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# Fiduciary Duties of Directors of Insolvent Corporations: A Comparative Perspective

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# FIDUCIARY DUTIES OF DIRECTORS OF INSOLVENT CORPORATIONS: A COMPARATIVE PERSPECTIVE

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## INTRODUCTION

The relationship between corporate directors and officers and creditors is central in many jurisdictions and has long been discussed by scholars, practitioners, and judges. Great emphasis has been placed on directors' fiduciary duties when a corporation is insolvent or in the amorphous "zone of insolvency"; notably, to investigate whether the directors should continue to promote the best interests of the corporation for the benefits of its shareholders, or whether their duties shift to its creditors.

The resolution of this ubiquitous issue—which has probably been debated too extensively over the past decade[1]—will help to answer the following questions: Do creditors have standing to pursue claims for breach of fiduciary duties in the insolvency scenario? And, if they do, is it direct or derivative standing? In answering this question, the focus will be on what happens when a corporation files for a reorganization proceeding.

The present comparative analysis deals with three countries—the United States and two European countries, France and Italy—where the role of the reorganization or the (pre-)insolvency proceedings in overcoming corporate crises has been prominent for many years (in the United States and, to a lesser extent, in France), or has been increasing in importance year-by-year (in Italy). In Italy, indeed, since 2005, all the bankruptcy reforms have been influenced by the legislation of other countries—mainly by the U.S. Bankruptcy Code,

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1. *See* Stephen M. Bainbridge, *Presentation of* Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency, 1 J. BUS. & TECH. L. 281, 281–82 (2007) (suggesting that "none of this matters very much" because "the vast majority of board-of-director decisions will continue to be governed by the business judgment rule").

and this has become particularly clear regarding corporate reorganization (chapter 11). In October 2017, the Italian Parliament passed a law that delegated to the government the responsibility to introduce a comprehensive reform of the insolvency and reorganization proceedings within twelve months. The new reform, which continues to be influenced by chapter 11,[2] includes a specific regulation of the claims that can be pursued against directors for breaches of fiduciary duties upon the commencement of a reorganization procedure. This issue has been long debated, and it is still under discussion, due to the absence of specific provisions.

The Article is structured as follows:

Parts I, II, and III focus on the fiduciary duties of directors of corporations (or joint-stock companies) and on the nagging question of whether, when a corporation becomes insolvent or nears insolvency, the directors also owe a fiduciary duty to its creditors.

Particularly, Part I discusses whether the corporate directors of *solvent* corporations owe fiduciary duties to creditors in the three countries mentioned above. Part II, after distinguishing the legal definition of insolvency and the imprecise concept of the zone (or vicinity) of insolvency, proceeds to investigate whether the latter has real implications for fiduciary duty claims. Part III then focuses on the state of insolvency—much more relevant than the ill-defined sphere known as "the zone of insolvency"—and on the question of whether directors' fiduciary duties should be extended to the creditors of insolvent corporations. The various scenarios in the U.S. and European countries can help to provide a greater understanding of the interests that modern insolvency laws are designed to protect. Part IV addresses the further question of who has standing to assert (direct or derivative) claims against directors who have failed to act in the best interests of the corporation upon the commencement of a reorganization proceeding. The reorganization procedures taken into consideration are the U.S. chapter 11 proceeding, the French *procédure de sauvegarde* (safeguard procedure)—inspired by the chapter 11 pre-pack—and *redressement judiciaire* (judicial restructuring), and the Italian *concordato preventivo* (composition with creditors).

Determining the person(s) or entities to whom corporate directors owe fiduciary duties is the necessary prerequisite for

2. Legge 19 ottobre 2017, n.155, G.U. Oct. 30, 2017, n.254 (It.).

addressing the latter question: A direct claim, indeed, is inherently based on a duty and an injury to the person having standing to sue.

Lastly, in Part V, some conclusions on the differences between Italy, on the one side, and the U.S. and France, on the other side, in terms of creditors' protection vis-à-vis directors' mismanagement will be drawn.

## I. FIDUCIARY DUTIES TO WHOM?

It is generally agreed and supported by courts' holdings that directors and officers owe fiduciary duties to the corporation they serve and its shareholders (as owners of the business enterprise).[3] Directors of a solvent corporation do not owe fiduciary duties to creditors beyond the relevant contractual terms[4] in the United States, France, or the United Kingdom.[5]

In most U.S. states, this rule is a mantra.[6] When the corporation is solvent, fiduciary duties may be enforced by the company through its board or by the shareholders, who have standing to bring derivative actions on behalf of the corporations. In contrast, corporate creditors have no right to assert claims for breach of fiduciary duties against directors. The relationship between directors and creditors are governed by contractual agreements, and creditors can sue the corporation for the breach of specific contractual, tort, and statutory duties (including the implied covenant of good faith).[7] It has been

3. *See*, *e.g.*, N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007).

4. *Id*.

5. In the United Kingdom, "[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole." Companies Act 2006, c. 46, § 172(1) (U.K.).

6. However, as Silberglied noted, since some U.S. states have a constituency statute, when pursuing a claim in bankruptcy court, it is important to understand which state's law applies to the claim. *See* Russell C. Silberglied, *Litigating Fiduciary Duty Claims in Bankruptcy Court and Beyond: Theory and Practical Considerations in an Evolving Environment*, 10 J. BUS. & TECH. L. 181, 184, 189 (2015).

7. *See*, *e.g.*, Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 345 (2007) (arguing that creditors should be limited to the rights the contract provides or might be inferred from the implied covenant of good faith); Bainbridge, *supra* note 1, at 284 ("Creditors can protect themselves *ex ante* . . . in this way, voluntary creditors can pass on the risk of default to the shareholders even in a system of limited liability."); Rutheford B. Campbell, Jr. & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. CORP. L. 491, 525 (2007) ("Creditors and other constituencies must seek protection through contract."); Larry E. Ribstein & Kelli A. Alces, *Directors' Duties in Failing Firms*, 1 J. BUS. & TECH. L. 529, 551 (2007).

argued that "creditors are better left to flexible enforcement of specific contract terms than broad fiduciary remedies."[8]

In France, likewise, creditors of solvent companies do not have an action against the directors for mismanagement. The only persons or entities that have standing to sue are the company itself, acting through its legal representatives, and the (individual) shareholders on behalf of the company (articles L. 225-252 and L. 223-22 of the French Commercial Code). Any shareholder, regardless of the number of shares he holds, has standing to sue the directors in the name of the corporation: this action, commonly known as *action sociale ut singuli* (as opposed to *action sociale ut universi*), is derivative in the sense that any recovery from directors who engaged in misconduct goes to the company.[9]

By contrast, because the directors are agents of the company, the latter is the unique entity liable to its creditors on the ground of its directors' mismanagement. Only in exceptional or rare cases and under specific circumstances—the so-called *faute détachable des fonctions*—can directors be pursued by individual creditors to recover damages.[10]

In sum, in France, the creditors appear to retain very limited powers (and authority) in litigation against the directors.

In Italy, the scenario is different, at least in theory.

Article 2394 of the Italian Civil Code provides that directors are personally liable to creditors if they fail to comply with their duties to preserve the integrity of the company's assets and, due to their misconduct, the assets become insufficient to pay the creditors' claims. Unlike the French rules, this provision refers only to joint-stock companies (*società per azioni*), while it has long been debated whether

8. Ribstein & Alces, *supra* note 7, at 536–37 ("[F]iduciary duties by shareholders to creditors are inappropriate because creditors do not delegate fiduciary-like open-ended discretion to shareholders."); *see also* J. William Callison, *Why a Fiduciary Duty Shift to Creditors of Insolvent Business Entities Is Incorrect as a Matter of Theory and Practice*, 1 J. BUS. & TECH. L. 431, 444–45 (2007).

9. Pursuant to the plain language of article L. 225-252 of the French Commercial Code. *See* PAUL LE CANNU & BRUNO DONDERO, DROIT DES SOCIÉTÉS 319 (6th ed. 2015) (Fr.).

10. However, they have—like any other third party (e.g., an employee)—the right to assert claims for the individual harm directly suffered as a result of the directors' misconduct. According to the French Supreme Court's rulings, in such cases, the loss suffered by the third party must be distinct from that suffered by the company, and it must be demonstrated that the wrongful act of the director(s) is separable from its functions (so-called *faute séparable* or *détachable des fonctions*). Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 10, 2009, Bull. civ. IV, No. 21 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., May 20, 2003, Bull. civ. IV, No. 84 (Fr.); *see, e.g.*, Alain Pietrancosta et al., *Corporate Boards in France*, *in* CORPORATE BOARDS IN LAW AND PRACTICE. A COMPARATIVE ANALYSIS IN EUROPE 175, 233–34 (Paul Davies et al. eds., 2013).

a similar provision may apply to the creditors of limited liability companies (*società a responsabilità limitata*).

Pursuant to article 2394—as interpreted by most Italian scholars and judges—(individual) creditors have standing to bring a *direct* action against the directors for breach of fiduciary duties.[11] They pursue such claims to protect their own right, not a right of the company, as the company is not the real party-in-interest. Thus, it is not a derivative claim asserted on behalf of and for the benefit of the company, whereby any recovery will go directly to the creditors.[12] However, the same duty to preserve the integrity of the company's assets is directly owed by the directors to the company, which has standing to sue the directors who engaged in misconduct on its own behalf.

