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John A. E. Pottow

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ABSTRACT

In earlier work, I explored the role of fiduciary duties in the bankruptcy trustee's administration of a debtor's estate, noting the absence of any explicit demarcation of those duties in the Bankruptcy Code. In this piece, I report the highlights of that analysis and see to what extent (if any) fiduciary duties can inform policy prescriptions for the issue of bankruptcy claims trading, colorfully referred to by some as the world of "bankruptcy M&A." My initial take is pessimistic. Fiduciary duties, at least as traditionally conceived in bankruptcy, are unlikely to provide much help. But there is still a source of optimism. Namely, the structural and procedural institutions of the Bankruptcy Code and court system may, through a transparent, court-supervised litigation process, achieve many of the same conflict-checking functions with which fiduciary duty law concerns itself.

INTRODUCTION

Currently, the Bankruptcy Code does not specifically address fiduciary duties imposed upon trustees in managing bankruptcy estates, although these duties clearly saddle such professionals in the discharge of their obligations.[1] The growing world of bankruptcy claims trading, also known more colorfully as bankruptcy M&A,[2] has now added new layers and complexities to this contentious and underspecified aspect of bankruptcy, for both trustees and creditors alike. Yet substantive doctrines of fiduciary duty do little to resolve inherent conflicts of interest, leaving trustees subject to sometimes divergent obligations—a situation only exacerbated when bankruptcy M&A takes

* John Philip Dawson Collegiate Professor of Law, University of Michigan. Thanks for research assistance go to Conor McNamara, Michigan JD Class of 2018. Helpful comments were provided by Daniel Greenwood, Ted Janger, Adam Levitin, Jay Westbrook, and all co-participants in our excellent symposium.

1. John A. E. Pottow, *Fiduciary Duties in Bankruptcy and Insolvency*, THE OXFORD HANDBOOK OF FIDUCIARY LAW (forthcoming 2018) (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds.) (Univ. of Mich. Law & Econ. Research Paper No. 17-014; Univ. of Mich. Pub. Law Research Paper No. 566) (manuscript at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032615.

2. Marc E. Albert & Katherine M. Sutcliffe Becker, Stinson Morrison Hecker LLP, *Key Issues in Acquisitions and Sales of Distressed Companies*, THOMSON REUTERS ASPATORE, 2009 WL 788626, at *6; Brooke Masters & Julie MacIntosh, *Bankruptcy-Related M&A has 'Only Just Begun'*, FIN. TIMES (Apr. 12, 2009), https://www.ft.com/content/05234d00-2788-11de-9b77-00144feabdc0; *see also* Edward J. Janger & Adam J. Levitin, *One Dollar, One Vote: Mark-to-Market Governance in Bankruptcy* 16 (Brooklyn Law Sch. Legal Studies Research Paper No. 567, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247267 ("Creditors have the power to influence the conduct of the case in various ways, and acquire key governance rights with regard to bankruptcy plan confirmation.").

place. All is not lost, however, as hope may be found in the procedural and institutional safeguards that draw creditor disputes out into an open judicial forum where they can be fully and fairly adjudicated (although for such procedural mechanisms to be maximally effective, the spirit of disclosure emphasized in Rule 2019 of the Federal Rules of Bankruptcy Procedure should probably be amplified).

Part I of this Article provides an overview of bankruptcy trustees' fiduciary duties and the various protections trustees enjoy from breach of fiduciary duty lawsuits, critically analyzing these duties. Part II applies these fiduciary duties to the bankruptcy M&A context and considers what guidance, if any, they provide for directing trustee or creditor behavior and decision-making. Finally, this Article points to the *Commodore* standing doctrine as a beneficial alternative to fiduciary mandates for resolving trustee and creditor conflicts in this area.

I. TRUSTEE FIDUCIARY DUTIES IN BANKRUPTCY

A. DEFINITION/SCOPE OF FIDUCIARY DUTIES

Because the fiduciary debtor-in-possession (DIP) in chapter 11 is derivative of the chapter 7 trustee model,[3] I focus on the chapter 7 trustee's fiduciary duties. Indeed, "fiduciary" duties fit comfortably with the very idea of a "trustee," which invokes the law of trusts, a canonical source of fiduciary obligation.[4] My key conclusions on the chapter 7 trustee's fiduciary duties can be summarized as follows.

First, not all (or perhaps even most) of the trustee's duties to the chapter 7 estate can be fairly characterized as "fiduciary."[5] To be sure, many sound in explicitly fiduciary registers, such as the obligation under the Bankruptcy Code "to be accountable for all property received,"[6] which expressly invokes trust law's remedy of an accounting.[7] So, too, do even neutrally phrased Code obligations, such as the duty to "collect and reduce to money the property of the estate for which such trustee serves," frequently attract courts to impress

3. 11 U.S.C. § 1106 (2012) (vesting DIP in most, but not all, of chapter 7 trustee's responsibilities).

