Chapter 11's *Van Gorkom* Moment?

Diane Lourdes Dick*

I.

In *Taking Corporate Bankruptcy Fiduciary Duties Seriously*, Professor Stephen Lubben challenges bankruptcy courts to reimagine the role of fiduciary duties in Chapter 11 bankruptcy proceedings—including duties that arise under state corporate laws and those that arise under federal bankruptcy law.[1] Professor Lubben argues that the most vexing problems plaguing modern corporate bankruptcy restructurings—such as opportunistic behavior by debtors and dominant stakeholders that is costly for the distressed company and the system as a whole—can be traced back to an unwillingness by courts and litigants to seriously enforce the debtor's fiduciary duties.

Professor Lubben is not the first legal academic to address the thorny intersection of fiduciary duties and the bankruptcy process. Professor Kelli Alces wrote about the issue in one of her earliest works,[2] and, more recently, Professor Christopher Hampson provides a comprehensive review of the role of fiduciaries in bankruptcy—focusing not only on the debtor but other fiduciaries as well.[3]

But Professor Lubben reminds us that while fiduciary duties are frequently mentioned in bankruptcy filings and proceedings, they are rarely applied in any meaningful way. Debtors seem reluctant to exercise their fiduciary duties to drive hard bargains with their dominant stakeholders. And, in the rare conflicts that demand a judicial resolution, bankruptcy courts have been reluctant to hold corporate debtors—or their boards—liable for breaches of their fiduciary duties so long as debtors make a reasonable showing that they have acted in the best interests of the corporation and sought to preserve and enhance the value of the debtor's estate.[4] Lamenting this reality, Professor Lubben's Article concludes with the following observation: "Chapter 11 is waiting for its *Van Gorkom* moment." The reference to the groundbreaking Delaware Supreme Court[5] ruling is a poignant reminder that legal standards change over time, either because courts interpret the law in new ways or because parties proactively adjust their behavior, eventually leading to a shift in customary practice.

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*Charles E. Floete Distinguished Professor of Law, University of Iowa College of Law. I owe a debt of gratitude to Joseph Yockey for his helpful comments and insights.

1. Stephen J. Lubben, *Taking Corporate Bankruptcy Fiduciary Duties Seriously*, 49 J. CORP. L. 549 (2024).

2. *See generally* Kelli A. Alces, *Enforcing Corporate Fiduciary Duties in Bankruptcy*, 56 KAN. L. REV. 83 (2007).

3. *See generally* Christopher Hampson, Bankruptcy Fiduciaries (Feb. 18, 2024) (unpublished manuscript) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4730736).

4. The filing of a bankruptcy petition creates an estate that includes "all legal or equitable interests of the debtor in property." 11 U.S.C. § 541(a).

5. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

To help reshape the role of fiduciary duties in modern bankruptcy practice, Professor Lubben provides a useful blueprint for how debtors may use their fiduciary duties to address some of the most egregious examples of opportunistic behavior in large chapter 11 cases. For instance, Professor Lubben details how debtors can and should be mindful of their fiduciary duties as they enter into and continue to adhere to so-called restructuring or plan support agreements.

However, challenges remain in applying Professor Lubben's thoughtful recommendations to the practical realities of chapter 11 bankruptcy. In this Essay, I introduce a recent and ongoing bankruptcy case to demonstrate both the importance and timeliness of Professor Lubben's analyses, as well as the difficulties bankruptcy courts and litigants encounter as they endeavor to apply fiduciary duties in a meaningful way. That case involves CorEnergy Infrastructure Trust, Inc. ("CorEnergy"), a publicly traded real estate investment trust ("REIT") that owns energy properties such as oil pipelines and storage terminals. CorEnergy filed for federal bankruptcy protection under chapter 11 of the U.S. Bankruptcy Code[6] on February 24, 2024, in the U.S. Bankruptcy Court for the Western District of Missouri.[7]

