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Directors' Fiduciary Duties in the Likelihood of Insolvency

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Cover Page Footnote

* Professor of Law, Comillas Pontifical University in Madrid. This Essay originated from a lecture delivered at the seminar Bridging the Pond: Navigating the Waters Between American and EU Business Law, organized by the Fordham Corporate Law Center and the Law School of Comillas Pontifical University. I would like to thank Professors Abel Veiga, Amelia Martella and Richard Squire for their ongoing support of my research.

ESSAY

DIRECTORS' FIDUCIARY DUTIES IN THE
LIKELIHOOD OF INSOLVENCY

A REFLECTION ON EUROPEAN AND AMERICAN LAW IN THE CONTEXT OF THE
DIRECTIVE ON PREVENTIVE RESTRUCTURING FRAMEWORKS

*Miguel Martínez Muñoz**

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INTRODUCTION

Corporate governance during a period of corporate crisis has been the subject of significant attention in recent years. In June 2019, the European Parliament adopted a directive on preventive restructuring frameworks, the discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and the discharge of debt (the “Directive”),¹ which has brought back to the table, among other issues, the liability of company directors for breach of the duties they hold in the management and direction of a company during a corporate crisis.

The measures mentioned in the Directive make us return to the idea, already deeply rooted in legal scholarship, of the shift that is taking place in the field of corporate law by insolvency law, which has given rise to what may be a distinct body of corporate crisis law.² In fact, the reforms to the Spanish Bankruptcy Act, which were originally adopted in 2014, already showed how insolvency law was moving forward in its application and came to modify certain paradigms and principles of corporate law, when it was recognized that the company was in a situation of business crisis, or a state in which signs of financial difficulties began to appear without the concurrence of the cause of insolvency being properly established.

Furthermore, as a sign of this shift between regulatory bodies in the field of corporate governance, the extension of the duties of directors in a business crisis scenario to creditors, shareholders and other interested parties, as provided for in Article 19 of the Directive stands out. In other words, when the company is in business crisis and proceeds with restructuring, the directors must take into account not only the interests of the shareholders

1. Parliament and Council Directive 2019/1023, 2019 O.J. (L 172) 18 (on preventive restructuring frameworks, discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive 2017/1132) [hereinafter Directive].

2. MIGUEL MARTÍNEZ, *LA CALIFICACIÓN DEL CONCURSO DE ACREEDORES: UNA INSTITUCIÓN NECESARIA* 29 (Thomson Reuters Aranzadi ed., 2019). On the separation between corporation law and bankruptcy law in Italy, see Alessandro Nigro, *Il “diritto societario della crisi”: nuovi orizzonti?*, 5-6 *RIVISTA DELLE SOCIETÀ* 1207, 1212-13 (2018).

but also those of the creditors and interested parties, or “duty shifting.”³ This circumstance requires that the directors follow a business strategy that satisfies all the stakeholders of the company in crisis if they want to avoid their own liability, a situation that will generate specific conflicts of interest that will have to be dealt with in due course and which are linked to the delimitation of the corporate interest clause.⁴

In this sense, our traditional understanding of corporate governance, in a more restricted form, has focused on the legal status of the administrative body—*i.e.*, configuration, performance, control, remuneration and liability of the directors—and on questions relating to the corporate interest. This understanding has been extended to the study of the management and control of the entire company, and not only of the administrative body, following the reform of the powers of the shareholders' meeting.⁵ For its part, in the Anglo-Saxon sphere, corporate governance acquires a broader perspective by focusing on the resolution of conflicts of interest that arise in the area of agency problems, *i.e.*, between the agent or director and the shareholders, in the first place, and in conflicts between shareholders, basically between majority and minority, in the second place.⁶

Additionally, there is a third group of conflicts of interest, those between the company and its creditors, which is decisive and is dealt with by the Directive, since they will occur more

3. See Eva Recamán, *Derecho proyectado de reestructuraciones y deberes de los administradores sociales* [Proposed Restructuring Law and Corporate Directors' Duties], 28 REVISTA DE DERECHO CONCURSAL Y PARACONCURSAL [RDCYP] 1, 1 (2018) (Spain) (ebook); Adrián They, *Los marcos de reestructuración preventiva en la propuesta de Directiva de 22 de noviembre de 2016 (y II)* [Preventive Restructuring Frameworks in the Proposed Directive of November 22, 2016 (Part II)], 28 RDCYP 1, 4–5 (2018) (ebook).

4. Aurelio Gurrea, *Towards an Optimal Model of Directors' Duties in the Zone of Insolvency: An Economic and Comparative Approach*, 21 J. CORP. L. STUD. 365, 367–368 (2021) (U.K.).

5. Juana Pulgar, *Gobierno corporativo, sociedades cotizadas y proximidad de la insolvencia: administradores, accionistas y acreedores* [Corporate Governance, Listed Companies, and Proximity to Insolvency: Directors, Shareholders, and Creditors], 30 RDCYP 35, 37 (2019) (Spain).

6. Gabriel Rauterberg & Sara Sanga, *Altering Rules: The New Frontier for Corporate Governance*, 42 YALE J. ON REG. 291, 294 (2025).

intensely during the period in which the capital company is undergoing restructuring during its business crisis.⁷ Disputes between a company and its creditors may arise as soon as the latter exist. In economically normal circumstances, however, such disputes are resolved primarily through contract law—in cases of debt claims—or through corporate law, which provides an array of creditor protections: minimum capital requirements; valuation rules for non-cash contributions and disbursements; treasury stock restrictions; rules governing the relationship between share capital and net worth; allocation of legal and statutory reserves; prohibition on dividend distributions when net worth falls below the share capital figure; shareholder rights of opposition or joint and several liability upon capital reduction by return of contributions; director liability for debts arising after the occurrence of a dissolution cause; and liabilities arising after the liquidation of the company.⁸

However, it will be when the company is approaching a solvency crisis when conflicts with creditors will be more intense, since the contracts and protective measures of corporate law will be insufficient and, thus, protective measures must be offered to creditors to guarantee the repayment of their credits in the best conditions of time and amount. When insolvency occurs, the protection of the creditors will come through the bankruptcy law insofar as it provides for the declaration of a regulated procedure with the intervention of an insolvency administrator, similar to the trustee under the American Bankruptcy Code, to reach an agreement that guarantees the payment of creditors and the continuity of the company or, as the case may be, the payment of all or part of the credits due with the liquidation of the company.⁹

7. See John Armour, Gerard Hertig & Hideki Kanda, *Transactions with Creditors*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 109, 109 (3d ed. 2017).

8. Pulgar, *supra* note 5, at 39–40; Carmen Alonso, *Algunas reflexiones sobre la función (la utilidad) del capital social como técnica de protección de los acreedores*, in *ESTUDIOS DE DERECHO DE SOCIEDADES Y DERECHO CONCURSAL: LIBRO HOMENAJE AL PROFESOR RAFAEL GARCÍA VILLAVARDE* 127, 127 (Marcial Pons ed., 2007).

9. In fact, to strengthen creditor protection in insolvency proceedings, the European Parliament and the Council have adopted Directive 2026/799. 2026 O.J. (L 799) 1 (EU) (harmonizing certain aspects of insolvency law). Article 40 of the Directive establishes the obligation of directors to apply for the opening of

The problem, however, lies in that grey area between solvency and insolvency. Or said differently: that stage in which the company is not insolvent, not even imminently insolvent, but begins to have financial difficulties with which to meet future payments. In the “likelihood of insolvency,” a stage similar to the “vicinity of insolvency,” under American law, the shareholders are no longer the residual claimants of the firm and the firm enjoys limited liability. In those instances, the firm may have an incentive to invest in risky projects in an attempt to “gamble for resurrection.” However, in the unlikely event of success, the firm can yield sufficient returns to turn around the company, allowing the shareholders to recover part of their investments. Therefore, because any losses associated with the project would fall exclusively on creditors while shareholders stand to benefit from any increase in the firm's value, shareholders will have incentives to pursue such projects, or at least to advocate for them.

It is in this twilight zone that the debate arises as to how the company should be managed and what interests should be taken into consideration during this situation, an issue on which the Directive has already expressed itself in a generic way. The Directive does, however, raise the need to reposition the duties of the directors during the stage of business crisis.¹⁰

The purpose of this Essay is to analyze the Directive and its interaction with American law in order to establish some considerations in coordinating the provisions of insolvency and corporate law. This Essay focuses on the configuration of a new framework of directors' liability in which, among other aspects,

insolvency proceedings or, failing that, to take any other measures to ensure that all creditors receive a level of protection equivalent to that guaranteed by filing an application for the opening of insolvency proceedings. *Id.* art. 40. In other words, if the directors initiate corporate measures to restore the company's solvency or pursue a restructuring, they will not be liable. It remains to be seen, however, how this new provision of the new Directive will be applied once it is transposed into national law.

10. See John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH*, *supra* note 7, at 29, 29; Pulgar, *supra* note 5, at 36–40; Eva Recamán, *Hacia una determinación del comportamiento debido por los administradores en la reestructuración*, 32 *REVISTA DE DERECHO CONCURSAL Y PARACONCURSAL* 127, 129 (2020).

the identity of the parties subject to the duties is expressly defined, as well as the application of the rules regulating the protection of corporate discretion as well as the application of the rules regulating the business judgment rule. In turn, the Essay puts forward some proposals for a solution to the multiple governance problems that occur in the field of companies positioned in a context of corporate crisis.

I. THE EXTENSION OF THE DUTIES OF THE DIRECTORS DURING CORPORATE CRISIS

A. *The Rethinking of the Social Interest Clause*

The extension of the regime of duties and liability of corporate directors is inevitably connected with the delimitation of the corporate interest clause as a criterion for delimiting the behavior of directors in line with the purposes of the company. Indeed, one of the great issues of corporate law has been the debate on the concept of corporate interest, giving rise to the various contractual and institutionalist theories that have survived to the present day. While contractual theory considers that the corporate interest is made up exclusively of the interests of different shareholders, the common interest of all of them being the corporate interest, the institutional theory assumes that the company, as an independent legal entity, has its own interests which may coincide with those of the shareholders or with those of other groups related to the corporate entity depending on the circumstances in which the company finds itself.¹¹

The conceptualization of the corporate interest from contractualist or institutionalist perspective has its importance in the delimitation of the duties of directors, which ultimately affects

11. See José Miguel Embid, *La responsabilidad social corporativa ante el derecho mercantil* [Corporate Social Responsibility Before Commercial Law], 42 CUADERNOS DE DERECHO Y COMERCIO [CDC] 11, 11–44 (2004) (Spain); Tullio Ascarelli, *Interesse sociale e interesse comune nel voto* [Corporate Interest and Common Interest in Voting], 19 RIVISTA DI DIRITTO PROCESSUALE CIVILE [RIV. DIR. PROC. CIV.] 1145, 1145 (1951) (Italy); Paolo Montalenti, *L'interesse sociale: una sintesi* [The Corporate Interest: A Synthesis], 2/3 RIVISTA DELLE SOCIETÀ [RIV. SOC.] 303, 303 (2018) (Italy); Walther Rathenau, *La realtà della società per azioni* [The Reality of the Joint-Stock Company], RIVISTA DELLE SOCIETÀ [RIV. SOC.] 912, 918 (1960) (Italy).

the liability of corporate managers. Indeed, from the traditional contractualist approach, directors must manage the company primarily in the interests of the shareholders, this is known as the shareholder value model, as the main and direct addressees of the directors' duties.¹² From the institutionalist thesis, on the other hand, directors must manage the company to maximize the value of the company for all stakeholders, including not only the shareholders but also creditors, employees, bondholders, public administrations, among others. This is known as the stakeholder value model.¹³

Although the contractual theory has traditionally prevailed in corporate law, I believe recent regulatory reforms addressing corporate distress have eroded that primacy and shifted the concept of corporate interest toward the institutionalist theory. Ultimately, at the European level, the Directive affects the corporate interest clause by reopening the debate on it in view of Article 19, a rule that requires that directors take due account of the interests of creditors, equity holders and other interested parties.¹⁴ In my opinion, the consideration of the interests of creditors and other interested parties in the actions of corporate managers during a situation of corporate crisis represents a paradigm shift as far as the corporate interest clause is concerned, because depending on these interests, the directors may behave in certain ways which may or may not be in line with their corporate duties.