4. *See, e.g.*, U.S. *ex rel.* Willoughby v. Howard, 302 U.S. 445, 450 (1938) ("[E]very trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate . . . ."); RESTATEMENT (THIRD) OF TRUSTS § 77 (AM. LAW INST. 2003) ("The duty of prudence requires the exercise of reasonable care . . . .").

5. Steven W. Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 147–48 (2006) (dividing trustees' obligations into "fiduciary" obligations, owed to the "bankruptcy court and the parties in cases in which the trustee serves," and "institutional" obligations, owed "to the bankruptcy process itself").

6. 11 U.S.C. § 704(a)(2).

7. RESTATEMENT (THIRD) OF TRUSTS § 83 (AM. LAW INST. 2003) ("A trustee has a duty to . . . provide beneficiaries with reports or accountings.").

upon trustees a fiduciary obligation.[8] But there are many other obligations imposed upon the chapter 7 trustee that are neutral at best and carry no fiduciary duty.[9] We might call them mere "statutory" obligations. Consider the charge to "if advisable, oppose the discharge of the debtor."[10] The trustee has no creditor-based obligation to do so, and, indeed, this has nothing to do with the trustee's role in helping creditors divide the debtor's estate. Rather, a discharge objection turns to the debtor's post-estate, post-trustee life.

Most interesting, however, are duties of the trustee that might be considered "anti-fiduciary." This label stems from the proposition that the presumed beneficiaries of the "trust" for which the trustee serves are the estate's creditors (with the debtor as ultimate residual beneficiary).[11] Yet the trustee is charged with a duty, if "a purpose would be served," to "examine [creditors'] proofs of claims and object to the allowance of any claim that is improper."[12] This means that trustees are not unadulterated champions of their creditors. They can (and often do) switch gears into an adversarial capacity toward their purported wards—the antithesis of the traditional fiduciary relationship.

Thus, looking at the chapter 7 trustee, we realize that simply calling him or her a "fiduciary" of the estate is too simple—notwithstanding the inexorable appeal to bankruptcy courts of doing so.[13] Bankruptcy often has conflicting alignments of interested parties, and even the trustee is not immune from shifting allegiances.[14] Recognizing these shifting allegiances is the first stage of understanding the unique challenges for the ascription of fiduciary duty in the bankruptcy context, even for the simplest, most canonical form of fiduciary: the bankruptcy trustee.

8. 11 U.S.C. § 704(a)(1); *see, e.g.*, Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 12 (2000) ("[T]rustee is obliged to seek recovery . . . whenever his fiduciary duties so require."). Trust law envisions a duty to take custody of assets when necessary, but not to liquidate them. *See* RESTATEMENT (THIRD) OF TRUSTS § 76 (AM. LAW INST. 2003) (imposing responsibility to "collect[] and protect[] trust property").

9. *See, e.g.*, 11 U.S.C. §§ 704(a)(10), (12) (requiring notice to certain domestic support creditors or transfer of patients to health care facilities).

10. *Id.* § 704(a)(6).

11. *See, e.g.*, *id.* § 702(b) (allowing creditors of estate to vote for trustee); *In re* Cent. Ice Cream Co., 836 F.2d 1068, 1072–73 (7th Cir. 1987) (reminding that equity, not creditors, holds ultimate residual interest of corporate debtor).

12. 11 U.S.C. § 704(a)(5).

13. *See, e.g.*, *In re* Engman, 331 B.R. 277, 288 (Bankr. W.D. Mich. 2005) (describing trustee simply as "fiduciary of the bankruptcy estate").

14. *See* RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. LAW INST. 2003) ("A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust . . . ."); *see also* Rhodes, *supra* note 5, at 149, 208 (contending that trustees have "obligations . . . to protect the integrity of the bankruptcy process," but that "it is hard to justify imposing the costs of the objection on the creditors").