As a case study, *CorEnergy* presents all of the issues Professor Lubben highlights in his Article: while the debtor's fiduciary duties have been raised early and often by multiple parties, they tend to serve a mere rhetorical function, helping parties develop more persuasive litigation positions as they work to advance their economic interests. The case also features a restructuring support agreement that binds the debtor and its senior creditors with aggressive timelines and milestones. In the following sections, I provide a detailed account of *CorEnergy*; in so doing, I showcase the strengths of Professor Lubben's insightful critique and highlight opportunities for further reflections on the role of fiduciary duties in modern corporate bankruptcy practice.

II.

As a REIT, CorEnergy can avoid liability for federal corporate income taxes if, among other things, it primarily engages in the ownership, operation, and financing of income-producing real estate assets and distributes at least 90% of its taxable income to its shareholders.[8] CorEnergy would have little difficulty meeting the standard, as it regularly leases out its properties to generate returns. In a declaration accompanying CorEnergy's bankruptcy petition, the company's chairman and chief executive officer explained that in recent years CorEnergy's business focused on owning and operating a Missouri natural gas pipeline and certain California crude oil pipelines.[9]

The company's financial troubles began to mount during the pandemic, when "crude oil prices fell briefly into negative territory for the first time in history pushing the lessors

6. All references in this Article to the "Bankruptcy Code" or "the Code" refer to the U.S. Bankruptcy Code, Title 11 U.S.C.

7. Voluntary Petition for Non-Individuals Filing for Bankr., *In re* CorEnergy Infrastructure Tr., Inc., No 24-BK-40236, (Bankr. W.D. Mo. Feb. 25, 2024). No trustee or examiner has been filed in the case; the debtor continues to operate its business as debtor-in-possession pursuant to 11 U.S.C. § 1107(a), 1108.

8. The various tests for REIT status are set forth in 26 U.S.C. § 856(c).

9. Declaration of David J. Schulte, Debtor's Chairman and Chief Exec. Officer, In Support of Debtor's Chapter 11 Petition and Emergency First Day Pleadings, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Feb. 25, 2024), at 3.

of two pipeline systems owned by CorEnergy . . . into dire financial situations."[10] CorEnergy's stock price declined by more than 90% and never returned to pre-pandemic levels.[11] As the volume of crude oil moving through the company's properties remained lower, and interest expenses increased with rate hikes in recent years, the company was forced to suspend dividends on its common and preferred equity interests.[12] In response to these and numerous other challenges, CorEnergy pursued a strategy of deleveraging its balance sheet by selling off some of its properties and using the proceeds to pay down debt, including all of the company's secured debts.[13]

In December 2023, the company was notified by the New York Stock Exchange that its common stock would be delisted because it failed to meet minimum market capitalization requirements.[14] The delisting, in turn, triggered a technical default under the company's unsecured notes, which at the time had an outstanding principal amount of approximately $118 million.[15] Because of the technical default, CorEnergy would be required to repurchase the notes at par value or refinance them through a new debt facility.[16]

CorEnergy engaged in out-of-court debt restructuring negotiations with its unsecured senior noteholders, memorializing these agreements in a restructuring support agreement ("RSA")[17] and a proposed bankruptcy plan of reorganization consistent with the terms of the RSA.[18] As of the commencement of the bankruptcy case, the RSA—and thus the proposed plan—had the support of persons holding approximately 90% of the principal amount of the senior notes.[19] Many of these persons would actively participate in the debtor's bankruptcy case through an ad hoc group of senior noteholders.[20]

Under the proposed plan, nearly all the value in the debtor's estate would flow to the senior noteholders through the issuance of new debt and equity securities by the reorganized company.[21] By converting a large portion of the senior debt to equity, the

10. *Id.* at 8.

11. *Id.*

12. CorEnergy: Common And Preferred Distributions Cut, What's Next?, Feb. 6, 2023, https://seekingalpha.com/article/4575662-corenergy-infrastructure-common-preferred-distributions-cut [https://perma.cc/5LWR-HVYK].

