The eXit Files

Best Path/Practical Issues to Exiting Chapter 11 Cases

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A. "Take me to Your Leader"

A key step in developing a successful path to exit from Chapter 11 is to ensure that the business leaders of your client understand the overlay of fiduciary duty upon their decision-making process.

The fiduciary duties that officers and directors[1] owe to a corporation and its shareholders are often articulated as the twin duties of "care" and "loyalty," along with an ancillary duty of "good faith." In order to be protected by the business judgment rule, the board must satisfy:

- a duty of loyalty, which requires the directors to act in good faith with no interest contrary to that of the corporation, and

- a duty of care, which requires the directors to exercise a reasonable degree of care in making decisions.[2]

In general terms, the duty of loyalty prohibits a director from using his or her corporate position to make a personal profit or otherwise receive some personal advantage at the corporation's expense.[3] The duty of loyalty embraces the principle that directors must act in good faith.[4] In order to be afforded the protections of the business judgment rule, directors must be disinterested with respect to the action they are approving.[5] If a director is not disinterested, such director is not entitled to the protections of the business judgment rule.

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[1]The Delaware Supreme Court has clarified that corporate officers owe the same duties as directors. *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009) ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold."). The Court noted, however, that the fact that officers owe the same duties "does not mean . . . that the consequences of a fiduciary breach by directors or officers, respectively, would necessarily be the same. Under 8 Del. C. § 102(b)(7), a corporation may adopt a provision in its certificate of incorporation exculpating its directors from monetary liability for an adjudicated breach of their duty of care. Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers." *Id.* at 709 n. 37.

[2]Some courts articulate the rule as a presumption that shields corporate decision makers and their decisions when the following elements are present: (a) a business decision, (b) disinterestedness, (c) due care, (d) good faith, and (e) according to some courts and commentators, no abuse of discretion or waste of corporate assets. *See Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.),* 147 B.R. 650, 656 (S.D.N.Y. 1992).

[3]Jean Allard et al., *Corporate Directors Guidebook* at 12 (2nd ed. 1994); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("Essentially, the 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.").

[4]*Stone v. Ritter*, 911 A.2d 362, 370-71 (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.'") (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n. 34 (Del. Ch. 2003).

[5]*Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d. 244, 254 (Del. 2000) (stating that "directors can neither appear on both sides of a transaction nor expect to

Unlike the threshold inquiry of whether a director has satisfied his or her duty of loyalty, the determination of whether a director has met his or her duty of care requires at least some judicial review of the decision making process used by directors.[6] This review centers on whether the board was adequately informed and came to a decision supported by the information available to the board. If the directors made a well-informed decision, based on the information reasonably available to them at the time, the directors will be deemed to have satisfied their duty of care and their decision will be protected by the business judgment rule regardless of the outcome of their decision.

From a practical perspective, officers and directors charged with developing or approving an exit strategy may be contemplating several different, and sometimes conflicting, considerations. For example, directors may be facing cancelation of substantial equity positions based on a potential plan of reorganization that distributes some or all of the equity in the reorganized company to debt holders. Officers may be evaluating prospective exit strategies (including going-concern sales or liquidation) that eliminate the need for their continued employment or trigger substantial retention bonus payments. Both groups may face confirmation objections regarding plan provisions that contain releases and injunctions preventing post-confirmation claims against officers and directors. As officers and directors deal with each of these issues, they must put their personal biases aside and carefully and in good faith develop an exit strategy that serves the best interests of the company. It is incumbent on counsel for the company to explain these obligations to the company's leaders and guide them through the decision-making process.

B. "The Truth is Out There"

One of the most noteworthy characteristics of Chapter 11 is the flexibility it provides for the debtor to develop an appropriate exit strategy. With this flexibility as a backdrop, another critical step in the path to Chapter 11 exit is identifying the appropriate vehicle for the journey.

Many debtors intend to implement an exit strategy that will simply reduce or otherwise modify their debt obligations to facilitate more profitable post-confirmation operations. Such debtors generally retain all of the estate assets necessary to run the business after emergence, as permitted by Bankruptcy Code section 1123(a)(5)(A). However, this approach is only one of the many alternatives available to a debtor. Bankruptcy Code section 1123 identifies various actions permitted under a plan of reorganization, including asset transfers and sales, merger or consolidation of the debtor with other parties, cancellation or modification of indentures, extension of terms of outstanding securities, and the issuance of securities, among others.[7]

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derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally").