B. TRUSTEE DUTIES

1. Duty of Care

When the trustee is a fiduciary under the Bankruptcy Code, the traditional duties of care and loyalty kick in.[15] But the duty of care is perhaps more effectively policed "extra-legally," rather than through the traditional trust law remedy of litigation for breach. This is because panel trustees are certified and removed by the U.S. Trustee's Office and subject to various restrictions.[16] As such, repeat play fiduciaries are to a certain extent regulated by public actors, minimizing (although not eliminating) the need for private enforcement through suit. Lest you worry, however, that reliance on public actors alone suffices, rest assured that the trustee's clarity is focused by the obligation to post a performance bond, which can be duly forfeited upon proper showing.[17] Instances of such forfeiture are understandably rare, but not unheard of.[18]

Finally, the trustee's care obligations derived from the Code are a floor, not a ceiling. Many courts advert to general, common law fiduciary duties that supplement a trustee's statutorily delineated obligations,[19] drawing upon such general sources as the Restatement of Trusts.[20] But again, while these cases may make waves, I suspect most of the work is being done offstage through the (de-)(re-)credentialing procedures of the U.S. Trustee.[21]

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15. *See, e.g.*, 11 U.S.C. § 701(a)(1) (requiring trustee to be a "disinterested" party); U.S. *ex rel.* Willoughby v. Howard, 302 U.S. 445, 450 (1938) ("[E]very trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate . . . ."); *cf.* 11 U.S.C. § 321(a)(1) (requiring trustee to be "competent").

16. 28 U.S.C. § 586(a)(1), (3) (2012) (enabling U.S. Trustee oversight of panel trustees); *see also, e.g.*, 11 U.S.C. § 321(a)(1) ("competen[ce]"); *In re* Lowery, 215 B.R. 140, 141–42 (Bankr. N.D. Ohio 1997) (finding trustee "obviously" competent "by virtue of being a member of the United States Trustee's panel of trustees").

17. *See* 11 U.S.C. § 322(a); R. Woolsey & Assocs., Inc. v. Gugino (*In re* R. Woolsey & Assocs., Inc.), 454 B.R. 782, 785–86 (Bankr. D. Idaho 2011) ("The purpose of the bond is to [en]sure faithful performance by the trustee and to indemnify the estate for any loss that might be sustained as a result of the misfeasance or malfeasance of the trustee.") (quoting 3 COLLIER ON BANKRUPTCY ¶ 322.02 [2] at 322–24 (Richard Levin and Henry J. Sommer eds., 16th ed. 2018)).

18. *See, e.g.*, *In re* Schooler, 449 B.R. 502, 517 (Bankr. N.D. Tex. 2010) (finding liability of surety under blanket bond triggered by trustee's gross negligence).

19. *See, e.g.*, *In re* Markos Gurnee P'ship, 182 B.R. 211, 219 (Bankr. N.D. Ill. 1995) (citing Mosser v. Darrow, 341 U.S. 267, 271 (1951)) ("Beyond the statutory duties, bankruptcy trustees owe to the beneficiaries of the estate the usual common law trust duties . . . .").

20. *See, e.g.*, *In re* Ferrante, 51 F.3d 1473, 1479–80 (9th Cir. 1995) ("When a trustee receives funds as trustee, he holds them as a fiduciary and is accountable for them.") (citing RESTATEMENT (SECOND) OF TRUSTS § 170(1) (AM. LAW INST. 1959)).

21. *See, e.g.*, 28 C.F.R. § 58.6 (2017); Review of the Decision of the United States Trustee for Region [ ] Regarding Chapter 7 Trustee [ ], Clifford J. White III, Acting Director, Exec. Office for the U.S. Trustees, Case No. 05-0004, at 6 (U.S. Dep't of Justice Nov. 1, 2005) (final agency action), https://www.justice.gov/sites/default/files/ust/legacy/2015/01/25/case05-0004.pdf (suspending trustee from panel for four months in part for conducting inadequate investigations at meeting of creditors).

2. Duty of Loyalty

As previously flagged, the real challenge trustees face is divergent interests, and this implicates the fiduciary duty of loyalty. I use a taxonomy dividing "external" from "internal" loyalty issues involving the trustee.[22] External loyalty refers to potential conflicts between the trustee himself and all the bankruptcy estate stakeholders. Self-dealing would be the classic example of such an external conflict of loyalty.[23] The Code addresses this, among other ways, by the ex ante requirement of trustee disinterestedness,[24] which is necessarily inapposite in the DIP context of chapter 11.[25]

"Internal" conflicts are more difficult. They pertain to the trustee's obligations to a menagerie of heterogeneous creditors. Without anesthetizing the reader here, I will simply summarize that there are numerous situations in which beneficiaries of the trustee's loyalty will be opposed to one another and the trustee will have to pick which to favor. For example, a secured creditor likely begrudges the examination of perfection status as an imprudent expenditure of estate resources, whereas an unsecured creditor hungers for the potential to drag the exalted down to the trenches of the unwashed.[26] Does the trustee then have an obligation to pursue avoidance of any/all potentially unperfected liens? How does characterization of the trustee as a fiduciary shed any light? The Code and rules settle on a prima facie trigger,[27] but this gives you a flavor for the embedded competing claims on the trustee's affection. Courts are hardly uniform in their treatment of these matters. For example, they divide on whether a trustee has an obligation to pay expenses to preserve a secured creditor's collateral,[28] or whether the secured creditor should be expected to look out for itself.[29] Ultimately, the comfort of broad platitudes proves irresistible, with courts eschewing

