YOUNG CONAWAY STARGATT & TAYLOR, LLP

SDNY BANKRUPTCY TREND WATCH

INDEPENDENCE OF CORPORATE GOVERNANCE - HELPFUL IN AND OUT OF BANKRUPTCY

In the wake of consistent attempts by official committees and significant creditors to wrestle control away from debtors in possession amidst allegations of insider taint and conflict, an interesting trend has emerged – just follow the traditional rules of corporate governance under non-bankruptcy law. This trend watch highlights a few key cases to demonstrate an increasing awareness by bankruptcy courts that permitting a debtor to simply exercise its own internal controls concerning independence can be effective and significantly less costly than more drastic measures, such as the appointment of a chapter 11 trustee.

Take, for example, the case of *In re Dynegy Holdings, LLC*, Case No. 11-38111(CGM) (Bankr. S.D.N.Y.). From the outset, the case was marked by heavy contention, difficult financial issues and distrust among most of the parties. Due to a significant restructuring with the debtor's parent company shortly before the filing in which a significant subsidiary had been transferred, the bankruptcy court appointed an examiner early in the case. After investigation of the transactions and claims at issue between Dynegy Holdings and its parent, the examiner had filed his conclusions, which were highly critical of the parent company and the transactions at issue. Ultimately, the United States Trustee, joined by certain noteholders, moved for the appointment of a chapter 11 trustee.

Recognizing that ousting management would result in significant, costly delay and be injurious to the interest of all stakeholders, Dynegy Holdings appointed David Hershberg to serve as an independent manager of the company for the purposes of evaluating causes of action against the parent and, if appropriate, commencing litigation or negotiating a settlement. As is critical in these appointments, Mr. Hershberg had a wealth of experience for this type of work in insolvency scenarios on behalf of certain funds and in corporate M&A work on behalf of numerous significant companies in a variety of positions as general counsel, board member, executive and as an attorney. Also important was the engagement of independent counsel, Young Conaway Stargatt & Taylor, LLP. This was specifically described at the time by Judge Morris as a "wise" appointment.

Despite a morass of complicated litigation that confronted all parties with the challenging task of assessing the legal risks and financial consequences of that litigation, the debtors managed to avoid the appointment of a trustee and obtain a global resolution of intricately complex issues. Perhaps the most significant of all, the settlement and plan were consummated on October 1, permitting over $2 billion in value to be distributed within just six months of Mr. Hershberg's appointment, all without the costly and delayed involvement of a chapter 11 trustee and the unpredictable and expensive litigation that would have surely been the alternative.

While Dynegy is the most recent and representative case, the appointment of independent directors and counsel has been used successfully in many other recent cases, as well, and in a variety of circumstances. The independent director appointment has been used to

View as Web Page

Unsubscribe

Forward to a Friend

The Bankruptcy and Corporate Restructuring Partners

Joseph M. Barry
Sean M. Beach
Robert S. Brady
M. Blake Cleary
John T. Dorsey
Daniel F.X. Geoghan
Edwin J. Harron
Matthew B. Lunn
Pauline K. Morgan
Edmon L. Morton
Michael R. Nestor
James L. Patton, Jr.
Joel A. Waite
Sharon M. Zieg

About Young Conaway Stargatt & Taylor, LLP

Young Conaway Stargatt & Taylor, LLP, one of Delaware's largest law firms, counsels and represents national, international and local clients, handling sophisticated advisory and litigation matters involving bankruptcy, corporate law and intellectual property. Young Conaway also guides regional businesses and individuals through a myriad of employment, real estate, tax, estate planning, environmental, and banking issues from the

provide appropriate oversight over an insider sale. *In re Boston Generating, LLC*, Case No. 10-14419 (SCC) (Bankr. S.D.N.Y.); *In re Pemco World Air Services, Inc*., Case No. 12-10799 (MFW) (Bankr. D. Del.). Such appointments have also been used to defend against the efforts of an official committee to obtain control over certain estate causes of action. *In re MIG, Inc*., Case No. 09-12118 (KG) (Bankr. D. Del.).

Thus, it appears that bankruptcy courts are generally becoming more comfortable with a debtor's appropriate "self-policing" under applicable corporate governance standards as a means to balance the tensions of the drastic consequences of trustee appointment with the need to ensure that independent oversight has been maintained in insider situations. Such appointments should definitely be considered in situations where your clients face, or will likely face, allegations of insider conflict and control post-filing.

If you have any questions or would like to discuss the decision further, please contact any of the Bankruptcy and Corporate Restructuring partners at Young Conaway. The Firm is also available for complimentary Delaware Update CLE programs to address any aspects of Delaware law that are of interest to our friends and colleagues around the country.

firm's offices in downtown Wilmington, Delaware. Through its office in New York City, Young Conaway offers its law firm and other referral sources conflicts counsel, special counsel and other restructuring and commercial litigation representation in the New York area and the Southern District of New York.