[6]Simon M. Lorne and Joy Marlene Bryan, *Acquisitions and Mergers; Negotiated and Contested Transactions, 11 Acquisitions & Mergers* §2:5 (2001).

[7]*See* 11 U.S.C. § 1123(a)(5)(B), (C), (D), (F), (H), (J).

Of course, a healthy operating emergence with retention of all estate assets is not always possible. One of the means for implementation listed in section 1123(a) is the "sale of all or any part of the property of the estate…or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate."[8] Similarly, Bankruptcy Code section 1123(b) allows a plan to "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests."[9] Bankruptcy Code section 1129 further provides that, in order for a Chapter 11 plan to be confirmed, the court must find that confirmation "is not likely to be followed by the liquidation…of the debtor or any successor to the debtor under the plan, unless such liquidation…is proposed in the plan."[10] In fact, the use of Chapter 11 to effectuate one or more sales of the debtor's assets has become a staple of modern bankruptcy practice.

Chapter 11 does not require a "one size fits all" approach to exit strategy formulation. In fact, creative solutions are often the most successful. The difficulty often arises in matching the correct strategy to the situation at hand, and legal practitioners and their financial advisory counterparts should assist their clients in an honest assessment of their ability to emerge as a going concern, the prospects for a sale of the business, or some more unique outcome that serves the bests interests of the debtor and its estate.

C. "Danger, Will Robinson"

During the quest to develop and implement the plan for exiting Chapter 11, the debtor must remain focused on day-to-day survival of its business while making progress toward its bankruptcy-based goals. Otherwise, the exit that the debtor is so carefully crafting may never be achieved, and creditors or other parties-in-interest may force their own form of exit upon the debtor.

In this regard, one of the clear dangers is conversion of the Chapter 11 case to Chapter 7. Section 1112 governs motions by parties-in-interest to convert cases under Chapter 7 of the Bankruptcy Code and provides, in relevant part, that:

> Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.[11]

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[8] 11 U.S.C. § 1123(a)(5)(D).

[9] 11 U.S.C. § 1123(b)(4).

[10] 11 U.S.C. § 1129(a)(11).

[11] 11 U.S.C. § 1112(b)(1).

Section 1112(b) provides examples of what constitutes "cause" for conversion, including, among others,

> (i) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
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> (ii) gross mismanagement of the estate;
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> (iii) failure to maintain appropriate insurance that poses a risk to the estate or to the public;
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> (iv) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
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> (v) failure to comply with an order of the court;
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> (vi) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
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> (vii) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
>
> (viii) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court; and
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> (ix) inability to effectuate substantial consummation of a confirmed plan.[12]

Courts have explained that the list of examples is not exhaustive and they can use their equitable powers to reach an appropriate result in individual cases.[13] The parameters of "cause" are omitted from the statute to allow for maximum flexibility and to enable a bankruptcy court to convert a Chapter 11 case for any equitable reason constituting an abuse of the bankruptcy reorganization process.[14] The decision to convert any case is within the sound discretion of the court, and courts have broad discretion in determining whether sufficient cause exists to grant a motion to convert.[15]

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[12] 11 U.S.C. § 1112(b)(4)(A), (B), (C), (D), (E), (F), (I), (J), (M).

[13] *See C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 113 F.3d 1304, 1311 (2d Cir. 1997); *see also In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 358 (Bankr. S.D.N.Y. 2001) ("[C]onsistent with section 1112(b)'s use of introductory words 'includes,' it is well established that the listed factors are not exclusive.").

[14] *See In re Hampton Hotel Investors, L.P.*, 270 B.R. at 358 (citing *In re HBA E., Inc.*, 87 B.R. 248, 258 (Bankr. E.D.N.Y. 1998).

[15] *Id*. at 359; *In re Syndicom Corp*., 268 B.R. 26, 43 (Bankr. S.D.N.Y. 2001).