Indeed, if we look at the wording of the Directive, the corporate interest clause would only be affected in situations of corporate crisis, thus introducing the underlying business or economic situation of the company as a criterion delimiting the corporate interest. In other words, in conditions of solvency, directors should act in the interests of shareholders, while any conflicts with creditors are resolved through the protective mechanisms of corporate law or the contractual terms agreed

12. See Steven L. Schwarcz, *Rethinking Corporate Governance for a Bondholder Financed, Systematically Risky World*, 58 WM. & MARY L. REV. 1335, 1342–44 (2017).

13. Ernest Lim, *Fiduciary Duty and Corporate Externalities: Rethinking Directors' Climate Obligations* (ECGI Working Paper Series in Law, No. 842/2025, 2025).

14. See Thery, *supra* note 3, at 4.

between the company and its creditors.¹⁵ Of course, the directors must know and respect such contracts with third parties as it is part of a diligent act, having to comply with the commitments to give, to do or not to do certain acts on the basis of the freedom of agreements. For their part, in situations of insolvency, creditors are protected by insolvency law, a regulatory discipline under which the corporate directors, assisted or entirely substituted by the insolvency administrator, must comply with the interests of the insolvency, a concept that encompasses the corporate interest, but giving priority to the interest of the creditors to see their claims satisfied.

However, when the company is in the vicinity of insolvency, the directors are faced with the dilemma of continuing with existing business activity, with the consequent risk of aggravating the business crisis, or paralyzing the activity in order not to incur new debts.¹⁶ Similarly, within the framework of the Directive, directors may seek to carry out certain debt refinancing or restructuring transactions with the risks that those transactions entail.¹⁷ In this scenario, the actions carried out by the administrative body can lead the company directly to insolvency, and a declaration of bankruptcy must then be requested, or the company can be saved from its situation of business crisis and lead it to a scenario of financial reorganization.¹⁸ In any case, the acts carried out by the directors will be relevant in order to evaluate the possible liability, both corporate and bankruptcy, in which they may incur.

15. Schwarcz, *supra* note 12, at 1342.

16. Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309, 1310 (2008).

17. CRISTINA GUERRERO, EL DEBER DE DILIGENCIA DE LOS ADMINISTRADORES EN EL GOBIERNO DE LAS SOCIEDADES DE CAPITAL. LA INCORPORACIÓN DE LOS PRINCIPIOS DE LA BUSINESS JUDGMENT RULE AL ORDENAMIENTO ESPAÑOL 425 (Thomson Reuters Aranzadi ed., 2014); Christine Hurt, *The Duty to Manage Risk*, 39 J. CORP. L. 253, 253 (2014); Andrés Gutiérrez, *El interés de los socios en la actuación orgánica societaria de las sociedades de capital en concurso*, in DERECHO PRECONCURSAL Y CONCURSAL DE SOCIEDADES MERCANTILES DE CAPITAL 225, 229 (2018).

18. Carmen Alonso, *Derecho de Sociedades vs. Derecho Concursal: ¿Técnicas alternativas o complementarias de protección de los acreedores?*, in 1 LA MODERNIZACIÓN DEL DERECHO DE SOCIEDADES DE CAPITAL EN ESPAÑA. CUESTIONES PENDIENTES DE REFORMA 67, 90 (Thomson Reuters Aranzadi ed., 2011); GUERRERO, *supra* note 17, at 433-34.

The assessment, in any case, of the performance of the management body at this stage is related to the potential conflict that will take place in crisis conditions between the interests of the shareholders and those of the creditors. Shareholders will want the company to survive in order to secure future dividends and protect their existing investment.¹⁹ For their part, creditors will be interested in the satisfaction of their claims under the most optimal conditions. Thus, the different interests at stake materialize the different corporate strategies that the management body will be able to implement in this scenario: on the one hand, a risky and potentially more advantageous strategy to try to save the corporate situation will be pursued by the shareholders, especially in capital companies insofar as their liability is limited to the capital contributed; on the other hand, the creditors will favor a conservative and low-risk strategy insofar as the corporate assets are the only guarantee that, a priori, they have to recover their claims.

It is in this scenario that the Directive sheds light. Without expressly invoking the corporate interest clause—and, in my view, implicitly situating the provision within the institutionalist thesis—Article 19 requires the management body to balance and calibrate the different interests at stake. Article 19 expressly identifies those interests as belonging to creditors, shareholders, and other stakeholders, but establishes no order of priority among them. On that point, the Directive grants member states full discretion to determine whether to impose such a ranking.²⁰

19. Bernard S. Sharfman, *Shareholder Wealth Maximization and its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 389 (2014).

20. See Giorgio Corno, *Article 19: Duties of Directors Where There is a Likelihood of Insolvency*, in EUROPEAN PREVENTIVE RESTRUCTURING 238–39 (Christoph G. Paulus & Reinhard Dammann eds., 2021) (“Article 19 of the Directive (EU) 2019/1023 on preventive restructuring frameworks establishes at a EU level as a general rule an obligation for Member States to impose specific duties on directors where there is a likelihood of insolvency. Such a rule encourages early restructuring efforts, prevents misconduct and avoidable losses for creditors. Specifically, it aims at balancing directors’ corporate power, creating appropriate incentives within Member States for early action through the use of voluntary restructuring negotiations; encouraging directors to obtain competent professional advice when financial difficulties occur and thus avoid

B. *The Performance of the Directors in the Likelihood of Insolvency*

The Directive does not establish a catalog of specific conduct that the director must carry out in the likelihood of insolvency,²¹ although it points out certain general actions. In this sense, Article 19 stipulates that the directors must take the appropriate measures to avoid insolvency, without specifying exactly whether these measures include financial restructuring or whether it would be sufficient, for example, to increase the company's capital or proceed to dissolution.²² However, Recital 70 of the Directive complements this rule by stipulating that directors should take measures to minimize losses and avoid insolvency, such as: seeking professional advice, especially on restructuring and insolvency; protecting the company's assets in order to maximize their value and avoid the loss of key assets; examining, in the light of the company's structure and functions, its viability and reducing costs; avoiding committing the company to transactions that may be subject to revocation, unless there is an adequate business justification; conducting negotiations with creditors and initiating preventive restructuring proceedings.²³

insolvency; and placing on some Member States to implement certain obligations for directors in the period before insolvency occurs The Directives allows Member States to retain flexibility as to the most appropriate means to implement in their national context such duties, providing a "safe harbour" against potential liability directors who, in good faith, attempt to restructure a financially distressed company with a view to the long-term best interests of the company and its constituencies. Such conduct should be taken into account by judicial or administrative authorities of Member States when assessing whether a director is to be held liable for breaches of duty of care, in case of subsequent opening of an insolvency proceeding. On the other end, liability should be imposed on directors for any harm caused by continuing to operate when it was either clear or should have been foreseen that insolvency could not be avoided.").

21. The concept of "likelihood of insolvency" is not defined in the Directive and each Member State may provide its own definition. For example, in Spain it is considered that there is a likelihood of insolvency when it is objectively foreseeable that, if a restructuring plan is not reached, the debtor will not be able to regularly meet its obligations falling due within the next two years.

22. See Directive, *supra* note 1, art. 19(b) (discussing "the need to take steps to avoid insolvency").

23. *Id.* recital 70; Carlos de Cárdenas, *La Propuesta de Directiva sobre reestructuración temprana y su transposición al Derecho español* [The Proposed

All these measures are set out as an example in a recital, as a catalog of suggestions within the generic obligation to minimize losses and avoid insolvency, without expressly providing that the directors must use any of these instruments.

On the other hand, Article 19, in connection with Recital 71, establishes that managers must avoid willful or grossly negligent conduct that jeopardizes the viability of the company, thereby harming the different stakeholders in the company, and that managers must also avoid accepting transactions at a loss or adopting measures that unfairly favor one or more stakeholders.²⁴ These facts—which, in my view, give concrete content to directors' general duties of care and loyalty in the context of likely insolvency—do not preclude directors from taking risks. They preclude only irrational risk: conduct that rises to the level of willful or gross negligence. In such cases, the business judgment rule would not apply, and the director could be personally liable for damages caused to corporate assets or to the individual assets of shareholders and creditors.²⁵ In this sense, the situation arguably becomes much more complicated since the directors must take into account, in the performance of their duties, the interests of the shareholders and creditors along with other stakeholders (*e.g.* workers), without having any specific guidelines for action. That is why they must analyze the special situation in which the company finds itself and do what is best for

Directive on Early Restructuring and its Transposition into Spanish Law], 29 RDCyP 1, 11 (2018).

24. See *id.* art. 19; *id.* recital 71. That Article 19 places directors' duty of regard to stakeholder interests as its first item reflects the long-standing debate on directors' duties in proximity to insolvency. This framing also aligns with the recommendations of the UNCITRAL Model Guide on Insolvency Law and the World Bank Principles for Effective Insolvency and Creditor Rights System, which stipulates the following with respect to directors' obligations in instances where the corporation approaches insolvency: "Laws governing directors' obligations in the period approaching insolvency should promote responsible corporate behavior while fostering reasonable risk taking and encouraging business reorganization. The law should provide appropriate remedies for breach of directors' obligations, which may be enforced after insolvency proceedings have commenced." See Corno, *supra* note 20, at 244.

25. See Eva Recamán, *La "Business Judgment Rule" en la crisis: Una propuesta interpretativa* [*The "Business Judgment Rule" in Crisis: An Interpretive Proposal*], 54 REVISTA DE DERECHO DE SOCIEDADES [RDS] 143, 143 (2018) (Spain).

the corporate interest, understood in institutionalist terms, complying with the rules established so that their actions are within the duty of care and covered by the business judgment rule.²⁶

As pointed out, when the company is close to insolvency, the directors may choose very risky strategies, encouraged by the shareholders, who have very little to lose and much to gain, in order to return to a scenario of solvency and prosperity very quickly, thus undermining the interest of the creditors in applying a conservative management that will secure the assets in the future. Of course, when a firm is within the vicinity of insolvency, the interests of creditors must be respected, and the directors must plan their actions on the basis of maximizing the corporate interest through the maximization of corporate value, an end desired by all stakeholders involved regardless of their status as shareholders, creditors or any other.²⁷

Therefore, I believe that what is appropriate in these circumstances is that the corporate directors carry out all reasonable actions to avoid a worsening of the financial conditions of the firm—which may consist of mitigating risky practices with reasonable and controlled risks, or conservative practices of cost reduction and disinvestment in non-strategic assets. At this point, it may even be reasonable to proceed with preventive restructuring with creditors, establishing new agreements that contemplate the entry of new money and/or that extend maturities of existing debt. In any case, the directors' guide for action at this point should be to study the plan that best

26. The excessive risk taken by the directors to try to save the company's financial situation should not be considered as unreasonable in all cases, with the consequent exclusion of informed knowledge and good faith action, see Jesús Alfaro, *Artículo 226. Protección de la discrecionalidad empresarial*, in *COMENTARIO DE LA REFORMA DEL RÉGIMEN DE LAS SOCIEDADES DE CAPITAL EN MATERIA DE GOBIERNO CORPORATIVO (LEY 31/2014). SOCIEDADES NO COTIZADAS* 325, 332–34 (Thomson Reuters Aranzadi ed., 2015). The directors may be willing to carry out a certain operation, which is quite risky, but without it becoming unreasonable, on the basis of an informed knowledge of the nature and significance of the operation, and the rule of protection of corporate discretion must therefore be applied in these cases. See EVA RECAMÁN, *LOS DEBERES Y LA RESPONSABILIDAD DE LOS ADMINISTRADORES DE SOCIEDADES DE CAPITAL EN CRISIS* 176–77 (Thomson Reuters Aranzadi ed., 2016).

27. See *id.* recital 70. This is also one of the conclusions drawn from the *Gheewalla* doctrine. See *supra* Part III.B.2.

guarantees the expectations of all the interested parties, avoiding, on the one hand, the future state of insolvency that may occur and, on the other hand, preserving the assets, without carrying out acts that, with malice or gross negligence, may endanger the viability of the company or exclusively benefit some stakeholders to the detriment of others.²⁸

In this regard, the question arises as to whether in a state of near insolvency or business crisis the directors acquire the duty to restructure the company. The concept of restructuring in the Directive is conceived from a broad perspective in view of Article 2(1)(1), which provides that the term “restructuring” refers to “those measures aimed at restructuring the debtor’s business which include altering the composition, terms or structure of the assets and liabilities or any other part of the capital structure of the debtor, such as sales of assets or parts of the business and, where provided for by national law, the sale of the business as a going concern, as well as any necessary operational changes or a combination of these elements.”²⁹ Note how the concept of restructuring encompasses all sorts of diverse measures that the directors will be able to carry out when the company is in a situation of near insolvency in order to avoid insolvency.

