“Fool Me Once”: A Director and Officer’s Guide to Avoiding the Mistakes of the Past

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Introduction

It is a well-accepted principle of corporate governance that officers and directors of solvent corporations owe fiduciary duties to the corporation and its shareholders. The picture becomes more muddled, however, when it comes to the duties of directors and officers of distressed business entities, who may face pressure to fix mounting or deepening crises through such potentially risky means as debt restructurings, asset sales, and changes in strategic direction. Though these, or similar, measures may successfully turn operations around, if unsuccessful such actions may degrade the value of an eventual bankruptcy estate in a way that needlessly reduces creditor recoveries. Put differently, because shareholders of an insolvent or near-insolvent company may have very different risk preferences than the company’s creditors, director and officer decision-making may change dramatically depending upon the way in which courts decide the nature or scope of fiduciary duties owed to these divergent constituencies at any given time.
In the wake of the recent financial crisis, courts have had more opportunities to consider officer and director fiduciary duties in the context of insolvency. For instance, in *In re Lemington Home for the Aged*, the Third Circuit reversed the district court’s earlier grant of summary judgment to the defendant officers and directors of the Lemington Home for the Aged (LHA), a non-profit provider of nursing home services. In doing so, the Third Circuit revived the plaintiff’s claims that LHA’s officers and directors had breached their fiduciary duties. *Lemington* is just one of the latest of a number of cases to have considered officer and director fiduciary duties in the context of insolvency. We further discuss *Lemington*, and others, below.

Though satisfaction of the obligations flowing from these duties may appear straightforward, crafty plaintiffs often can leverage the complexities of modern commerce to highlight and elevate to a cause of action virtually any appearance of impropriety, forcing officers, directors, and others to defend themselves against breach of duty allegations. This article first takes a look at several recent decisions that have closely scrutinized officer and director acts and omissions. It then offers some simple, yet practical, advice as to how officers, directors, and other involved parties can increase the chances that a scrutinizing court will determine that their conduct not only was proper, but appeared proper. For, as the late Judge Henry Friendly once stated, “[t]he conduct of bankruptcy proceedings not only should be right but must seem right.”

**Fiduciary Duties of Directors and Officers: Duty of Care and Duty of Loyalty**

The fiduciary duties of officers and directors of a corporation are governed by the laws of its state of incorporation. Without significant exception, the laws of the most common states of incorporation in the United States, including Delaware, California, and New York, have bifurcated fiduciary obligations into two general categories: the duty of loyalty and the duty of care.

The duty of care requires directors and officers to exercise the decree of care that “ordinarily careful and prudent men would use in similar circumstances.” Courts have interpreted this to require the fiduciary to act rationally, in good faith, and based upon reasonable investigation. The duty of loyalty, on the other hand, requires that directors and officers act in good faith and in the best interests of the corporation, which includes avoiding self-dealing or usurpation of corporate oppor-
tunities. Understanding the nature and scope of these duties of course is imperative for directors and officers in the ordinary course of business. This understanding arguably takes on even greater importance for a fiduciary whose company is near-insolvent or insolvent.

Limiting Officer and Director Liability: Business Judgment Rule and Exculpatory Clauses

In carrying out their fiduciary duties, directors and officers generally receive the benefit of the business judgment rule, which is the “presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” Thus, when disinterested or independent directors make a business decision on an informed and good faith basis with the reasonable belief that their actions will benefit the corporation, courts will not second-guess their decisions. Importantly, however, because one element of the business judgment rule is that the fiduciary be disinterested, the rule only applies to allegations relating to the duty of care. It is not available as a defense to alleged violations of the duty of loyalty.

Further, in many states corporations are allowed to exculpate directors and officers contractually, albeit with statutory limitations. Delaware, for example, does not permit exculpation of liability for acts of intentional misconduct or breaches of the duty of loyalty. Any director or officer wishing to use a corporate exculpation to protect himself or herself from liability would be well-advised to understand the nature and scope of statutory limitations on such protection.