Another risk to a healthy exit strategy is termination of the exclusive periods for filing and confirming a plan of reorganization. Bankruptcy Code section 1121 provides that only the debtor may file a plan of reorganization in the first 120 days after the petition date. Similarly, only the debtor may solicit votes on the plan within the first 180 days after the petition date. After the expiration of these periods, any party-in-interest may submit a plan of reorganization.[16] In addition, the plan exclusivity periods may be increased ***or decreased*** for "cause," a decision that rests within the sound discretion of the bankruptcy judge.[17]

The Bankruptcy Code also fails to define "cause" in this context. Courts have identified a number of factors that should be considered in determining whether cause exists to shorten or extend the debtor's exclusivity periods. Those factors include:

(a) the size and complexity of the case;

(b) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information to allow a creditor to determine whether to accept such plan;

(c) the existence of good faith progress towards reorganization;

(d) the fact that the debtor is paying its bills as they become due;

(e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;

(f) whether the debtor has made progress in negotiations with its creditors;

(g) the amount of time that has elapsed in the case;

(h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and

(i) whether an unresolved contingency exists.[18]

In light of the factors that can serve as cause for either involuntary conversion or termination of exclusivity, particularly those based on lack of progress toward reorganization, at all times the debtor must be diligently developing and implementing an exit strategy. In

[16]*See* 11 U.S.C. § 1121(c).

[17]*See* 11 U.S.C. § 1121(d); *In re Pub. Serv. Co. of N.H.*, 88 B.R. 521, 534 (Bankr. D.N.H. 1988) (Section 1121(d) "has been construed to leave the question to the reorganization court in the exercise of its discretion and to promote maximum flexibility to suit various types of reorganization proceedings").

[18]*In re Adelphia Commnc's Corp.*, 336 B.R. 610, 674 (Bankr. S.D.N.Y. 2006) (citing *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997) and *In re Express One Int'l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996)).

addition, providing the bankruptcy court and key creditors with information regarding such progress is essential in avoiding allegations that the case is not on track toward exit. A significant stumble along the path to exit (or sometimes the mere perception of a stumble) could lead to a party-in-interest taking control of the debtor's future, an outcome that few debtors would find acceptable.

D. "We are Not Alone"

The final step in developing a successful Chapter 11 exit is to develop a confirmable plan that is acceptable to some portion of the creditor body. Achieving plan support is often the most difficult obstacle on the path to exit, especially when the estate has scant resources available to satisfy creditors' claims.

Of course, all debtors would prefer to develop a plan of reorganization that is generally accepted by all of classes of creditors. A plan that results in the affirmative vote of more than two-thirds in amount of claims voted, and more than one-half in number of the creditors actually voting in that class, can be confirmed if it satisfies the requirements of Bankruptcy Code section 1129(a), including, among others, that the debtor has complied with all Code requirements, that the plan was proposed in good faith, that the plan is feasible, and that each creditor has accepted the plan or will be paid at least as much as it would have received in a Chapter 7 case.[19]

Some debtors do not have the luxury of affirmative consent among all members of the creditor body and instead have to "cramdown" their plan over one or more negatively-voting creditor classes. In order to achieve plan confirmation in a "cramdown" scenario, the plan must satisfy all of the same section 1129(a) requirements as a consensual plan (other than obtaining affirmative votes of all classes), at least one impaired class of creditors must vote to accept the plan,[20] and, finally, the plan cannot discriminate unfairly and must be fair and equitable.[21]

"Unfair discrimination" is not defined in the Bankruptcy Code, and courts have broadly construed the term to require treatment of each class of creditors in a manner that allocates value consistent with the manner in which other classes with similar legal claims are treated.[22]

In contrast, "fair and equitable" treatment is explained in detail in the Bankruptcy Code. With respect to secured creditors, a plan is fair and equitable if either: (1) the secured creditor (i) retains its lien in the collateral to the extent of the allowed amount of the secured claim, and (ii) receives *deferred cash payments* which total the allowed amount of the claim and which have a present value equal to the value of the collateral; or (2) the secured creditor realizes the "indubitable equivalent" of its secured claim pursuant to the plan.[23] With respect to unsecured

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[19]*See* 11 U.SC. § 1129(a).

[20]*See* 11 U.SC. § 1129(a)(10). In determining acceptance by an impaired class, the affirmative votes of insiders are not counted. *Id*.

[21]11 U.SC. § 1129(b)(1).

