LLC's Are Different: Creditors of Insolvent LLC's Do *Not* Have Standing To Sue For Breach of Fiduciary Duty, But Can a Creditors' Committee Be Granted Standing?

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Almost four years ago, the Delaware Supreme Court held that while creditors of an insolvent Delaware corporation do not have the right to assert direct claims for breach of fiduciary duty against officers and directors, they may obtain derivative standing to enforce the company's claims.[1] The legal community had almost universally assumed that the law of insolvent limited liability companies was no different.[2]

Not so fast.

In a November 2010 opinion captioned *CML V, LLC v. Bax*,[3] the Delaware Court of Chancery held that creditors of an insolvent Delaware LLC do *not* have standing under Delaware law to sue derivatively for breach of fiduciary duty. The court held that section 18-1002 of Delaware's Limited Liability Company Act (the "LLC Act")[4] limits standing to pursue derivative claims to members or assignees of limited liability company interests in the LLC. Creditors are neither, and thus are not afforded derivative standing by Delaware's LLC Act. The court recognized that this creates a distinction between corporations and LLCs, but held that "[t]o limit creditors to their bargained-for rights and deny them the additional right to sue derivatively… comports with the contractarian environment created by the LLC Act."[5]

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Many questions remain after *Bax*. This article focuses on one: what about creditors' committees in Chapter 11 cases? Can they obtain derivative standing (notwithstanding *Bax*) when the debtor is an LLC? The issue is important because typically, insolvent companies ultimately file for some form of bankruptcy, so if *Bax* only concerns who may obtain standing for LLCs that are insolvent yet somehow never file for bankruptcy, it has limited importance. Given that circuit courts usually describe claims brought by a creditors' committee as "derivative" claims, and that obviously committees are not members of an LLC nor the members' assignees, the question is whether bankruptcy courts no longer will have the discretion to grant standing to committees to sue derivatively on behalf of LLCs.

From *Credit Lyonnais* to *Gheewalla*

The famous 1991 *Credit Lyonnais* opinion noted in a footnote that when operating a solvent company

> in the vicinity of insolvency, circumstances may arise when the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholders (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act.[6]

The court concluded that "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."[7] Many courts and commentators read *Credit Lyonnais* to hold that creditors affirmatively have the right to enforce fiduciary duties owed to them by filing suit against directors and officers, as long as the company is in the so-called "zone of insolvency."[8] This led to a multitude of complaints, mostly filed in bankruptcy courts, by creditors' committees, litigation trusts, or trustees, against directors for breach of fiduciary duties for alleged failure to prefer the interests of creditors over stockholders of insolvent or troubled, but arguably solvent, companies.[9]

The Delaware Supreme Court's *Gheewalla* opinion changed this. It held that duties do not shift or expand when a marginally solvent company is operating in the zone of insolvency.[10] More germane to the *Bax* discussion, it further held that creditors cannot maintain a direct claim for breach of fiduciary duty even for insolvent corporations.[11] However, it held that creditors of an insolvent corporation may obtain derivative standing to sue for a breach of fiduciary duty owed to the corporation itself.[12] The court reasoned that "[w]hen a corporation is insolvent… its creditors take the place of the shareholders as the residual beneficiaries of any increase in value."[13] Thus, they are the stakeholders who have the most incentive to enforce the corporation's rights by filing derivative claims.

The *CML v. Bax* Opinion

The facts of *Bax* are fairly typical. Plaintiff CML loaned JetDirect, a private jet management and charter company, nearly $35 million. While in the process of rapidly expanding by acquiring smaller companies, JetDirect defaulted on the CML loan and then or shortly thereafter became insolvent. CML alleged that the board of managers acted without sufficient knowledge of the company's finances when it continued the policy of expansion through acquisition, citing the fact that two independent auditors declined to complete their audits of JetDirect. CML further alleged that following JetDirect's default, certain of its managers negotiated sales of JetDirect Assets to entities they controlled, and that the JetDirect board failed to exercise proper oversight of those sales. Accordingly, CML asserted derivative claims for breaches of the managers' fiduciary duties, as well as a direct claim for breach of the loan agreement. This article focuses only on the derivative claims.