Burdens of Proof: Violations of Duty of Care and Duty of Loyalty

The duty of care and duty of loyalty each carry its own burden of proof. As Judge Walrath explained in Brown Schools, “a plaintiff asserting a duty of care violation [at least in Delaware] must prove the defendant’s conduct was grossly negligent in order to overcome the deferential business judgment rule.” The burden is thus on the party challenging a director’s decision to rebut the presumption with clear facts. Unless fraud, bad faith, gross over-reaching, or abuse of discretion is established, a court generally will not question the exercise of a director’s business judgment. Thus, duty of care violations will not be found “unless the directors individually and the board collectively have failed to inform themselves fully and in a deliberate manner.” The business
judgment rule also does not protect directors from breach of duty of care liability for their gross negligence. How courts interpret these standards is a fact-intensive exercise; we provide examples below to demonstrate the types of facts (or acts) that will rise to the level of a breach.

“For breach of the duty of loyalty claims, on the other hand, the plaintiff need only prove that the defendant was on both sides of the transaction. The burden then shifts to the defendant to prove that the transaction was entirely fair.”21 Interestingly, at least one bankruptcy court has posited that application of the business judgment rule has “practically limited” breach of fiduciary duty claims to issues of whether the officers and directors engaged in self-dealing.22 Still, the law remains unsettled in this area.

The Scope of Fiduciary Duties and the “Insolvency Exception”

Traditionally, directors of a solvent company owe fiduciary duties to stockholders and the corporation.23 Conversely, they do not owe fiduciary duties to creditors.24 Yet when a corporation becomes insolvent, directors may owe fiduciary obligations to the corporation’s creditors.25 The rationale for this so-called “insolvency exception;” to traditional corporate theory is that insolvency is a “special circumstance” that warrants a shift from the general rule that directors do not owe creditors duties beyond contractual terms, such that when it “does arise, it creates fiduciary duties for directors for the benefit of creditors.”26 This is also the rule in the Fourth and Seventh Circuits.27

It is important to note, however, that as made clear by recent Delaware case, creditors of an insolvent corporation cannot bring direct breach of fiduciary claims against the corporation’s directors.28 Further, according to the Delaware Court of Chancery in Production Resources Group L.L.C. v. NCT Group, Inc.29, the expansion of a director’s fiduciary duty when a corporation approaches the vicinity of insolvency does not create a new body of creditor’s rights law, but instead gives creditors standing to assert a derivative claim for a director’s breach of fiduciary duty, which continues to be owed to the corporation itself.30. Once a company is insolvent, however, some courts will subject directors to greater scrutiny. For example, the court in In re Xonics, Inc. recognized that when the company became insolvent, the directors “became trustees for the benefit of all creditors.”31

Moreover, the business judgment rule may not apply to the directors and officers of an insolvent company, especially where directors appear on both sides of a transaction or otherwise expect to derive personal financial
benefit such transaction, or where evidence exists showing that directors acted in the interests of shareholders rather than of corporation, or where directors did not consider material information reasonably available to them regarding fairness of transaction to corporation and corporate creditors.\textsuperscript{32} Finally, directors should be aware that their duties also apply in the situation where a subsidiary is insolvent. For instance, in \textit{Buchwald v. Renco Group, Inc. (In re Magenium Corp of Am.)}, the bankruptcy court found that “while officers and directors of subsidiaries may legitimately advance the interests of the corporate parent when the subsidiaries are not insolvent, they may no longer do so when the subsidiaries are insolvent, or would be rendered insolvent by the contemplated action.”\textsuperscript{33}

Thus, though the contours are unclear and the lines unsettled, there are certain circumstances under which courts will revoke the protections of the business judgment rule to impose liability upon officers and directors. By avoiding the sort of behavior and facts detailed in the following sections, directors and officers will minimize the chance that they be held liable for their actions.

