

Wisconsin Directors Beware!! Failure to Give a Plant Closing Notice Could Subject You to Personal Liability

In a recent decision involving the Golden Guernsey Chapter 7 proceeding,[\[1\]](#) a Delaware bankruptcy court refused to dismiss a Chapter 7 trustee's complaint that the manager and president of an insolvent limited liability company operating in Wisconsin breached their fiduciary duty (and were therefore personally liable) for failing to give the 60 day plant closing notice required under Chapter 109 of the Wisconsin Statutes.

The Golden Guernsey Dairy ("Golden Guernsey") began in 1930 as a Wisconsin cooperative and grew into one of the largest milk producers in the upper Midwest. In 2010, Dean Foods Company, its then owner, sold Golden Guernsey to a private equity company, Open Gate Capital, LLC ("Open Gate"), as part of the settlement of an antitrust lawsuit brought by the United States Department of Justice. Post-closing, Open Gate employee Andrew Nikou was appointed as the sole member of Golden Guernsey.

Open Gate bought the plant at a bargain price and put no additional capital into the business after the purchase. Golden Guernsey suffered losses in each month following Open Gate's acquisition, experiencing a net loss of 19.01 cents for each gallon of milk sold in the first full year of operations following closing, and a net loss of 20.43 cents per gallon of milk sold through the 12 month period ending November 30, 2012. Running out of operating capital, Golden Guernsey abruptly closed its doors on January 5, 2013. It filed a petition under Chapter 7 of the Bankruptcy Code three days later. The Wisconsin Department of Workforce Development ("DWD") asserted that the debtor's failure to give a 60 day plant closing notice to its more than 100 employees was a violation of Wisconsin Statutes section 109.07. The DWD filed a priority claim in the bankruptcy case for approximately \$1 million.

In November 2014, the Chapter 7 trustee brought an adversary proceeding against Mr. Nikou and Brad Parks, the president of Golden Guernsey, asserting, among other things, that their failure to give the requisite 60 day plant closing notice caused the company to suffer damages evidenced by the DWD's claim, which constituted a breach of their duties of good faith, loyalty, fair dealing and

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care to Golden Guernsey and its creditors.

The defendants moved to dismiss the complaint, arguing that because the company was insolvent before the plant shutdown, and only became more so because of the failure to give the plant closing notice, Golden Guernsey suffered no harm. Delaware courts, argued the defendants, rejected the concept of "deepening insolvency," a theory that directors and officers breach their fiduciary duty by taking actions which cause an enterprise to become more insolvent. The fact that Golden Guernsey's liabilities grew because of the failure to give the plant closing notice was unfortunate, said the defendants, but did not give rise to a cause of action. Further, the defendants asserted that the potential harm from their actions was to the general unsecured creditors and not the company, and the trustee therefore lacked standing to bring the action.

The court said that this case was different from *Trenwick*,^[2] a case in which the Delaware Supreme Court held that there was no cause of action based upon the theory of "deepening insolvency." In *Trenwick*, the defendants made imprudent investments.^[3] In this case, said the court, if the allegations in the complaint are true, the defendants engaged in misconduct.^[4] They operated the business until the last moment and then closed it down without giving the employees the requisite plant closing notice, exposing the debtor to the DWD's plant closing claim. If proven, this would constitute a failure to act in good faith and a breach of the defendants' duty of loyalty to the company.^[5] Dismissing the argument that the trustee lacked standing, the court held that the Chapter 7 trustee is charged with pursuing the estate's interest both directly and derivatively. The trustee is seeking to redress damages suffered by the company and is not asserting the claims of creditors.^[6] The court denied the defendants' motion to dismiss the complaint.

This case should set off the warning claxon for officers and directors of corporations, and managers of limited liability companies. The decision of when to give a plant closing notice with respect to a business in financial distress is a crucial one. Giving the notice too early could significantly injure the debtor in the marketplace, cause the debtor to begin hemorrhaging employees and doom any chance for a turnaround of its operations. However, in light of *Golden Guernsey*, waiting too long and risking the possibility of an abrupt shutdown without the ability to give the required plant closing puts the directors and officers at risk of personal liability for breach of fiduciary duties. A very difficult decision has suddenly become even more so.

[1] *Stanziale v. MILK072011 (In re Golden Guernsey Dairy, LLC)*, No. 13-10044, 2015 WL 5579990 (Bankr. D. Del. September 21, 2015).

[2] *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billet*, 931 A.2d 438 (Del. 2007).

[3] *Stanziale*, 2015 WL5579990, at *2.

[4] *Id.*

[5] *Id.*

[6] *Id.*, (citing *Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.)*, 208 B.R. 288 (Bankr. D. Mass. 1997)).

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