28. See Directive, *supra* note 1, recital 71 (“Where the debtor is close to insolvency, it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor’s estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, and avoid agreeing to transactions at below market value, or taking actions leading to unfair preference being given to one or more stakeholders. Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account. This Directive is not intended to establish any hierarchy among the different parties whose interests need to be given due regard. However, Member States should be able to decide on establishing such a hierarchy. This Directive should be without prejudice to Member States’ national rules on the decision-making processes in a company.”).

29. Directive, *supra* note 1, art. 2(1)(1).

Restructuring instruments may consist of agreements with creditors, subject to the protective shields of the bankruptcy law, capital increases or reductions, debt capitalizations, bond issues, bank loan applications, sales of production units or singular assets, and termination or modification of contracts of any kind, among others.

From my point of view, the Directive does not establish *ex novo* a duty to restructure on the part of the company's directors, since the European regulation does not oblige company managers to adopt specific restructuring measures, but only to act preventively in order to minimize losses and avoid insolvency. Indeed, I believe that when the directors detect the likelihood of insolvency of the business, they will have to adequately plan the future steps to be taken, although they are entirely free to adopt (or not) some measures examining the success or failure of their actions in the light of the duty of diligent administration.

It must not be forgotten that the directors are responsible for the management and representation of the company at the different moments of the life of the legal entity and must act at all times in compliance with the duties of care and loyalty. In this way, if the directors act in a fraudulent or seriously negligent manner, they fail to comply with their obligations and aggravate the state of financial difficulties. This, in turn, contributes and may give rise to the insolvency of the company along with the liability of the directors.

The duties of care and loyalty constitute the main duties of the corporate directors, with the shareholders the primary addressees of directors when the firm is solvent. However, when the firm is within the vicinity of insolvency, the shareholders lose their undisputed protagonism in favor of the creditors. This loss of protagonism of the shareholders is proportional to the decrease of the economic interest of this group in the company. In other words, the more out of the money the shareholders are, the less interest they will have in the restructuring of the company and, therefore, the more intense will be the duties of the directors towards the creditors, who will become the main interested parties, thus producing duty shifting.³⁰ On this point, the

30. Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Director's Duty to Creditors*, 46 VAND. L. REV. 1485, 1485 (1993). *They, supra*

Directive makes it very clear that shareholders are the residual creditors of a company (provided they are in the money) and that, if they are not considered as a class of creditors for the purposes of voting on restructuring plans under Articles 9 to 11 of the Directive, member states shall ensure that they may not unreasonably prevent or hinder the adoption, confirmation, implementation or enforcement of a restructuring plan.³¹

Note how the legal position of the shareholders is viewed exclusively from an economic point of view, as creditors for a hypothetical liquidation quota, and not as the holders of the share capital and, therefore, of the control over a company. This assessment must be taken into account for the purpose of delimiting the duties of the directors. Indeed, although Article 19 of the Directive stipulates that directors must consider the interests of creditors, shareholders and other interested parties,³² it is clear that the role of shareholders in preventive restructuring frameworks is subordinate to that of the rest of the creditors, which should not, however, translate into an absolute lack of attention on the part of directors, who must act at all times with a view to maximizing corporate value.³³ The interests of the

note 2, at 5–6, considers that the addressees of the duties of the directors in the near-insolvency phase are the so-called “fulcrum class of creditors,” *i.e.*, the best-ranking class that does not collect its claims in full because the value of the company or the restructuring value only partially covers them, thus receiving the post-restructuring capital as compensation. *See* Cárdenas, *supra* note 20, at 11.

31. Directive, *supra* note 1, arts. 9–12 (establishing protections against equity holder obstruction of restructuring plans).

32. *Id.* art. 19 (requiring that, where there is a likelihood of insolvency, directors have due regard to the interests of creditors, equity holders, and other stakeholders, as well as the need to take steps to avoid insolvency and to avoid deliberate or grossly negligent conduct that threatens the viability of the business).

33. *See* Corno, *supra* note 20, at 245–46 (“The Directive acknowledges the relevance of equity holders with different rights, limited or unlimited liability and, therefore, different interests. Investors may only seek to recover their investment in equity, whereas the company’s shareholders may be subject to personal liability for all company’s debt. Equity holders may be effectively expropriated by a restructuring plan, as example where it provides debt-to-equity swaps which would dilute their shareholding and, therefore, may not

shareholders, provided that they are not out of the money taking into account the value of the company undergoing restructuring, must be duly taken into account by the directors together with those of the other parties involved in the commercial company that is close to insolvency.

In this sense, a solvent company will seek that the decision procedure of its directors results in a “profitability forecast” for the shareholders (*i.e.*, maximization of profitability), but a company close to insolvency must ensure a “viability forecast,” *i.e.*, the company directors must not make decisions that potentially increase firm profitability for the sake of shareholders, but decisions that ensure the continuity of the company by maximizing its value. Therefore, once again, the directors must take into account the interests of the creditors, which is precisely what the continuity of the company entails. In any case, this “viability forecast” does not imply a suppression of the interests of the shareholders, since guaranteeing the continuity of the company in the short term entails a recovery of the return on investment in the medium or long term due to the restoration of the company’s solvency.³⁴

*C. The Application of the Business Judgment Rule in
the Likelihood of Insolvency*

As mentioned above, it is the reasonable actions aimed at avoiding insolvency and preserving the viability of the company that must govern the performance of the directors. However, it is important to point out that the business discretion characteristic of the actions that the directors deploy in this stage of likelihood of insolvency should be understood as protected by the business

have an incentive to restructure and unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan. . . . This explains why Article 19 requires Member States to impose on directors, in the likelihood of insolvency, a duty to have regard to equity holders interest as well, preventing, their reaction to possible expropriation of their rights in addition to other provisions of the Directive. Directors’ liability could be at stake in case the plan proposed by the debtor’s directors fails; such failure entails the loss of the going-concern surplus; and the plan takes into account shareholders’ position rather than (also) creditors’ one.”).

34. RECAMÁN, *supra* note 26, at 154–55.

judgment rule.³⁵ It is thus held that in the area of strategic and business decisions, subject to corporate discretion, the standard of diligence for an orderly business person is satisfied when the manager has acted in good faith, without personal interest in the matter under decision, with sufficient information and in accordance with an appropriate decision-making procedure.³⁶

In the context of the present case study, the business judgment rule provides that directors should not be held liable for breach of the duty of care where their decisions, even those that ultimately precipitated the company's insolvency, were made in good faith, free from conflicts of interest, on the basis of adequate information, and in compliance with the decision-making procedures prescribed by applicable law and the company's bylaws.³⁷ The concurrence of all the aforementioned requirements would exclude willful misconduct or gross negligence in the actions of the directors in the phase of likelihood of insolvency, such conduct which would not be considered a

35. See Directive, *supra* note 1, recital 70 (recognizing the importance of ensuring that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks where doing so would improve the chances of restructuring potentially viable enterprises).

36. Andrea Vicari, *I doveri degli organi sociali e dei revisori in situazioni di crisi di impresa*, in 40 GIURISPRUDENZA COMMERCIALE 128, 129 (2013); Paolo Piscitello, *La responsabilità degli amministratori di società di capital tra discrezionalità del giudice e business judgment rule [The Liability of Directors of Corporations Between Judicial Discretion and the Business Judgment Rule]*, 57 RDS 1167, 1167 (2012); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 235 (1994); Alfaro, *supra* note 26, at 327.

37. RECAMÁN, *supra* note 26, at 176. To explore the subject of the business judgment rule in American Law in more detail, see 1 STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 40, 425 (Wolters Kluwer ed., 6th ed., 2009); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88 (2004); Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 342 (2007); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 1-74 (2005); Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment Rule*, 88 NOTRE DAME L. REV. 1139, 1139 (2013); Douglas M. Branson, *Intracorporate Process and the Avoidance of Director Liability*, 24 WAKE FOREST L. REV. 97, 97-116 (1989); Ramesh K.S. Rao, David S. Sokolow & Derek White, *Fiduciary Duty a la Lyonnais: An Economic Perspective on Corporate Governance in a Financially-Distressed Firm*, 22 J. CORP. L. 53, 57 (1996).

breach of the duty of care, and therefore aligning this provision with the objectives sought by the Directive in this field. Thus, corporate directors who have developed discretionary strategies aimed at avoiding insolvency and minimizing losses, will not be liable in corporate or insolvency proceedings, provided that they have acted in good faith, and believed that their actions benefited or did not harm the interests of all stakeholders within the meaning of Article 19 of the Directive. It also assumes the directors held sufficient information in, *inter alia*, the early warning indicators of financial distress and acted in accordance with the decision-making procedure provided for by law or the bylaws.³⁸

In any case, the business judgment rule is expressly connected with the purpose of the duty of care, which consists of acting in an informed and knowledgeable manner, in good faith and in the certain belief that a business decision will benefit the interests of the company. Thus, a director is considered to act in an informed manner when he gathers and studies sufficient information of the act to be implemented to make a prudent and reasonable decision or when he consults an expert in the matter.³⁹ That is to say, although directors are not required to have exhaustive and profound knowledge, they are required to make the decision that any reasonable person would make, that is, the most prudent one and without committing gross negligence.⁴⁰ In

38. Directive, *supra* note 1, recitals 22, 70. This consideration takes into account the requirement to develop early warning mechanisms that directors can use to take informed action.

39. See *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981) (“Directors are under a continuing duty to keep informed about the activities of the corporation . . . Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the Enterprise he is charged to protect. Directorial management does not require a detailed inspection of day-to-day activities but rather a general monitoring of corporate affairs and policies. Accordingly, a director is well advised to attend board meetings regularly.”).

40. It should be noted that it is not required that the director has a specific education, but simply that his actions be governed by informed knowledge. A director may have such status without having business studies and this does not necessarily imply that he exercises his functions lightly. The business judgment rule applies as long as the director surrounds himself with experts and acts with

addition, when assessing whether a decision should be protected by the business judgment rule, the courts have to investigate whether the directors have followed the appropriate procedures to reach such a decision, an aspect in which the minutes and books of the board or management body, among other elements, are essential.⁴¹ Indeed, it will be in these documents that the directors will have to record the decision-making process, reflecting the discussions and opinions expressed by the members of the management body or by the experts invited, in order to ensure that their management is covered by the business judgment rule.⁴²

In short, the rationale behind this presumption is to protect directors in the exercise of their functions. Directors may, in the course of their duties, make decisions that ultimately prove detrimental to the company, its shareholders, or other stakeholders to whom duties are owed during the period of likelihood of insolvency under the Directive. Under this presumption, however, such directors should not incur liability if they acted independently and free from conflicts of interest. They must also have acted in good faith and with the consistent objective of maximizing the value of the enterprise. In other words, directors are shielded from liability where they discharged

sufficient knowledge of the consequences that a particular business act may have for the company. GUERRERO, *supra* note 17, at 152.

41. See S.T.S., June 27, 2023 (R.J., No. 1045/2023) (Spain); S.A.P. Madrid, June 12, 2020 (Spain). See also Vicenç Ribas Ferrer, *El deber de diligencia: contenido del deber y protección de la discrecionalidad de los administradores* [*The Duty of Care and the Protection of the Business Judgment Rule*], 233 REVISTA DE DERECHO MERCANTIL [RDM] 1, 11 (2024) (Spain) (electronic copy).