13. CorEnergy Provides Update on Asset Sales, Business Wire, Mar. 22, 2023, www.businesswire.com/news/home/20230322005312/en/CorEnergy-Provides-Update-on-Asset-Sales [https://perma.cc/X3HW-RS4H]; Declaration, *supra* note 9, at 5.

14. Declaration, *supra* note 9, at 13.

15. *Id.* at 12–13.

16. *Id.* at 13.

17. Press Release, CorEnergy Enters Restructuring Support Agreement, CorEnergy Infrastructure Tr., Inc., (Feb. 26, 2024), https://cases.stretto.com/public/X315/12674/PLEADINGS/12674022624800000000021.pdf [https://perma.cc/JMD4-2W3J].

18. Plan of Reorganization of CorEnergy Infrastructure Tr., Inc. Pursuant to Chapter 11 of the Bankr. Code, *In re* CorEnergy Infrastructure Trust, Inc., No. 24-40236 (Bankr. W.D. Mo. Feb. 25, 2024).

19. Motion of the Debtor for Entry of an Order (I) Scheduling the Combined Hearing on Adequacy of the Disclosure Statement and Confirmation of the Plan, (II) Establishing Deadlines to Object to the Disclosure Statement and Plan (III) Approving the Form and Manner of the Combined Hearing Notices, (IV) Limiting the Requirement as to Certain Equity Security Holding Disclosures; and (V) Granting Related Relief, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Feb. 26, 2024), at 2.

20. *See* Verified Statement Pursuant to Bankr. Rule 2019, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 1, 2024).

21. *See* Plan of Reorganization, *supra* note 18, at 24–25.

company would achieve the necessary deleveraging of its balance sheet; indeed, the company would emerge from bankruptcy owing only 38% of its current indebtedness. To effectuate the debt-to-equity swap, 86.41% to 88.96% of the common stock in the reorganized company would be issued to the senior noteholders. 8.25% and 10.25% of the common stock would be allocated to the preferred equity holders,[22] 5% would be used to fund a new management incentive plan, and 2.79% to 3.44% would be allocated to a current member of CorEnergy's board of directors to satisfy obligations concerning his equity security interests in an affiliated entity.[23] Meanwhile, CorEnergy's existing equity shares—both common and preferred—would be extinguished.

On the same day that it filed for bankruptcy, the debtor also filed, among other things, the proposed plan, a proposed disclosure statement, and a motion to assume the RSA.[24] The latter filing addresses a point that Professor Lubben raises in his Article: a restructuring support agreement is an executory contract[25] that remains enforceable by the debtor but cannot be enforced *against* the debtor until it is assumed or rejected. Professor Lubben recommends that debtors "contemplate using the threat of rejection to negotiate a better deal." But CorEnergy did nothing of the sort. Not only did the debtor act quickly to assume the RSA; two days later, the debtor filed a motion seeking to schedule, among other things, the plan confirmation hearing and to establish a set of litigation deadlines for the case that were even more aggressive than those outlined in the RSA.[26] As the following section explains, these actions would stir controversy, leading some parties to argue that the debtor was not acting as a faithful fiduciary.

III.

The U.S. Trustee[27]—the primary watchdog of the U.S. bankruptcy system—filed a limited objection to the debtor's assumption motion raising, among other things, concerns about the debtor's conduct.[28] Specifically, the U.S. Trustee acknowledged that a current board member—an insider—stands to benefit from the transactions contemplated by the RSA.[29] Accordingly, although the business judgment rule normally applies to the debtor's decision to assume an executory contract,[30] a "'heightened' standard" may apply to the debtor's decision.[31]

But the U.S. Trustee did not engage with this heightened standard—or the debtor's broader fiduciary duties, whether arising under state corporate or federal bankruptcy law—

22. *Id.* at 25–26.