I have pointed out above that the directors are held liable if the company's assets become insufficient to pay its creditors. Such insufficiency, which occurs when the company's liabilities exceed its assets, does not coincide with the state of insolvency—it might occur before the insolvency or even after it.[13] But the creditors' direct claims against directors are usually pursued when a company has become insolvent and a liquidation procedure (*fallimento*) is commenced. On a practical basis, the insufficiency of the corporation's assets becomes evident to the creditors (only) at that point.

Accordingly, when an event of dissolution occurs, the directors retain the duty to manage the company with the sole purpose of preserving the integrity and the value of the company's assets. If they violate such duty, they are personally liable to the creditors for the damages caused to them.[14]

Does this mean that the corporate directors also owe fiduciary duties to creditors?

I believe that the answer is yes, though its practical effects must not be overestimated, as I will suggest in the conclusion.

11. Although among Italian scholars and judges, it is still debatable if such a claim is direct or derivative, the overwhelming majority of them conclude in favor of the direct nature of the claim. I agree.

12. *See*, *e.g.*, Giuseppe Guizzi, *Responsabilità degli amministratori e insolvenza: spunti per una comparazione tra esperienza giuridica italiana e spagnola* [*Responsibility of Directors and Insolvency: Suggestions for a Comparison Between Italian and Spanish Legal Experience*], 2010 RIVISTA DI DIRITTO DELL'IMPRESA [RIV. DIR. IMPR.] 227, 231–33 (It.).

13. *See* Cass. [supreme court for judicial matters] civ., sez. I [first session], 25 luglio 2008, n. 20476, Giurisprudenza Italiana [Giur. it.] 2009, 1188 (It.).

14. *See* Codice civile [C.c.] art. 2486 (It.).

In Italy, as in the other countries, the directors' duties are owed primarily to the corporation and its shareholders (the ultimate beneficiaries of what the directors do). However, the violation of some obligations—those consisting of the preservation of the integrity of the assets—enables the creditors to bring direct claims against the directors even if the company is solvent. It follows that the duty to preserve the integrity of the company's assets is provided by the law to protect the interests of both constituencies (*shareholders* and *creditors*).

It is unclear, however, what interests should prevail upon insolvency or when a company goes into a bankruptcy or a reorganization procedure. I will return to this issue below.

## II. Definition of the "Zone of Insolvency" and its Implication for Directors' Duties

In the previous paragraph, I concluded that in most jurisdictions, the directors of a solvent corporation do not owe fiduciary duties to creditors, and the creditors have no direct claim against them for breach of fiduciary duties.

The next question to address is whether these duties "shift" from the shareholders to the creditors when a corporation experiences serious financial troubles or is insolvent.

In this regard, the non–legal and controversial concept of the zone of insolvency and that of insolvency must first be distinguished. Second, it must be determined whether the sphere of the zone of insolvency has practical implications for fiduciary duty claims and their triggering. Lastly, I will investigate what happens when a corporation enters the zone of insolvency or becomes insolvent pursuant to the legal definition of insolvency—which may differ in the various countries.

In the United States, until 2007, it was asserted in many scholarly articles and in some judicial opinions[15] that when a corporation

15. *See* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 790–91 (Del. Ch. 2004); Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Grp. (*In re* Hechinger Inv. Co. of Del., Inc.), 274 B.R. 71, 89 (D. Del. 2002); Weaver v. Kellogg, 216 B.R. 563, 583–84 (S.D. Tex. 1997); Brandt v. Hicks, Muse & Co. (*In re* Healthco Int'l, Inc.), 208 B.R. 288, 300 (Bankr. D. Mass. 1997); Jewel Recovery, L.P. v. Gordon, 196 B.R. 348, 354–55 (N.D. Tex. 1996); Official Comm. of Unsecured Creditors v. Reliance Capital Grp. (*In re* Buckhead Am. Corp.), 178 B.R. 956, 968 (D. Del. 1994); Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 789–90 (Del. Ch. 1992); Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'n Corp., No. 12150, 1991 WL 277613, at *34 n.55 (Del. Ch. Dec. 30, 1991); Fed. Deposit Ins. Corp. v. Sea Pines Co., 692 F.2d 973, 976–77 (4th Cir. 1982); Bovay v.

become insolvent or enters the zone of insolvency, the fiduciary duties of the directors shift to the creditors or expand beyond the corporation and its shareholders to include preserving the company's assets for the benefit of the creditors. However, the scenario was far from being clearly defined and commonly accepted.[16]

After 2007, the famous *Gheewalla* decision appears to have changed such an interpretation of the state laws. Although *Gheewalla* strictly only affects the law of Delaware, the decision has been highly influential on the other state laws since Delaware is the leading corporate law jurisdiction in the United States.[17]

The Delaware Supreme Court first held that there is no recognized "zone of insolvency" with implications for fiduciary duty claims—it explicitly stated that its holding made it *unnecessary* to precisely define what constitutes the zone of insolvency.[18] When a solvent corporation is navigating in the zone of insolvency, the directors must continue to discharge their fiduciary duties to the corporation and its shareholders in the best interests of the corporation for the benefit of its shareholders.[19] The only transition point that affects the fiduciary duty analysis is the state of insolvency.[20]

Second, the court noted that the directors of an insolvent firm do not owe *direct* fiduciary duties to creditors, recognizing that this would create uncertainty for directors who have a fiduciary duty to exercise

H.M. Byllesby & Co., 38 A.2d 808, 813 (Del. 1944); *see also* Bainbridge, *supra* note 7, at 347–48; Royce de R. Barondes, *Fiduciary Duties in Distressed Corporations: Second-Generation Issues*, 1 J. BUS. & TECH. L. 371 (2007).

16. *See* Jonathan C. Lipson, Assoc. Professor of Law at Temple Univ., Remarks at the Fourth Annual Business Law Conference at the University of Maryland School of Law: Twilight in the Zone of Insolvency (Nov. 4, 2005), *in* Royce de R. Barondes et al., *History & Background*, 1 J. BUS. & TECH. L. 229, 241–42 (2007) ("Perhaps what we are seeing in these confused, complicated, contradictory, dicta-ridden cases like *Credit Lyonnais* and *Production Resources* are fiduciary duty sermons about DDCs.").

17. *But see* Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1343–44, 1397–98 (2007) ("Unfortunately, the Delaware Supreme Court takes the far more significant step of adopting duty shifting. For the first time, creditors of Delaware corporations would clearly have rights beyond those granted them in contract or in tort.").

18. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 98 n.20 (Del. 2007). See also *Quadrant Structured Products. Co. v. Vertin*, 115 A.3d 535, 546 (Del. Ch. 2015), and its interpretation of the *Gheewalla* case.

19. *Gheewalla*, 930 A.2d at 101.

20. Determining when the point of insolvency has been reached is another nagging issue in this area. The courts have applied both the balance sheet test and the cash flow test to make this determination. *See, e.g.*, Robert J. Stearn, Jr. & Cory D. Kandestin, *Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests Under the Bankruptcy Code and Delaware Law*, 36 DEL. J. CORP. L. 165 (2011).

their business judgment in the best interests of the (insolvent) corporation.[21] In other words, the directors continue to owe fiduciary duties to the corporation for the benefit of all of its constituencies—or, quoting *Gheewalla*, all those having an interest in it: a class that includes creditors when the corporation is insolvent.[22]

The last statement of the supreme court's ruling is significant because it explains why, as Delaware courts have long held, creditors have no right to assert direct claims against directors when the corporation becomes insolvent.[23] I will discuss this issue in more detail in Part III.

The court's opinion in *Gheewalla* has influenced and inspired many subsequent court rulings—in Delaware, as well as in other U.S. states, though unresolved questions remain.[24]

In the *Berg & Berg Enterprises* decision, for example, the Court of Appeal of California, after stating that the existence of a zone of insolvency is even less objectively determinable than actual insolvency, held that "there is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in the 'zone' or 'vicinity' of insolvency."[25] Indeed, in contrast to the "apparently simple" definition of insolvency, there is no bright-line test for when a company enters into the zone of insolvency.

21. *Gheewalla*, 930 A.2d at 103; *see also* Berg & Berg Enters. v. Boyle, 100 Cal. Rptr. 3d 875, 893–94 (Ct. App. 2009) ("[U]nder the current state of California law, there is no broad, paramount fiduciary duty of due care or loyalty that directors of an insolvent corporation owe the corporation's creditors solely because of a state of insolvency . . . . And we decline to create any such duty, which would conflict with and dilute the statutory and common law duties that directors already owe to shareholders and the corporation.").

22. *Vertin*, 115 A.3d at 546–47.

23. *See*, *e.g.*, Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 776, 792 (Del. Ch. 2004).