[22]*See In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 228-32 (Bankr. D.N.J. 2000).

creditors, a plan of reorganization is "fair and equitable" if either: (i) the holders of claims in the unsecured class receive *property* under the plan having a present value equal to the amount of the claim; or (ii) no class junior to the dissenting class receives anything under the plan (also known as the "absolute priority rule").[24]

Some debtors formulate their entire exit strategy around the plan acceptance framework described above. In other words, a debtor may start the process by determining first if a fully consensual arrangement may be possible and, if not, quickly pivoting to exploration of a solution that may be acceptable to at least one class of impaired creditors. In some situations, including companies with few creditor classes, working backwards in this manner produces a quick path toward a confirmable plan. Other cases, particularly those with more complicated operations and capital structures and disparate creditor groups, require a more linear approach that starts with an analysis of the debtor's current finances and future prospects and concludes with a pitch to creditors based on a treatment scheme that the debtor's resources and future operations can support.

Regardless of whether the debtor implements a forward-facing approach or works backward from the minimum affirmative consents needed to confirm a plan, in order to obtain "buy-in" from the requisite creditor class or classes, the debtor must establish believability and trust. In almost every case, this trust requires the debtor to implement an honest and forthcoming approach to creditor interactions, sharing both positive developments and the often severely negative circumstances present in distressed situations. While the creditors may not always like the debtor's message, if they believe that the debtor is acting in the manner that maximizes recovery, they will likely support the debtor's exit strategy.

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[23]*See* 11 U.S.C. 1129(b)(2)(A). If a secured creditor's property is sold pursuant to Bankruptcy Code section 363 free and clear of the secured creditor's liens with such liens attaching to the sale proceeds, then the sale proceeds must satisfy these requirements as well. 11 U.S.C. 1129(b)(2)(A)(ii).

[24]*See* 11 U.S.C. § 1129(b)(2)(B).

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Byrnie Bass graduated from Baylor University in 1969 with a B.A. Degree and received his Juris Doctor from the University of Texas in 1972. Since that time, he has been engaged in the private practice of law in Lubbock.

Mr. Bass is a past President of the West Texas Bankruptcy Bar Association, the Lubbock County Bar Association and is a Texas Bar Foundation Fellow. Mr. Bass is a frequent speaker at Texas State Bar institutes and seminars around the Country. He was five times Chairman and Co-Chairman of the Farm Ranch and Agri-Business Bankruptcy Institute (West Texas Bankruptcy Institute) sponsored by the West Texas Bankruptcy Bar Association and the Texas Tech University School of Law. He also has served on the Planning Committees for the State Bar's Advanced Consumer Bankruptcy Course, Advanced Business Bankruptcy Course and also for the University of Texas Law School's annual Jay Westbrook Bankruptcy Conference having also chaired that Committee in 1991. In 2003, Mr. Bass was selected to and inducted into the membership of the American College of Bankruptcy (Fellows, 15^{th} Class). In 2010-2011, he served as Chair of the State Bar's Bankruptcy Section. For the past eleven years he has been on Texas Monthly's list of "Super Lawyers" (makes one suspect the list).

An avid golfer, Mr. Bass served as a Marshall at the 1999 and 2000 Masters in Augusta, Georgia. He is a past-president of Lubbock Country Club. He also likes smoky bars and music, particularly the blues, rock and funk. Active in civic affairs, he has served as Chairman of the Lubbock Arts Festival and currently serves on the Lubbock Chamber of Commerce Board of Directors, where he previously served as Chairman in1991-92. He also currently serves on the Lubbock United Way's Board of Directors, chaired the Professional Division of the Lubbock United Way's 2011 fundraising campaign, and was Chair of Lubbock's United Way fundraising campaign for 2014.