42. See DOUGLAS M. BRANSON, CORPORATE GOVERNANCE 270 (1993) (“A director may keep informed in a number of ways. Attendance at meetings is one such way. Conversations with fellow directors, employees, or agents may provide a director with part of the information or “feel” she must possess to comply with her standard of care. She may keep informed by reading reports and other information the corporation provides her. Indeed, the law gives to her broad rights of inspection of corporate books and records and other information rights. She may also keep informed by reading publicly available information about her company and its industry.”).

their responsibilities with due diligence.⁴³ However, the presumption of protection of corporate discretion does not imply that directors enjoy immunity for all their acts, since they will be liable if they make decisions lacking due diligence and, above all, if the decisions are irrational and negligent, as mentioned above.⁴⁴ In these cases, the shareholders and any third party who has suffered damage as a result of the actions of the directors will have to destroy the presumption, since the burden of proof will be on them, a task which, although complicated, will not be entirely impossible when the directors have failed to exercise the minimum diligence or have acted in bad faith.⁴⁵ Only in these cases, the directors will be personally liable for the damages caused to the company or to the patrimony of such subjects.⁴⁶

In this scenario, the Directive somehow objectifies this behavior during the likelihood of insolvency by expressly providing that the directors must take into consideration the interests of creditors, shareholders and other interested parties, as well as adopt measures to avoid insolvency and any willful or

43. See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *Paramount Commc'n Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1993) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment."); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010) ("[T]he court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives.").

44. See *RECAMÁN*, *supra* note 26, at 176.

45. See, e.g., *Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002); *Lewis v. S.L.&E., Inc.*, 629 F.2d 764, 768, 773 (2d Cir. 1980); *Mueller v. Zimmer*, 124 P.3d 340, 352 (Wyo. 2005); *Stanziale ex rel. Tower Air, Inc. v. Nachtomi*, 416 F.3d 229, 238 (3d Cir. 2005); *McMullin v. Beran*, 765 A.2d 910, 916-17 (Del. 2000) ("Procedurally, the initial burden is on the shareholder plaintiff to rebut the presumption of the business judgment rule. To meet that burden, the shareholder plaintiff must effectively provide evidence that the defendant board of directors, in reaching its challenged decision, breached any one of its 'triad of fiduciary duties, loyalty, good faith or due care.' Substantively, 'if the shareholder plaintiff fails to meet that evidentiary burden, the business judgment rule attaches' and operates to protect the individual director-defendants from personal liability for making the board decision at issue." (internal citations omitted)).

46. See *Ribas*, *supra* note 41, at 10.

grossly negligent conduct that endangers the company's viability.⁴⁷ The directors who do not comply with this standard of conduct, which implies, de facto, the non-application of the business judgment rule, will be liable for their actions or omissions in the context of the corporate crisis and may be sued through the channels already provided for in corporate law by means of corporate and individual liability actions.

In this respect, it should be noted that the problem will arise when the necessary measures are not adopted or when the decisions taken lead the company into insolvency proceedings. In this case, the actions of the directors may be subject to liability claims by shareholders and/or creditors, depending on the risky or conservative strategy adopted and the interests that were violated. Although neither corporate law nor bankruptcy law currently contemplate who are the addressees of the duties of the directors in situations of likelihood of insolvency as it is a diffuse area, this scenario changes and becomes concrete with the Directive because the directors must in any case try to reconcile the interests of the shareholders with the interests of the creditors in view of the economic-financial difficulties of the company,⁴⁸ since the application of the business judgment rule requires that the directors always act in favor of the corporate interest.⁴⁹

47. See Directive, *supra* note 1, art. 19 (providing that, where there is a likelihood of insolvency, directors shall have due regard to the interests of creditors, equity holders, and other stakeholders; the need to take steps to avoid insolvency; and the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business).

48. *Id.* recital 71 (requiring directors, where there is a likelihood of insolvency, to have due regard to the interests of creditors, equity holders, and other stakeholders, and recognizing that while no hierarchy among those interests is imposed, member states may establish one, thereby concretizing the otherwise diffuse question of to whom directors owe duties in the vicinity of insolvency).

49. RECAMÁN, *supra* note 26, at 177-78; Alfaro, *supra* note 26, at 332; Gutiérrez, *supra* note 17, at 237; see Vicari, *supra* note 36, at 130-31 ("[I]n a context of crisis, there are no normative reasons to derogate from the ordinary rules that consider the pursuit of profit to be diligent conduct, nor to impose upon directors an obligation to act in a purely conservative manner. Moreover, in cases of loss of capital and crisis, there is likewise no reason to disapply the business judgment rule in evaluating how the directors responded to the state of financial difficulty." (translated from Italian)).

Indeed, taking into consideration the interests of creditors as potentially affected in instances where the corporation faces a likelihood of insolvency, together with the protection of corporate discretion, allows us to look towards a framework for regulating the duties of directors in this type of scenario in which elements of company law and other elements of bankruptcy law are combined.⁵⁰ Accordingly, directors should be exempt from liability for alleged breaches of the duty of care provided they acted in good faith—meaning they assessed the crisis rationally and avoided absurd decisions—and on the basis of adequate information gathered in light of the company’s financial distress, including both internal and external sources. They must further demonstrate that they gave due consideration to the competing interests of all stakeholders without unduly favoring any particular group or yielding to outside influence, and that they followed an appropriate decision-making procedure involving a rigorous assessment and weighing of the various possible scenarios before arriving at their course of action. Assuming those conditions are satisfied, directors should be immune from liability for purported breaches of the duty of care in situations where the corporation is in the vicinity of insolvency.⁵¹

II. THE EXPERIENCE OF AMERICAN LAW

American law is often referred to in doctrine to outline a system for extending the fiduciary duties of corporate directors to creditors in situations of near insolvency. Although the legal system of the United States constitutes a fairly solid reference in certain aspects of the corporate governance of commercial companies, especially that relating to the corporate law adopted in Delaware, it also arguably offers less reliable guidance on a director’s fiduciary duties when the corporation is in the vicinity of insolvency. After briefly analyzing the fiduciary duties in the

50. GUERRERO, *supra* note 17, at 442–45; Andrew Keay, *The Director’s Duty to Take into Account the Interests of Company Creditors: When Is It Triggered?*, 25 MELB. U. L. REV. 315, 315–39 (2001); Jonathan Lipson, *Directors’ Duties to Creditors: Volition, Cognition, Exit and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1189 (2003); Steven L. Schwarcz, *Rethinking a Corporation’s Obligation to Creditors*, 17 CARDOZO L. REV. 647, 647 (1996).

51. Alfaro, *supra* note 26, at 330.

American legal system, this Essay will highlight the evolution of the doctrine of the extension of the duties of the directors towards creditors.

A. Fiduciary Duties of American Directors

The relationship between directors and shareholders is based on the agency theory, which is mainly a fiduciary or trust relationship based on the Fiduciary Law derived from equity.⁵² In this sense, the managers are agents and fiduciaries of the shareholders, who are the beneficiaries. The corporation's managers have undertaken to manage the company, owned by the shareholders, typically for the general purpose of obtaining a profit. In this shareholder-manager relationship, the key element is the trust that the shareholders have in the managers as experts who are given the power to manage the means of the relationship for the benefit of the shareholders. A breach of that trust is seen in the common law system as a manifest immorality.⁵³ On the other hand, in continental legal systems, the breach of this type of duty is analyzed from a contractual perspective, in the sense of the

52. In Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 28-32 (1990), Professors Butler and Ribstein argued that the agency relationship is essentially contractual in nature, although it does include elements from fiduciary law. On the other hand, in Larry E. Ribstein & Kelli Alces, *Directors' Duties in Failing Firms*, 1 J. BUS. & TECH. L. 529 (2007), Professors Ribstein and Alces integrate both concepts by establishing that "fiduciary duties are a set of implied contract terms that, in the absence of contrary agreement, accompany the open-ended power to manage another's property," *id.* at 532; *see also* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 427 (1993) (explaining that the agency relationship is fundamentally a fiduciary one, rooted in the trust law duty of loyalty that courts have adapted over the past two centuries to govern diverse principal-agent relations, including the relationship between corporate managers and investors).

53. *See* Easterbrook & Fischel, *supra* note 52, at 425-28 (describing the fiduciary relationship as one in which a principal entrusts an agent with the expertise and discretion to manage resources on the principal's behalf, subject to a duty of loyalty rooted in centuries of trust law); *see also* *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) (describing the fiduciary's obligation as demanding the highest standards of loyalty and good faith).

breach of a contract entered into between two parties and from which liability for such breach will arise.⁵⁴

Thus, the directors have committed themselves to the shareholders to manage the company in such a way that their management results in maximizing the value of the company, while this purpose is considered to be the main positive obligation that the directors have towards the company and its shareholders, an obligation to which are necessarily joined other negative obligations which, in my opinion, are nothing more than a (negative) concretization of the main obligation.⁵⁵ Thus, in order to serve the interests of the company, directors may not compete with the company, nor may they act on behalf of the company when it comes to their own business. Directors must also avoid conflicts of interest and may not take advantage of business opportunities of the company, all in a context of maximum confidentiality with respect to the affairs of the company in question.⁵⁶

In short, in order to safeguard the wealth and the means of production that the shareholders have placed in the hands of the directors, the latter have a duty of loyalty, insofar as they must take care of the corporate interests, and a duty of care, conducting the affairs with diligence, that is, without gross negligence.

The duty of loyalty is considered absolutely fundamental in a relationship based on trust. Thus, to the extent that the directors of the company have the powers of management and direction of the company, they must act in good faith and be loyal to the

54. Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems* 5, 8–10, 23 (Eur. Corp. Governance Inst., Law Working Paper No. 392/2018, 2018) (explaining that in continental civil law systems, the absence of the law-equity distinction meant that functional equivalents to fiduciary duties were absorbed into the general law of obligations and contract, such that breach of such duties gave rise to contractual or tortious liability rather than equitable remedies).

55. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.”); Sharfman, *supra* note 19, at 391.

56. *See Kelli Alces, Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 265 (2009).

interests of the company, which coincide in a situation of economic solvency with the interests of the shareholders.⁵⁷ Loyalty to the company and its shareholders in no way implies acting according to the wishes of the latter, since the manager is expected to use his or her own business sense to maximize corporate value by making decisions in good faith and in the belief that the company benefits, even if the shareholders do not agree with certain measures.⁵⁸ In other words, the duty of loyalty implies business independence with respect to the wishes of the shareholders and the adoption of business decisions in good faith that seek to ensure the good performance of the company.

The duty to act in good faith is one of the components of the duty of loyalty, which constitutes the legal framework of liability in cases of failure to act in good faith.⁵⁹ Therefore, good faith is an essential element of the necessary loyalty that directors must profess to the company they serve, so that if this good faith is

57. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 447 (2001); BRANSON, *supra* note 42, at 394–97; Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2021 (1993); RADIN, *supra* note 37, at 2, 787; Ribstein & Alces, *supra* note 52, at 533; Rutherford B. Campbell & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. CORP. L. 491, 492 (2007); *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361–62 (Del. 1993) (“[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.”). On the other hand, Rao, Sokolow & White, *supra* note 37, at 56, argue that managers have their own interests and that therefore there may be conflicts of interest between shareholders and managers.

58. *See* Nicholson v. Evans, 642 P.2d 727, 730 (Utah 1982) (“[Directors and officers] are obligated to use their ingenuity, influence, and energy, and to employ all the resources of the corporation, to preserve and enhance the property and earning power of the corporation, even if the interests of the corporation are in conflict with their own personal interests.”).

59. *See* Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008). More specifically, *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007), establishes that acting in bad faith constitutes a breach of the duty of loyalty to the extent that good faith constitutes an essential component of the fiduciary duty of loyalty. *See also* RADIN, *supra* note 37, at 3–11 (providing a summary of U.S. case law in this regarding acts of bad faith constituting a breach of the duty of loyalty).

lacking in the director-company relationship, the fundamental duty of loyalty will be breached and liability will arise as a result.⁶⁰

This duty of loyalty also translates into two other duties. Firstly, directors must act at all times in the interests of the company and its shareholders and, secondly, there can be no conflicts of interest between the shareholders and the directors' own interests.⁶¹ Therefore, in order to avoid these conflicts of interest, a series of preventive rules derive from the duty of loyalty, which are intended to protect the interests of the company and its shareholders.⁶²

On the other hand, the duty of care implies that directors must act diligently and make their decisions in good faith and always with sufficient information, knowing the consequences that will derive from a certain decision, and ignorance cannot be alleged against them.⁶³ Acting with care or diligence implies developing management powers with prudence and keeping in mind the best interests of the company.⁶⁴ Likewise, the duty of

60. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (“The failure to act in good faith may result in liability because the requirement to act in good faith is a subsidiary element, *i.e.*, a condition, of the fundamental duty of loyalty.”); *see also* DEL. CODE ANN. tit. 8, § 102(b)(7)(i) (2025) (providing that a corporation’s certificate of incorporation may not eliminate or limit the liability of a director or officer for any breach of the duty of loyalty to the corporation or its stockholders).

