

Bankruptcy and Restructuring: Practical Considerations for Non-Profits

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Agenda

- Introduction
- Fiduciary Duties
 - Insolvency
 - Business judgment
- Bankruptcy
 - Overview
 - Property of the Estate
 - Sales and Transfers of Assets of Exempt Organizations
 - Fraudulent Transfers
- Questions

Fiduciary Duties

- Duty of Care
 - Directors and officers must discharge the duties of their positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. (See, e.g., NY N-PCL §717)
- Duty of Loyalty
 - Directors and officers must place the interests of the organization ahead of their own interests, including publicly disclosing any conflicts of interests and not using board service as a means for personal or commercial gain.
- Duty of Obedience
 - Directors and officers must ensure that the nonprofit corporation abides by its stated purposes and goals. A nonprofit chartered to support low-cost housing initiatives in Houston should not be expending funds in Tuscon.

Fiduciary Duties

- Insolvency
 - Fiduciary duties of insolvent boards generally mirror the fiduciary duties of insolvent for-profit corporations during potential insolvency (regular meetings, careful diligence and record-keeping, consulting with professionals, thorough and meticulous review of alternatives, etc.).
- Business Judgment Rule
 - The business judgment rule can protect directors' decisions from scrutiny if they can show that they discharged their duties in good faith, in an informed manner, and did not personally benefit from their actions

Fiduciary Duties

- Maintaining Charitable Purpose. Even when insolvent, officers and directors of a nonprofit must **balance** the interests of the corporation's creditors against the interest of preserving and observing the organization's charitable purpose.
- “[I]t cannot be the case that the Court is simply paralyzed if both objectives, paying creditors as much as possible and serving the mission of the corporation, cannot be met at the same time. So what weight is to be applied? The best I can discern from the case law is that all of these considerations are supposed to be taken into account and balanced in a reasonable way, and with no other requirement or particular weight to be applied.”
- *In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 704 (Bankr. S.D.N.Y. 2016)

Bankruptcy Basics

- 11 U.S.C. § 101, *et seq.*
- Chapter 7 – liquidation
- Chapter 11 – reorganization
- Pre-petition v. post-petition



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