision is protected by the business judgment rule.

Background

Tower Air was founded by Morris Nachtom, its principal and controlling shareholder, in 1982 as a charter airline. By 1999, Tower Air had developed into a large commercial airline with over 1,700 employees, 14 passenger aircraft and three cargo aircraft. In February 2000, faced with mounting debt, eroding revenues and a deteriorating fleet, Tower Air filed a voluntary petition under Chapter 11 of the Bankruptcy Code, which was later converted to a Chapter 7 proceeding. The complaint asserts that the Defendants, in their capacities as directors and officers of Tower Air, breached their duties of good faith, loyalty and care and committed gross negligence through inattention and/or an irrational decision-making process by:

- allowing the practice of leasing and/or financing the purchase of new jet engines rather than repairing existing engines and "rubberstamping" large corporate expenditures in connection therewith without adequate discussion or analysis, which allegedly caused Tower Air to incur excessive debt;
- allowing Tower Air to operate and maintain certain unprofitable routes, which resulted in significant losses to Tower Air, including a route to Santo Domingo that was allegedly maintained solely to please Nachtom's daughter;
- allowing Nachtom, as controlling shareholder, to continue to manage and operate Tower Air and rubberstamping his decisions without proper oversight or control;
- failing to establish adequate management controls to ensure all used passenger tickets were processed for payments from credit card companies, as evidenced by \$1 million in unprocessed tickets uncovered by the Trustee; and
- failing to take action when notified of quality assurance problems with aircraft maintenance and repair work by the company's safety director.

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The Decision

The district court held that the complaint failed to allege facts which showed self-dealing or that the directors' actions bespoke irrationality or inattention, finding that the conclusory allegations were insufficient to overcome the protections of the business judgment rule. Under Delaware law, a plaintiff may overcome the presumption that directors acted in good faith by showing irrationality - that no reasonable business person could possibly authorize the decision in good faith; or inattentiveness - that the decision was the result of an irrational process or that the directors' failed to establish adequate information and reporting systems.³ In its opinion, the Third Circuit noted that Delaware cases are legion requiring specific allegations of fact to support a claim for relief under Chancery Rule 8 and that, in Delaware, such specificity requirements are consonant with notice pleading. However, the Third Circuit held that Delaware notice pleading bears "scant resemblance" to the Federal Rules of Civil Procedure which do not require a claimant to set out in detail the facts upon which he bases his claim, but only require that the plaintiff state a claim upon which relief can be granted. Under the standard espoused by the Third Circuit in *Tower Air*, the claimant need only set out a simple and brief statement of claims of irrationality or inattention and give the directors fair notice of the grounds of those claims. Finding that the district court erroneously pre-empted discovery, the Third Circuit reinstated four claims, which, if proved, might overcome the business judgment presumption, even though the same allegations might fail in state court.

The Third Circuit further advised that generally an affirmative defense such as the business judgment rule should not trigger dismissal under Rule 12(b)(6), unless an unanswered affirmative defense appears on the face of the complaint

Reflecting the "process" analysis espoused in the *Disney* decision, the court ironically upheld the dismissal of the first count in the complaint which alleged that the directors breached their fiduciary duties by declining to repair *Tower's* jet engines and replacing them with new leased engines, which was cheaper in the short run but more expensive in the long run, holding that the decision was a classic exercise of business judgment. However, the court reversed the dismissal of the third count as to the directors which alleged inattention with respect to the board's decision-making process regarding the decision to lease the new engines as evidenced by the alleged lack of discussion in the board minutes. The court ruled that the directors' alleged rubberstamping of large corporate expenditures was consistent with bad faith, notwithstanding the fact that the decision itself was a classic exercise of business judgment, because in Delaware the merits of the decision are considered separately from the process used to reach the decision. The court also reversed the dismissal of two counts of the complaint which alleged irrationality and inattention on behalf of the officers in connection with their inaction when told by the corporate director of safety of quality assurance problems with aircraft maintenance, their failure to process one million dollars worth of used airline tickets and the decision to establish and maintain an unprofitable route to Santo Domingo solely to placate *Nachtomi's* daughter. The court ruled that no business person acting in good faith could authorize such actions. The court also resurrected count 5 of the complaint which alleged gross negligence and mismanagement on behalf of the officers with respect to their irrational decision-making process, while acknowledging that the court itself appeared to be duplicative of the other counts alleged against the officers.