\textbf{Duty of Loyalty}

\textit{1. Avoid the Appearance of Being on Both Sides of a Transaction}

In \textit{Brown Schools}, the Delaware bankruptcy court ruled that the defendant private equity firm and certain of its affiliates and members would have to defend themselves against charges of self-dealing involving one of the firm’s investments, The Brown Schools, Inc. (“BSI”).\textsuperscript{34} The chapter 7 trustee alleged that the private equity firm “used its power as the majority and controlling shareholder... to cause its representatives to serve on [BSI’s] board of directors... and on the executive committee of that board.”\textsuperscript{35} It used this influence to “wrongfully prolong[...] the existence of [BSI] so that [the private equity firm] could profit at the expense of [BSI] and [its] creditors, in violation of its duties of good faith, honest governance, and loyalty which required a prompt bankruptcy filing and liquidation of [BSI].”\textsuperscript{36}

The trustee pointed to two incidents of alleged self-dealing as examples of the private equity firm’s wrongful conduct. The first occurred when BSI sold a significant portion of its assets for $64 million and paid $1.7 million in “illegitimate ‘fees’” to the private equity firm.\textsuperscript{37} The second stemmed from events that began a month later when, “at
the direction of the private equity firm, BSI hired a major law firm to effectuate a restructuring of its remaining debt. As a consequence of the restructuring, the private equity firm was granted a junior security interest in substantially all of the BSI’s assets and, under a separate intercreditor agreement, the right to receive up to $2.9 million from any monies received by the senior secured creditor. Subsequently, BSI sold more than $18 million in assets, the proceeds of which were shared between the private equity firm and the senior creditor.

After BSI filed for relief under chapter 7 of the Bankruptcy Code two years later, the trustee sued the private equity firm, the directors associated with the firm, and the law firm that advised BSI during the restructuring. The bankruptcy court refused to dismiss the trustee’s claims that the defendants had breached their fiduciary duties to BSI’s creditors by holding, among other things, that Delaware’s refusal to recognize a claim for deepening insolvency did not prohibit such claims.

The defendants in *Lemington* similarly were denied summary relief against claims of self-dealing in approving the transfer of LHA’s principal asset—the Lemington Home Fund—to another non-profit organization run by the same group of directors. The Third Circuit found that such “plans to divert” LHA’s principle asset were sufficient to create a triable issue as to breach of duty of loyalty. In addition, the bankruptcy court viewed the failure of the board to heed “red flags” as to the reliability and competence of LHA’s officers, as well as eschewal by the board of directors of a viability study which called into question the adequacy of pre-bankruptcy investigation as factored bolstering the finding that a genuine dispute of fact existed as to whether “alleged breaches of fiduciary duties constituted self-dealing.”

*Brown Schools* and *Lemington* teach that officers and directors must be able to demonstrate that they used independent and impartial judgment when evaluating transactions involving companies affiliated with one or more directors or officers. When facing similar circumstances, boards should appoint one or more independent, disinterested directors to assess such a transaction’s merits and only they, the disinterested directors, should vote on the transaction. Boards also must ensure that company advisors are wholly disinterested.

### 2. Avoid Preferential Treatment of Insiders

Directors and officers must act in the best interests of the corporation, its shareholders, and its creditors where the corporation is in the zone of
insolvency. As a result, directors and officers must avoid preferential treatment of insiders, favored shareholders, or other similar constituencies. Also, directors must avoid deriving personal benefits through their support of a particular transaction.

In *In re Healthco International, Inc.*, a Massachusetts bankruptcy court found that directors did not fulfill the “duty to inform themselves, prior to making [a] business decision, of all material information reasonably available to them.” The court found that directors breached their fiduciary duty where they failed to review projections (that indicated that debtor would be left with insufficient capital) prepared by the purchaser in a leveraged buyout that ultimately left the corporation with “unreasonably small capital.” According to the court, directors who voted in favor of the transaction failed to fully inform themselves despite many warnings signs at the time of the merger agreement that indicated the likelihood of further losses. These warning signs included: the leveraged nature of the transaction, the projected cash flow, and the lack of experience of Healthco’s new president. Ultimately, the court found that directors were not entitled to the benefit of the business judgment rule due to their failure to keep themselves informed. While the debtor’s certificate of incorporation protected the directors against liability for a breach of their duty of care, the directors remained liable for duty of loyalty violations stemming from the allegedly injurious nature of the transaction and the benefits it provided to selling stockholders, including the very directors who had approved it.