61. In *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939), these two obligations are recognized when it is foreseen that “the duty of loyalty requires an undivided and unselfish loyalty to the corporation and demands that there shall be no conflict between duty and self-interest,” *id.* at 510. *See* John A. Pearce II & Ilya A. Lipin, *The Duties of Directors and Officers Within the Fuzzy Zone of Insolvency*, 19 AM. BANKR. INST. L. REV. 361, 364–65 (2011); RADIN, *supra* note 37, at 796; BRANSON, *supra* note 42, at 401.

62. *See* Hurt, *supra* note 17, at 279 (“In corporate law, the duty of loyalty is traditionally described as encompassing the duty of noncompetition, the duty of confidentiality, and the duty against self-dealing, including the duty not to usurp corporate opportunities.”); Alces, *supra* note 56, at 249.

63. Ribstein & Alces, *supra* note 52, at 533 (arguing that the duty of care is not fiduciary in nature because “a fiduciary does not commit all of its time to the beneficiary and the duty inherently does not require the fiduciary to disgorge gain”).

64. *See* RADIN, *supra* note 37, at 432–33; BRANSON, *supra* note 42, at 251; Rhee, *supra* note 37, at 1144; Pearce & Lipin, *supra* note 63, at 363–65. For helpful examples on the prudence and care required of managers, *see* *Graham v. Allis-*

diligence entails supervising the performance of those persons who report directly to the directors and to whom certain management powers have been delegated to ensure that these powers are being carried out in full and with an optimum level of professionalism. Therefore, it can be seen that the duty of care extends to two different areas. On the one hand, the decision-making process, which must be made in good faith and always in the best interest of the company; and, on the other hand, the supervision of subordinates who directly exercise the powers delegated by the directors.⁶⁵

Although directors under American law are protected by the business judgment rule, the liability that may arise for breach of the duty of care will arise in two different contexts. First, liability may arise from a decision taken by the management body that results in a financial loss to the company, the decision having been based on bad advice or having been negligent. Second, it may arise from a business decision that has been taken as a result of an ill-considered failure to act in circumstances in which greater care would have prevented the loss of assets suffered.⁶⁶

On the other hand, and in clear connection with the problems highlighted by the Directive, American law provides that directors may be held liable if a series of risky decisions are taken that lead to the insolvency of the company, provided that the risky business was adopted on the basis of gross negligence.⁶⁷ This type of action

Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963); Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 720 (5th Cir. 1984); Meyers v. Moody, 693 F.2d 1196, 1209 (5th Cir. 1982); Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000).

65. RADIN, *supra* note 37, at 443-44.

66. See, e.g., *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996); *McCall v. Scott*, 250 F.3d 997, 999 (6th Cir. 2001); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005); *David B. Shaev Profit Sharing Account v. Armstrong*, No. Civ.A 1449-N, 2006 WL 391931 (Del. Ch. Feb. 13, 2006).

67. See *Trenwick Am. Litig. Tr. v. Ernst & Young*, 906 A.2d 168, 174-75 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (holding that directors of an insolvent corporation remain protected by the business judgment rule and that the mere act of incurring additional debt in the face of insolvency does not, standing alone, establish bad faith or a breach of fiduciary duty where the decision-making process was proper and undertaken in good faith); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)

is known as a “waste claim” and consists of alleging a breach of the duty of care on the basis that the best interests of the company have not been pursued, *i.e.*, that the high-risk business has been carried out at excessive cost for which there has been no correlative benefit (waste), which denies the application of the business judgment rule.⁶⁸ However, American courts do not generally uphold waste claims brought by shareholders because they consider business decisions made in good faith and after due deliberation to be worthy of protection.⁶⁹ In our case, if in the context of the likelihood of insolvency the director were to carry out an unreasonably risky business decision, such action would be understood to be imputable by way of willful misconduct or gross negligence, thus not complying with the requirement of good faith demanded by the protection of corporate discretion and, for this reason, the director would be liable. Furthermore, it should be recalled in this respect how the Directive contemplates, in Article 19, that willful or grossly negligent conduct that endangers the viability of the company must be avoided,⁷⁰ the aforementioned case falling within this prohibition and, therefore, giving rise to the appropriate liability.

*B. The Extension of Fiduciary Duties to Creditors in
the Likelihood of Insolvency*

The Directive has raised the question of whether creditors (and other interested parties) are addressees, together with the shareholders, of the duties of directors in a state of insolvency.

(holding that the standard for determining whether directors have breached their duty of care is gross negligence, and that the business judgment rule presumes directors acted on an informed basis, in good faith, and in the honest belief that their actions were in the corporation’s best interests).

68. See BRANSON, *supra* note 42, at 296–98; Ann Scarlett, *Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts’ Response to Recent Corporate Scandals*, 60 FLA. L. REV. 589, 622–23 (2008).

69. Hurt, *supra* note 17, at 276–79. For examples of where a waste claim was not viable, see *In re Walt Disney Co.*, 906 A.2d 27 at 74; *Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1992); *Gagliardi v. Trifoods Int’l, Inc.*, 683 A.2d 1049, 1055 (Del. Ch. 1996).

70. Directive, *supra* note 1, art. 19 (requiring that, where there is a likelihood of insolvency, directors have due regard to “the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business”).

Although this issue is a question that has been discussed for some time in different European countries, American corporate law is no stranger to this matter and, therefore, its doctrine and jurisprudence have considered duty shifting for many years.⁷¹ Duty shifting refers to the point at which a company's directors stop focusing exclusively on the interests of the shareholders (partners) and begin to prioritize the interests of the creditors.

The issue is not a trivial one, as it is rooted in the different existing theories on the concept of corporation. Depending on the concept of corporation, one can speak of fiduciary duties with a broader scope of action than that of the company and its shareholders or, on the contrary, restricted to the latter.⁷² The problem with the different theories used in American law with respect to fiduciary duties is that either no economic interest other than the intrinsic interest of the company itself is recognized or, on the contrary, as many interests as stakeholders

71. Gurrea, *supra* note 4, at 371–73, 378–81.

72. This debate arose in the United States in the 1930s at the hands of Adolph Berle and Merrick Dodd. The former considered that the corporation only existed to generate wealth for its members and that until this objective was achieved, it could not be focused on other people. On the other hand, Merrick Dodd understood that the corporation is an economic institution with a social function in addition to that of wealth creation and value maximization, so that there were other stakeholders who also had rights over the corporation. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932) (expressing the view that it is “undesirable” to give emphasis to the notion that the corporation exists for the sole purpose of maximizing profit for stockholders). Furthermore, depending on the nature of the corporation, fiduciary duties will develop in one direction or another. Thus, if one follows the contractual view (“contractual view” or “contractarianism”), which considers the corporation as a mere set of contracts by virtue of which a number of persons (directors, shareholders, employees, creditors and others) participate in the business, one concludes that the law must impose the fewest possible duties and that fiduciary duties are consented to in origin because they are one of the terms of the corporate contract. On the contrary, the anti-contractual view (“anti-contractual view” or “anti-contractarianism”) argues that fiduciary duties are necessary to the extent that there is an inherent risk of abuse of power in any relationship in which the ownership and management of assets is entrusted to other persons, which is why the law must impose this type of duty to prevent abuse. *See* Easterbrook & Fischel, *supra* note 52, at 425–46; Lipson, *supra* note 50, at 1192–93, 1199–1200.

exist are intermingled, which not only does not clarify the problem but also aggravates it and makes it more confusing.⁷³

The doctrine and jurisprudence have been evolving and have established who are the beneficiaries of the directors' fiduciary duties according to the solvency or insolvency of the company, taking into account that the power held by each type of stakeholder changes according to the economic stage in which the company finds itself.⁷⁴

While the company is solvent, there is, as mentioned above, a fiduciary relationship between the directors and the company itself and its shareholders, in such a way that the directors are obliged to pursue, in the exercise of their duties, the interests of the company by creating and maximizing the value of the company, which has repercussions for the shareholders. In this sense, the directors must act loyally and diligently in order to

73. Remus D. Valsan & Moin A. Yahya, *Shareholders, Creditors, and Directors' Fiduciary Duties: A Law and Finance Approach*, 2 VA. L. & BUS. REV. 1, 5-7 (2007). This problem has even been noted in Delaware Chancery Court decisions. See, e.g., *Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772 (Del. Ch. 2004). In this case, it is held that the corporation is the sole beneficiary of the fiduciary duties of the directors, thus failing to distinguish the different interests at stake. *Id.* at 792. But in addition to not distinguishing, concepts such as fiduciary duties owed to the company itself and fiduciary duties owed to "residual risk bearers," such as partners and creditors, are used interchangeably, see *id.* at 788-91, which is not correct and increases the existing confusion in this field.

74. Rao, Sokolow & White, *supra* note 37, at 65. Campbell and Frost also highlight that the courts have recognized four different economic situations through which companies pass, so that, depending on the situation, fiduciary duties will be owed to one stakeholder or another. Campbell & Frost, *supra* note 57, at 493. Thus, in a solvent situation, directors must serve the interests of shareholders. If the company subsequently approaches insolvency and is close to insolvency, the directors must attend to the general interest of the company, understood as a group of stakeholders with particular interests. If the company deepens its bad economic situation and becomes completely insolvent, without filing for insolvency, then the fiduciary duties extend to the creditors, with the company's directors having to maximize their interests. Finally, if the insolvent company requests the initiation of insolvency proceedings and resorts to a reorganization procedure, it is optimal that the directors of the company seek to maximize the interests of the shareholders and the creditors as a homogeneous whole. Notwithstanding this jurisprudential doctrine, some skepticism is shown to the extent that each of the economic situations presented have diffuse limits that make them very difficult to distinguish, which, together with the disparity of stakeholders and interests, increases the existing confusion in this already complex and confusing subject. See Pearce & Lipin, *supra* note 63, at 370.

maintain this fiduciary relationship based on the trust of the shareholders in the management of the directors. From this perspective, fiduciary duties are owed to the company and its shareholders and not to any other stakeholder such as, for example, creditors, who must “protect themselves” by introducing certain clauses in the contracts that bind them to the company.⁷⁵

Indeed, creditors must be sufficiently diligent to protect their investment in the contract or regulatory agreement itself by introducing different covenants aimed at satisfying their claims.⁷⁶ These clauses have a very broad spectrum and may consist of prohibiting the distribution of dividends until the creditors' claim is repaid in full, the payment of compensation, or even the directors taking or not taking certain investment decisions in order to protect the creditors' rights.

However, in a solvency situation, the fact that fiduciary duties are not extended to creditors does not imply that the directors can act inappropriately with respect to the interests of this group. On the contrary, since directors must at all times act in good faith, it

75. See *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1417 (3d Cir. 1993) (“It is well established that a corporation does not have a fiduciary relationship with its debt security holders, as with its shareholders.”).