Significance

As Judge Jordan succinctly noted in his *IT Group* decision, *Tower Air* is significant for several reasons. By implementing the more liberal federal pleading standards for a breach of fiduciary duty

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claim, the Third Circuit has caused directors to "face greater expense and risk in federal court than they would in state court," because plaintiffs can now more easily survive a motion to dismiss and "impose the burdens of litigation on corporate officials," potentially leading to disparate findings in state and federal courts. Jordan and others contend that the Third Circuit erred in applying the more lenient federal notice pleadings standard, because the business judgment rule is a matter of substantive corporate law (rather than a procedural rule requiring the application of the more lenient federal rule) which allows directors of Delaware corporations a presumption that absent self-interest or lack of independence, the directors of a corporation have acted on an informed basis, in good faith and in the belief that the actions taken were in the best interests of the corporation and "prevents the courts from second guessing the decisions of directors and officers based on the results of those decisions rather than on the care, loyalty and good faith of those decisions." Citing the PRG Resources⁴ decision (which is discussed herein at p.1), Jordan also noted that it made "little sense to expand the risk of directors and officers because a corporation is insolvent." In essence, directors should not face greater liability because a suit is brought directly by a bankruptcy trustee in federal court rather than by the corporation itself derivatively. Jordan also chastised the Third Circuit's decision for not only making particularized pleading unnecessary, but for "actively penalizing particularity and rewarding obscurity" in pleadings.

Aside from the issue of the proper pleading standard, Tower Air is also significant in that it echoes other recent decisions which discuss a director's duty to implement and actively participate in a good faith decision making process. The Third Circuit cited the need for a rational process noting that "action may lead to liability where the action or the process that led to it were irrational; inaction may lead to liability where no red flag monitoring system is installed and non-compliance with applicable legal standards results." As noted above, the Tower Air court recognized that even if the ultimate decision is protected by the business judgment rule, the faulty decision making process that lead to that decision may nonetheless result in personal liability.

This takes on greater significance in light of other recent Delaware cases which suggest that "good faith" may be an additional fiduciary duty beyond the duties of care and loyalty, and, hence, an independent basis for liability, or, that the lack of good faith may take actions which otherwise fulfill the duties of care and loyalty outside the exculpatory charter provisions⁵ of Delaware Corporation Law § 102(b)(7). Such deliberate inattention or indifference, while not disloyal in the sense of personal or pecuniary gain, may take the conduct outside the protection of the exculpatory provisions. As the Disney court advised, this may be particularly true in the context of cases involving an "imperial CEO" or controlling shareholder coupled with an inattentive board. In Tower Air, the Third Circuit warned that at least in that jurisdiction, alleged inattention or irrationality in the decision-making process may form a basis for liability or, at the very least, a basis to survive a motion to dismiss. Directors and officers need to ensure that they faithfully implement and adhere to a rational and informed decision making process, especially when the company is in or approaching financial distress. Otherwise, they will likely face suits by bankruptcy trustees in federal courts that have a much greater chance to proceed in light of the Tower Air decision.

¹ 416 F.3d 229 (3d Cir. 2005)

² *IT Litigation Trust v. Daniel A. D'Aniello, et al.*, Slip Copy, 2006 WL 319000 (D. Del. 2006) fn. 10.

³ *In re Caremark Int'l Securities Litig.*, 698 A.2d 959

⁴ 863 A.2d 772 (Del. Ch. 2004)

⁵ *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003); *In re Walt Disney Co. Derivative Litigation*, 2005 WL 2056651 (Del. Ch. 2005).



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