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INDEPENDENT DIRECTORS IN CHAPTER 11: GOVERNANCE BENEFITS AND IMPLICATIONS FOR TRADITIONAL CREDITOR OVERSIGHT

In this article, the authors examine the growing trend of distressed companies appointing independent directors to investigate and resolve potential insider claims in advance of a bankruptcy filing in ways that displace the traditional oversight roles of other estate fiduciaries, like the official creditors' committee, in chapter 11 cases. Using the recent Vanderbilt Minerals case as an illustration of this practice, the authors explore the debate over whether independent directors offer a genuinely efficient and cost-effective alternative to committee-led investigations and litigation, or whether they present a structural risk to the creditor protections built into the Bankruptcy Code.

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Chapter 11 of the Bankruptcy Code is built on principles of transparency and meaningful participation by stakeholders. While the Code allows the debtor's management to remain in control, it does so within a framework that affords all parties in interest the opportunity to evaluate, scrutinize, and, if necessary, challenge the actions that impact them. Traditional aspects of chapter 11 practice that facilitate this transparency and oversight include the Office of the United States Trustee, the appointment of an official committee of unsecured creditors, and, in appropriate cases, the appointment of an examiner or chapter 11 trustee. Together, these safeguards ensure that decisions affecting estate value and creditor recoveries are subject to informed review by stakeholders who bear their consequences. However, they also often result in a substantial increase in administrative expenses that threaten to erode value. For example, creditors' committees often retain counsel and other advisors to perform expensive investigations into the prepetition decisions by the chapter 11 debtor that led to the bankruptcy filing to determine whether there are valuable causes of action that could augment creditor recoveries.

To address this, chapter 11 debtors have more recently explored alternative ways to shift the responsibility for investigating and pursuing claims and causes of action from traditional estate fiduciaries, like unsecured creditors' committees, to specialized bankruptcy directors. Borrowed from corporate law's special committee practice, these independent directors are typically designated by the debtor's own board or equity sponsor and are given a mandate to investigate and resolve all potential claims shortly before, and in anticipation of, a bankruptcy filing. Then, upon a bankruptcy filing, the investigation and resolution of these claims are presented to the bankruptcy court for approval as the product of a neutral, arm's-length process led by the independent director. As these

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