Defendants contended that, as a creditor, CML lacked standing to assert a derivative claim under Delaware's LLC Act. CML, in turn, asserted that creditors of an insolvent LLC should be treated the same as creditors of an insolvent corporation, and therefore be permitted to obtain derivative standing to sue on behalf of the LLC. The Court agreed with the defendants and dismissed the case.

The Court focused on the language of Sections 18-1001 and 18-1002 of the LLC Act.[14] Section 18-1001, entitled "Right to Bring Action," provides that "a member[15] or an assignee of a limited liability company interest may bring an action" on behalf of an LLC when managers or members have refused to do so or demand would be futile. Section 18-1002, entitled "Proper Plaintiff," provides:

> 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… [a]t the time of the transaction of which the plaintiff complains

While many had focused on Section 18-1002's temporal aspects—i.e., when a member must have owned its equity stake to assert derivative claims, the so called "contemporaneous ownership requirement"—the Court emphasized the first and second clauses of the statute: "in a derivative action the plaintiff must be a member or an assignee." It does not say "or a creditor." Thus, the Court held that it could not grant derivative standing to creditors. CML therefore lacked standing to bring a derivative suit under the plain language of the LLC Act.

The Court was aware that this ruling would be considered a surprise because certain court opinions and articles had expressly assumed that creditors of insolvent LLCs could obtain derivative standing.[16] However, this did not convince the Court to depart from a plain meaning in-

terpretation. The Court also rejected CML's argument that the language of section 18-1002 was ambiguous because its literal application would lead to absurd results—that the creditors of an insolvent LLC would be treated differently than creditors of an insolvent corporation. The Court found no absurdity in interpreting the two acts differently given the LLC Act's paramount goal of freedom of contract.

Moreover, the Court emphasized that the LLC Act provides creditors with several avenues to protect their interests, so that asserting derivative claims for breach of fiduciary duty is unnecessary. These include, among others, the right to enforce capital calls if a creditor extends credit in reliance on a member's obligation,[17] and the ability to provide for rights to creditors in the operating agreement even though creditors are not a party to the operating agreement.[18] In addition, the LLC Act expressly contemplates that fiduciary duties can be expanded as well as limited or even eliminated.[19] The Court stated that an "LLC Agreement conceivably could provide for duties triggered by insolvency that would include an obligation to preserve assets for creditors.[20] Presumably, this would be structured as a *direct* duty owed to the creditors, because despite the flexibility of the LLC Act, there does not appear to be a provision that clearly permits an operating agreement to alter the Proper Plaintiff requirements of section 18-1002.

Bax Should Not Effect Claims of Trustees or Litigation Trusts

While recent years have provided the Delaware state courts with a few opportunities to consider the law of fiduciary duties of insolvent companies, typically these cases are litigated in the bankruptcy courts for an obvious reason—if the company is insolvent, there is a good chance it will wind up in bankruptcy. Of course, bankruptcy courts apply state law to claims of breach of fiduciary duty.[21] So the important question is, how (if at all) does the *Bax* opinion effect fiduciary duty claims of LLCs litigated in bankruptcy courts, given that individual creditors rarely file such claims?

Generally, fiduciary duty claims are asserted in bankruptcy cases by one of four types of entities: the debtor itself, a trustee, a postconfirmation litigation trust, or a creditors' committee. With respect to the first two—the debtor and a trustee—*Bax* clearly is irrelevant. Whether in or out of bankruptcy, where the company asserts a fiduciary duty claim itself, that is *not* a derivative claim. Rather, it is the company asserting its own rights, not someone stepping into the company's shoes to assert those rights.[22] Similarly, where a Chapter 7 or 11 trustee is asserting the claim, it is exercising its power, granted to it by the Bankruptcy Code, to operate the company's assets, including litigation,[23] in the same manner as a board of directors usually acts on behalf of the company under Delaware corporate law.[24] That, too, is not a "derivative" claim, so *Bax* does not effect such suits.[25] The third type of plaintiff, a postconfirma-

tion litigation trust, is an entity created by or pursuant to a plan and confirmation order in which the debtor assigns its rights and title to litigation claims to the trust. While little if any case law addresses the point, it seems that this, too, would not be a derivative claim because the "new owner" of the claim is asserting it, rather than someone asserting the claim on the owner's behalf. Thus, *Bax* also should not effect claims brought by litigation trusts.