**Duty of Due Care**

1. **Conduct Orderly Board Meetings, Document Deliberations and Decisions, Encourage Broad Participation, and Engage Professionals When Appropriate**

In *Clarkson Co. v. Shaheen*, the Second Circuit upheld a jury verdict finding a company’s directors liable for more than $50 million in damages when the company made unjustified loans to its parent company and its affiliates just prior to filing for bankruptcy. The Second Circuit held that the jury was justified in holding the directors liable despite the directors’ claims that they did not know the purpose of the loans or did not attend the meetings when the loans were discussed.
The Third Circuit in *Lemington* noted similarly that the LHA board was in complete “disarray” in the months leading up to its bankruptcy filing. Minutes of board meetings were “incomplete or non-existent” despite discussion of key issues. Attendance at board meeting “often fell below 50%.”

“A cardinal precept of [corporate law] is that directors, rather than shareholders [or creditors], manage the business and affairs of the corporation.” Management is accomplished through the board’s actions at board meetings and otherwise. Directors must stay abreast of all issues facing their company. They must prepare for and attend board meetings, and actively participate in the board’s deliberation and decision-making processes. Further, the board must appropriately document its deliberations and decision-making with a contemporaneous record of its proceedings. Absent preparation, participation, and preservation of a record, board members increase the risk of being subjected to claims of mismanagement or worse, even if only because of the appearance that “they must have been asleep at the wheel.”

Directors and officers should also engage valuation professionals when appropriate, as in the context of assets sales and leveraged buyouts. In *In re Performance Nutrition, Inc.*, for instance, a Chapter 7 trustee brought an adversary proceeding to recover from the debtor’s former director and chief executive officer for allegedly conspiring to orchestrate a sale of the debtor’s assets at a price considerably less than that which the CEO might have obtained if he had diligently marketed the assets to other potential buyers. Ultimately, the court found that the director/CEO breached his duty of care by failing to properly market assets for the sale on the open market, failing to obtain a valuation of the assets, and failing to establish bid procedures.

In *In re Bidermann Industries*, the debtors sought approval of an anticipated leveraged buyout sponsored by management; the debtors did not, however, hire an investment banker to solicit purchasers in the market. According to the court, it was “astounding that the debtors had not hired an investment banker to test the marketplace for other expressions of interest.” Because the transaction at issue in *Bidermann* was rife with self-dealing as well as inappropriate fees and procedures, the court found “disinterestedness and due care” to be lacking and refused to approve the deal. *Bidermann Industries* thus demonstrates the negative consequences that may flow from the missteps of a board of directors, even when such actions do not rise to the level of a breach of fiduciary duty.
2. Avoid Vacancies on Board Committees

In *Lemington*, the Third Circuit further faulted the LHA board for failing to fill a vacant Treasurer position.\(^{65}\) Indeed, the board allowed this position to remain open for at least 14 months despite a by-law requirement that the board maintain a standing Finance Committee with the Treasurer as its chairperson.\(^{66}\) This led the Third Circuit to conclude that it was possible that there was no “meaningful oversight of [LHA’s] financial operations during this period.”\(^{67}\)

Courts are mindful that most boards employ a committee system as one means of fulfilling the board’s oversight function. *Lemington* shows how a court may view the prolonged vacancy of a committee position as an indication that the board has failed to meet its obligation to adequately supervise the company.

3. Keep Creditors Informed

Failing to keep creditors informed may be viewed as a violation of the trust they have placed in a company’s officers and directors.\(^{68}\) In *Weiss*, the New York Court of Appeals faulted two directors for failing to provide the insolvent company’s creditors with notice of a sale of the company’s assets, a sale that recovered less than 40% of the aggregate amount owed the creditors.\(^{69}\)

Failing to keep creditors informed also may lead to defaults or events of default under credit agreements. As noted above, in *Lemington*, the Third Circuit cited the board for failing to perform a viability study even though LHA’s lender had required such a study as a condition to providing further financing.\(^{70}\) Further, a court may view a creditor’s concern about the company’s financial health as an independent, third-party assessment of the company’s viability and may fault officers and directors for ignoring the creditor’s unease.\(^{71}\)

If insolvency is even a remote concern, officers and directors must keep creditors informed. If the company ultimately becomes insolvent, directors and officers may owe its creditors duties of care and loyalty, which can lead to liability if breached. Communicating with creditors early and often may therefore help to avert any finding of such a breach.

