Journal of Business & Technology Law

Volume 1 | Issue 2 Article 1

Foreword (and Update)

Follow this and additional works at: https://digitalcommons.law.umaryland.edu/jbtl

Recommended Citation

Foreword (and Update), 1 J. Bus. & Tech. L. 1 (2007)

Available at: https://digitalcommons.law.umaryland.edu/jbtl/vol1/iss2/1

This Front Matter is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Foreword (and Update)

THE PAPERS in this issue of the JOURNAL were presented at the fourth annual business law conference at the University of Maryland School of Law on Friday, November 4, 2005. The focus of the conference—*Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies*—was the trend among numerous courts toward the imposition of a common law fiduciary duty running from a corporation's board of directors to the corporation's creditors in situations in which the corporation is insolvent or is on the brink of insolvency. On the one hand, this trend appears to be quite at odds with the traditional idea that the board of directors owes a fiduciary duty exclusively to the stockholders as residual beneficiaries. On the other hand, if a corporation is insolvent, the creditors are the residual beneficiaries because *ex hypothesis* the corporation cannot pay the creditors in full. The creditors thus have an interest in any increase or decrease in the value of the corporation. But the creditors do not have the only interest here. Although it is clear that the creditors have an interest here that is akin to that of stockholders in a solvent corporation, the courts have not often addressed the question of creditor standing because the corporation is almost always in bankruptcy at that point.

The 1991 case, *Credit Lyonnais Bank Nederland v. Pathe Communications Corp.*, gave rise to an avalanche of cases and commentary, as the footnotes in this issue of the JOURNAL attest. Then, in 2004, Vice Chancellor Strine sought to put the matter to rest in *Production Resources Group, LLC v. NCT Corp.*, by holding that what *Credit Lyonnais* really did was to extend the shield of the business judgment rule to decisions in which the board seeks to maximize total firm value rather than just stockholder value. In other words, *Credit Lyonnais* protects the board of directors from an action by the stockholders grounded on the board's failure to seek advantage for the stockholders at the expense of creditors.

At the time of the conference, some of the papers published in this issue of the JOURNAL were almost finished, while others were almost started. Either way, there have been developments in the meantime that should be considered when one reads the papers that follow. The decision in *Production Resources* was discussed approvingly and at some length in *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC* and *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.* The most significant development was the recent decision by the Delaware Supreme Court in *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, where the court held that creditors may not assert direct claims for breach of fiduciary duty when a corporation is either insolvent or in the zone of insolvency. The

court further stated that creditors do have standing to maintain a derivative action for breach of fiduciary duty when a corporation is in fact insolvent.

The papers written for this conference have been cited in both *Big Lots* and *North American Catholic*. Thus, while the circumstances are no longer exactly as they were when the papers were prepared, the papers are to some extent responsible for the circumstances as they are today. We hope that will make for even more interesting reading.