22. Pottow, *supra* note 1, at 12–15.

23. *See, e.g.*, *In re* San Juan Hotel Corp., 71 B.R. 413, 423 (D.P.R. 1987), *aff'd in part and rev'd in part on other grounds*, 847 F.2d 931, 950 (1st Cir. 1988) (holding that trustee's relative's freebie marriage reception on estate property was "self-dealing" and "conflict of interest").

24. *See* 11 U.S.C. §§ 101(14), 701(a)(1) (2012); 18 U.S.C. § 154 (2012).

25. *See, e.g.*, 11 U.S.C. § 1107(b)(1) (excusing DIP's professionals from disinterestedness bar that might be triggered by prior representation of the debtor).

26. 11 U.S.C. § 544(a) (allowing trustee to void unperfected security interests); *see generally In re* J.F.D. Enterprises, 223 B.R. 610, 628 (Bankr. D. Mass. 1998) ("[U]nsecured creditors demand of the trustee the due performance of the trustee's duties, amid their underlying concern that the trustee may object to their claims, demand recovery of their prepetition gains as preferences or fraudulent transfers, and/or question their prepetition business activities with the debtor.").

27. *See, e.g.*, Fed. R. Bankr. P. 3001(f); *In re* Atcall, 284 B.R. 791, 799 (Bankr. E.D. Va. 2002).

28. *See, e.g.*, *In re* Kinross Mfg. Corp., 174 B.R. 702, 706 (Bankr. W.D. Mich. 1994) ("Procuring insurance would ordinarily be an integral part of the trustee's duty [to secured creditor].").

29. *See, e.g.*, *In re* Peckinpaugh, 50 B.R. 865, 869 (Bankr. N.D. Ohio 1985) (finding trustee has no duty to manage assets, just preserve them until sale, otherwise "it would shift the Trustee's role from custodian to investment manager thereby encouraging secured creditors to avoid the responsibility for their investments").

difficult analysis in favor of such old saws as the trustee diffusely owing a primary obligation to "the corporation" as a whole.[30]

Trust law has confronted the issue of competing beneficiaries before (classically, the income vs. remainder beneficiary), and has developed a duty of impartiality.[31] Bankruptcy cases have picked up this language,[32] but it is unclear how much guidance this actually provides. In the trust law realm, the duty of impartiality manifests in a requirement of according "due regard" to the interests of all beneficiaries,[33] but even that is in an easier context than bankruptcy, where portfolio theory can step in to counsel the benefits of wealth maximization (and trust instruments can pre-specify trustee exculpation).[34] Thus, the bankruptcy trustee is faced with a seething bed of angry constituents who are not getting paid, many of whose interests diverge, all with little helpful guidance from the Code on what her fiduciary duty of "loyalty" to these charges might require.

C. Immunities & Safeguards

Finally, prior examination of fiduciary obligations of bankruptcy trustees unearthed a convoluted web of immunities and privileges that protect bankruptcy trustees from breach of fiduciary duty lawsuits. This, in my view, is an implicit recognition that the conflicting demands on a trustee's loyalty make it near-guaranteed that litigation from disgruntled creditors will arise. But doctrines with such exotic labels as *Barton* and *McNulta* all serve to protect the trustee from all but the most egregious violations.[35] These immunity doctrines reflect a concession that (internal) conflict is just "in the air" in bankruptcy.

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30. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 344, 353 (1985) (opining that the "trustee plays the role most closely analogous to that of a solvent corporation's management," which broadly owes its "fiduciary duty to . . . the corporation"); *see also In re* Troy Dodson Constr. Co., 993 F.2d 1211, 1216 (5th Cir. 1993) ("[F]iduciary duty [flows] to all creditors, not just the unsecured creditors.") (emphasis omitted); *In re* JMW Auto Sales, 494 B.R. 877, 893 (Bankr. S.D. Tex. 2013) (noting trustee owes duty to "the [e]state").

31. *See* RESTATEMENT (SECOND) OF TRUSTS § 232 (AM. LAW INST. 1959) ("Impartiality Between Successive Beneficiaries"); RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. LAW INST. 2003) ("A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust . . . ."); UNIF. TRUST CODE § 803 (UNIF. LAW COMM'N 2010) ("Impartiality"); 3 JUSTIN W. SCOTT, WILLIAM F. FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 17.15 (5th ed. 1995) ("Duty of Impartiality").

