


Directors' and Officers' Liability

United States of America


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DIRECTORS' AND OFFICERS' LIABILITY

Organs of the Corporation


- State law matter
- Unitary board
- Exec and non-exec directors have common duties
- Generally bylaws determine election of directors
- Staggering boards prevents replacement of entire board at once



DIRECTORS' AND OFFICERS' LIABILITY

Directors' Duties


- Fiduciary responsibility to the corporation, managed on behalf of its shareholders
- Duties of care, loyalty, good faith
- Burden on director to show acted appropriately
- Defence: acted on informed basis, in good faith and honest belief that action in the best interests of the company
- If personal interest, director must show conduct satisfies 'entire' fairness test



DIRECTORS' AND OFFICERS' LIABILITY

Scope of Duties


- Business judgment rule
- Process not outcome
- No liability for decisions made through reasonable effort and that were reasonably informed
- Duties individual



DIRECTORS' AND OFFICERS' LIABILITY

Internal Controls


- Duty of oversight part of good faith and loyalty
- Must implement and oversee information and reporting systems
- Sustained, systematic failure of oversight leads to liability
- Again process oriented



DIRECTORS' AND OFFICERS' LIABILITY

Claims for Compensation

- Duties run to corporation
- Suit for breach generally derivative
- Brought by shareholder on behalf of corporation



DIRECTORS' AND OFFICERS' LIABILITY

Duties Near Insolvency

- No requirement to open insolvency proceedings at particular time
- No theory of 'deepening insolvency'
- Directors' duties apply
- Duties to corporation come to encompass creditors upon insolvency
- Creditor suits derivative



Waiver of Liability

- Exculpation clauses
- not for breach of duty of loyalty, bad faith, intentional misconduct, improper benefit, express statutory liability
- Shareholder agreements
- not for publicly traded
- Indemnification provisions
- not for willfully liable director, intentional director benefit, breach of duty of loyalty, bad faith



Shareholder Authorisation

- Bylaws can require shareholder vote
- Closely-held corporations
- Controlling shareholders
- Independent judgment
- Illegal actions breach fiduciary duty



Liability for Damage to Third Parties

- Corporation liable for authorised acts of its agents
- Directors not personally liable for torts of corporation or agents without more
- Possible connections: participation, breach of personal duty, grounds for piercing veil
- Additional potential regulatory basis for liability



False Balance Sheets

- Rule 10b-5, '34 Act and '33 Act
- Directors' liability for statements of material fact and misleading omissions
- Due diligence defence
- Scienter

