Lowenstein Sandler

Insurance Recovery

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SVB Bankruptcy Court Grants Executives Access to Defense Costs Under D&O Insurance Policies

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When a company enters bankruptcy, directors and officers (D&O) insurance policies become a critical asset, which can spark a dispute between directors, officers, and creditors. Creditors want to preserve the D&O policies' limits to maximize recovery for their potential claims, while directors and officers want to access the D&O policies to defend and resolve claims asserted against them (whether inside or outside of bankruptcy).

This recently became a point of contention after Silicon Valley Bank (SVB) collapsed in March. Since then, seven putative securities class actions have been filed against certain SVB directors and officers (Executives) along with several nonpublic regulatory investigations of the Executives. After the Executives sought coverage from the D&O insurers, the insurers advised the Executives that they would need a court order to advance defense costs under the policies, which provide $210 million in coverage.

The Executives filed a motion with the bankruptcy court to obtain that court order, but the unsecured creditors' committee (Committee) objected. The Committee argued that, because the policy also covered SVB for its alleged wrongful acts, the policy proceeds were the property of the Debtor's estate. Further, the Committee claimed that "uncontrolled payment of defense costs has the potential to severely diminish available proceeds that would otherwise inure to the benefit of the Debtor's estate." The Committee requested that, if the court permits access to these proceeds, it impose a "soft cap" and monthly reporting requirements regarding amounts disbursed.

Last week, the court granted the Executives' motion allowing access to the D&O policy proceeds, finding that it "will not result in substantial interference with the bankruptcy case" and that advancing defense costs "is critical to the [Executives'] ability to present defenses to the Covered Claims." The court relied on the policies' "priority of payments" provision, which states that if "payments are due to both the Debtor and the Directors & Officers at the same time, the Directors & Officers should be paid first." The court held that because "the Debtor is last in line for the insurance proceeds" and it is "merely speculative" whether the Debtor will need insurance proceeds, the Executives were permitted immediate access to the policies.

While the court imposed periodic reporting requirements, it declined to go further and impose a soft cap on the defense cost payouts under the policies, which bankruptcy courts have done before. Thus, the court distinguished its 2012 decision in *MF Global* because, unlike in that case, the policies here have a "priority of payment provision[, which] means that the Directors and Officers are entitled to have their claims paid first." *See In re MF Glob. Holdings Ltd.*, 469 B.R. 177 (Bankr. S.D.N.Y. 2012).

This decision serves as a reminder that the words in D&O policies matter. Directors and officers who count on their D&O policies to protect their personal assets should actively participate in the purchase and negotiation of these policies to ensure that they contain the type of priority-of-payments provision seen here, which precluded the court from limiting access to needed coverage. Failing to be diligent when D&O insurance is purchased may expose directors and officers to unexpected and unwelcome coverage disputes when a robust and immediate defense is needed. Experienced coverage counsel can help companies and their directors and officers review their policies and negotiate any necessary improvements to their D&O coverage.

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