



AMERICAN
BANKRUPTCY
INSTITUTE

Southeast Bankruptcy Workshop

Coverage Under Fire: D&O Insurance and Self-Insured Retention Policies (SIRs)

John Elrod

Greenberg Traurig, LLP | Atlanta

Jason D. Horwitz

CAC Specialty | Chicago

Laura Marcero

MERU | New York

Matthew Michael Weiss

Parker, Hudson, Rainer & Dobbs LLP | Atlanta



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D&O Considerations

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D&O Considerations from Fiduciary Point of View

- Interim Management positions and Board of Directors need adequate, confirmed coverage before accepting position
 - Full policy review for exclusions and limitations – *CAC is a great resource for this!*
 - Inquire as to claims made against the policy
 - Determine if policy is sufficient or whether increase in coverage or supplemental Side A is necessary (side A usually always necessary)
- Consider risk inherent in the industry and circumstances
 - Is litigation common in the industry
 - Has the company engaged in any activities that could reasonably lead to litigation or pursuit
- Composition of the Board and Strength of Executive Management Team
 - Are there real/perceived conflicts that could affect decisions
 - Have any board members been pursued on other cases
 - Is there an Independent Director with the appropriate authority (or are you undertaking that role)
 - Strength of counsel
- **Adequate insurance, in sole discretion, should be a CP to accepting either type of role**

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D&O Considerations from Fiduciary Point of View

Risk of Industry and Situation

- Industry Risks
 - Employee injuries
 - Restaurants/fast casual
 - Dangerous conditions (operating heavy machinery, certain manufacturing, transportation)
 - Customer litigation
 - Prison healthcare
 - Gyms/Fitness
 - Travel & Leisure
 - Food manufacturing
- Situation Specific Risks
 - Challenging accounting/financial concerns
 - History of litigation or recent allegations
 - Significant management turnover
 - Fraud or misappropriation of funds
 - Overactive sponsor

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D&O Considerations from Fiduciary Point of View

Composition of the Board & Strength of Executive Management Team

- Board Considerations
 - Who is on the Board, who selected them, and how long have they been on
 - Does the Board function in a collaborative and constructive manner
 - Is there one constituent that could effectively control the Board and decisions
 - What is the role of the Special Committee?
 - Restructuring Activities/Conflict Matters
 - Direction of Executive Management
 - Investigations
- Executive Management Team
 - How long in her/his position (and of the collective team)
 - Industry experience
 - Perceived ability and willingness to handle stress of restructuring situation
 - Adequate retention programs
 - Ability to replace key management, if necessary

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Faculty

John D. Elrod is a shareholder with Greenberg Traurig LLP in Atlanta, where he focuses his practice on bankruptcy, creditors' rights and commercial litigation. He regularly represents secured lenders, indenture trustees, creditor committees, estate fiduciaries and other parties in commercial bankruptcies, out-of-court restructurings and litigation. Mr. Elrod's industry experience includes insolvency matters in the automotive, health care, financial services, restaurant and retail sectors. He also has wide-ranging experience in litigation involving complex fraudulent transfers, corporate director and officer fiduciary-duty claims, and public finance matters. Mr. Elrod has broad experience in federal, state and bankruptcy courts throughout the U.S. He was a member of the winning team that received the Global M&A Network's Turnaround Atlas Awards, "Energy Services Restructuring of the Year (Mid-Markets)," for Shale Support Global Holdings in 2021, and he has been listed in *Georgia Super Lawyers* (2016-22). He also was a member of the winning team for The M&A Advisor's Turnaround Awards, "Sec. 363 Sale of the Year (\$25MM to \$100MM)," for the § 363 sale of Last Call Guarantor, LLC in 2017, and he has been listed in *Georgia Trend* magazine's "Legal Elite" from 2012-13 and 2015-16, and in *Chambers USA* from 2013-14. Mr. Elrod is a member of ABI and the Turnaround Management Association's Education Oversight Committee, as well as the Commercial Finance Association. He is admitted to practice in Alabama, Florida, Georgia and Tennessee. He received his B.A. in 1997 from the University of the South and his J.D. in 2001 from Samford University Cumberland School of Law.

Jason D. Horwitz leads CAC Specialty's Special Situations Group and is a member of CAC's Management Committee and M&A Solutions Group Executive Committee in Chicago. He focuses on providing insurance solutions to distressed and bankrupt companies. Mr. Horwitz is responsible for advising clients during times of crisis and transition on strategies surrounding personal asset risk, liquidity solutions and insurance cost reduction. He also advises clients on M&A/transactional insurance issues, including representations and warranties, contingent liability/litigation, successor liability and fraudulent conveyance risk. Prior to joining CAC, Mr. Horwitz was an attorney concentrating first on insurance defense and coverage issues, then corporate restructuring. He practiced bankruptcy law for eight years at Kirkland & Ellis and Perkins Coie, both in Chicago. While practicing, he worked on several debtor engagements, including United Airlines, The Fleming Companies, Exide Technologies, Tower Automotive, Consec, Humphries, Foster & Gallagher, Chicago H&S Hotel Property and Glazed Investments. Mr. Horwitz next spent nearly six years as a bankruptcy consultant and director of business development in the bankruptcy administration industry. Immediately preceding his time at CAC, he led the same distressed/bankruptcy practice at another global insurance broker. His clients have included GNC, Gibson Brands, Ascena Retail, 24 Hour Fitness, Z Gallerie, Exide Technologies, Frontier Communications, Windstream, Lantern Entertainment (f/k/a The Weinstein Company), Aegean, syncreon, Covia Holdings, Valaris, GenOn, Energy Future Holdings, Patriot Coal, Sabine Oil & Gas, Magnum Hunter and Murray Energy. Mr. Horwitz is a frequent speaker on bankruptcy issues in D&O insurance. He received his B.A. with honors from Michigan State University in international relations and his J.D. with honors from DePaul University College of Law, where he was admitted to the Order of the Coif.