24. *See*, *e.g.*, Sol. Tr. v. 2100 Grand LLC (*In re* AWTR Liquidation Inc.), 548 B.R. 300, 324–26 (Bankr. C.D. Cal. 2016); *Berg & Berg Enters.*, 100 Cal. Rptr. 3d at 893–94; Sanford v. Waugh & Co., 328 S.W.3d 836, 846 (Tenn. 2010); RSL Commc'ns PLC v. Bildirici, 649 F. Supp. 2d 184, 203–07 (S.D.N.Y. 2009) ("Plaintiff has adduced no support under New York law for its argument that Defendants owed a fiduciary duty of care, 'without any limitations,' to RSL Plc's creditors during the thirty- to sixty-day period in which Plaintiff argues that RSL Plc was in the 'zone of insolvency.'" (citation omitted)), *aff'd sub nom.* RSL Commc'ns PLC *ex rel.* Jervis v. Fisher, 412 F. Appx 337 (2d Cir. 2011). Not all jurisdictions, however, have readdressed the issue post-*Gheewalla*. *See*, *e.g.*, Official Comm. of Unsecured Creditors v. Baldwin (*In re* Lemington Home for the Aged), 659 F.3d 282 (3d Cir. 2011).

25. *Berg & Berg Enters.*, 100 Cal. Rptr. 3d at 894; *see also* Lightsway Litig. Servs., LLC v. Yung (*In re* Tropicana Entm't, LLC), 520 B.R. 455, 471 (Bankr. D. Del. 2014) ("[T]his plaintiff must allege either that a corporation was *insolvent* or *became insolvent* as a result of the misconduct." (emphasis added)).

Likewise, neither the French law nor the Italian law provide for a definition of the zone or vicinity of insolvency with implications for directors' duties and liabilities.

In France, it has been pointed out that the zone of insolvency and the exact moment from which directors should consider creditor interests are very difficult to determine and demarcate in practice. In addition, some scholars have argued that the French insolvency law is not amenable to provide the new class of residual owners (the creditors) with decision powers: The sitting managers are usually given extensive powers to manage the company in financial trouble in order to restructure it.[26] Thus, the Anglo-Saxon concept of the zone of insolvency appears not to matter very much.

By contrast, the significant distinction under the French Commercial Code is between cash-flow insolvency—*recte*: the suspension of payments—and experiencing financial troubles that the debtor is not able to overcome.[27] In the event of the suspension of payments, the company, through its legal representatives, has the obligation to file a petition for the commencement of a judicial liquidation or a judicial restructuring within forty-five days of that date.[28] Instead, a debtor may enter a safeguard procedure—a preventive procedure that was introduced in 2005 and inspired by the U.S. chapter 11[29]—only if the debtor has not suspended its payments.[30]

The Italian Bankruptcy Law, on its side, only distinguishes between insolvency and a state of crisis to determine when a debtor is eligible to commence bankruptcy proceedings. Technically, a state of insolvency is required to commence a liquidation procedure, whereas a company may file a petition to enter a composition with creditors if it

26. *See* Alain Pietrancosta & Sophie Vermeille, *Le droit des procédures collectives à l'épreuve de l'analyse économique du droit: Perspectives d'avenir?*, 2010 REVUE TRIMESTRIELLE DE DROIT FINANCIER [RTDF] 1, 7, 10 (Fr.).

27. Pursuant to article L. 631-1 of the French Commercial Code, the company is in suspension of payments when it is unable to meet its current liabilities with its available funds. *See*, *e.g.*, FRANÇOISE PÉROCHON, ENTREPRISES EN DIFFICULTÉ 173–82 (10e ed. 2014) (Fr.).

28. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 653-8, L. 653-11 (Fr.), where directors who fail to do so may be prohibited by the Court from managing, running or controlling any business for up to fifteen years (*interdiction de diriger* or *gérer*).

29. Although both the judicial restructuring and the safeguard procedure are designed to allow the continuation of the business activity, the maintenance of employment, and the settlement of liabilities, there are significant differences between them, including the content of the respective plans. *See*, *e.g.*, PÉROCHON, *supra* note 27, *passim*.

30. Pursuant to article L. 620-1 of the French Commercial Code, to enter a safeguard procedure, the eligible debtor must not have suspended payments to creditors (*cessation des paiements*), though he is facing troubles that he is not able to overcome on a case-by-case evaluation. *See id.* at 182–87.

is in a state of crisis. The law clarifies that the latter includes the insolvency.

Unlike the concept of insolvency,[31] there is no legal definition of crisis, but it is commonly defined by scholars and judges as the risk of becoming insolvent. A specific definition of a state of crisis, however, is expected to be introduced by the forthcoming insolvency law reform. This concept, however, could intersect that of the vicinity of insolvency.[32]

Even though there is no legal definition of the zone of insolvency and the concept is not outlined in the Italian bankruptcy cases, many scholars have recognized the existence of a zone of insolvency as opposed to actual insolvency. They argue, relying on the "common law" zone-of-insolvency theory, that, in the proximity of insolvency, what is in the best interests of the company departs from what is in the best interests of the shareholders, and the creditors take the place of the latter as the ultimate or residual beneficiaries.[33] Additionally, they opine that, although the directors have fiduciary duties to creditors during any phase of the company's life, when the company enters the zone of insolvency, the interests of the creditors to preserve the corporate assets prevail or should prevail over those of the shareholders.

I do not believe that such an amorphous concept, in addition to that of insolvency, and the ill-defined moment as a company *approaches* the cone of insolvency provide directors with helpful and clear guidance in discharging their duties. By contrast, it produces even more uncertainty and subjectivity than that permeating the practical determination of insolvency in some situations.[34] As some

31. Pursuant to article 5 of the Italian Bankruptcy Law, Regio Decreto 16 marzo 1942, n.267, G.U. Apr. 6, 1942, n.81 (It.), a person is insolvent when he is no longer able to regularly pay his liabilities.

32. *See* Massimo Miola, *Riflessioni sui doveri degli amministratori in prossimità dell'insolvenza*, *in* 1 STUDI IN ONORE DI UMBERTO BELVISO 609, 612–13 (Emma Sabatelli et al. eds., 2011) (It.).

33. For articles of Italian scholars dealing with this issue, see Grazia Monia Buta, *Tutela dei creditori e responsabilità gestoria all'approssimarsi dell'insolvenza: prime riflessioni*, *in* 3 SOCIETÀ, BANCHE E CRISI D'IMPRESA: *LIBER AMICORUM* PIETRO ABBADESSA 2541, 2587–90 (Mario Campobasso et al. eds., 2014) (It.).

34. It is worth noting that the Court of Appeals of California also confirmed perceiving practical problems with creating a fiduciary duty to creditors, among them, a director's ability to objectively and concretely determine when a state of insolvency actually exists such that his or her duties to creditors have been triggered. *See* Berg & Berg Enters. v. Boyle, 100 Cal. Rptr. 3d 875, 893–94 (Ct. App. 2009).

authors have well said, "to be effective, a duty must have a clear trigger point."[35] The zone of insolvency is far from being a clear trigger point.

In Italy, the concept has even less legal and practical import than in the United States,[36] because directors owe a fiduciary duty to creditors throughout the company's life, and it is clearly established by the law that the duty is enforceable when the company's assets have become insufficient to cover its liabilities (article 2394 of the Italian Civil Code).

One could argue that the zone of insolvency determines the earlier appropriate moment from which the interests of the creditors should prevail over those of the company and its shareholders when directors make corporate decisions.[37] However, I do not believe that creditors' interest(s) should be preeminent or even replace those of the shareholders in an insolvent company, as I will discuss in more detail below.

## III. FIDUCIARY DUTY CLAIMS IN INSOLVENT CORPORATIONS

It is commonly said that, when a corporation becomes insolvent, its shareholders are more likely to promote high-risk business strategies and to encourage the directors to take risks. This is because there is no residual value for them in the corporation, and their attention is focused exclusively on the potential upside of the decision.[38] Thus, the failure of excessively risky projects will be substantially neutral for the shareholders, who have already been deprived of the amount they paid for their shares, whereas the downside risk of such projects will fall on the creditors. As a result, many scholars agree that, though it is predominantly possible in close companies, the risk of shareholders' opportunism is high.[39]

35. Anil Hargovan & Timothy M. Todd, *Financial Twilight Re-Appraisal: Ending the Judicially Created Quagmire of Fiduciary Duties to Creditors*, 78 U. PITT. L. REV. 135, 154–57 (2016).

36. In Italy, there is no mention of the zone or vicinity of insolvency in the rulings of the bankruptcy courts or commercial courts.

37. Some authors have opined that the trigger point or transition line should be the inability of the company to continue as a going concern. *See*, *e.g*., Miola, *supra* note 32, at 628–29.

38. *See*, *e.g.*, Paul Davies, *Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency*, 7 EUR. BUS. ORG. L. REV. 301, 306–07 (2006).