76. See *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986); *Harff v. Kerkorian*, 324 A.2d 215, 222 (Del. Ch. 1974) (“It is apparent that unless there are special circumstances which affect the rights of the debenture holders as creditors of the corporations, *e.g.*, fraud, insolvency, or a violation of a statute, the rights of the debenture holders are confined to the terms of the indenture agreement pursuant to which the debentures were issued.”); *Campbell & Frost*, *supra* note 57, at 495–96 (“A corollary of this fiduciary duty to act in the best interests of shareholders is that corporate managers owe no fiduciary duty to the corporation's creditors or any other non-shareholder constituency, such as employees. Duties to creditors . . . are purely contractual in nature, except for discrete legal duties imposed on the corporation (and its managers), such as duties to refrain from paying excessive dividends to shareholders or engaging in fraudulent transfers.”); see also *Bainbridge*, *supra* note 37, at 363 (noting “it seems clear that creditors are well positioned—especially relative to shareholders—to protect themselves. Accordingly, we can confidently predict the majoritarian default that would emerge from the hypothetical bargain. Shareholders will want the protections provided by fiduciary duties, while bondholders will be satisfied with the ability to enforce their contractual rights, which is precisely what the law provides”).

may be that directors' actions benefit both stakeholders.⁷⁷ Moreover, American law contains two exceptions to this general rule that, in instances of solvency, there is no extension of fiduciary duties to creditors.⁷⁸ First, it has been established that directors of banking institutions owe fiduciary duties to depositors, as do directors of non-banking companies to those who are beneficiaries of funds deposited in trust.⁷⁹ Second, some U.S. states have drafted rules that explicitly allow corporate directors to make decisions that take into account the interests of stakeholders other than the members, such as employees, creditors, suppliers, consumers and, in some jurisdictions, the local and national economy and even society as a whole.⁸⁰ These

77. See *In re Healthco Int'l, Inc.*, 208 B.R. 288 (Bankr. D. Mass. 1997) (holding that directors must take into account the consequences that certain acts produce on the creditors even if they do not have fiduciary duties with respect to that group) ("Normally, what is good for a corporation's stockholders is good for the corporation [but stated that] when a transaction renders a corporation insolvent, or brings it to the brink of insolvency, the rights of creditors become paramount. . . . [T]he Delaware courts did not say in *Revlon*, nor has it said in any other decision, that directors have an obligation to benefit stockholders at the expense of creditors [and that] the Delaware courts recognize that directors breach their fiduciary obligation when they authorize a transaction which prejudices creditors A distribution to stockholders which renders the corporation insolvent, or leaves it with unreasonably small capital, threatens the very existence of the corporation. This is prejudicial to all its constituencies, including creditors, employees, and stockholders retaining an ownership interest. Surely it is not asking too much of directors that they honor their obligations of loyalty and care to avoid the corporation's destruction.").

78. RADIN, *supra* note 37, at 2080–81.

79. See *Briggs v. Spaulding*, 141 U.S. 132, 148–49 (1891) (finding that directors of a bank are held to the duty of ordinary care and diligence in the administration of the bank's affairs, including to the depositors whose funds are entrusted to the institution). Of course, it should be noted that this exception does not stem from corporate law, but rather from banking law itself, and therefore has different implications in cases of insolvency.

80. See, e.g., MINN. STAT. § 302A.251, subdiv. 5 (2025) (permitting directors to consider "the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders"); 15 PA. CONS. STAT. § 1715(a)(1) (2025) (authorizing directors to consider the effects of any action upon employees, suppliers, customers, creditors, and communities in which the corporation operates); see also *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE

rules provide that directors may (but should not) take into account the interests of groups other than members. However, in some states, the statutes indicate that the ability to consider the interests of other stakeholders does not imply the existence of any duty to those stakeholders.⁸¹

In the study of fiduciary duties with respect to creditors, two stages can be distinguished according to the jurisprudential changes that have taken place.

1. American Legal Treatment of Fiduciary Duties for Firms Approaching Insolvency Up to 2007

From the moment the corporation enters insolvency or when it is close to insolvency, the fiduciary relationships change. Until 2007, when the Supreme Court of Delaware issued an important decision in *North American Catholic Educational Programming Foundation Inc. v. Gheewalla*,⁸² and in the absence of specific regulation, part of the American doctrine and jurisprudence established that there was an extension of the fiduciary duties of the directors with respect to the corporate creditors, so that if these duties were breached, civil liability would arise under certain circumstances.⁸³ Those who supported this extension of

(Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/8WFZ-996L>] (expressing the view that the corporation's purpose is to consider commitments to ancillary stakeholders).

81. See, e.g., N.Y. BUS. CORP. LAW § 717(b) (McKinney 2025) ("Nothing in this paragraph shall create any duties owed by any director to any person or entity to consider or afford any particular weight to any of the foregoing or abrogate any duty of the directors, either statutory or recognized by common law or court decisions."); see BRANSON, *supra* note 42, at 399–400.

82. 930 A.2d 92 (Del. 2007).

83. See Lin, *supra* note 37, at 1486; Royce R. Barondes, *Fiduciary Duties of Officers and Directors of Distressed Corporations*, 7 GEO. MASON L. REV. 45, 46 (1998); Norwood Beveridge, *Does a Corporation's Board Owe a Fiduciary Duty to Its Creditors?*, 25 ST. MARY'S L.J. 589, 590 (1993); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 706–10 (1993); Rao, Sokolow & White, *supra* note 37, at 64; Jacob S. Ziegel, *Creditors as Corporate Stakeholders: The Quiet Revolution—An Anglo-Canadian Perspective*, 43 U. TORONTO L.J. 511, 529–

fiduciary duties to creditors were based on the trust fund doctrine. According to this theory, when a company becomes insolvent, the corporate assets constitute a trust fund for the benefit of the creditors and the directors are conceived as trustees who must do everything possible and convenient to protect the remaining assets for the benefit of the creditors, who are the ones who have a real interest in them.⁸⁴ In this sense, the directors are no longer fiduciaries but trustees and, therefore, they are obliged to observe a conservative conduct of the corporate assets, not being able to carry out speculative operations and not being covered in these cases by the business judgment rule.⁸⁵ Thus, according to this

31 (1993). The sources make apparent that the protection of creditors' interests through fiduciary duties is justified by the existing imbalance between the positions of the company and its creditors and by the need to balance the advantages of the shareholders deriving from the principle of limited liability. In American corporate law jurisprudence, this extension of fiduciary duties when the company is insolvent is well established. *See, e.g.*, *Davis v. Woolf*, 147 F.2d 629, 633 (4th Cir. 1945) (“[W]hen a corporation becomes insolvent or [is] in a failing condition, the officers and directors no longer represent the stockholders, but by the fact of insolvency, become trustees for the creditors.” (internal citation omitted)); *FDIC v. Sea Pines Co.*, 692 F.2d 973, 976–77 (4th Cir. 1982) (indicating “when the corporation becomes insolvent, the fiduciary duty of the directors shifts from the stockholders to the creditors”); *Bank Leumi-Le-Israel, B.M. v. Sunbelt Indus., Inc.*, 485 F. Supp. 556, 559 (S.D. Ga. 1980) (indicating that “in the case of an insolvent firm, the directors and officers stand as trustees of corporate properties for the benefit of creditors first”); *In re Ben Franklin Retail Stores, Inc.*, 225 B.R. 646, 653 (Bankr. N.D. Ill. 1998) (concluding that creditors replace shareholders as ‘residual owners’ of a corporation during insolvency); *In re Healthco Int’l, Inc.*, 208 B.R. 288, 300 (Bankr. D. Mass. 1997) (establishing that “when a transaction renders a corporation insolvent, or brings it to the brink of insolvency, the rights of creditors become paramount”). There are even cases stating that the extension of fiduciary duties occurs even when the insolvency occurs well before liquidation and even before the bankruptcy proceedings are initiated. *See Clarkson Co. Ltd. v. Shaheen*, 660 F.2d 506, 512 (2d Cir. 1981); *Geyer v. Ingersoll Publ’ns Co.*, 621 A.2d 784, 787–88 (Del. Ch. 1992); *In re O.P.M. Leasing Servs., Inc.*, 28 Bankr. 740, 760 (Bankr. S.D.N.Y. 1983).

84. Henry T. C. Hu & Jay L. Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1332 (2007) (discussing the origins of the trust fund doctrine).

85. Pearce & Lipin, *supra* note 63, at 381–82; Lipson, *supra* note 50, at 1203–08; RADIN, *supra* note 37, at 2091–92; *see* N.Y. Credit Men’s Adjustment Bureau, Inc. v. Weiss, 110 N.E.2d 397 (N.Y. 1953); *Sea Pines Co.*, 692 F.2d at 976–77; *Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808, 813 (Del. 1944) (“An insolvent corporation is

theory, if the directors do not fulfill their duties of preserving the corporate assets and carry out very risky businesses that cause the company to worsen its insolvency, then they will be liable in the insolvency proceedings and may be sued by the creditors.

As mentioned above, this situation only creates a conflict between the shareholders and the creditors, who will want to see their interests in the company satisfied and will “ally” themselves with the directors of the insolvent company during the insolvency proceedings, especially in cases of reorganization under Chapter 11 of the U.S. Bankruptcy Code.⁸⁶ The leading case on this issue, which is often invoked as an argument that in insolvency fiduciary duties extend to creditors, who are the ultimate beneficiaries of those duties, is *Geyer v. Ingersoll Publications Co.*⁸⁷

On the other hand, another doctrine considers that if the company has not entered into insolvency proceedings, but is in the vicinity of insolvency, a de facto assumption of the Directive, the creditors become beneficiaries of the fiduciary duties from that very moment, insofar as the assets are of interest to them in order to see their claims satisfied.⁸⁸ Indeed, according to this

civily dead in the sense that its property may be administered in equity as a trust fund for the benefit of creditors. The fact which creates the trust is the insolvency, and when that fact is established, the trust arises, and the legality of the acts thereafter performed will be decided by very different principles than in the case of solvency.” (citations omitted)).

86. See Lin, *supra* note 37, at 1486; LoPucki & Whitford, *supra* note 83, at 677; Valsan & Yahya, *supra* note 73, at 2; see also Baird & Henderson, *supra* note 16, at 1316 (arguing that the main sign of alliance between creditors and directors is the filing of bankruptcy proceeding, at which point the creditors acquire a preponderant role in decision-making to the detriment of the shareholders).

87. 621 A.2d 784; see Lipson, *supra* note 50, at 1189–90; Campbell & Frost, *supra* note 57, at 500–01.

88. Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'n Corp., Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991). That case established a true revolution by considering that the fiduciary duties of the directors extend to the creditors in cases of vicinity of insolvency, given that at these thresholds the directors are tempted to undertake risky businesses in order to put the company on the road to liquidity and economic expansion. These businesses can either save the company or plunge it completely into insolvency, which puts at risk the assets that creditors will be able to use to see their claims paid. The Delaware Chancery Court's decision represented a fundamental change in the issue of directors' liability since, from this case onwards, directors were obliged to

theory, when the company approaches insolvency, the shareholders lose the character of main stakeholder to the detriment of the creditors, who become central stakeholders to the extent that the company operates with the creditors' money.⁸⁹ The conflict between the shareholders and the creditors will focus, in this case, on the risk of the business that the directors will want to undertake at this temporary moment, as it has been shown with regard to the analysis of the Directive.⁹⁰ In this

consider the effects that their decisions could have on other stakeholders in the company, other than the shareholders, if the company were to enter a situation of near insolvency. This case was followed by many others that continued to apply the "vicinity of insolvency doctrine." *See, e.g.,* *Pereira v. Cogan*, 294 B.R. 449 (Bankr. S.D.N.Y. 2003); *In re Buckhead Am. Corp.*, 178 B.R. 956 (Bankr. D. Del. 1994); *In re Ben Franklin Retail Stores*, 225 B.R. at 646; *Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772 (Del. Ch. 2004); *Trenwick Am. Litig. Tr. v. Ernst & Young*, 906 A.2d 168 Del. Ch. 2006); *Big Lots Stores, Inc. v. Bain Cap. Fund VII, LLC*, 922 A.2d 1169 (Del. Ch. 2006); *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, LLC*, 864 A.2d 930, 948 (Del. Ch. 2004); *Blackmore Partners, L.P. v. Link Energy LLC*, No. Civ.A. 454-N, 2005 WL 2709639, at *3 (Del. Ch. Oct. 14, 2005).

89. Although the concept of the "vicinity of insolvency" is the cornerstone of the *Credit Lyonnais* case and of the theory that creates this ruling, it is curious that the Delaware Chancery Court does not define what exactly it means by this concept. *See Valsan & Yahya, supra* note 73, at 13 n.41 ("Because 'vicinity of insolvency' is a vague concept, it is often argued that it is impossible to determine when the fiduciary duties should shift from shareholders to creditors (or should broaden to include the creditors). In response to this inconvenience, certain guidelines have been advanced to determine whether the firm is in the insolvency zone. The shift of fiduciary duties shall occur whenever insolvency in fact is reasonably foreseeable or when directors engage in a transaction that would raise the specter of insolvency in fact. The insolvency in fact can be determined based on two tests: the balance sheet test (when liabilities exceed assets) and the cash-flow test (when the corporation is unable to pay its debts as they fall due in the ordinary course of business).").

