

Client Alert | November 2025

Part I of II

Delaware Chancery Court Recognizes Bankruptcy Fiduciaries' Litigation Advantages

The Decision

In *Giuliano v. Grenfell-Gardner*, No. 2025-0458-PAM, 2025 Del. Ch. LEXIS 224 (Del. Ch. Sept. 2, 2025), Chancellor McCormick upheld *Caremark* claims brought by a post-confirmation plan administrator. The Delaware Court of Chancery confirmed that bankruptcy fiduciaries enjoy significant procedural and informational advantages. Given those advantages, the Chancellor observed that it was “no surprise” that most of the claims survived dismissal.

This client alert will cover some of their advantages.

Direct Standing Removes Procedural Barriers

Bankruptcy fiduciaries own the debtor’s causes of action outright. They sue directly, not derivatively, and thus avoid the procedural hurdles of Rule 23.1’s demand requirement—a barrier that defeats many shareholder-derivative suits before they begin.

Superior Access to Information

Bankruptcy fiduciaries also enjoy superior access to information in two critical respects. They possess sweeping access to corporate records including management emails. In *Giuliano*, this access supplied the factual detail needed to overcome a motion to dismiss. Notably, when dismissing red-flag claims against the directors, the Chancellor observed that the plan administrator had access to the emails of management but *not* of the directors.

Additionally, Bankruptcy Rule 2004 grants fiduciaries a powerful pre-suit investigation tool: the authority to subpoena documents and examine witnesses under oath. Rule 2004 far exceeds the limited “books and records” inspection rights available to stockholders under Section 220.

Control Over Attorney–Client Privilege

Bankruptcy fiduciaries also control the debtor’s attorney–client privilege. In *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 358 (1985), the Supreme Court held that a trustee inherits management’s authority to assert or waive the privilege. Post-confirmation fiduciaries typically acquire that same authority unless a plan or confirmation order provides otherwise.

Key Takeaways

Bankruptcy fiduciaries have three significant advantages when pursuing fiduciary-duty claims:

- Their direct standing eliminates Rule 23.1’s demand-futility requirement.
- Superior access to information including management emails and subpoena powers under Bankruptcy Rule 2004.
- Control over privilege grants access to pre-petition legal advice.

Armed with such advantages, bankruptcy fiduciaries are better able to craft detailed, fact-rich complaints that can withstand dismissal.

Giuliano vividly illustrates the strength of such advantages.