

NATIONAL
DIRECTORS
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NDI Executive Exchange

Private Equity Portfolio Company Governance

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Panelists

- **Todd Boudreau - Moderator**
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Foley & Lardner LLP
- **Michael Condron**
Managing Director, Newport Board Group
- **Dan Weintraub**
Managing Director and General Counsel, Audax Group
- **Venita Fields**
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Life Cycle of the Investment

- Conduct extensive pre-investment diligence (background checks, interviews, history of compliance and conflicts)
- Consider contractual rights and proper investment structure to protect investment and exit potential from the beginning
- Engage management but maintain independent judgment
- Be transparent and communicative to reduce potential conflicts in valuation at exit

Conflicts of Interest and Director Liability

- **Competing Duties to Fund and Portfolio Company**
 - Capital allocation, additional financings, acquisition decisions, executive compensation, management fees
- **Maintain corporate formalities and safeguard against blurring the line to mitigate risks to the director and fulfil the mandate to maximize returns for the fund**
 - Independent directors and outside experts, disclosure of any related transactions, audited material company information, transparent and active communication with shareholders and management, diligent review of board materials, active participation in meetings and clear record of decision-making processes
- **Take steps early in the investment**
 - Provide for indemnification and insurance prior to serving on board; consider observer seat rather than director seat; consider rep & warranty insurance

Governance of Distressed Companies

- **Distressed but solvent company:**
 - Fiduciary duty to shareholders remains
- **Insolvent company:**
 - Fiduciary duty does not shift to creditors, rather pool of constituents which can assert derivative claims expands to include creditors
 - Duty owed to insolvent company for benefit of all residual claims
- **Business Judgement Rule protects directors' decisions, including attempting to restructure a distressed company rather than close up shop for the benefit of creditors**

(see *Quadrant Structured Prods. Co. v. Vertin*, 115 A.3d 535 (Del. Ch. 2015))

Disputes Between Company and Investor Director

- **Common Disputes**
 - Founder misrepresentation of core technology (i.e. Theranos/Elizabeth Holmes)
 - Founder refusal to slow spending
 - Conflicting visions of future of company
- **Typically More Prevalent in VC/Growth Equity Setting**
 - Company has severely less leverage and control
 - In PE setting, PE fund, as controlling shareholder, owes duty to minority shareholders and fund itself risks breaching this duty if simply tunnel all value to fund