4. Ensure that Company Officers Are Well-Qualified and Actively Managing the Organization and Take Swift Action to Correct

The board in *Lemington* “received numerous red flags as to the competence and diligence of” the administrator it had hired to manage LHA.\(^{72}\)
For instance, four years prior to LHA seeking bankruptcy relief, The Pittsburgh Foundation recommended that LHA replace its administrator with a “qualified, seasoned nursing home administrator and review, revamp and re-staff each department.” It even went so far as to provide a grant of $175,000 so that LHA could hire a new administrator. LHA’s board, however, failed to act; the inept administrator stayed—and quickly re-allocated the grant to other purposes.

Three years later, the Pennsylvania Department of Health investigated LHA after two of its residents died in a five month period. The department “determined that the Administrator … lack[ed] the qualifications, the knowledge of the [personal care] regulations and the ability to direct staff to perform personal care services as required.” The department also noted that “[i]n the administrator’s frequent absence, staff are confused as to whom is to be in charge of the [personal care unit].” Still, the board did not terminate the administrator for another three months. This all factored into the Third Circuit’s assessment that the board may have violated its duty of due care in failing to react to the administrator’s inaptitude.

_Lemington_ thus stands as a warning that Boards must be diligent about hiring capable officers and must ensure that they are actively managing the organization. What is more, boards must quickly respond to any “red flags.”

**Conclusion**

By avoiding the appearance of self-dealing, conducting board meetings in an orderly manner with broad participation, keeping creditors informed, and monitoring the efficacy of those charged with oversight, officers and directors can meet their fiduciary obligations and, perhaps even more importantly, instill confidence in a company’s creditor constituency, thus avoiding not only liability but, perhaps, even litigation itself. In the end, officers and directors must be mindful of their duties and should seek the advice of independent counsel whenever questions arise.

**Notes**

2. See Cieri and Riela, Protecting Directors and Officers of Corporations that are Insolvent or in the Zone or Vicinity of Insolvency: Important Considerations, Practical Solutions, 2 DePaul Bus. & Comm. L.J. 295 (2003-2004).


5. Lemington, 659 F.3d at 295.


8. In Delaware, these duties are a product of common law. See Smith v. Van Gorkom, 488 A.2d 858, Fed. Sec. L. Rep. (CCH) P 91921, 46 A.L.R.4th 821, 46 A.L.R.4th 821 (Del. 1985) (overruled on other grounds by, Gantler v. Stephens, 965 A.2d 695 (Del. 2009)); In New York and California, these duties have been codified. See New York Business Corporations Law § 717(a) (“A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.”); California Corporations Code § 309(a) (“A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”).


11. See e.g. Guth, 5 A.2d at 510 (Del. 1939); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (rejected on other grounds by, Kamen v. Kemper Financial Services, Inc., 908 F.2d 1338, Fed. Sec. L. Rep. (CCH) P 95363, 17 Fed. R. Serv. 3d 224 (7th Cir. 1990)) and (overruled on other grounds by, Brehm v. Eisner, 746 A.2d 244 (Del. 2000)) (directors “can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or stockholders generally.”).


13. See e.g, In re Integrated Resources, Inc., 147 B.R. 650, 656, 23 Bankr. Ct. Dec. (CRR) 1042 (S.D. N.Y. 1992) (The business judgment rule’s presumption shields corporate decision-makers and their decisions from judicial second-guessing when the following elements are present: (1) a business decision, (2) disinterestedness, (3) due care, (4) good faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets.”) (internal citations omitted); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954, Fed. Sec. L. Rep. (CCH) P 92046, Fed. Sec. L. Rep. (CCH) P 92077 (Del. 1985) (“A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.”) (internal citations omitted).


15. See e.g. Delaware General Corporations Law § 102(b)(7) (permitting corporations to adopt a charter provision to eliminate or limit personal liability of directors for breach of fiduciary duty under various circumstances, including negligent violations).

16. See e.g, Emerald Partners v. Berlin, 787 A.2d 85 (Del. 2001) (if any exculpatory clause is adopted by corporation in accordance with Delaware General Corporations Law § 102(b)(7), the clause will “exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations, and certain other conduct.”).