However, as shown below, if the purported plaintiff is a creditors' committee of an LLC, *Bax* seems to be a bar to the suit.

Creditors' Committee Standing

The first question in analyzing whether *Bax* matters in adversary proceedings is: should a federal court care about state law requirements for derivative standing? The answer is yes. "Despite persisting uncertainty as to whether state or federal law supplies the choice of law rules in a bankruptcy case… the law of the state of incorporation determines who can bring a derivative suit."[26] That is exactly the subject that *Bax* addresses. Indeed, *Bax*'s holding that the LLC Act's use of the words "the plaintiff must be a member or an assignee" excludes creditors is a very similar subject to one addressed years ago by the Third Circuit in *Gallup v. Caldwell*:[27] whether someone who purported to be a stockholder but was not a stockholder of record could maintain a derivative suit. The Court held that this question is a matter of state law. An independent, second rationale exists where the cause of action that the committee asserts is pursuant to state law, such as breach of fiduciary duty.[28] That is, *Bax* turned on the application of a statute—Delaware's LLC Act—not a Rule of Civil Procedure. It seems incongruous to contend that a plaintiff can sue under different provisions of that same statute or common law relating to it and at the same time ignore a portion of the statute. Accordingly, true derivative claims should not be permitted by bankruptcy courts unless the plaintiff is a member of the LLC or an assignee of a limited liability company interest in the LLC.

That, of course, begs the following question: where a creditors' committee obtains standing to bring the estate's claims, is that a "derivative claim" within the meaning of *Bax* and section 18-1002? The author believes that the better reading is yes.

Certainly, creditors' committees rarely have the right to bring *direct* claims, i.e., claims that the committee itself suffered some damage by the defendants' conduct. After all, a creditors' committee is not even formed until some time after a bankruptcy case is filed, and even then can not be "damaged" (in the sense of tort law) because it simply is a group of otherwise unaffiliated creditors who join together to represent common interests of and act as a fiduciary for other unsecured creditors. While individual creditors might have claims against directors and of-

ficers, the Bankruptcy Code does not authorize a creditors' committee to pursue such claims.

Thus, it is no surprise that when granting a creditors' committee standing to sue, courts uniformly refer to the committee's "derivative standing."[29] Moreover, just like in a shareholders' derivative suit outside of bankruptcy, the derivative plaintiff is not the entity originally vested with the right to bring the suit, but obtains that right as a matter of equity because the entity with the right to bring the claim will not do so; and any recovery on the claim goes not to the plaintiff but to the company (or, in bankruptcy, to the estate). Even the standards for obtaining derivative standing are similar. In most bankruptcy courts, a committee must show that: (1) there is a colorable claim, (2) the debtor in possession "unjustifiably refuses" to pursue the claim, and (3) the committee has received permission from the bankruptcy court to initiate the action.[30] This parallels with the "demand excused" and "demand refused" paradigms outside of bankruptcy.[31] Also, the effect of granting derivative standing is similar: it "does not strip a debtor of ownership of the claims," so in certain circumstances the debtor may still try to settle the case,[32] just as occasionally a special litigation committee of a non-debtor's board settles a pending shareholder derivative suit.[33]

Moreover, in explaining the type of derivative standing it was authorizing a committee to obtain, the *Cybergenics* court cited the origins of stockholder derivative actions:

> The concept of derivative standing arose when, despite a lack of express statutory authorization, courts of equity allowed shareholders to pursue valuable actions when the nominal plaintiff (the corporation) unreasonably refused to do so… We believe that the ability to confer derivative standing upon creditors' committees is a straightforward application of the bankruptcy courts' equitable powers.[34]

Thus, there is no question that derivative suits in and out of bankruptcy share many similarities. However, in order to determine whether that which bankruptcy courts are calling "derivative" is the same thing as what is meant by "derivative claim" in section 18-1002 of Delaware's LLC Act, any differences between the two should be examined. To that end, it is certainly true that outside of bankruptcy, the claim belongs to the company, whereas in bankruptcy, it belongs to the estate, and the trustee or debtor in possession (whichever is applicable) is only one of the two estate fiduciaries, the other being the creditors' committee. The author suggests that this distinction should make little difference. First, while the committee is a fiduciary for unsecured creditors (not the estate generally), the Bankruptcy Code does not, in the first instance, vest it with the authority to sue; the authority is given to the trustee or debtor in possession.[35]

