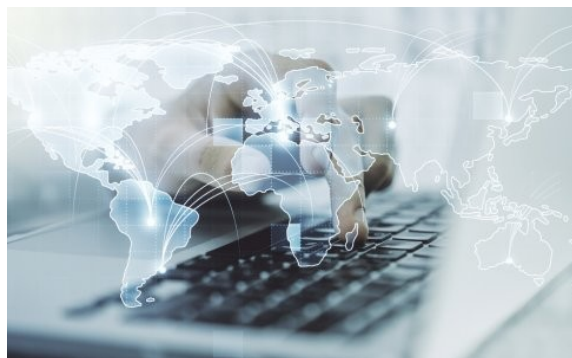


When the Subsidiary Fails: Litigation Risks for Officers and Directors of Parent Companies

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A recent decision in an adversary proceeding in Delaware, arising from the Chapter 7 liquidation of Rosetta Genomics, Inc., serves as a cautionary tale for corporate officers and directors — especially those of parent companies operating across borders. In *Beskrone v. Berlin* (In re Rosetta Genomics Inc.), 18-11316 (Bankr. D. Del. July 14, 2025), the complaint, which survived a motion to dismiss, underscores how fiduciary and fraud-related claims can reach beyond the immediate debtor to implicate leadership at the parent level, even when that parent is based outside the United States.

Rosetta Genomics, Inc., a Delaware corporation, was a wholly owned subsidiary of Rosetta Genomics, Ltd., an Israeli biotechnology company. The U.S. entity was created to commercialize diagnostic tests in the American market. The parent company developed new diagnostic tests based on various genomics markets, including DNA, microRNA, and protein biomarkers, using various technologies, including qPCR, microarrays, Next Generation Sequencing (NGS), and Fluorescent In Situ Hybridization.

The complaint alleges that the Delaware subsidiary's most significant assets were its subsidiaries Minuet Diagnostics, Inc. and GynoGen, Inc., as well as the diagnostic test RosettaGX Reveal ("Reveal"). The latter accounted for the vast majority of the debtor's revenue (up to 85%). The Israeli parent company owned another diagnostic test RosettaGX Cancer Origin Test. In 2012 Medicare established a reimbursement rate for Cancer Origin and published a formalized coverage decision through a Local Coverage Determination. This meant that the debtor and/or parent received approved automatic payments for claims submitted to Medicare and private insurers for Cancer Origin. The Reveal test was rarely reimbursed, but it was often billed under the coding for Cancer Origin.

Central to the claims is the alleged miscoding of RosettaGX Reveal, which led to inflated revenues. Despite learning of Medicare scrutiny in mid-2017, the executives allegedly failed to disclose the issue to investors and continued to raise capital, ultimately contributing to the collapse of both entities. According to the complaint, Sabby Healthcare and Sabby Volatility Warrant Master Funds (collectively "Sabby") and a potential merger partner incorporated financial statements that allegedly misrepresented the true source of revenue, omitting the coding irregularities. After the merger partner walked away, the Delaware subsidiary was placed in a Chapter 7 proceeding in 2018.

Years after the subsidiary was put in a Chapter 7 proceeding, the trustee, Don Beskrone, initiated litigation not only against the officers of the debtor but also against the executives of the Israeli parent. Interestingly, a lawsuit was first commenced in the Southern District of New York in 2021, and the case was dismissed without prejudice for lack of personal jurisdiction.

What facilitated the litigation was an assignment of claims from the Israeli parent's liquidator and Sabby, which had invested nearly \$8 million in the parent company under securities purchase agreements signed.

The lawsuit asserts a number of causes of action, including breach of fiduciary duty, gross negligence, fraud, and negligent misrepresentation on behalf of the bankruptcy estate, against Kenneth Berlin (CEO of the parent and sole director of the debtor), Ron Kalfus (CFO of both entities), and Brian Markison (chairman of the parent's board). All are U.S. citizens, yet their roles in the foreign parent did not shield them from liability in the U.S. bankruptcy court. The defendants in their motion to dismiss emphasize that Rosetta, Ltd. operated in the intensely competitive and rapidly changing biotechnology marketplace, and it had a consistently disclosed history of losses, as well as extensive disclosures in its public filings detailing the many risks inherent in investment (including, but not limited to, the risks inherent in Medicare billing determinations). Its failure was a risk that was clearly disclosed both early and often. Sabby, on the other hand, was a sophisticated investor that well understood the risks associated with investment in biotechnology and healthcare startups.

The defendants challenged the complaint on numerous procedural grounds, including lack of subject matter jurisdiction, statute of limitations, forum non-conveniens, and failure to state claims. Nonetheless, the court allowed the case to proceed, signaling that directors and officers, even of foreign parents, can face serious litigation exposure when a U.S. subsidiary fails.

This case is particularly instructive because it highlights how liability can extend across borders and corporate structures, exposing parent company officers to U.S. litigation and broadening the scope of claims through investor and liquidator assignments.