23. *Id.* at 23–24, 30.

24. Motion of the Debtor for Entry of an Order Authorizing the Debtor's Assumption of the Restructuring Support Agreement, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Feb. 25, 2024).

25. *See* 11 U.S.C. § 365(a).

26. *See* Motion of the Debtor, *supra* note 19.

27. By "U.S. Trustee," I mean the appropriate regional U.S. Trustee Office responsible for administering a particular bankruptcy case. *See, e.g.*, 28 U.S.C. § 586 (establishing 21 regional U.S. Trustee Offices). The instant case is in Region 13.

28. Limited Objection to Debtor's Motion to Assume the Restructuring Support Agreement, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 8, 2024).

29. *Id.* at 1.

30. *Id.* at 1–2 (citing *In re* Genco Shipping & Trading Ltd., 509 B.R. 355, 463 (Bankr. S.D.N.Y. 2014)).

31. *Id.*

in its limited objection. Instead, the U.S. Trustee merely concluded that "after analyzing the relevant factors, the UST does not object to the Debtor's authority to enter an RSA in this case….[A]lthough Mr. Grier is an insider who received a benefit under the RSA, the majority of the Debtor's board is comprised of independent directors."[32] The U.S. Trustee also objected to the fact that the RSA contemplates the debtor's payment of professional fees incurred by the ad hoc group of senior noteholders, even though the Bankruptcy Code normally subjects payment of such fees to judicial scrutiny.[33]

The U.S. Trustee was not the only party to file an objection. From the earliest days of the case, investors holding preferred stock in the company formed an ad hoc preferred equity committee and retained counsel to advocate for their interests in the proceedings.[34] One of the ad hoc preferred equity committee's first moves was to file an emergency motion seeking an order directing the appointment of an official preferred equity committee.[35] In a chapter 11 case, the Bankruptcy Code authorizes the U.S. Trustee to appoint one or more official committees to represent persons with an interest in the debtor's estate, such as creditors and equity security holders.[36] But while the U.S. Trustee is typically obligated to appoint an official committee of unsecured creditors in Chapter 11 cases,[37] the appointment of an official committee of equity security holders—whether common or preferred—is discretionary under the Bankruptcy Code.[38]

CorEnergy's bankruptcy case is unusual in that there is no official committee of unsecured creditors. This is because the only unsecured creditors with an economic interest in the proceedings are the senior noteholders, and they are already represented by the ad hoc group of senior noteholders.[39] In the earliest days of the case, certain equity interest holders had asked the U.S. Trustee to appoint an equity committee; the U.S. Trustee declined to exercise its discretion to make the appointment.[40]

In its motion for the court to order the U.S. Trustee to appoint an official equity committee, the ad hoc preferred equity committee observed that the case is "proceeding rapidly and its outcome may soon become a foregone conclusion."[41] This is because, "on seventeen days' notice and without the benefit of the oversight provided by any official committee, the Debtor is [seeking] authority to assume the Restructuring Support Agreement…effectively lock[ing the Debtor] into the Restructuring Transactions

32. *Id.* at 2.

33. *Id.* at 2–3.

34. Verified Statement Pursuant to Bankruptcy Rule 2019, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 12, 2024).

35. Emergency Motion of the Ad Hoc Preferred Equity Comm. for Entry of an Order (I) Directing the Appointment of an Official Preferred Equity Committee, (II) Adjourning March 13 Hearing, and (III) Granting Related Relief, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 8, 2024).

36. 11 U.S.C. § 1102.

37. 11 U.S.C. § 1102(a)(1) ("[T]he United States trustee shall appoint a committee of creditors holding unsecured claims").

38. *Id.* ("[T]he United States trustee . . . may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.").

39. *See* Debtor's Objection to Motion for an Order Approving an Official Committee of Equity Security Holders Pursuant to Section 1102 of the Bankruptcy Code, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 11, 2024), at 2.