Second, and perhaps more importantly, the ownership by the estate in bankruptcy versus the company outside of bankruptcy distinction is a false dichotomy. Courts analogizing creditor derivative suits in bankruptcy to stockholder suits outside of bankruptcy have equated the debtor's/trustee's role with the role of *management*, rather than the company itself.[36] By conceptualizing it in this way, it becomes more apparent that both in and out of bankruptcy, there is a distinction between those who control whether the suit is brought and who gets the recovery: the management or board—whether of a debtor in possession or a solvent company not in bankruptcy—is vested with authority to control claims unless derivative standing is granted, and if there is any recovery on the claim, it goes not to management but to the estate or the company itself.

However, what about the Supremacy Clause? Some will argue that because Chapter 11 is federal law, it supersedes state law, rendering *Bax* irrelevant. However, while *Cybergenics* held that granting derivative standing was consistent with the equitable powers of a bankruptcy court,[37] it stopped short of finding that that any section of the Bankruptcy Code expressly provided for derivative standing.[38] Since there is no Bankruptcy Code section directly addressing and negating 6 Del. C. §18-1002 nor legislative history manifesting an intent to do so, it is difficult to see how the Bankruptcy Code could be held to override applicable state law.[39] Moreover, as shown above, federal courts have expressly held that state law governs who may bring a derivative claim.[40] Thus, the Supremacy Clause does not appear to affect the analysis.

Alternatives

For the reasons set forth above, the author believes that *Bax* compels a finding that where the debtor is a Delaware LLC, a bankruptcy court cannot grant a creditors' committee derivative standing to bring claims. It is not lost on the author that this creates potential problems. The *Cybergenics* court addressed various alternatives to allowing derivative standing—appointing a trustee, converting the case to Chapter 7, ordering the debtor to sue management, etc.—and found each to be far less effective than derivative standing.[41] Some "amount to replacing the scalpel of a derivative suit with a chainsaw."[42] However, in the absence of authority to grant derivative standing to committees of LLCs, it is likely that there would be an increase in motions to appoint a trustee.

One possible solution, at least in a case that is leading to plan confirmation, is for the debtor to agree early in the process to assign its claims to a trust. As shown above, this structure should not be affected by *Bax*. Even in the absence of a plan—and particularly where the business is sold pursuant to section 363—trusts for the benefit of creditors have become more common recently. There does not appear to be a reason why such trusts could not be vested with the debtor's or estate's rights and title to cases of action, just as occurs in postconfirmation trusts.[43]

Another possible solution presents itself where the debtor/LLC's parent is a corporation which also is a debtor and there is only one creditors' committee for both debtors. In that situation, the committee, acting for the corporate parent/debtor in its role as a member of the LLC/debtor, could seek derivative standing to sue the LLC's managers. While it is true that this still would not meet the literal words of section 18-1002 because the plaintiff would not be a member but rather a creditors' committee of the member, it seems to come closer because the committee would be acting in the name of the member. There also is some possibility that the cause of action and/or damages might be affected by making the plaintiff an entity seeking redress on behalf of the member rather than creditors. However, theoretically it should not, since the claim is derivative, i.e., on behalf of the LLC, and (absent a contrary provision in the operating agreement) the fiduciary duty is owed to the LLC itself.

Substantive Advice Should Not Change

Even assuming that creditors' committees no longer may be granted standing to sue, it does not follow that attorneys counseling a board of managers of a financially troubled Delaware LLC should change their substantive advice. After all, *Bax* dealt with standing to sue, not the substantive duties owed by a board of managers of an LLC. And as shown above, others will continue to be able to obtain standing to sue for the same conduct: the LLC itself, a trustee, or probably a postconfirmation litigation trust. Even when the LLC remains a debtor in possession in a Chapter 11 case, if it refuses to bring claims against its board of managers and a committee cannot, a bankruptcy court might consider appointing a limited purpose trustee, or at a minimum an examiner.[44] Thus, anyone celebrating *Bax* as providing a "free ride" for managers of a Delaware LLC is mistaken.