32. *See, e.g.*, *In re* Comput. Learning Ctrs., Inc., 268 B.R. 468, 473 (Bankr. E.D. Va. 2001) ("[the chapter 7 trustee is] charged with *impartially* administering the estate entrusted to him.") (emphasis added).

33. RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. LAW INST. 2003).

34. *See* Pottow, *supra* note 1, at 14–15, n.60; *see also* UNIF. PRUDENT INVESTOR ACT § CMT. AT 10–12 (UNIF. LAW COMM'N 1994) (prescribing trustee duty to diversify invested assets in name of prudent wealth maximization).

35. *See* McNulta v. Lochridge, 141 U.S. 327, 332 (1891) (holding that when trustee is sued in personal capacity, the trustee is immune for actions performed within the scope of his duties); Barton v. Barbour, 104 U.S. 126, 136–37 (1881) (establishing that suits against trustees in connection with estate administration require appointing court's leave).

Fiduciary duty law's limited helpfulness is even more pronounced in the chapter 11 context where the DIP is thrust into a fiduciary fox role and entrusted to guard the estate henhouse.[36] This may be why the Code builds in a number of structural procedural safeguards to check these concerns.[37] For example, the Creditors Committee, funded by the estate, can serve as a check on the DIP.[38] Similarly, the bankruptcy court's oversight of debtor conduct means not only that the DIP is being watched, but also that creditors who have conflicting interests can ventilate their disputes in an open forum, rather than just pestering the trustee/DIP to favor them in the discharge of fiduciary duty.[39] Moreover, the beleaguered fiduciary can always seek direction from the court for cover.[40] Thus, the public resolution of a bankruptcy case, in a sense, can fill some of the gaps that fiduciary duty law leaves when applied to DIPs (and even trustees). In this regard, I confess to a somewhat consequentialist view of fiduciary duty law in this context: as a means to police and resolve conflicting stakeholder interests, especially regarding internal conflicts of interest. In the bankruptcy courtroom, those conflicts can come out openly in motion practice; not every creditor dispute needs to be shoehorned into a claim of breach of fiduciary duty. Differences of opinion by adversaries are simply litigated as fights over whether, for example, the court should approve or deny a motion to sell estate property.

II. LESSONS FROM FIDUCIARY DUTIES FOR BANKRUPTCY M&A

What can we learn from thinking seriously about the trustee's fiduciary duties in bankruptcy in considering the challenges faced by claims trading and related issues of bankruptcy M&A?[41] At root, the problem seems to be one of "Creditors Behaving Badly." Thus, at first blush, it may seem that the fiduciary obligations of *the trustee* (*or DIP*) have nothing to say about the behavior of *creditors*. And as a first principles matter, that is of course correct, although bankruptcy courts are creative in stretching obligations to effect workarounds on formal limitations. Consider, for example, *In re Food Management*, in which the debtor's counsel (following a majority approach) was found to owe fiduciary obligations not just to its client (the DIP), but

36. *Cf.* Thomas G. Kelch, *The Phantom Fiduciary: The Debtor in Possession in Chapter 11*, 38 WAYNE L. REV. 1323, 1352 (1992) ("It is said that one cannot serve two masters; in Chapter 11 the masters are not only two, but profuse—the various groups of creditors and equity interest holders.").

37. *See generally* Martin J. Bienenstock, *Conflicts Between Management and the Debtor in Possession's Fiduciary Duties*, 61 U. CIN. L. REV. 543, 551 (1992) (cataloging other DIP loyalty checks).

38. *See* 11 U.S.C. §§ 330, 1103 (2012).

39. *See id.* §§ 363(b)(1), (c)(2).

40. *See, e.g.*, Mosser v. Darrow, 341 U.S. 267, 274 (1951) (noting that trustee may "seek instructions from the court" to "effectively protect . . . against personal liability").

41. This brief article assumes reader familiarity with the creditor exploits chronicled in Janger & Levitin, *supra* note 2.

more broadly to the estate, such that the chapter 11 trustee could pursue actions for breach.[42] So it is not impossible to envision a "one-step removed" imposition of a fiduciary duty on the DIP to ride herd over miscreant creditors, although it would certainly require a stretch.