39. *See*, *e.g.*, *id.* at 307–08; Gerard Hertig & Hideki Kanda, *Creditor Protection*, *in* REINIER R. KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 71, 88 (2004); Andrew Keay, *Formulating a Framework for Directors' Duties to Creditors: An Entity Maximisation Approach*, 64 CAMBRIDGE L.J. 614, 636–37 (2005); Laura Lin, *Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 VAND. L. REV. 1485, 1489–93 (1993); Alberto Mazzoni, *La responsabilità gestoria per scorretto esercizio dell'impresa priva della prospettiva di continuità aziendale*, *in* AMMINISTRAZIONE E CONTROLLO NEL DIRITTO DELLE

These propositions have not been disputed or even denied. The Delaware Supreme Court in *Gheewalla* stated that "[w]hen a corporation is insolvent, however, its creditors take the place of the shareholders as the residual beneficiaries of any increase in value," and that "[t]he corporation's insolvency 'makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value.'"[40] But the primary object of the directors' duties and efforts remains the same—the corporation and its maximized excepted value, and the event of insolvency does not cause a radical shift in fiduciary duties.[41] What actually changes is the identity of the residual claimants to the remaining assets for the benefit of whom the duties are exercised.[42]

To sum up, the directors' only obligation is to use their best judgment on behalf of the entity that employs them,[43] and individual creditors—protected by contract and other laws—should not be heard to assert a newly recognized direct fiduciary duty.

Applying these principles to the relationship between the directors and the creditors as residual interest-holders, it has been consistently maintained that the latter cannot bring *direct* actions for breach of fiduciary duty even if a corporation is insolvent. When a corporation becomes insolvent, the creditors gain standing to assert

SOCIETÀ: *LIBER AMICORUM* ANTONIO PIRAS 813, 836 (Pietro Abbadessa et al. eds., 2010) (It.); Pietrancosta & Vermeille, *supra* note 26, at 7–8; Lorenzo Stanghellini, *Proprietà e controllo dell'impresa in crisi*, 49 RIVISTA DELLE SOCIETÀ [RIV. SOC.] 1041, 1048–51 (2004) (It.).

40. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101–02 (Del. 2007) (quoting Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 792 (Del. Ch. 2004)). *But see* Hu & Westbrook, *supra* note 17, at 1382–83 ("This approach ignores entirely the possibility—indeed, the likelihood—that the corporation will not enter bankruptcy at all, much less be liquidated in connection.").

41. *See also, e.g.*, Marshall Huebner & Hugh McCullough, *The Fiduciary Duties of Directors of Troubled U.S. Companies: Emerging Clarity*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CORPORATE RECOVERY AND INSOLVENCY (Sarah Paterson ed., 2008); MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, BANKRUPTCY IN PRACTICE 159 (Charles J. Tabb ed., 5th ed. 2015); Larry Ribstein, *The* Gheewalla *Case: The Delaware Supreme Court Clarifies Directors' Duties in Bankruptcy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 6, 2007), https://corpgov.law.harvard.edu/2007/06/06/the-gheewalla-case-the-delaware-supreme-court-clarifies-directors-d/ [https://perma.cc/9GFW-LB9R]; Callison, *supra* note 8 (arguing that there are several theoretical and practical arguments against recognizing that creditors of insolvent firms have fiduciary claims against the directors, officers and managers of such firms). For a different perspective—which integrates corporate governance and bankruptcy governance considerations—see Hu & Westbrook, *supra* note 17, *passim*.

42. *See* Sol. Tr. v. 2100 Grand LLC (*In re* AWTR Liquidation Inc.), 548 B.R. 300, 325 (Bankr. C.D. Cal. 2016) ("What changes upon insolvency is the constituency: the creditors are now 'risk bearers' so they now have the right, like stockholders, to bring a derivative action in the corporation's name against directors who 'unduly risk' corporate assets.").

43. Ribstein, *supra* note 41.

such claims *derivatively* on behalf of the corporation, to ensure that any valuable claims the corporation possesses against its directors are prosecuted.[44] The Supreme Court in *Gheewalla* opined that "[i]ndividual creditors of an insolvent corporation have the same incentive to pursue valid derivative claims on its behalf that shareholders have when the corporation is solvent."[45]

In sum, the creditors have standing to sue the directors for breaches of the fiduciary duty only on a derivative basis and only once the corporation is insolvent, but this does not change the object and the substance of the directors' duties.[46] Such claims belong to the corporation itself: The directors' mismanagement injures the creditors only indirectly, by diminishing the value of the assets from which they may satisfy their claims, and it would therefore be classified as derivative.[47] As the Delaware Supreme Court pointed out in the *Tooley v. Donaldson* decision, the proper analysis to distinguish between direct and derivative claims—which is a question of state law– must be based on the following questions: who suffered the alleged harm, and who would receive the benefit of the recovery or other remedy?[48]

The creditors, when they assert fiduciary duty claims, sue to enforce the directors' duties to the corporation itself, not a duty specifically to the creditors.

However, it is worth noting that the Delaware state courts, by contrast, have denied the rights of the creditors to bring an action—even a derivative action—against the directors in limited liability companies, relying on the plain language of the Delaware Limited

44. *Gheewalla*, 930 A.2d at 102. BERNSTEIN & KUNEY, *supra* note 41, at 159, noted that "a bankruptcy filing should not alter this analysis: If the officers' and directors' fiduciary duty extends to creditors when the debtor is insolvent, then the duty ought to apply independently of whether bankruptcy has intervened."

45. *Gheewalla*, 930 A.2d at 102; *see also* Russell C. Silberglied, *LLC's Are Different: Creditors of Insolvent LLC's Do Not Have Standing To Sue For Breach of Fiduciary Duty, But Can a Creditors' Committee Be Granted Standing?*, 20 NORTON J. BANKR. L. & PRAC. 253, 254 (2011).

46. Ribstein & Alces, *supra* note 7, at 551.

47. *See* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 776, 793 (Del. Ch. 2004) (stating that "[c]laims of this type are classically derivative, in the sense that they involve an injury to the corporation as an entity and any harm to the stockholders and creditors is purely derivative of the direct financial harm to the corporation itself" and that "the later fact of insolvency does not transform the nature of the claim; it simply changes the class of those eligible to press the claim derivatively, by expanding it to include creditors"); Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004). See also *Schoon v. Smith*, 953 A.2d 196, 202 (Del. 2008), and *Agostino v. Hicks*, 845 A.2d 1110, 1116 (Del. Ch. 2004), both relating to a stockholder's derivative suit.

48. *Tooley*, 845 A.2d at 1035; *see also* Official Comm. of Unsecured Creditors v. Tech. Olympic, S.A. (*In re* Tousa, Inc.), 437 B.R. 447, 456 (Bankr. S.D. Fla. 2010).

Liability Company Act.[49] This opinion appears to effect fiduciary duty claims litigated in bankruptcy courts when the debtor is a Delaware LLC.[50]

In France, it follows from the premises in Parts I and II that when a company enters a collective proceeding (both liquidation and reorganization procedures), a creditor has no standing to bring claims for breach of fiduciary duties unless he shows he has suffered an injury distinct from that suffered by the other creditors.[51]

The most common action against the directors of insolvent companies is the *action en responsabilité pour insuffisance d'actif*, which derogates from the general rules of civil liability. This action may be brought only by the court-appointed liquidator when a company goes into a judicial liquidation (*liquidation judiciaire*), not when it enters a reorganization proceeding, regardless of whether it is a safeguard procedure or a judicial restructuring.[52] The reason given for this in the official statement of the purposes of the legislation is that such action is incompatible with the recovery plan that should be adopted in both procedures.[53] But, as an author noted, the legislative choice appears to be influenced by the desire to promote a rescue culture in the country.[54]

Under the French law provisions, directors who have mismanaged the company may be held personally liable for all or part of its liabilities. They may be sued for damages in any event of a shortfall in corporate assets where it has been ascertained that their misconduct

49. In *CML V, LLC v. BAX*, 6 A.3d 238, 250 (Del. Ch. 2010), *aff'd*, 28 A.3d 1037 (Del. 2011), the Delaware Court of Chancery held that creditors of limited liability companies lack derivative standing to sue, even if the LLC is insolvent, quoting section 18–1002 of the Delaware LLC Act, titled "Proper Plaintiff." This section limits LLC derivative standing to "member[s]" or "assignee[s]." For a detailed analysis of such case, see Silberglied, *supra* note 45, at 253, and also the recent ruling of the Delaware Court of Chancery in *Trusa v. Nepo*, No. 12071-VCMR, 2017 Del. Ch. LEXIS 57, at *13-15 (Apr. 13, 2017).

50. *See infra* Section IV.A. *Bax*'s holding seems to be a bar to a creditors' committee's derivative standing to sue.

51. Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 29, 2016, 14-25904 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters], com., Jun. 18, 2013, 12-17195 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters], com., Mar. 7 2006, Bull. civ. IV, No. 61 (Fr.).

52. For a specific analysis of this liability action, see Jean-Pierre Legros, *Sanctions patrimoniales et professionnelles et droit des entreprises en difficulté*, *in* ENTREPRISES EN DIFFICULTÉ 743, 744–772 (Philippe Roussel Galle ed., 2012) (Fr.).

53. Projet de loi de sauvegarde des entreprises [Draft law for safeguarding of enterprises], No. 1596, ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY] (May 12, 2004), http://www.assemblee-nationale.fr/12/projets/pl1596.asp [http://perma.cc/V65M-26WA] (Fr.) (see *Exposé des motifs* [*Statement of Reasons*], para. VIII (*Les sanctions*), subsec. B (*Les sanctions commerciales*)).