40. *See* Emergency Motion, *supra* note 35, at Exh. C.

41. *Id.* at 2.

contemplated by the Restructuring Support Agreement."[42] The ad hoc committee explained that the preferred equity holders are "one of the two primary economic stakeholders"[43] in the case and "urgently require their own fiduciary with appropriate access, standing, and resources to represent their interests."[44]

The ad hoc preferred equity committee acknowledged that the debtor owes a fiduciary duty to maximize the value of the bankruptcy estate for the benefit of all creditors and interest holders.[45] But it complained that the debtor's very act of "bulldozing through chapter 11 by pursuing confirmation of the Proposed Plan on a truncated timeline"[46] evidences the "differing interest between the Debtor and its insiders…, on the one hand, and the Preferred Equity Holders, on the other."[47] Moreover, although the draft plan contemplates a distribution for preferred equity holders, the class is subject to a "death trap" provision: the offer of common equity shares will be rescinded if the class votes to reject the plan.[48] The ad hoc preferred equity committee summarized the significance of the death trap provision thusly: "The Class 6 'death trap' underscores the differing interests between the Debtor and management and the Preferred Equity Holders. Accordingly, the Preferred Equity Holders simply cannot rely on the Debtor or management to adequately represent their interests in this chapter 11 case."[49]

The debtor, for its part, has repeatedly asserted that it has acted as a faithful fiduciary when making restructuring decisions. For instance, in its motion to assume the RSA, the debtor clarified: "After considering the likelihood of success of other alternatives . . . the Debtor determined, based on its fiduciary responsibility and advice of its legal and financial advisors that the restructuring transactions . . . set forth in the RSA are in the best interest of the Debtor and its stakeholders."[50] The debtor also referred to its "its reasonable business judgment that the terms of the RSA represent the best restructuring terms available,"[51] and pointed out that the RSA has a clause providing "that the Debtor may terminate the RSA in the exercise of its fiduciary duties relating to such event."[52] And in its objection to the ad hoc preferred equity committee's request for an official committee of equity security holders, the debtor explained that "holders of Preferred Equity are adequately represented by the Debtor and its Board of Directors who advocated for and have aligned interests with the holders of Preferred Equity."[53] Specifically, four of the six members of the company's board of directors are independent directors, and the ad hoc preferred equity committee has not overcome bankruptcy law's presumption that a "functioning board" is capable of carrying out its duty to maximize the value of the estate.[54]

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42. *Id.*
43. *Id.*
44. *Id.* at 3.
45. Emergency Motion, *supra* note 35, at 6.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 7.
50. Assumption Motion, *supra* note 24, at 4.
51. *Id.* at 5.
52. *Id.*
53. Debtor's Objection, *supra* note 39, at 6.
54. *Id.* at 7.

In its objection to the assumption motion, the ad hoc preferred equity committee urged the court to force the debtor to reject the early assumption of the RSA: "Granting the relief requested in the RSA Assumption Motion…may very well predetermine the outcome of this chapter 11 case merely seventeen days following the Petition Date. Why the rush?[55] The ad hoc committee cited a 2010 decision of the U.S. Bankruptcy Court for the Southern District of New York denying the assumption of an RSA because, among other things, "[t]he Debtors ha[d] not set forth justification as to why, at th[e] very early stage in the cases, the Debtors need[ed] to lock themselves into the proposed plan before either (a) seeking higher and better offers…or (b) at a minimum, negotiating with their existing creditors regarding a restructuring transaction."[56]

The bankruptcy court denied the ad hoc preferred equity committee's emergency motion at a hearing held on March 13, 2024; in so doing, it put to rest the ad hoc committee's request for an official committee, allowing the debtor and its senior creditors to move forward without any meaningful resistance.[57] As of this writing, the bankruptcy court has conditionally approved the debtor's disclosure statement and scheduled a plan confirmation hearing for May 22, 2024.[58]

IV.