Rather, *Bax* does not purport to alter the managers' substantive duties. Of course, Delaware's LLC Act permits the LLC's operating agreement to expand, limit, or eliminate fiduciary duties,[45] so the operating agreement must be consulted in determining what those duties are. In the absence of such a provision in the operating agreement, *Bax* does not seem to imply any different substantive result than *Gheewalla*—upon insolvency, fiduciary duties should continue to be owed to the entity itself.[46] To the extent that the managers instead govern the LLC solely for the benefit of the members at the expense of the entity and its creditors, it is likely that a court would listen carefully to a trustee's or postconfirmation trust's allegations that such governance was improper.

Conclusion

Bax was a surprise to most practitioners. If it is interpreted to deny the right of creditors' committees to obtain derivative standing to sue on behalf of LLCs, it will have a significant effect on future Chapter

11 cases of LLCs. As with most issues regarding LLC's, however, it also is possible that practitioners will come up with new, permissible provisions in operating agreements to ameliorate any perceived problems arising from *Bax*. Until then, it is important that attorneys giving governance advice to a board of managers recognize that *Bax*'s holding concerned standing, and did not, in itself, change substantive fiduciary duty law.

Notes

1. North American Catholic Educational Programming Foundation, Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

2. See, e.g., Vichi v. Koninklijke Philips Electronics N.V., 2009 Del. Ch. LEXIS 209 (Del. Ch. Dec. 1, 2009). CML V, LLC v. Bax, 6 A.3d 238 (Del. Ch. 2010)

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

4. 6 Del. C. § 18-1002.

5. Bax, 6 A.3d at 250.

6. Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., 17 Del. J. Corp. L. 1099, 1991 WL 277613 at *34 n.55 (Del. Ch. 1991).

7. Credit Lyonnais, 1991 WL 277613 at *34 n.55.

8. See, e.g., In re Buckhead America Corp., 178 B.R. 956, 968-69 (D. Del. 1994) (denying a motion to dismiss because a complaint alleged that even if the company was not insolvent, it was at least in the zone of insolvency).

9. See, e.g., Buckhead, 178 B.R. at 968-69; In re Hechinger Inv. Co. of Del., 327 B.R. 537 (D. Del. 2005), aff'd, 278 Fed. Appx. 125 (3d Cir. 2008); In re Radnor Holdings Corp., 353 B.R. 820 (Bankr. D. Del. 2006).

10. Gheewalla, 930 A.2d at 101.

11. Gheewalla, 930 A.2d at 94.

12. Gheewalla, 930 A.2d at 103.

13. Gheewalla, 930 A.2d at 103.

14. The Court noted that there also are identically worded provisions in Delaware's Revised Uniform Limited Partnership Act, 6 Del. C. §17-10001-2. Bax, 6 A.3d at 245. Thus, *Bax* presumably applies to limited partnerships as well as LLCs.

15. A "member" of an LLC is akin to a stockholder of a corporation or—more closely—a limited partner of a limited partnership.

16. Bax, 6 A.3d at 243-244 (citing, inter alia, Vichi, 2009 Del. Ch. LEXIS 209; Bren v. Capital Realty Group Senior Housing, Inc., 2004 WL 370214 (Del. Ch. 2004); and Royce De R. Barondes et al., Twilights in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies, 1 J. Bus. & Tech. L. 229, 249 (2007) (panel discussion, which included the author of this article)).

17. See 6 Del. C. §18-502(b).

18. Bax, 6 A.3d at 250.

19. 6 Del. C. §17-1101(d).

20. Bax, 6 A.3d at 251.

21. See, e.g., In re Scott Acquisition Corp., 344 B.R. 283, 46 Bankr. Ct. Dec. (CRR) 196 (Bankr. D. Del. 2006).

22. See Keith Sharfman, "Creditor('s) Committee Derivative Suits: A Reply to Professor Bussell," 10 Stan. J. L. Bus. & Fin. 38, 43 (2004-05).