90. With respect to risk and its impact on corporate insolvency, there is a current of thought that advocates considering the selection of business risk to be developed by a company as a fiduciary duty in addition to the traditional duties of loyalty and care. Specifically, the duty to manage risk is conceived as a complement to the duty of oversight (which is connected, in turn, with the duty of loyalty according to the Delaware Supreme Court) insofar as this duty to manage risk is an obligation to supervise and control those who have the task of selecting the risk of the activities to be developed. Indeed, this duty presupposes that the directors are in charge of supervising the investments made by the agents hired by them, mainly the investment banks, in such a way that if the high risk applied to the investment policy is not somehow addressed by the

context, the shareholders will prefer that the managers engage in high-risk businesses in order to obtain higher returns and to move the company away from the vicinity of insolvency. On the other hand, creditors will want the company to carry out low-risk activities in order to avoid endangering the company's assets and to be able to collect their claims in the event that the company goes into liquidation.⁹¹

It is argued, however, that managers should stay out of such conflicts of interest and attend exclusively to their fiduciary duties to the corporation, which are primarily aimed at maximizing the value of the company they serve.⁹² Indeed, the managers of the

management body and the company becomes insolvent, the directors may be attacked by way of breach of fiduciary duties. *See* Hurt, *supra* note 17, at 280; *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 122–23 (Del. Ch. 2009); *In re Goldman Sachs Mortg. Servicing S'holder Derivative Litig.*, No. 11 Civ. 4544, 2012 WL 3293506, at * 6–7 (S.D.N.Y. Aug. 14, 2012); *In re Am. Int'l Grp. Derivative Litig.*, 700 F. Supp. 2d 419, 437 (S.D.N.Y. 2010); *In re China Agritech, Inc. S'holder Derivative Litig.*, C.A. No. 7163-VCL, 2013 WL 2181514, at * 20 (Del. Ch. Feb. 21, 2013).

91. *See* LoPucki & Whitford, *supra* note 83, at 684: (“[W]hen a marginally solvent company engages in high risk investments, the risks are borne primarily by creditors while the benefits accrue primarily to shareholders.”); Barondes, *supra* note 83, at 48; Valsan & Yahya, *supra* note 73, at 10–11; Keay, *supra* note 50, at 317–18 (“Certainly if the company is insolvent, in the vicinity of solvency or embarking on a venture which it cannot sustain without relying totally on creditor funds, ‘the interests of the company are in reality the interests of existing creditors alone.’ At this time, because the company is effectively trading with the creditors’ money, the creditors may be seen as the major stakeholders in the company. The creditors are protected only by contractual rights, but when companies are financially stressed perhaps it is only fair that their position warrants some form of fiduciary protection, whereby the directors become accountable principally to the creditors.” (citations omitted)).

92. In *Goodwin v. Agassiz*, 186 N.E. 659 (Mass. 1933), it was established that the fiduciary duties of the directors are with respect to the company they manage, not with respect to the shareholders individually considered. However, it has subsequently been established that those duties must be extended to the shareholders to the extent that there is a personal or *ad personam* relationship between them and the directors, which is why the directors have fiduciary duties with respect to the company and its members. *See, e.g.,* *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515–16 (Mass. 1975) (holding that shareholders in a closely held corporation owe one another a fiduciary duty of “utmost good faith and loyalty,” because the close personal relationships among participants

company must do everything that maximizes the company's wealth insofar as this will benefit shareholders and creditors alike, since both have invested in the company and expect the highest possible rates of return.

The *Credit Lyonnais* case establishes a shield in favor of directors, because if the shareholders sue them for breach of their duties, they can claim that their actions were taken to protect the interests of the creditors. When one also considers that the business judgment rule applies in these cases, it becomes clear that the directors will be protected against many claims of liability, whether brought by shareholders or creditors. For example, if the directors implement a series of risky business decisions, even though they are reasonable risks and those risks do not succeed and result in the company's liquidation, the directors will be protected against the claims of creditors and there will be no bankruptcy liability as long as their actions fall within the presumption given by the business judgment rule.⁹³ In the same way, if the directors fail to comply with their duties towards the company or its shareholders by engaging in asset protection management and, as a result of this low risk, the

in such enterprises give rise to heightened obligations beyond those owed in publicly traded corporations). Likewise, in the *Credit Lyonnais* judgment itself, emphasis was placed on the fact that the directors must seek to maximize corporate value because the fiduciary duties are owed to the corporation. 1991 WL 277613, at *34; see also *Prod. Res. Grp.*, 863 A.2d at 788 n.52 (“[T]he business judgment rule remains important and provides directors with the ability to make a range of good faith, prudent judgments about the risks they should undertake on behalf of troubled firms.”); *id.* at 792 (“[T]he fact of insolvency does not change the primary object of the directors’ duties, which is the firm itself.”); Lin, *supra* note 37, at 1487 (arguing that “directors should maximize the company’s value even when the company is in financial distress. Because maximizing the expected value of the firm can minimize losses associated with business failure and reduce the overall cost of capital, directors should take actions that maximize the company’s value even if such actions diverge from what shareholders or creditors would have chosen if left unconstrained”).

93. Professors Ribstein and Alces have suggested that the business judgment rule insulates business decisions that implicate the duty of care in a manner that may render the duty of care to lack a fiduciary nature. See Ribstein & Alces, *supra* note 52, at 533. Put differently, it does not matter who the direct addressees of the fiduciary duties are, because if the directors act under the business judgment rule, they will not be liable either to the company, its shareholders or its creditors.

company goes into liquidation, the directors are again protected against the claims of, in this case, the shareholders.

Notwithstanding the extensive doctrinal commentary and judicial decisions regarding the extension of fiduciary duties to creditors upon or near insolvency, the practical reality is more modest. There have been no significant cases in which directors have been held personally liable for a direct breach of fiduciary duty owed to creditors as such. This is largely attributable to the absence of any express provision in the Bankruptcy Code recognizing such duties. The result is a meaningful gap in creditor protection under fiduciary law, one that effectively compels creditors to seek recourse through alternative legal frameworks, principally contract law and tort law.⁹⁴

2. American Legal Treatment of Fiduciary Duties for Firms Approaching Insolvency Since 2007

As discussed in the previous section, 2007 marked a turning point in the debates about the protection of creditors through fiduciary obligations in cases of insolvency or near insolvency of corporations. That year saw the *North American Catholic Educational Programming Foundation Inc. v. Gheewalla* decision,⁹⁵ in which the Delaware Supreme Court sought to clarify whether the fiduciary duties of trustees extended to creditors. The *Gheewalla* decision stands out because the court clearly and unambiguously denies that creditors of a corporation can be beneficiaries of the fiduciary duties of the corporation's directors.⁹⁶ Indeed, the Delaware Supreme Court held that, regardless of the state or level of solvency of a corporation,

94. See Ribstein & Alces *supra* note 52, at 529–30; Robert K. Sahyan, *The Myth of the Zone of Insolvency: Production Resources Group v. NCT Group*, 3 HASTINGS BUS. L.J. 181, 196 (2006).

95. 930 A.2d 92 (Del. 2007).

96. *Id.* at 99–101 (holding that “the creditors of a Delaware corporation that is either insolvent or in the zone of insolvency have no right, as a matter of law, to assert direct claims for breach of fiduciary duty against the corporation’s directors,” and clarifying that while creditors of an insolvent corporation may bring derivative claims on behalf of the corporation, directors’ fiduciary duties run to the corporation and its shareholders, not to creditors directly).

directors owe fiduciary duties exclusively to the corporation and its shareholders and under no circumstances to creditors.⁹⁷

In its decision, however, the Delaware Supreme Court distinguishes between whether the company is in the zone of vicinity of insolvency or whether it is insolvent, establishing different levels in terms of creditor protection. The court suggests that if the company is close to insolvency or in a crisis phase, as it continues to be solvent, the directors have fiduciary duties towards the company and the shareholders and that they must act in compliance with the interests of the company to ultimately benefit the shareholders.⁹⁸ In this way, creditors are protected through the terms agreed in their contracts, through the rules on fraudulent conveyances and through the general regulations of commercial law and insolvency law.⁹⁹

On the other hand, when the company is insolvent, the court does not recognize an extension of fiduciary duties, but it does contemplate that creditors take the place of shareholders with respect to the greater interest in the situation of the company.¹⁰⁰ In other words, fiduciary duties are owed to the company in any situation and its value must be maximized at all times except in a state of insolvency, when it is the creditors who have a greater interest in this maximization of value, which is why they are entitled to take legal action for derivative liability, *i.e.*, in the name and on behalf of the company if the directors breach the fiduciary duties owed to the legal entity.¹⁰¹

97. *Id.*

98. *Id.* at 101 (“In this case, the need for providing directors with definitive guidance compels us to hold that no direct claim for breach of fiduciary duties may be asserted by the creditors of a solvent corporation that is operating in the zone of insolvency. When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.”).

99. *Id.* at 99; see RADIN, *supra* note 37, at 2070.

100. See *In re Ben Franklin Retail Stores, Inc.*, 225 B.R. 646 (Bankr. N.D. Ill. 1998); *In re Toy King Distrib., Inc.*, 256 B.R. 1 (Bankr. M.D. Fla. 2000).

101. *Gheewalla*, 930 A.2d at 101–02 (“It is well settled that directors owe fiduciary duties to the corporation. When a corporation is solvent, those duties may be enforced by its shareholders, who have standing to bring derivative actions on behalf of the corporation because they are the ultimate beneficiaries

In this judgment, the court recognized that the intended extension of fiduciary duties to creditors, defended at another time by certain doctrine and supported by part of the jurisprudence, would cause uncertainty in the directors and would generate a conflict between the duty of the directors to maximize the value of the company for the benefit of all those who have an interest in it and the particular interest of the creditors.¹⁰² The *Gheewalla* court concluded that directors must continue to manage the corporation and seek to maximize its value, even in insolvency.¹⁰³ Creditors, for their part, may protect their interests either directly, through contract law, tort law, or other non-fiduciary remedies; or indirectly, by bringing derivative claims on behalf of the insolvent corporation where directors have breached the fiduciary duties they owe to the corporate entity.¹⁰⁴

of the corporation's growth and increased value. When a corporation is insolvent, however, its creditors take the place of the shareholders as the residual beneficiaries of any increase in value. Consequently, the creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties."); *see, e.g.,* Fleet Nat'l Bank v. Boyle, 2005 U.S. Dist. LEXIS 44036, at * 57 (E.D. Pa. Sep. 12, 2005); *In re I Successive Corp.*, 321 B.R. 640, 659 (Bankr. S.D.N.Y. 2005); *Agostino v. Hicks*, 845 A.2d 1110, 1117 (Del. Ch. 2004); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (2004); *Guttman v. Huang*, 823 A.2d 492, 500 (Del. Ch. 2003).

102. *Gheewalla*, 930 A.2d at 101–02.

103. *Id.* at 101 (“When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.”).

104. *Id.* at 103 (“Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation. To recognize a new right for creditors to bring direct fiduciary claims against those directors would create a conflict between those directors’ duty to maximize the value of the insolvent corporation for the benefit of all those having an interest in it, and the newly recognized direct fiduciary duty to individual creditors. Directors of insolvent corporations must retain the freedom to engage in vigorous, good faith negotiations with individual creditors for the benefit of the corporation. Accordingly, we hold that individual creditors of an insolvent corporation have no right to assert direct claims for breach of

In *Quadrant Structured Products Co. v. Vertin*,¹⁰⁵ a creditor brought a derivative action alleging a breach of fiduciary duty against an insolvent corporation, as allowed after *Gheewalla*. In this case, the first to address the fiduciary duties of directors in insolvency after *Gheewalla*, the Delaware Court of Chancery reaffirmed that directors owe their fiduciary duties to the corporation they manage and that, in solvency, the shareholders are the ultimate beneficiaries of those fiduciary duties, and may therefore bring actions on behalf of the corporation when those duties are breached.¹⁰⁶ In the same sense established in *Gheewalla*, when the company is insolvent, its creditors become the main stakeholders and beneficiaries of the value of the company, taking priority over the interests of the shareholders and therefore being able to indirectly bring actions for breach of fiduciary duties on behalf of the insolvent company, which is not the case in situations of solvency or close to insolvency.¹⁰⁷ In addition, given

fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation or any other direct nonfiduciary claim, as discussed earlier in this opinion, that may be available for individual creditors.”); accord *Hedback v. Tenney* (*In re Sec. Asset Cap. Corp.*), 390 B.R. 636, 642 (Bankr. D. Minn. 2008); *In re Bear Stearns Litig.*, 870 N.Y.S.2d 709, 737 (N.Y. Sup. Ct. 2008).