Just as Professor Lubben observes in his Article, CorEnergy's fiduciary duties were referenced repeatedly by multiple parties, both as a sword and as a shield. But they were never subjected to any serious inquiry, and the court was never called upon to rule on whether the debtor had breached its fiduciary duties by entering, assuming, and abiding by the RSA. Of course, the court will be called upon to confirm the proposed plan; at that time, the court may further investigate the debtor's conduct, including whether the plan has been proposed in good faith.[59] However, any such investigation will likely consider the realities of a company that made restructuring decisions while in a potential death spiral. With revenues down, its common stock delisted, and its senior debt in technical default, the company was not exactly in a position to play hardball with lenders who were willing to entertain a restructuring proposal.

And given that time is of the essence in this case—as it is in most complex corporate bankruptcy restructurings—we should not expect the court to conduct an exhaustive review of the debtor's compliance with the full range of fiduciary duties arising under state corporate and federal bankruptcy laws. Indeed, the decision in *Van Gorkom* was handed down four years after the merger transaction at issue. In the bankruptcy world, decisions

55. Ad Hoc Preferred Equity Comm's Preliminary Omnibus Objection and Reservation of Rights with Respect to (I) RSA Assumption Motion and (II) Solicitation Motion, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 11, 2024), at 2.

56. *Id.* at 3 (citing Innkeepers USA Tr., 442 B.R. 227, 233 (Bankr. S.D.N.Y. 2010)).

57. *See* Order of the Court, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. MO. Mar. 14, 2024).

58. Order (I) Conditionally Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation Procedures and Solicitation Packages, (III) Scheduling a Combined Hearing, (IV) Establishing Procedures for Objecting to the Plan, (V) Approving the Form, Manner, and Sufficiency of Notice of the Combined Hearing, and (VI) Granting Related Relief, *In re* CorEnergy Infrastructure Tr., Inc., No. 24-BK-40236 (Bankr. W.D. Mo. Mar. 19, 2024), at 1–2.

59. *See* 11 U.S.C. § 1129 (regulating the confirmation of a plan).

need to be made in an expedited fashion; we simply cannot wait four years for a decision on whether and how to restructure a distressed company.

Yet even though time is of the essence, parties to complex corporate bankruptcy restructurings still endeavor to develop winning litigation strategies. As they work to preserve and enhance their economic interests and obtain a seat at the negotiation table, they are naturally incentivized to formulate arguments around fiduciary duties and other legal and equitable doctrines that invoke basic principles of right and wrong. Ultimately, however, bankruptcy is a world of scarcity, where all parties are better off when they reach a fair and efficient *consensual* resolution. Once parties reach a consensus on the economic terms—or, in the absence of reaching a consensus, realize the battle is futile and give up—there is simply no reason to litigate the legal and equitable doctrines they first used to frame their arguments.

V.

How, then, might we imagine bankruptcy law's *Van Gorkom* moment? Perhaps change would come from debtors and other stakeholders voluntarily shifting their practices. For one, debtors in the position of CorEnergy might proactively detail, in their bankruptcy filings, the diligent efforts they have made to investigate restructuring alternatives and identify the best path forward for the company and its stakeholders. Some debtors already do this, whether in their first-day filings describing the events leading up to the bankruptcy filing or in their various motions to obtain court approval of critical restructuring decisions. Debtors might even obtain fairness opinions in support of their proposed plans and share these opinions with stakeholders and/or the bankruptcy court.

Given the realities of modern chapter 11 practice, these subtle shifts in customary practice seem more likely than the sort of judicial earthquakes we occasionally encounter in corporate fiduciary duty law. Professor Lubben's Article provides a helpful roadmap for debtors to engage with their fiduciary duties more thoroughly in the course of making certain key restructuring decisions. New and enhanced practice standards of this sort would help to reduce opportunistic behavior and enhance the fairness of chapter 11 restructurings without unduly burdening the proceedings.