

## Fiduciary-Duty Claims in Bankruptcy Litigation



King & Spalding has significant experience representing officers and directors in fiduciary-duty and fraudulent-transfer lawsuits in bankruptcy proceedings. The primary goal for bankruptcy trustees, plan agents, and creditors' committees is to maximize recovery for the bankruptcy estate. The D&O insurance policy that covers directors and officers is a tempting source of funds for the estate.

This dynamic makes directors and officers the prime target for adversary litigation in bankruptcy proceedings. These are high-stakes matters where the estate alleges that executives engaged in some malfeasance or financial mismanagement that caused the company's insolvency. The estate often tries to measure damages based on the loss of enterprise value or market capitalization, which can involve hundreds of millions of dollars.

Fiduciary-duty claims in bankruptcy can be more difficult to litigate than similar claims asserted in shareholder-derivative lawsuits. The lawyers representing the estate typically have unfettered access to all of the company's documents, including privileged documents, and the estate need not make a demand on the board or establish demand futility.

Directors and officers who become ensnared in fiduciary-duty litigation in bankruptcy need the guidance of experienced defense counsel on a number of critical matters, including:

- challenging attempts to lock up D&O policy proceeds as estate property;
- withdrawing the reference and removing the claims from the bankruptcy court;
- managing potential conflicts between executives and outside directors;
- leveraging the substantial protections of the business-judgment rule and any exculpatory clauses in the company's bylaws; and
- partnering with the D&O insurer to provide the most efficient resolution of the case as possible.

King & Spalding attorneys earned 121 individual rankings and 44 practice rankings in the 2016 edition of *Chambers USA*.



King & Spalding is one of only 51 law firms selected to BTI Consulting's "Client Service A-Team" for 13 consecutive years. That represents less than 8 percent of the 650 law firms serving the Fortune 1000.

## Proven Experience

King & Spalding has successfully defended numerous directors and officers of financially distressed companies against fiduciary-duty claims. The following are some recent examples:

- *In re SemCrude L.P.* – Obtained a permanent injunction from the Third Circuit preventing investors in a bankrupt oil-and-gas company from bringing derivative claims against the former CEO in Oklahoma state court. (3d Cir.)
- *In re Digital Domain Media Group, Inc.* – Negotiated favorable settlement of fiduciary-duty claims by creditors committee against outside directors of digital visual effects provider for movies, including "Titanic," "Transformers," and "Iron Man." (Bankr. D. Del.)
- *In re ATP Oil & Gas Corp.* – Obtained a complete dismissal with prejudice of fiduciary-duty claims brought by the bankruptcy trustee against the former directors and officers of a bankrupt oil-and-gas company. (E.D. La.)
- *In re iPractice Group, Inc.* – Settled potential fiduciary-duty claims against former directors and officers of bankrupt medical-records company with Chapter 7 trustee. (Bankr. E.D. Tenn.)
- *In re Introgen Therapeutics, Inc.* – Obtained dismissal of fiduciary-duty and fraudulent-transfer claims by trustee against the former CFO of cancer biopharma company. (Bankr. W.D. Tex.)
- *In re Superior Offshore International, Inc.* – Settled fiduciary-duty and fraudulent-transfer claims brought against former CEO and CFO of offshore oil-services company. (S.D. Tex.)

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