23. See, e.g., Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 18 Collier Bankr. Cas. 2d (MB) 84, Bankr. L. Rep. (CCH) P 72009 (7th Cir. 1987) ("It has long been held that rights of action against officers, directors and shareholders of a corporation for breaches of fiduciary duties, which can be enforced by either the corporation directly or the

shareholders derivatively before bankruptcy, become property of the estate which the trustee alone has the right to pursue after the filing of a bankruptcy petition.") (citing, inter alia, Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939)).

24. 8 Del. C. § 141.

25. The Supreme Court has held that a trustee may not pursue claims on behalf of creditors. See Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 434, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972). Thus, a trustee only brings the estate's own claims.

26. Fogel v. Zell, 221 F.3d 955, 966, 36 Bankr. Ct. Dec. (CRR) 122, 44 Collier Bankr. Cas. 2d (MB) 847 (7th Cir. 2000).

27. Gallup v. Caldwell, 120 F.2d 90, 93 (C.C.A. 3d Cir. 1941).

28. This rationale obviously does not apply where the committee seeks to pursue, for example, avoidance actions created by the Bankruptcy Code.

29. See, e.g., Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 41 Bankr. Ct. Dec. (CRR) 98, Bankr. L. Rep. (CCH) P 78861 (3d Cir. 2003); In re Commodore Intern. Ltd., 262 F.3d 96, 38 Bankr. Ct. Dec. (CRR) 72, 46 Collier Bankr. Cas. 2d (MB) 1120 (2d Cir. 2001).

30. See, e.g., In re Centaur, LLC, 2010 WL 4624910 at *4 (Bankr. D. Del. 2010); Commodore, 262 F.3d at 100.

31. See generally Zapata Corp. v. Maldonado, 430 A.2d 779, 22 A.L.R.4th 1190 (Del. 1981); Abramowitz v. Posner, 672 F.2d 1025, 1030, Fed. Sec. L. Rep. (CCH) P 98458 (2d Cir. 1982) ("where a demand is made and refused, absent a showing of wrongful conduct by the voting directors, the stockholder is simply without the legal ability to initiate a derivative action").

32. Centaur, 2010 WL 4624910 at *7.

33. See, e.g., Carlton Investments v. TLC Beatrice Intern. Holdings, Inc., 23 Del. J. Corp. L. 712, 1997 WL 305829 (Del. Ch. 1997).

34. Cybergenics, 330 F.3d at 568.

35. See Cybergenics, 330 F.3d at 568.

36. See Fogel, 221 F.3d at 966 ("In such a suit, the creditor corresponds to the shareholder, and the trustee to management, in a shareholder derivative action."); Cirka v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2004 Del. Ch. LEXIS 118, at *27 n.46 (Del. Ch. Aug. 6, 2004) ("The Committee, as in *Fogel's* analogy, acts in the role of stockholder; the Debtor in Possession's role is that of management."). Perhaps a better analogy would be to the board than management, but the point remains the same either way.

37. Cybergenics, 330 F.3d at 568 ("We believe that the ability to confer derivative standing upon creditors' committees is a straightforward application of the bankruptcy court's equitable powers.").

38. Cybergenics, 330 F.3d at 566-67.

39. See Wyeth v. Levine, 129 S. Ct. 1187, 1194-1195, 173 L. Ed. 2d 51, Prod. Liab. Rep. (CCH) P 18176 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700, Prod. Liab. Rep. (CCH) P 14634, 29 U.C.C. Rep. Serv. 2d 1077 (1996) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal quotations omitted)).

40. Fogel, 221 F. 3d at 966; Gallup, 120 F.2d at 93.

41. Cybergenics, 330 F.3d at 576-579.

42. Cybergenics, 330 F.3d at 577 (internal quotation omitted).

43. Of course, if the debtor refused to sue directors and officers (thereby necessitating a derivative action), it might well also refuse to transfer claims to a trust. While conceivable, it seems unlikely that a court could force a debtor to transfer claims to a trust, but it certainly could present the debtor with unattractive options—i.e., transfer the claims or a trustee will be appointed.

44. See U.S.C.A. § 1104.

45. 6 Del. C. § 18-1101(c).

46. Gheewalla, 930 A.2d at 1101.