Still, the analysis of the trustee fiduciary duty issues in chapter 7 does have some bearing on the bankruptcy M&A world of chapter 11. Specifically, recall that in the chapter 7 trustee's world, the greatest problem fiduciary duty law faces is the internal loyalty conflict of creditor vs. creditor.[43] Similarly in chapter 11, it seems that the real source of creditor misbehavior is more one of inter-creditor conflict rather than, say, a creditor trying to steal property of the estate who needs to be smacked down by a strict fiduciary obligation. So, can fiduciary duties incumbent on the chapter 7 trustee shed any light on how to deal with Creditors Behaving Badly in the chapter 11 context?

A. SHORTCOMINGS OF FIDUCIARY DUTIES TO POLICE BANKRUPTCY M&A

Consider some of the higher-profile cases, such as *In re Lyondell Chemical Company*, where some creditors had credit default swaps and, more importantly, some had guarantees that ostensibly made them differently situated from other creditors.[44] These splinter creditors wanted to initiate involuntary European bankruptcy proceedings, which the domestic court enjoined to protect the reorganization.[45] Ironically, those foreign proceedings might have triggered debtor and managerial fiduciary duties to liquidate,[46] which presumably the guaranty-holding creditors were much more sanguine about than the rank-and-file. From the chapter 7 context, we see that the fiduciary duty of the trustee would have provided no guidance; the trustee would simply have to favor the preferences of one creditor constituency over another. And the immunity doctrines would protect the trustee from suit by

42. *In re* Food Mgmt. Grp., LLC, 380 B.R. 677, 707 (Bankr. S.D.N.Y. 2008) ("The majority rule is that the attorney for a debtor in possession is a fiduciary of the estate.").

43. *See* discussion *supra* Section I.B.2.

44. *See In re* Lyondell Chem. Co., 402 B.R. 571, 576–78 (Bankr. S.D.N.Y. 2009). Credit default swaps obviously made some creditors impervious, even gleeful, regarding the prospect of nonpayment.

45. *Id.* at 582–83, 595.

46. *Id.* at 581–82; *see, e.g.*, Insolvency Act 1986, c. 45, § 214 (UK) (imposing de facto duty to file by subjecting directors to personal liability if they knew or should have known there was no "reasonable prospect" the company would avoid insolvent liquidation and failed to minimize potential losses to the company's creditors); Burnden Holdings (UK) Ltd. v. Fielding and Another [2018] UKSC 14 [11] (appeal taken from Eng.) (finding directors "are entrusted with the stewardship of the company's property and owe fiduciary duties to the company in respect of that stewardship" when interpreting the Limitations Act 1980, c. 58, § 21 (UK)); *see also, e.g.*, CARSTEN GERNER-BEUERLE ET AL., LONDON SCH. OF ECON., DEP'T OF LAW, prepared for the EUROPEAN COMM'N DG MARKT, STUDY ON DIRECTORS' DUTIES AND LIABILITY 209 (2013) (noting in Table 4.1.a that twenty-three out of twenty-eight EU countries impose a duty to file for insolvency).

the losing side.[47] This augurs poorly for fiduciary duties riding to the conceptual rescue. Now, in fairness, *Lyondell* may be hard to generalize from because it had a ready tiebreaker: initiation of the European involuntary proceedings would jeopardize the reorganization, and so it was easy to point to the "favor reorganization" maxim in chapter 11 as a thumb on the scale for the victorious creditor constituency.[48]

A perhaps better case to consider the role of fiduciary duties in creditor-vs.-creditor conflicts is *Dish Network*.[49] There, a Schadenfreude creditor, to use Janger and Levitin's evocative language,[50] wanted to see the plan fail and thus scooped up claims in an unregulated marketplace for purposes of defeating the plan.[51] The court, in designating the claims under § 1126(e) of the Code was refreshingly candid in the absence of any meaningful guidance offered by case law for when tolerable "selfishness" crosses the line into seeking a "benefit" to which the creditor is "not entitled."[52] True, the court eschewed the imposition of a fiduciary duty on the creditor, Dish Network, toward its co-creditors. But note that the institutional safeguards on creditor conflicts—the Creditors Committee—weighed in to oppose Dish Network,[53] suggesting some of the substantive slack was picked up by procedural checks, namely, having a designated watchdog in the form of the Committee. And the court, exercising its own power to oversee an open vote,[54] crushed the scheming creditor. Thus, we see another instance in which fiduciary duty is not doing explicit work, but perhaps at most indirectly influencing other procedural structures within the Code that work to achieve the same divergent-interest-checking goal.

Indeed, fiduciary duty law seems especially toothless for bankruptcy when the harms are diffusely scattered to "the market" writ large. In the remarkable case of *Hovnanian*, the debtor manufactured a default event at the instigation of one of its creditors, whose seduction was to offer a sweetheart DIP loan in exchange.[55] The swap counterparty cried foul, drawing attention to the systemic effects the scheme would have on the

47. *See supra* text accompanying notes 35–37.