54. Davies, *supra* note 38, at 333.

has contributed to the shortfall. It is left to the broad discretion of the Court to decide how much the improper acts of the directors have contributed to the loss in value of the company's assets and the amount of the recovery.[55] However, mere negligence is no longer included in the misconduct that can serve as the basis of such liability action.[56]

It must be noted that there is no specific time period prior to the commencement of the liquidation procedure in which an act of mismanagement must have occurred to make the directors liable for the shortfall of the company's assets. Accordingly, the French courts have broadly interpreted the breaches of the directors' duties from which such liability can arise, which include faults committed throughout the company's life, even before the commencement of the liquidation procedure.[57] However, what must be pointed out for the purpose of the present analysis is that French law does not require the court to impose creditor-regarding duties on the directors, either while the company is solvent[58] or when it is insolvent.[59]

Finally, as far as Italy is concerned, many Italian scholars have agreed that, whether a company is insolvent or is facing serious financial troubles, the interests of the creditors (to preserve the integrity of the corporation's assets) should prevail over those of the shareholders.[60] I think that this assertion should be interpreted as follows. The directors of insolvent companies must continue to conduct their business and affairs to maximize the value and the general wealth of the company, but the beneficiaries of any increases in value—including those resulting from successful litigation claims–are the creditors. The substance of the directors' duties, as described above, does not change—the duties remain the same, but what is in the best interests of an insolvent company might not be what is in the best interests of its shareholders.

55. The maximum amount to be paid by the director(s) cannot exceed the shortfall of assets suffered by the company. *See*, *e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters], com., Nov. 4, 2014, Bull. civ. IV, No. 164 (Fr.).

56. *See* CODE DE COMMERCE [C. COM.] [Commercial Code] art. L. 651-2 (Fr.).

57. *See* Davies, *supra* note 38, at 331–32 (pointing out that, unlike section 214 of the British Insolvency Act of 1986, the duty created by the French action is not triggered by the prospect of insolvency).

58. *Id.*

59. *See* Pietrancosta & Vermeille, *supra* note 26, at 10.

60. *See*, *e.g.*, Roberto Sacchi, *La responsabilità gestionale nella crisi dell'impresa societaria* [*Managerial Responsibility in the Corporate Crisis*], 41 GIURISPRUDENZA COMMERCIALE [GIUR. COMM.] I 304, 318–19 (2014) (It.).

The remarkable point here that differentiates Italy from the United States or France is that in Italy, (some) fiduciary duties are owed directly to the creditors, regardless of whether the company is solvent or insolvent, though the practical effects of their violation generally emerge upon its insolvency.

## IV. Standing to Bring Actions for Breach of Fiduciary Duties in Reorganization Proceedings

The observations in the previous Parts will help us to address the core question for this paper: who does have standing to bring an action against the directors, either directly or derivatively, when a corporation has filed a petition with the bankruptcy court? In this respect, though a company is not required to be insolvent to enter a reorganization procedure in the United States and Italy, it is most of the time, and fiduciary duty claims are frequently litigated in the bankruptcy courts.[61]

I will first examine the scenario in the United States, which appears to be quite clear compared with that of the two European countries. I will then proceed to analyze the directors' liability regime in France, and lastly, in Italy, where there has been much debate about fiduciary duty claims in reorganization proceedings.

### *A. The U.S. Chapter 11*

I contend that the body of cases on the extent of directors' fiduciary duties focuses on whether the entity has become insolvent, rather than on whether a petition has been filed for bankruptcy, for the purposes of determining if (or when) a fiduciary duty to the creditors arises.[62] Thus, I now move on to consider the second event, i.e., a bankruptcy filing: this should not alter the previous analysis on whether the directors owe a direct fiduciary duty to creditors.[63] However, upon filing for bankruptcy relief, fiduciary duty claims will be governed by the federal bankruptcy law—which is focused on the

61. In regards to France, the insolvency is only required for the judicial restructuring and the judicial liquidation. *See supra* Part II.

62. *See* Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 787–88 (Del. Ch. 1992).

63. Bernstein & Kuney, *supra* note 41, at 159–60. *But see* Hu & Westbrook, *supra* note 17, at 1325, 1369–76 (holding that a formal bankruptcy filing, unlike changes in financial conditions, is the proper point for duty shifting).

adjudication of the heterogeneous interests and has an evolved set of mechanisms for accomplishing this.[64]

After the commencement of a case under chapter 11 and before the confirmation of a plan, the standing of the debtor-in-possession or the court-appointed trustee (in rare cases, it is appointed)[65] to sue the directors for breach of fiduciary duties is not questioned. The corporation, through its board or its trustee—who exercises the power granted to it by the U.S. Bankruptcy Code to operate the company's assets—is asserting its own claim.[66] Under 11 U.S.C. § 541(a)(1), all the debtor's property, including all the legal or equitable interests belonging to him, becomes property of the estate.[67]

It is less clear whether a creditor may assert a claim of the debtor after the commencement of a chapter 11 bankruptcy proceeding. The U.S. courts have opined that once the debtor files for bankruptcy protection, the creditor (as well as the shareholder) is precluded from continuing to pursue derivative claims against the directors and officers for breaches of fiduciary duties that could have been enforced before bankruptcy.[68] Indeed, the filing of the bankruptcy petition immediately alters the rights of the corporation and the manner in which such rights can be asserted.[69]

Another significant point is whether the (unsecured) creditors' committee appointed under 11 U.S.C. § 1102—or even an individual creditor[70]—may obtain standing to bring actions on the behalf of the

64. Hu & Westbrook, *supra* note 17, at 1369–79.

65. *See* 11 U.S.C. § 1104 (2005).

66. Silberglied, *supra* note 6, at 205; Silberglied, *supra* note 45, at 256.

67. *See*, *e.g.*, Torch Liquidating Tr. *ex rel.* Bridge Assocs. v. Stockstill, 561 F.3d 377, 386 (5th Cir. 2009).

68. *See, e.g.*, iXL Enters. v. GE Capital Corp., 167 F. App'x 824, 826–27 (2d Cir. 2006); Koch Ref. v. Farmers Union Cent. Exch., 831 F.2d 1339, 1343 (7th Cir. 1987) ("[R]ights of action against officers, directors and shareholders of a corporation for breaches of fiduciary duties, which can be enforced by either the corporation directly or the shareholders derivatively before bankruptcy, become property of the estate which the trustee alone has the right to pursue after the filing of a bankruptcy petition."); Mitchell Excavators, Inc. *ex rel.* Mitchell v. Mitchell, 734 F.2d 129, 131 (2d Cir. 1984) ("Under 11 U.S.C. § 541, the rights of action of the debtor pass to the estate created by the commencement of the bankruptcy proceeding, not directly to the trustee. Those rights, however, are still normally vindicated by the trustee.").

69. Seinfeld v. Allen, 169 F. App'x. 47, 49 (2d Cir. 2006); *Mitchell Excavators, Inc.*, 734 F.2d at 131; *see also* Kelli A. Alces, *Enforcing Corporate Fiduciary Duties in Bankruptcy*, 56 U. KAN. L. REV. 83, 90 (2007) ("The cause of action for breach of fiduciary duty belongs to the estate and the automatic stay prevents parties other than the DIP or trustee from exercising control over property of estate without permission from the bankruptcy court, DIP, or trustee" (footnotes omitted)).

70. Fogel v. Zell, 221 F.3d 955, 965–966 (7th Cir. 2000) ("If a trustee unjustifiably refuses a demand to bring an action to enforce a colorable claim of a creditor, the creditor may obtain the

corporation if the trustee or the corporate officers fail to pursue litigation that is in the best interests of the estate. Although the Bankruptcy Code does not appear to directly authorize derivative standing for the creditors' committee(s), the courts have repeatedly held that derivative standing to pursue causes of action held by the bankruptcy estate is permissible.[71]

The state law actions against the corporate directors and officers are clearly—for all the reasons mentioned before—the property of the estate pursuant to the broad scope of 11 U.S.C. § 541.[72] In *In re STN Enterprises*, the Second Circuit held that creditors' committees have an *implied* qualified right to initiate suits in the name of the debtor in possession under 11 U.S.C. § 1103(c)(5) and § 1109(b) when the debtor in possession or the trustee have unjustifiably failed to bring claims against the directors—with the approval of the bankruptcy court.[73] This logically follows from the fact that the creditors' committee represents the common interests of the unsecured creditors and is charged with the responsibility to monitor the debtor's estate.[74]

permission of the bankruptcy court to bring the action in place of, and in the name of, the trustee."); Can. Pac. Forest Prods. v. J.D. Irving, Ltd. (*In re* Gibson Grp., Inc.), 66 F.3d 1436, 1441–42 (6th Cir. 1995).

