

PUBLICATIONS

“Fool Me Once”: A Director and Officer’s Guide to Avoiding the Mistakes of the Past

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It is a well-accepted principle of corporate governance that officers and directors of solvent corporations owe fiduciary duties to the corporation and its shareholders. The picture becomes more muddled, however, when it comes to the duties of directors and officers of distressed business entities, who may face pressure to fix mounting or deepening crises through such potentially risky means as debt restructurings, asset sales, and changes in strategic direction. Though these, or similar, measures may successfully turn operations around, if unsuccessful such actions may degrade the value of an eventual bankruptcy estate in a way that needlessly reduces creditor recoveries. Put differently, because shareholders of an insolvent or near-insolvent company may have very different risk preferences than the company’s creditors, director and officer decision-making may change dramatically depending upon the way in which courts decide the nature or scope of fiduciary duties owed to these divergent constituencies at any given time.

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