17. See, e.g., Lemington, 659 F.3d at 291 (recognizing two distinct duties); Brown Schools, 386 B.R. at 46-47 (same).

22. In re Security Asset Capital Corp., 390 B.R. 636, 642, 50 Bankr. Ct. Dec. (CRR) 54 (Bankr. D. Minn. 2008) (“The [business judgment] rule shields directors and officers from liability for actions and decisions that, even in retrospect, might be seen as clearly erroneous and damaging to their corporations. So, breach of fiduciary duty by directors and officers is practically limited to their self-dealing to the detriment of their corporations, even in corporate insolvency.”)
25. See Clarkson, 660 F.2d 506, 512-515 (indicating that directors can be personally liable for value of funds fraudulently transferred, even though they were not the transferees); In re Buckhead America Corp., 178 B.R. 956, 968 (D. Del. 1994); Credit Lyonnais, 1991 WL 277613 at *34.
30. Production Resources, 863 A.2d at 791.
34. Brown Schools, 386 B.R. at 44-53 (denying motion to dismiss certain breach of fiduciary duty claims in chapter 7 trustee’s second amended complaint); see also In re The Brown Schools, 368 B.R. 394 (Bankr. D. Del. 2007) (addressing motions to dismiss trustee’s original complaint).
40. Brown Schools, 386 B.R. at 42.
41. Brown Schools, 386 B.R. at 41 n.2.
42. Brown Schools, 386 B.R. at 44-49.
43. Lemington, 659 F.3d at 287, 291-93.
44. Lemington, 659 F.3d at 291.
45. Lemington, 659 F.3d at 291.
46. See Brown Schools, 368 B.R. at 411 (noting that the law firm’s employment was allegedly urged by the private equity firm and that the law firm had previously advised the private equity firm); cf In re El Paso Corp. Shareholder Litigation, 2012 WL 907781 at *5-6 (Del. Ch. 2012), published at, 41 A.3d 432 (Del. Ch. 2012) (calling into doubt the independence of a financial advisor in the context of a merger because, among other things, the financial advisor owned 19% of the acquiring company).
47. See Production Resources, 863 A.2d at 789 n. 56.
49. Healthco, 208 B.R. at 306.
50. Healthco, 208 B.R. at 300.
51. Healthco, 208 B.R. at 300.
52. Healthco, 208 B.R. at 308.
53. Clarkson, 660 F.2d 506.
54. Clarkson, 660 F.2d at 508, 513.
55. Clarkson, 660 F.2d at 510, 512 (“[D]irectors have an affirmative duty to inform themselves about the affairs of the corporation.”).
56. Lemington, 659 F.3d at 287.
57. Lemington, 659 F.3d at 287.
58. Lemington, 659 F.3d at 287.
59. Aronson, 473 A.2d at 811.
64. Bidermann, 203 B.R. at 552-3.
65. Lemington, 659 F.3d at 286-87.
66. Lemington, 659 F.3d at 286-87.
67. Lemington, 659 F.3d at 286.
68. See, e.g., New York Credit Men’s Adjustment Bureau v. Weiss, 305 N.Y. 1, 9-10, 110 N.E.2d 397 (1953).
69. Weiss, 305 N.Y. at 8, 10 (“While it is true… that notice to the creditors was not required, nevertheless, the failure to so notify the persons primarily interested in the assets requires the imposition… upon the defendants of the burden of going forward to show that their action[s]… resulted in obtaining full value.”).
70. See Lemington, 659 F.3d at 286.
71. See Lemington, 659 F.3d at 292 (board’s failure to have study done “calls into question the adequacy of [the board’s] pre-bankruptcy investigation”).

72. Lemington, 659 F.3d at 292 (emphasis added); see also id. at 286 (despite state law requirements that LHA have a full-time administrator, its administrator worked part-time due to health reasons and was completely absent from the organization for periods of six to eight weeks at a time).

73. Lemington, 659 F.3d at 286.
74. Lemington, 659 F.3d at 286.
75. Lemington, 659 F.3d at 286.
76. Lemington, 659 F.3d at 286-87.
77. Lemington, 659 F.3d at 287.
78. Lemington, 659 F.3d at 287.
79. Lemington, 659 F.3d at 287.
80. See Lemington, 659 F.3d at 291-92.