71. *See generally* Official Comm. of Unsecured Creditors v. NewKey Grp., LLC (*In re* SGK Ventures, LLC), 521 B.R. 842, 847–48 (Bankr. N.D. Ill. 2014); Official Comm. of Unsecured Creditors *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 568 (3d Cir. 2003) ("[T]he ability to confer derivative standing upon creditors' committees is a straightforward application of bankruptcy courts' equitable powers."); *Fogel*, 221 F.3d at 965 ("The right to bring a derivative claim . . . depends on showing that the primary claimant has unjustifiably failed to pursue the claim."); La. World Exposition v. Fed. Ins. Co., 858 F.2d 233, 252 (5th Cir. 1988); *see also* Daniel J. Bussel, *Creditors' Committees as Estate Representatives in Bankruptcy Litigation*, 10 STAN. J.L. BUS. & FIN. 28 (2004); Dennis Klein & Mira Vayda Edelman, *Litigation Against Directors and Officers of Bankrupt Dot-Com Entities: A Potential Asset for the Debtor's Estate*, 27 DEL. J. CORP. L. 803 (2002); Russell C. Silberglied, Dir. at Richards, Layton & Finger, Remarks at the Fourth Annual Business Law Conference at the University of Maryland School of Law: Twilight in the Zone of Insolvency (Nov. 4, 2005), *in* Barondes et al., *supra* note 16, at 237. For some arguments against creditor derivative standing and the rationales offered by the *Cybergenics* court for permitting derivative suits in bankruptcy, see Keith Sharfman, *Derivative Suits in Bankruptcy*, 10 STAN. J.L. BUS. & FIN. 1 (2004).

72. *La. World Exposition*, 858 F.2d at 252; *see also* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 792 (Del. Ch. 2004) ("[W]hen a director of an insolvent corporation, through a breach of fiduciary duty, injures the firm itself, the claim against the director is still one belonging to the corporation.").

73. Unsecured Creditors Comm. v. Noyes (*In re* STN Enters.), 779 F.2d 901, 904 (2d Cir. 1985); *see also In re* First Capital Holdings Corp., 146 B.R. 7, 10–11 (Bankr. C.D. Cal. 1992).

74. *See* Klein & Edelman, *supra* note 71, at 805–06. The Bankruptcy Court in *In re First Capital Holdings Corp.*, 146 B.R. at 11, stated that the creditors' committee has a duty to take action, including prosecuting actions against directors when the debtor fails to take appropriate action for the benefit of the estate.

Some authors have argued that the creditors' committee has other remedies that could serve as a substitute for derivative standing—namely, the committee may move the court to appoint a trustee (or an examiner) pursuant to 11 U.S.C. § 1104.[75] By contrast, the Third Circuit in *Cybergenics* held that the appointment of a trustee was not a realistic alternative to allowing derivative suits by creditors' committees. One concern is the incremental cost of a trustee (which usually outweighs the benefits); the second, more important, concern is the cost implicit in replacing the current management with a team that is less familiar with the debtor and its market.[76] However, it has been asserted that the bankruptcy court may appoint a trustee for the sole purpose of pursuing fiduciary duty claims (a "limited purpose trustee"), without replacing the debtor's current management.[77]

After the confirmation of a chapter 11 plan, the conclusion about who has the standing or the authority to pursue claims for breaches of fiduciary duties varies depending on the content and the provisions of the plan. The plan may create a litigation or liquidating trust—which is a state-law trust—and assign the claims belonging to the debtor' estate to the trust, transferring the (exclusive) authority to sue to the litigation or liquidating trustee.[78] The trustee appears to assert a direct, not a derivative claim, as the litigation trust is the new owner of the claim.[79] The formation of litigation trusts has increased in recent years and has become more common and popular due to their utility in supporting the U.S. Bankruptcy Code's intent to hasten the debtor's reorganization.[80]

Although a bankruptcy court's order confirming a chapter 11 plan prevents the future assertion of any claims that could have been, but were not, raised prior to the confirmation, the Bankruptcy Code

75. *See*, *e.g.*, Alces, *supra* note 69, at 127–30; *see also* Mitchell Excavators, Inc. *ex rel.* Mitchell v. Mitchell, 734 F.2d 129, 132 (2d Cir. 1984) ("[I]f a trustee had been appointed, one remedy available to appellant would have been to petition the bankruptcy court to compel the trustee to either bring suit or abandon the claim.").

76. *See Cybergenics Corp.*, 330 F.3d at 576–77 ("[W]e believe that appointing a trustee is too drastic a step to constitute a serious alternative to allowing derivative suits by creditors' committees.").

77. Alces, *supra* note 69, at 127, 130.

78. *See*, *e.g.*, Torch Liquidating Tr. *ex rel.* Bridge Assocs. v. Stockstill, 561 F.3d 377, 388 (5th Cir. 2009); Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P., 906 A.2d 168, 189–91 (Del. Ch. 2006) (pointing out that the litigation trust only has the ability to assert a claim that the debtor possesses), *aff'd sub nom.* Trenwick Am. Litig. Tr. v. Billett, 931 A.2d 438 (Del. 2007).

79. *See* Silberglied, *supra* note 45, at 257.

80. Kristen M. Lasak, Note, *Whose Claim is it Anyway?—Direct and Derivative Claims in the Context of Bankruptcy Litigation*, 8 ST. JOHN'S BANKR. RES. LIBR., no. 14 (2016).

provides for an exception under 11 U.S.C. § 1123(b)(3).[81] Pursuant to this section, a plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest."[82] The trustee appointed to administer a litigation or liquidation trust is generally considered a representative of the estate pursuant to § 1123(b)(3)(B) if a successful recovery by the trustee would benefit the unsecured creditors.[83] By the plan's retention of the claims, the creditors are given notice of any potential causes of action that might enlarge the estate and that could be used to increase payment to them.[84]

Consistent with the premises, when a litigation trust is created, the creditors are prevented from pursuing claims belonging to the debtor's estate—namely, claims that are derivative from those asserted by the trustee or the debtor for the estate—and assigned to the litigation trust. The same preclusive effect on the creditors' ability to bring actions follows from a chapter 11 plan providing for the retention of the claim.[85]

Likewise, pursuant to § 1123(b)(3)(A), the reorganization plan may also provide for a settlement of claims held by the corporation against the directors and officers or may include debtor releases if

81. *See* 11 U.S.C. § 1141(b) (2010) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.").

82. Absent preservation, the plan and confirmation order will become res judicata as to all claims belonging to the debtor's estate. *See, e.g.*, Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008) ("This is a logical consequence of the nature of a bankruptcy, which is designed primarily to 'secure prompt, effective administration and settlement of all debtor's assets and liabilities within a limited time.'" (quoting Kroh Bros. Dev. Co. v. United Mo. Bank of Kan. City (*In re* Kroh Bros. Dev. Co.), 100 B.R. 487, 495 (Bankr. W.D. Mo. 1989)); Elk Horn Coal Co. v. Conveyor Mfg. & Supply, Inc. (*In re* Pen Holdings, Inc.), 316 B.R. 495, 498–99 (Bankr. M.D. Tenn. 2004); Harstad v. First Am. Bank, 39 F.3d 898, 902–03 (8th Cir. 1994).

83. *See, e.g.*, McFarland v. Leyh (*In re* Tex. Gen. Petroleum Corp.), 52 F.3d 1330, 1335 (5th Cir. 1995); Retail Marketing Co. v. King (*In re* Mako, Inc.), 985 F.2d 1052, 1054–56 (10th Cir. 1993).

84. *See* Spicer v. Laguna Madre Oil & Gas II, L.L.C. (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 551 (5th Cir. 2011). It is still not clear, however, what level of specificity is needed in identifying the claims being retained post-confirmation. *See*, *e.g.*, Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 454-57 (5th Cir. 2012); *In re United Operating, LLC*, 540 F.3d at 355; *In re Pen Holdings, Inc.*, 316 B.R. at 501–05; *see also* John W. Busch, *Should I Stay or Should I Go? A Practitioner's Guide to the Fifth Circuit's Specific and Unequivocal Retention Standard Under Bankruptcy Code 11 U.S.C. § 1123*, 66 BAYLOR L. REV. 447 (2014).

85. *See* Seinfeld v. Allen, 169 F. App'x. 47, 49–50 (2d Cir. 2006).

such provisions are deemed appropriate under the plan.[86] The bankruptcy courts have identified some (not binding) factors or standards that are relevant in determining whether the plan's releases are "fair" and, therefore, permissible or are "unfair or in bad faith."[87]

### *B. The French* Procédure de Sauvegarde *and* Redressement Judiciaire

In France, the topic of the directors' liability in insolvency proceedings is much less debated than in the United States, and only limited types of cases are brought before the courts. The only claims that arise, indeed, are those brought against the directors for a shortfall in the company's assets.

As set forth above in Part III, under certain circumstances, the directors and officers of a French company that enters a liquidation procedure—but not a restructuring procedure or a safeguard procedure—can be held liable for the shortfall of the assets.

The persons having exclusive standing to bring such action are the court-appointed liquidator and the public prosecutor. If the liquidator refuses to pursue the claim, the majority of the creditors' representatives appointed as controllers have the authority to act a substitute for it to protect the interests of the creditors as a whole.

