

## **Authority Without Responsibility? Response to the Proposal to Eliminate Directors' and Officers' Liability Under the New Israeli Insolvency Law**

**Ehud Kamar & Kobi Kastiel**

Section 288 of the Israeli Insolvency and Rehabilitation Law, 5778-2018, imposes liability on directors and chief executive officers who fail to take reasonable measures to narrow the scope of insolvency when they know or should know that the corporation is insolvent. Professor David Hahn proposes to eliminate this provision, arguing that it would lead to defensive decision-making and premature insolvency proceedings. In the interim, he proposes to blunt its effect by applying the business judgement rule to decisions of officers who consult bankruptcy experts, and wonders whether to apply it even absent such consultation. He also recommends authorizing courts to keep management in office with no supervision by an outside trustee during insolvency proceedings, as is done in the United States.

We oppose these proposals. Section 288 applies when the corporation is insolvent but still under shareholder control. At this point, directors and officers have a conflict of interest: they are shareholder appointees and may advance shareholder interests or their own interests at creditors' expense. Their conflict of interest is even greater if the corporation has a controlling shareholder. Therefore, the business judgment rule is inapplicable to their decisions, and the presumption that they have fulfilled their duty under Section 288 if they consult bankruptcy experts is rebuttable. Section 288 is flexible enough to address market-wide crises like the one caused by the COVID-19 epidemic. For example, the court can clarify that, during a market-wide crisis, liability will be imposed only in extreme cases.

Moreover, we see no reason to revamp the statute and keep management in office, as in the United States. The statute already authorizes the court to appoint an officer of the corporation as bankruptcy trustee as long as the court hears the creditors first and appoints an additional, outside trustee. A purposive reading of this provision would further authorize the court, given the support of key creditors, to instruct the outside trustee to focus only on oversight. This interpretation balances management continuity against creditor protection.