48. *In re Lyondell*, 402 B.R. at 581–82.

49. Dish Network Corp. v. DBSD N. Am., Inc. (*In re* DBSD N. Am., Inc.), 634 F.3d 79 (2d Cir. 2010).

50. Janger & Levitin, *supra* note 2, at 11.

51. *Dish Network*, 634 F.3d at 104.

52. *Id.* at 101–02 (citation omitted).

53. *See* Final Brief of Appellee Official Committee of Unsecured Creditors at 5, 634 F.3d 79 (2d Cir. 2010) (Nos. 10-1175(L), 10-1201(con)), 2010 WL 2831618, at *5 (arguing for affirmance of decision to designate Dish Network's votes as being cast in bad faith).

54. *Dish Network*, 634 F.3d at 105–06.

55. *See* Solus Alt. Asset Mgmt. LP v. GSO Capital Partners L.P., No. 18 CV 232-LTS-BCM, 2018 WL 620490, at *1, *4 (S.D.N.Y. Jan. 29, 2018).

certainty of the derivatives market broadly,[56] but the bankruptcy court saw no problems.[57] On the contrary, the court commended the debtor in the discharge of its fiduciary duty to get a good deal on the DIP loan, and noted that the sophisticated protection seller could look out for itself, and the International Swaps and Derivatives Association (ISDA) could amend its contracts to combat prospectively the perceived market evils of engineered defaults.[58] Fiduciary duty once again offered no check on the creditors. (Parenthetically, it might be noted that the *Hovnanian* court's faith in contract mechanisms to remedy the problem may be over-optimistic in light of *Ion Media*,[59] where a creditor with a clear subordination agreement waiving confirmation challenges to the reorganization plan nonetheless brazenly objected to confirmation.[60] So much for contract! Indeed, nothing short of imposing upon the vulture fund creditor a fiduciary obligation on its co-creditors could have helped police that chutzpah, and notably the ostensible fiduciary of the creditors, the Creditors Committee, did in fact oppose the objection.).[61]

B. A BETTER ALTERNATIVE? USING *COMMODORE* STANDING IN BANKRUPTCY M&A

The most striking example of creditor-versus-creditor infighting laying bare the trustee's loyalty problems is *Adelphia*,[62] where explicit creditor bickering threatened to sink the entire reorganization. This case vividly demonstrates the value of process and institutional safeguards over substantive doctrines of fiduciary duty in addressing this conflict. The court in *Adelphia* went a step beyond. Rather than fall back on broad pronouncements that the DIP should discharge a duty to the "corporation as a whole," or invoke trust law's discharge of the duty of impartiality by having "due regard" for all beneficiaries and their potential conflicts, the court just drew the conflict out into the open. In the creditor-versus-creditor fight, the court ordered the DIP to stay neutral and, accepting the impossible demands of the internal loyalty conflict, ordered the Creditors Committee to stay neutral, too.[63] Invoking the doctrine of *Commodore* standing,[64] the court

56. *Id.* at *4, *6 (characterizing, with perhaps some melodrama, the issue as "whether market participants will be unable to accurately assess risks and leave the CDS market, thereby depriving lenders of a source of insurance and causing reverberating effects in the sector").

57. *Id.* at *7.

58. *Id.* at *4.

59. *In re* Ion Media Networks, Inc., 419 B.R. 585 (Bankr. S.D.N.Y. 2009).

60. *Id.* at 598.

61. *See infra* note 67.

62. *In re* Adelphia Commc'ns. Corp., 361 B.R. 337 (S.D.N.Y. 2007).

63. *Id.* at 343 ("[T]he Bankruptcy Court established a process to resolve the Inter–Creditor Dispute by which the Debtors and the Official Committee of Unsecured Creditors (the 'Creditors Committee') were ordered to remain neutral . . . .").