105. 102 A.3d 155 (Del. Ch. 2014).

106. *Id.* at 176.

107. *Id.* at 172 (“As residual claimants and the ultimate beneficiaries of the fiduciary duties that directors owe to the corporation, stockholders have standing in equity to bring claims derivatively on behalf of the corporation for injury that the corporation has suffered. When a corporation is insolvent, its creditors become the beneficiaries of any initial increase in the corporation’s value. The stockholders remain residual claimants, but they can benefit from increases in the corporation’s value only after the more senior claims of the corporation’s creditors have been satisfied. The corporation’s insolvency makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm’s value. Because the creditors of an insolvent corporation join the class of residual claimants, equitable considerations give creditors standing to pursue derivative claims against the directors of an insolvent corporation.”); see also 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, 171 (2011) (“Post-*Gheewalla*, the significance of insolvency is now clear. It marks a shift in Delaware law, though that shift does not refer to an actual shift of duties to creditors (duties do not shift to creditors). Instead, the shift refers primarily to standing: upon a

the facts of the case, Vice Chancellor Laster determined that creditors may indirectly bring actions for breach of fiduciary duties against the directors of the company and against the controlling shareholders who permit certain practices against the company, since these shareholders also owe fiduciary duties to the company in question.¹⁰⁸

On the other hand, the study of the *Quadrant* case is particularly interesting in that there is a conflict of interest between the creditors and the sole shareholder of the insolvent company insofar as the directors carry out a series of risky business decisions in an attempt to maximize the value of the company in the interest of the sole shareholder and, therefore, against the interests of preservation of the company's assets desired by the creditors. But the decision in *Gheewalla*, which is recalled in *Quadrant*, holds that a corporation in a state of insolvency puts creditors ahead of shareholders as the main stakeholders in the value of the company,¹⁰⁹ which is why the directors play a leading role in a conflict between the two types of stakeholders deriving from the duty of loyalty. The judgment emphasizes that the duty of loyalty is owed to the company in such

corporation's insolvency, its creditors gain standing to bring derivative actions for breach of fiduciary duty, something they may not do if the corporation is solvent, even if it is in the zone of insolvency. Insolvency also may involve a subtler substantive shift affecting directors' focus as they carry out their fiduciary obligations.").

108. The holding of fiduciary duties by the controlling or majority shareholders with respect to the corporation they control has been recognized in a variety of cases. *See, e.g.,* Kahn v. Lynch Commc'n Sys. Inc., 638 A.2d 1110, 1114 (Del. 1994); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109–10 (Del. 1952); Keenan v. Eshleman, 2 A.2d 904, 908 (Del. 1938); S. Pac. Co. v. Bogert, 250 U.S. 483, 487–88 (1919); *see also* J. Travis Laster, *How to Evaluate Non-Majority Control: What History and Statutes Tell Us*, 31 *FORDHAM J. CORP & FIN. L.* 1, 68–75 (2025) (highlighting recent Delaware case law finding fiduciary obligations for controlling shareholders). Similarly, in *Shandler v. DLJ Merchant Banking, Inc.*, C.A. No. 4797-VCS, 2010 WL 2929654 (Del. Ch. July 26, 2010), Vice Chancellor Strine held that a bankrupt corporation could sue another corporation, which was the controlling shareholder of the bankrupt, and the corporate directors aligned with the controlling shareholder for breach of the duty of loyalty to the extent that a transaction was approved whereby the bankrupt corporation sold a production unit to an affiliate of the controlling shareholder. *See* RADIN, *supra* note 37, at 411, 1122.

109. *Quadrant Structured Prods.*, 102 A.3d at 173.

a way that if the directors fail to act in good faith and are loyal exclusively to the shareholders to the detriment of the legal entity, there will be a breach of this duty.¹¹⁰

Indeed, the directors owe loyalty to the corporation in question and must therefore always seek to maximize the value of the company, which will be to the benefit of all stakeholders involved, mainly the shareholders in solvency and the creditors in insolvency. Thus, *Quadrant* suggests that courts may be reticent to intervene and impose significant scrutiny over decisions taken to benefit the company as a whole, particularly those decisions that benefit one group over another.¹¹¹ The court also acknowledges that directors may believe risky businesses decisions can provide high returns that significantly increase the value of the company in a state of insolvency, which benefits all stakeholders, including creditors, and should therefore be insulated from speculation by courts as to whether those decisions might benefit some residual claimants more than others.¹¹²

Thus, if the directors are loyal at all times to the legal entity and take risky decisions that finally lead to the liquidation of the company, shareholders and creditors may allege in their claims a breach of the duty of care, since wrong decisions have been taken without due diligence.¹¹³ Notwithstanding these possible allegations, it should be remembered that, in addition to the fact that *Quadrant* permits the conduct of high-risk business,

110. See *Quadrant Structured Prods. Co. v. Vertin*, 115 A.3d 535, 546–47 (Del. Ch. 2015) (Laster, V.C.) (reaffirming that “the only transition point that affects fiduciary duty analysis is insolvency itself,” that directors owe fiduciary duties “to the corporation for the benefit of all its residual claimants,” and that upon insolvency creditors replace shareholders as the principal residual beneficiaries, such that directors who act exclusively for the benefit of shareholders to the detriment of the corporate enterprise and its creditors breach their duty of loyalty).

111. See *Quadrant Structured Prods.*, 102 A.3d at 187–88 (“[W]hen directors make decisions that appear rationally designed to increase the value of the firm as a whole, Delaware courts do not speculate about whether those decisions might benefit some residual claimants more than others.”).

112. See *id.*; see also *Hedback v. Tenney (In re Sec. Asset Cap. Corp.)*, 390 B.R. 636, 642 (Bankr. D. Minn. 2008) (“[Directors of insolvent corporations] are not obligated, as a matter of law, to liquidate their corporations for the benefit of unsecured creditors, but, can pursue risky restructuring plans in good faith attempts to regain solvency.”).

113. See *Hurt*, *supra* note 17, at 269; *Rhee*, *supra* note 37, at 1157.

corporate directors are protected by the business judgment rule, so that if risky investments are undertaken in good faith, after due consideration and in the belief that such a transaction will maximize the value of the company and all its stakeholders, then there will be no liability for breach of the fiduciary duty of care.

Note at this point how the Directive adopts a contrary approach to that case law established in Delaware circa 2007. As discussed above, the Directive seems to enshrine the duty shifting that was followed by the American jurisprudential doctrine prior to 2007, which contrasts with the absence of extending fiduciary duties to creditors irrespective of the state of the company's assets as declared by Delaware case law. This circumstance could lead, a priori, to the forum shopping of many European companies fleeing to Delaware in search of greater protection for their shareholders.

Indeed, the Directive seeks to place creditors and other stakeholders on equal footing with shareholders in situations of corporate crisis and to incentivize directors to perform their duties in the interests of these stakeholders on risk of liability. In the United States, by comparison, it is assumed that the main addressees in a crisis remain the company and its shareholders, so that creditors cannot sue directors directly on the grounds of breach of fiduciary duties. In any case, the common ground between both legal systems lies in the fact that the purpose of directors' duties is the maximization of corporate value. The primary differences concern the way that maximization is achieved, particularly when conflicts arise between shareholders and creditors. European law tends to resolve such conflicts in favor of creditors, while American law resolves them in favor of shareholders.

Finally, the United Kingdom's law adds to the duty shifting included in the Directive through the "creditor duty" set forth in Section 172 (1) of the Companies Act.¹¹⁴ Section 172 of the Companies Act 2006 states that directors must act in the way they consider, in good faith, would likely promote the success of the company for the benefit of its members as a whole.¹¹⁵ However, when a company faces insolvency or is on the brink of it, the

114. Companies Act 2006, c. 46, § 172(1).

115. *Id.* § 172.

directors' obligation shifts, and they must prioritize the company's creditors' interests. This principle is often referred to as the "creditor duty."

In the UK Supreme Court decision *BTI 2014 LLC v. Sequana S.A.*,¹¹⁶ the pivotal moment, termed the "trigger point," was identified as the time at which the directors knew or ought to have known that the company was actually insolvent, bordering on insolvency or likely to go into insolvent liquidation or administration.¹¹⁷ Despite guidance from the Supreme Court, the identification of the trigger point can still be complex given that it is circumstantial. It is imperative that directors seek early advice from an insolvency professional if they are in any doubt as to the likely insolvency of the company.¹¹⁸

In clarifying the doctrinal basis for the creditor duty, and rejecting its characterization as a free-standing obligation owed to creditors, Lord Briggs wrote:

The effect of the rule is to require the directors to consider the interests of creditors along with those of members. The weight to be given to their interests, insofar as they may conflict with those of the members, will increase as the company's financial problems become increasingly serious. Where insolvent liquidation or administration is inevitable, the interests of the members cease to bear any weight, and the rule consequently requires the company's interests to be treated as equivalent to the interests of its creditors as a whole.¹¹⁹

Therefore, despite the fact that the UK is no longer part of the European Union, a convergence between the two legal systems can be observed on this point.

CONCLUSION

Insolvency law anticipates and modifies certain paradigms of corporate law the moment it recognizes that a company is in a state of financial distress, or when signs of difficulty begin to

116. [2022] UKSC 25.

117. *Id.* at [178].

118. See Lauren Hartigan-Pritchard, *Creditor Duty: What Directors Need to Know*, *THE GAZETTE* (Sep. 27, 2023), <https://www.thegazette.co.uk/all-notices/content/104195> [<https://perma.cc/9MUL-V3GY>].

119. *BTI 2014 LLC v. Sequana S.A.* [2022] UKSC 25, [11].

emerge, even absent a formal finding of insolvency or its imminent onset. This scenario also means that the addressees of the duties of the directors are the creditors together with the shareholders, insofar as the former become the main interested parties in the progress of the company in the face of the possible or probable risk of insolvency. The directors, for their part, will have to follow a business strategy that satisfies all the stakeholders involved if they want to avoid their own liability, a situation that will generate specific conflicts of interest that will have to be dealt with on a case-by-case basis.

The Directive is raising a controversial issue, which in the United States was the subject of intense debate, with the *Credit Lyonnais* ruling in 1991 establishing the extension of the duties of directors in situations of near insolvency. However, despite this ruling, there was no change in the law, nor was it ratified by the Delaware Supreme Court, and it only applied in the state of Delaware, a territory that includes the largest corporations in the United States and in the world. However, in 2007, this situation changed with the *Gheewalla* case, in which the Delaware Supreme Court established that in no case, not even in situations of near insolvency, are creditors beneficiaries of the fiduciary duties of directors, and therefore creditors cannot bring direct actions against the corporate managers for breach of those duties. This situation means that American law is not a good mirror for the Directive, since it would be inspired by a doctrine that changed radically in 2007, thus going against what is currently applicable in that country.

The Directive leaves European member states free to protect the interests of creditors in ways they consider best when a firm is in the likelihood of insolvency, either by establishing specific duties for directors in relation to that group of interest (as is the case in Italy) or, on the other hand, by not adding new duties to those already existing under corporate and bankruptcy law and leaving the directors to integrate in their actions all the interests that may arise in a given situation (as is the case in Spain).

From my point of view, the best solution to this problem is the application of the general duties established in corporate law for directors in the sense that directors have a duty of care and a duty of loyalty to the company in order to maximize the value of the firm. So, directors are required to act in the best interest of the

corporation even if the firm becomes factually insolvent or is in the likelihood of insolvency.

Thus, directors' duties remain unchanged in the zone of insolvency. The key distinction between solvent and insolvent companies lies in who indirectly bears the costs and benefits of the managers' decisions: shareholders in solvent firms, and creditors in insolvent ones. Regardless of the firm's financial state, the company itself directly absorbs the potential gains and losses, and directors are obligated to maximize the firm's value by selecting investment projects with the highest net present value. When the company is solvent, this duty indirectly affects shareholders. When it is insolvent, the impact shifts to creditors—particularly those who become the firm's residual claimants.¹²⁰

To proceed otherwise would be very detrimental to the freedom of action of directors and would jeopardize their way of acting, making people not want to be company directors.

120. Gurrea, *supra* note 4, at 385.