The French Supreme Court clearly stated that corporate directors and officers cannot be prosecuted for the same misconduct—shortfall of the company's assets—based on the rules on directors' liability contained in the Commercial Code (articles L. 223-22 and L. 225-251) or those on tort liability contained in the Civil Code (articles 1240–1241).[88]

86. *See, e.g.*, *In re* Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999). On the other hand, there is a current split in the circuits over the permissibility of non-consensual non-debtor release provisions that affect third-party claims in confirmable chapter 11 plans. It seems that the majority of the circuits have adopted the view that non-consensual releases of claims or causes of action by a non-debtor (creditor) against another non-debtor, though permissible, are to be granted only in extraordinary or rare cases. *See*, *e.g.*, Ashraf Mokbel, *The Permissibility of Chapter 11 Non-Debtor Release Provisions*, 7 ST. JOHN'S BANKR. RES. LIBR., no. 16 (2016).

87. *In re* Hercules Offshore, Inc., 565 B.R. 732, 755–56 (Bankr. D. Del. 2016); *In re* Indianapolis Downs, LLC, 486 B.R. 286, 303 (Bankr. D. Del. 2013); *In re* Wash. Mut., Inc., 442 B.R. 314, 346 (Bankr. D. Del. 2011); *In re Zenith Elecs. Corp.*, 241 B.R. at 110–11.

88. *See*, *e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 19, 2013, Bull. civ. IV, No. 170 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., June 27, 2006, Bull. civ. IV, No. 152 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 28, 1995, Bull. civ. IV, No. 60 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 14, 2000, Bull. civ. IV, No. 59, (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., June 20, 1995, Bull. civ. IV, No. 187 (Fr.).

Outside of the liquidation procedure, the directors may be held liable in accordance with the general rules on directors' liability mentioned in Part II. There is no general agreement on it, but this interpretation appears to better correspond to the Supreme Court's rulings.[89] Moreover, a specific provision on directors' liability has been introduced in 2012, though it only applies to the judicial restructuring. Pursuant to article L. 631-10-1 of the Commercial Code, the judicial receiver or the judicial administrator, who has commenced a liability action against the directors for any fault contributing to leading the company to suspend its payments, may file a motion with the competent court to request precautionary measures against such directors' assets. It is uncertain whether the provision refers to the general civil liability based on article 1240 of the Civil Code,[90] or whether it creates a new type of action. Some authors argued that the legislator has introduced a new action for damages against the directors and officers (an action *en responsabilité pour contribution à la cessation des paiements*).[91]

However, claims for breach of fiduciary duties are very rare, particularly in the safeguard procedures: such procedures are voluntary and can only be commenced by a company that has not suspended its payments.

The safeguard procedure is a preventive proceeding designed to favor, at an early stage of the difficulties, a restructuring based upon a plan that provides the continuation of the debtor's activity with a minimized involvement of the court.

The debtor remains in possession and its incumbent management continues to manage the company—the debtor retains the freedom to act for the benefit of the company. As in the judicial restructuring, an

89. *See* Cour de cassation [Cass.] [supreme court for judicial matters] com., June 27, 2006, Bull. civ. IV, No. 152 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., May 28, 2002, 98-20.333 (Fr.), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007632593&fastReqId=1744108616&fastPos=1 [https://perma.cc/988X-HA5H]. For more discussion of this issue, see MAURICE COZIAN ET AL., DROIT DES SOCIÉTÉS 192 (28th ed. 2015) (Fr.), and Marie-Hélène Monsèrié-Bon, *Les risques de l'ouverture d'une procédure collective pour les associés et les dirigeants*, *in* DROIT DES SOCIÉTÉS ET PROCÉDURES COLLECTIVES 119, 122–124 (Laurence Caroline Henry ed., 2018) (Fr.).

90. *See* ASSEMBLÉE NATIONALE, No. 4411, RAPPORT DE MME FRANÇOISE GUÉGOT RELATIVE AUX MESURES CONSERVATOIRES EN MATIÈRE DE PROCÉDURES DE SAUVEGARDE, DE REDRESSEMENT JUDICIAIRE OU DE LIQUIDATION JUDICIAIRE ET AUX BIENS QUI EN FONT L'OBJET (2012) (Fr.).

91. *See*, *e.g.*, Pierre-Michel Le Corre, *Pour quelques barils de plus chez la fille, et pour quelques dollars de moins . . . chez la mère: la loi Petroplus du 12 mars 2012*, 2012 REVUE DES SOCIÉTÉS [REV. SOCIÉTÉS] 412, 415 (Fr.); Philippe Roussel Galle, *La loi Petroplus: quelques réflexions . . . avec un peu de recul*, REVUE DES PROCÉDURES COLLECTIVES [REV. PROC. COLL.], May–June 2012, at 11, 13 (Fr.).

administrator may be appointed by the court,[92] but he has very limited authority: he is usually vested with supervisory functions or, where appropriate, assists the corporate directors in performing all or part of their duties. Moreover, the court supervision itself is lighter than in the other proceedings, and the debtor retains some control over the procedure.[93]

In light of all these aspects, pursuing claims against incumbent directors appears to be incompatible (or more accurately, scarcely compatible) with the nature and the features of this preventive procedure, and they are not brought in practice. However, if such claims should be pursued, the receiver appointed by the court to represent and protect the creditors' interests (*mandataire judiciaire*) would have standing to bring them. The receiver's standing to sue can be inferred by article L. 622-20 of the French Commercial Code providing that he has the exclusive standing to act in the name and in the interest of the creditors as a whole. Any claims intended to benefit the estate and, generally, the creditors are asserted by the receiver. Moreover, if the receiver fails to bring such claims, any creditors' representative appointed as controller has the authority to substitute himself for the benefit of the creditors. The controllers, indeed, whose role has been strengthened by the 2005 reform, assist the receiver in discharging his duties and may act in the interest of the creditors as a whole in the event of the receiver's failure to act (article L. 622-20).

The same provisions apply to the judicial restructuring. In such a procedure, certain significant differences from the safeguard procedure (for example, the greater involvement of the court-appointed administrator and the fact that the company has suspended its payments) make it more likely that a liability action against the directors will be brought.[94] In particular, pursuant to article L. 631-10-1 mentioned above—that so expressly provides—both the receiver and the administrator have standing to sue the directors and officers for any fault that has contributed to lead the company to suspend its payments.

It should also be noted that in both procedures, the court-appointed receiver or administrator is usually entrusted with the

92. This appointment is not required when the number of the debtor' employees and its turnover excluding tax are below the thresholds established by art. R. 621-11 of the French Commercial Code. *See* CODE DE COMMERCE [C. COM] [COMMERCIAL CODE] art. L. 621-4 (Fr.).

93. Pietrancosta & Vermeille, *supra* note 26, at 10–11.

94. PHILIPPE PÉTEL, PROCÉDURES COLLECTIVES 73–74 (9th ed. 2017) (Fr.).

execution of the reorganization plan upon its confirmation (article L. 626-25). In the capacity of the commissioner for the execution of the plan, he has standing to prosecute all claims brought by the receiver and the administrator before the plan confirmation and to bring actions for the benefit of all the creditors (including fiduciary duty claims against the directors).

### *C. The Italian* Concordato Preventivo

I will now examine the regime for liability actions in Italy. There, the question of who has standing to pursue claims against directors who engage in misconduct is not an easy question and has generated a huge debate among scholars, practitioners and, to a lesser extent, judges.

Although it is clear, and well established by the law, who has standing to pursue fiduciary duty claims upon the commencement of a liquidation procedure, when a company files a petition for a reorganization procedure, it is uncertain who has the right to sue. To date, neither the company law provisions nor the Bankruptcy Law has dealt with this issue.[95]

In particular, there is some debate about (a) whether the creditors can assert direct claims after the commencement of a reorganization proceeding; and (b) what person(s) have standing to sue mismanaging directors on behalf of the estate (both pre- and post-confirmation).

As set forth above in Part I, the creditors of Italian companies have standing to bring direct actions against directors for the violation of the duty to preserve the integrity of the company's assets. Thus, in the following analysis, the standing to pursue claims on behalf of the company must be distinguished from that to sue the directors on behalf of the creditors themselves—individually or as a whole.

With regard to fiduciary duty claims on behalf of the company, after filing a petition with the bankruptcy court, the company itself, through its legal representatives, has exclusive standing to bring direct actions against the directors. Indeed, in the preventive composition

95. As I noted in the introduction, *supra*, the Italian Parliament passed a law that delegates to the government the responsibility to introduce a comprehensive reform of the insolvency and reorganization proceedings within twelve months. A first draft of the legislative decree implementing the new law sets out that, after the plan is confirmed, the person having standing to pursue fiduciary duty claims against the directors is the liquidating trustee. Moreover, it has been clarified that the (individual) creditors retain standing to assert direct claims against the directors.

with creditors, the corporate directors remain in possession and retain the freedom to exercise their managerial power and their business judgment, subject to certain safeguards regarding the disposal of assets outside of the ordinary course of business. The court-appointed commissioner is generally given supervisory functions and a role in providing the creditors with relevant information, but he does not manage the company, nor does he assist the directors in performing their duties. Thus, he has no authority in pursuing liability actions on behalf of the company.

After the confirmation of the reorganization or liquidation plan,[96] the retention of liability actions against the directors, as well as the persons having standing to sue, follow the specific contents of the plan approved by the majority of the creditors by value.