He and his wife, Sharon, (Executive Director of the Volunteer Center of Lubbock) to whom he has been married for 47 years, have two sons. Roy Byrn Bass, III (Rob), age 39, is a guitar player and writer, college tutor, private music instructor, and an honor graduate of Texas Tech University. He received his Masters in creative writing through Goddard College in Vermont and currently lives in Austin with his wife Catherine and daughter, Miller, who's 7 years old, already past gorgeous, and who gets anything she wants from "Pa". Their other son, Brett, is 35 and is a professional musician who headquarters in New York City. He has toured the world and made numerous network television appearances as the bass player for pop rock international superstar Enrique Iglesias, singer/songwriter Regina Spektor, European rock star Anastasia, legendary blues singer Darlene Love, funk rock star Bernie Worrell, Chris Barron, former lead singer for the popular 90's rock group, the Spin Doctors, and The Dan Band, a comedy wedding band with several movie appearances to its credit. Brett can flat play that bass.

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Preserving Claims in Chapter 11 Plans – State Bar of Texas: 30th Annual Advanced Business Bankruptcy Course, September 12, 2012 Presentation

Bankruptcy Pitfalls in Civil Trials: A Litigator's Guide to Bankruptcy
State Bar of Texas: Advanced Civil Trial Course 2010, San Antonio, Dallas and Houston, Texas

Accrual Rule vs. Payment Rule: Conflicting Interpretations of the Obligations of a Chapter 11 Debtor under 11 *U.S.C. sec. 365(d)(3)*
Tarrant County Bankruptcy Bar, November 15, 2004

A Potpourri of Bankruptcy Issues: Administrative Claims, The Reading Exception, Preference Claims and Burdens of Proof
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Insurance and Bankruptcy: It's All Clear as Mud - A Basic Primer
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Dick Harris graduated from Texas Tech University in 1974 and from Texas Tech University School of Law in 1976. His practice includes representing creditors and debtors in consumer and business cases. Dick Harris has been certified by the Texas Board of Legal Specialization in both Business and Consumer Bankruptcy Law since 1988. He is a member of the American Bankruptcy Institute, the College of the State Bar of Texas and the Texas Bar Foundation. He is a past vice president and director of the Abilene Bar Association and past chairman of the Texas Bar Association Region 14D Grievance Committee. He is licensed in the State of Texas, the Northern District of Texas and the Fifth Circuit Court of Appeals.

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Ian Peck is the Chair of the firm's Bankruptcy and Business Restructuring section and a well-known restructuring lawyer who has handled numerous complex Chapter 11 bankruptcy cases, out-of-court workouts, and distressed mergers and acquisitions transactions across a broad array of industries. Ian understands that debt restructuring or bankruptcy can often be the most stressful and critical event in a client's history and brings a sense of calm determination to each restructuring engagement.

Ian's experience includes leading roles in some of the largest bankruptcy cases in recent history, serving as lead counsel for a bankrupt bank holding company facing claims of over $2 billion and representing one of the world's largest generators and marketers of electricity in its successful Chapter 11 reorganization. Ian also has extensive experience in middle-market cases, recently guiding one of the largest retail liquor chains in Texas through bankruptcy and previously representing a four-hundred store furniture retailer in its Chapter 11 case. Outside of the courtroom, Ian has helped several companies renegotiate their financial and contractual obligations to avoid contentious litigation or lengthy reorganization proceedings.

Ian frequently speaks throughout the country on bankruptcy topics, including various Chapter 11 plan issues and transportation company bankruptcies. Ian is also a prolific author, having published scholarly articles throughout his career and recently serving as a contributing author to the new *Bloomberg Law: Bankruptcy Treatise*, the first comprehensive bankruptcy treatise published in the last 40 years.

Ian is active in the American Bankruptcy Institute and the Dallas Bar Association. Ian has also served the community through his pro bono work, including obtaining asylum in the United States for a client who was violently persecuted in her native country.

Professional Recognition

- Recognized by *The Best Lawyers in America,* Woodward/White, Inc., in Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation - Bankruptcy, 2014-2016
- Recognized in *Texas Super Lawyers*, Thomson Reuters, 2013-2015
- Recognized as a leading lawyer in Texas for Bankruptcy, *Chambers USA*, Chambers & Partners, 2012-2016
- Recognized by *D Magazine,* D Magazine Partners, in Best Lawyers of Dallas, 2015
- Selected for inclusion in *Texas Super Lawyers* - Rising Stars Edition, Thomson Reuters, 2004-2012
- Chosen by his peers as one of Fort Worth's Top Attorneys in Bankruptcy in *Fort Worth, Texas* magazine, 2005-2013

Professional and Community Activities

- State Bar of Texas
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