FIDUCIARY DUTIES

Duty of Care

The duty of care requires that a director exercises the care that a person in a like position would exercise under similar circumstances. To fulfill the duty of care, directors "have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must act with requisite care in the discharge of their duties.

Duty of Loyalty

The duty of loyalty springs from the central principle of placing the interest of a beneficiary first, thus avoiding self-dealing and conflicts of interest. In *Guth v. Loft*, the Delaware Supreme Court wrote, "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders … The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."

Directors must also make full disclosure of potential conflicts of interest and may need to abstain from voting and, in most circumstance, from consideration of such matters in their entirety.

The law does not require that a director serve as a disinterested trustee for a single beneficiary. "The duty of loyalty can still be met in such circumstances through full disclosure and approval or ratification of the decision by disinterested persons. A common example of this rule is the approval of corporate transactions with a board member by a vote of other disinterested board members."

Duty of Good Faith

Directors must make "a good faith effort to be informed and to exercise appropriate judgment." Because of the protection of the business judgment rule, a court may not review the content of a board's decision under a due care analysis, but the court may review the content of a board's decision in determining whether the decision was made in good faith. Recent court decisions have observed that goood faith is intertwined with the duties of care and loyalty.

FIDUCIARY DUTIES

Duty of Disclosure

The duty of disclosure requires that directors truthfully and candidly disclose to shareholders all facts material to a transaction involving shareholder approval. When a board of directors seeks shareholder action, it has a duty "to disclose fully and fairly pertinent information within the board's control." The board's communications must be unambiguous in order to allow shareholders to make an informed vote. This is the case whether shareholder approval is mandatory or is voluntarily sought by the directors.

Duty of Impartiality

The duty of impartiality governs how a fiduciary manages the duty of loyalty among all beneficiaries where the beneficiaries' interests may conflict. "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."

Duty of Obedience

The duty of obedience requires that a director obey the directions of its corporation. Corporate law, the charter, articles of incorporation, the bylaws, and shareholder resolutions set out the architecture of obedience. Failure to comply with these governance principles runs afoul of this duty.

Fiduciary Duties in Bankruptcy

A chapter 11 debtor has fiduciary duties to its creditors and the "estate" as opposed to, or at least ahead of, its fiduciary duties to shareholders. A company that seeks relief under chapter 11 of the Bankruptcy Code is not simply a "debtor" as that term is understood under Section 101 (13). Under Sections 1101(1) and 1108, the debtor company remains in possession of the bankruptcy estate. The debtor-in-possession (or trustee, if one has been appointed) owes a duty to the estate that redounds to the benefit of all stakeholders, particularly the unsecured creditors.