64. *In re* Commodore Intern. Ltd., 262 F.3d 96, 100 (2d Cir. 2001) (deputizing non-DIP to pursue specific cause of action). *Adelphia* actually used what might be thought of as "Double

deputized an ad hoc committee to serve as a special prosecutor of sorts to bring the action against the renegades and negotiate any settlement.[65] The results were not perfect—the plan was eventually confirmed over this "prosecutor's" objections, which were meritorious enough to garner a stay pending a (later-dropped) appeal[66]—but this application unquestionably drew the disputed issues out into the open through adversarial litigation with full ventilation and judicial resolution. In a sense, this approach accepted that picking beneficiaries to favor in a fight like this would be functionally impossible for any fiduciary. So, instead, we should just let the fiduciaries off the hook and have the "beneficiaries" duke it out in the open venue of bankruptcy court while the fiduciaries sit back as neutrals.[67]

The use of *Commodore* standing to empower a deputized prosecutorial subcommittee in *Adelphia* highlights a procedural apparatus through which bankruptcy law can achieve the same results as the imposition of a fiduciary duty of loyalty: the resolution of conflicted interests in distributional fights over a bankruptcy estate. And it also underscores that the imposition of a fiduciary duty on the Creditors Committee (which many courts have found) would do little to resolve the dispute.[68] The litigation of the dispute necessarily engendered judicial oversight. But there is a corollary for this model of "procedural bypass" to fiduciary duties to resolve internal loyalty matters: the judicial institutions (committees, judge, U.S. Trustee, etc.) must have fulsome information upon which to pursue this public-forum exercise. To this end, the disclosure spirit of Rule 2019 (as perhaps insufficiently amended) arguably needs to be augmented.[69] Only with full disclosure can an open, litigation-driven system of policing conflicts properly function.

Commodore standing," because the deputized "special prosecutor" was not the Creditors Committee, but an ad hoc subset. *In re Adelphia Commc'ns.*, 361 B.R. at 343.

65. *Id.* at 354.

66. *Id.* at 356 ("While it is true that the Committee could and did object to confirmation of the Plan (as opposed to the Settlement) at a later date, it then faced an uphill battle based on the fact that the majority of creditors had accepted the Plan (which included the purported Settlement).").

67. One might have baseline skepticism whether the judiciary has adequate institutional competence to get right what might at core be an economic or business question about a failing business (couched in equitable garb of fiduciary obligation), but that is a discussion—a long, painful one—for another day.

68. *See* 11 U.S.C. § 1103 (2012). Indeed, although captioned "Powers and Duties," § 1103 only confers discretionary power, not any explicit obligations beyond the caption. Martin Bienenstock thus says Creditors Committees have only "statutory" duties. Email from Martin J. Bienenstock, Esq., Partner, Proskauer, to author (Mar. 21, 2018, 12:26 PM EST) (on file with author) ("The safest interpretation of the statute is the members owe statutory duties to their constituency."). Although courts aplenty have found fiduciary duties for the Creditors Committee. *See, e.g.*, *In re* PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000) ("Section 1103(c) of the Bankruptcy Code . . . has been interpreted to imply both a fiduciary duty to committee constituents and a limited grant of immunity to committee members.") (citations omitted); *In re* Tucker Freight Lines, Inc., 62 B.R. 213, 216 (Bankr. W.D. Mich. 1986) ("[I]mplied in this grant of authority [under § 1103(c)] must also be a concurrent fiduciary duty to all the unsecured creditors.").

69. *See* Fed R. Bankr. P. 2019; 9 COLLIER ON BANKRUPTCY ¶¶ 2019.01, 2019.02 (Richard Levin and Henry J. Sommer eds., 16th ed. 2018); *see also, e.g.*, Janger & Levitin, *supra* note 2, at

CONCLUSION

The bankruptcy system is rife with fiduciary obligations, although none is specified in the Code. The chapter 7 trustee's most difficult task is wrestling with "internal" duties of loyalty, namely, how to police the competing clamoring for her attention from beneficiaries whose interests often conflict. The short answer is there is not much the trustee can do, even though trust law nominally offers a "duty of impartiality" to provide (deeply laissez-faire) guidance. The longer answer is that there are procedural and institutional structures within the bankruptcy system that compensate for this substantive legal vacuum. For example, the Creditors Committee serves as a check on the DIP, and the bankruptcy court itself serves as a check on the Committee. Thus, when considering the bankruptcy M&A problem that arises when Creditors Behave Badly, we see that we may not need substantive trust law to impose fiduciary duties upon those creditors to curb their behavior (or upon DIPs a derivative obligation to do so). Rather, we can turn to procedural mechanisms such as *Commodore* standing to drag those conflicts out into the light, have a fight about them in open court by two openly antagonistic adversaries, and judicially resolve them through a disinterested arbiter. The caveat, however, to such an approach, is the full flow of information so the conflicts can indeed come into the open. Ensuring that transparency is probably, in reality, the greatest challenge the bankruptcy system faces with bankruptcy M&A.

71–72 (discussing *In re* Northwest Airlines, 363 B.R. 701 (Bankr. S.D.N.Y. 2007), in which an ad hoc group of creditors were required to make various disclosures, including the amount paid for any "claims or interests" in the debtor). Critique of Rule 2019 is best left for another day.