If the plan provides for the sale or transfer of all or part of the company's assets for the benefit of the creditors, including fiduciary duty claims, the court-appointed trustee entrusted with the disposal of the assets has the authority to assert such claims on behalf of the company. However, because the Italian courts have repeatedly held that the company (debtor) remains in possession of all of its property even though a liquidating trustee has been appointed, the standing to sue of the latter does not appear to be exclusive.[97] Whether the plan provides otherwise—i.e., it provides for the business activity to be continued by the debtor—the reorganized company also maintains the authority to bring liability actions against its own directors. The plan may also provide that the claims belonging to the company are transferred to an assignee that will have, therefore, the exclusive right to assert such claims.

Absent any provision on liability actions in the discipline of the composition with creditors, some issues still remain. For example, it is not clear whether the transfer of a business as a going concern to an entity or an individual includes the transfer of direct claims against the sitting or former directors (if the plan does not address this point).[98]

Moreover, it is a moot point whether a resolution by the shareholders' meeting is required to bring actions against the mismanaging directors, even

96. The plan may provide for the sale or the transfer of all or part of the company's assets (liquidation plan) or the continuation of the business activity by the debtor or by an assignee or an entity —whether organized before or after the confirmation of the plan— in case of a transfer of the business as a going concern.

97. *But see* Giacomo D'Attorre, *Le azioni di responsabilità nel concordato preventivo* [*Actions for Breach of Fiduciary Duties in the Preventive Composition with Creditors*], 60 RIVISTA DELLE SOCIETÀ [RIV. SOC.] 15, 25 (2015) (It.).

98. *See* Cass. [supreme court for judicial matters] civ., sez. I [first session], 12 giugno 2007, n. 13765, Foro Italiano [Foro it.], 2008, I, 1573 (It.).

when the person having standing to sue is the liquidating trustee. It must be recalled that, in Italian solvent companies, a liability action can be brought by the legal representatives of the company only if such a claim has been previously approved at a shareholder meeting. Thus, it has long been debated whether such resolution remains necessary when the claims are pursued after the commencement of a reorganization procedure. I think the answer is yes, because there is no law provision that explicitly derogates what is provided for in the general rules relating to directors' liability (article 2393 of the Italian Civil Code).[99]

I now move on to the creditors' standing to sue.

As we have seen above, the creditors of Italian companies have standing to pursue direct claims against the directors for breach of a fiduciary duty, even when, in theory, the company is solvent. Accordingly, first, after filing for a reorganization procedure, the creditors have standing to sue the directors individually, and their claim remains a direct claim. Unlike the liquidation procedure, where all claims for breach of fiduciary duties are brought by the trustee (*curatore fallimentare*), in the reorganization procedure the court-appointed trustee only has the authority to bring actions belonging to the company. There is no provision under the Italian law that allows us to reach a different conclusion.

Second, the confirmation of the plan by the court does not impact on third-party claims against non-debtors. Namely, pursuant to article 184 of the Italian Bankruptcy Law, a debtor's discharge does not affect the liability of any other non-debtor, including the corporate directors –the only exception concerns the general partners of a partnership.[100] It follows that the creditors have the right to maintain direct actions for damages against the directors, if under the confirmed plan they will not be paid in full.

99. *See* Trib. Bologna, 16 agosto 2016 (It.), http://www.ilcaso.it/giurisprudenza/archivio/15745.pdf [https://perma.cc/P36Z-RJ6R]; Trib. Milano, 19 luglio 2011 (It.), http://www.ilcaso.it/giurisprudenza/archivio/6547.pdf [https://perma.cc/5PKV-4WNR]; Trib. Bolzano, 30 aprile 2015 (It.), http://www.ilcaso.it/giurisprudenza/archivio/13400.pdf [https://perma.cc/R2HQ-M8SV]; *see also* D'Attorre, *supra* note 97, at 22–23.

100. *See*, *e.g.*, Trib. Piacenza, 12 febbraio 2015, BANCA BORSA TITOLI DI CREDITO [BANCA BORSA] 2015, II, 565 (It.); *see also* Stefano Ambrosini, *Il concordato preventivo*, *in* 4 LE ALTRE PROCEDURE CONCORSUALI: TRATTATO DI DIRITTO FALLIMENTARE E DELLE ALTRE PROCEDURE CONCORSUALI 3, 141 (Francesco Vassalli et al. eds., 2014) (It.); Massimo Fabiani, *Fondamento e azione per la responsabilità degli amministratori di s.p.a. verso i creditori sociali nella crisi dell'impresa* [*Foundation and Action for the Liability of Directors of Joint-Stock Companies to Creditors in the Corporate Crisis*], 60 RIVISTA DELLE SOCIETÀ [RIV. SOC.] 272, 333 (2015) (It.); Ilaria Pagni, *La legittimazione alle azioni di responsabilità nel concordato preventivo* [*Standing to Bring Actions for Breach of Fiduciary Duties in the Preventive Composition with Creditors*], 2015 LE SOCIETÀ 601, 605 (It.).

As far as the creditors' committee, its formation is permissible, but not required under the Italian Bankruptcy Law. In particular, the creditors' committee is appointed by the court only when the plan provides for a disposal of assets and that a liquidating trustee shall be appointed. Additionally, such committee is vested with very limited powers compared to those given to the creditors' committees under chapter 11, which consist in consulting activities and in authorizing the trustee to perform certain operations.

Consistent with such a limited role, the creditors' committee has no standing to bring claims against the directors.

Finally, because these liability actions belong to individual creditors, not to the company, and they have direct standing to sue, any release contained in the plan does not prevent non-consenting creditors from asserting fiduciary duty claims against the directors and recovering from their personal assets. Unlike the United States, where non-debtor releases have been allowed by some circuits under unusual or extraordinary circumstances,[101] in Italy, such provisions have no effect on third-party claims. Consequently, the bankruptcy court could not confirm the relative (reorganization or liquidation) plan.

## V. CONCLUSION

Under the Italian law, the interests of creditors in preserving the integrity of the company's assets must be taken into account by the directors, regardless of whether the company is solvent or insolvent, or even in the zone of insolvency.

Some scholars have said that this general rule is more effective than that allowing creditors to bring (only) a derivative suit when a company becomes insolvent and that it offers better protection to creditors.[102] In Italy, indeed, non-debtor release provisions negotiated in a composition plan, or waivers of causes of action against directors in solvent companies[103] do not produce any

101. *See*, *e.g.*, Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 141–43 (2d Cir. 2005); *In re* Exide Tech., 303 B.R. 48, 72-73 (Bankr. D. Del. 2003); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 656–58 (6th Cir. 2002). However, as noted *supra* note 86, the issue of the permissibility of non-consensual non-debtor releases in chapter 11 plans remains controversial and continues to be the subject of a split between the circuits. The Bankruptcy Code, indeed, does not explicitly authorize the release and permanent injunction of claims against non-debtor third parties, except in one instance. *See* 11 U.S.C. § 524(g) (2012) (establishing a statutory procedure specially designed to deal with asbestos claims).

102. *See*, *e.g.*, Guizzi, *supra* note 12, at 233.

103. In the liquidation procedure, the only person who has standing to bring actions against directors and to waive or release such claims is the trustee.

effect on the direct claims of the creditors, who maintain an individual right to sue.

Having read many U.S. bankruptcy cases and appreciating their reasoning and rationale, I am not fully persuaded of this.

Claiming that the directors owe fiduciary duties to creditors, in addition to those owed to the company and its shareholders, clearly affects the nature (direct or derivative) of the claims that creditors may pursue. However, the Italian cases show that the vast majority of actions against directors are brought by the trustee upon the commencement of a liquidation proceeding (*fallimento*). Indeed, it is only when a company becomes insolvent that the insufficiency of its assets—which is a necessary condition for the creditors to bring an action against the directors—generally arises. I recall that, in Italy, insolvency is defined in cash flow terms, not in balance sheet terms.

In the liquidation procedure, unlike the reorganization procedure, the trustee has the exclusive standing to bring all actions for the benefit of the estate and its beneficiaries, including liability actions on behalf of the creditors as a whole. Any recovery from the directors goes to the company, not to the plaintiff, and will belong to the estate. Additionally, due to the high costs and long duration of litigation, it is commonplace for the trustee to settle such actions.[104] This is often the best avenue to recover losses and maximize the liquidation of assets and the return for the creditors, particularly when the directors' liabilities are covered by D&O liability insurance.

All these aspects, I think, considerably reduce the differences in creditor protection between Italy, on the one side, and the United States and France, on the other side.

Two not negligible differences remain, however.

First, in France, directors' liability actions are substantially brought only when the directors' misconduct has contributed to the shortfall of the company's assets. Moreover, the commercial court has broad discretion in determining whether a director has contributed to the shortfall of the assets and to what extent, and in deciding the amount of liabilities he should be held to recover. Second, in Italy, the level of the efficiency and effectiveness of both liquidation and reorganization proceedings in satisfying creditors' claims is significantly lower than in the United States and France. The courts' decisions often lack clarity and predictability—much more, I believe, than the decisions of the U.S. courts.

104. The trustee, however, shall have been authorized by the creditors' committee to settle the claims. *See* article 35 of the Italian Bankruptcy Law, R.D. 16 marzo 1942, n.267, G.U. Apr. 6, 1942, n.81 (It.).