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Unlocking Value in Cross-Border Professional Negligence Claims

Increasing regulatory scrutiny of professional advisers, such as auditors, accountants and other financial advisors, is creating new opportunities to pursue professional negligence claims as part of a broader recovery strategy. Investors, creditors, and liquidators should consider key issues, including regulatory findings, evidence preservation, cross-border discovery, limitation periods, and damages, to maximize the viability and value of potential claims.

Recent regulatory and disciplinary actions —marked by significant penalties and sanctions against professional advisers, such as auditors, accountants and other financial advisors — highlight increased scrutiny of auditors and other professionals, reflecting the critical role they play in large-scale collapses of listed companies and the expanding scope of their civil and regulatory liability.

While such claims may offer an alternative route to recovery where claims against the company and/or its wrongdoing management are not viable, stakeholders (including investors, creditors, and shareholders) should bear in mind that the underlying duties are owed ultimately to the company and are generally pursued by liquidators or administrators for the benefit of all stakeholders. In practice, stakeholders will typically need to engage with and support these officeholders in assessing and advancing any such claims.

Stakeholders evaluating recovery options in distress scenarios should consider the following when engaging with liquidators and administrators on potential claims against professional advisers:

- **Map professional involvement against inflection points in the company's decline.** Stakeholders should identify not only which professionals were involved, but also when their work intersected with emerging red flags and deteriorating financial conditions. In many cases, the most viable claims arise not simply because an adviser was involved, but because it continued to sign off, advise, or refrain from escalation as the company's position worsened.

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- **Test whether the record reflects the risk environment at the time.** In evaluating the conduct of professional advisers, stakeholders should look beyond whether applicable industry and regulatory standards were engaged and consider whether the adviser's documented reasoning reflects the risks that were apparent at the time. Regulatory findings can help identify potential grounds for professional negligence claims. For instance, the Hong Kong Accounting and Financial Reporting Council and the China Securities Regulatory Commission have identified audit deficiencies, including failures to exercise professional skepticism despite heightened risks and threats to auditor independence.
- **Prioritize preservation of evidence held across the engagement structure.** Professional negligence claims are often evidence-intensive. In cross-border audits, where consolidated statements often involve subsidiaries across different jurisdictions, information is often shared among local offices. While advisers are generally subject to jurisdiction-specific retention requirements, some of the most probative material may fall outside standard retention practices or be dispersed across multiple jurisdictions, which is why stakeholders may wish to encourage liquidators and administrators to take early steps to preserve relevant evidence, including issuing litigation hold notices and using disclosure or cross-border discovery tools, particularly over longer time horizons. They should also consider whether subsidiaries or affiliated entities in other jurisdictions were subject to a group or consolidated audit, as work performed by overseas offices—and the related working papers held there—may be relevant to assessing and pursuing potential claims.
- **Consider issues of statutes of limitation early**. Negligent conduct often occurs over multiple years before a collapse or the discovery of fraud, and viable claims may be lost not because they lack merit, but because they are identified too late. Stakeholders should therefore raise potential limitation issues early with liquidators and administrators, including whether to pursue tolling agreements during pre-action discussions with professional advisers or to defer proceedings pending the outcome of regulatory investigations. Attention should be paid to "statutes of repose", which set a hard-stop deadline on claims—typically running from the date of the alleged misconduct rather than its discovery—even where the underlying facts have been concealed from creditors.
- **Evaluate recoverable loss, not just overall loss**. The damages recoverable in a professional negligence claim are often highly nuanced. Even where negligence or other wrongdoing can be established, the central question is often not whether the company suffered loss, but which losses can properly be attributed to the adviser's conduct under the applicable legal and causation framework. Professional advisers will often argue that the same loss would have occurred in any event, making early expert-led analysis of causation, alternative counterfactuals, and recoverable loss critical to evaluating a claim's viability and potential value.

As regulatory scrutiny of professional advisers continues to intensify across jurisdictions, well-constructed professional negligence claims are increasingly being considered as part of an effective recovery approach. Early, independent analysis—grounded in evidence, timing, and recoverability—can be critical to preserving options and positioning stakeholders to act decisively, including by supporting officeholders when the facts warrant.

About Kobre & Kim

Kobre & Kim is a global law firm that focuses on cross-border disputes and investigations, often involving fraud and misconduct.

- We are able to maintain our independence as advocates ready to litigate against any adversary institution by avoiding repeat client relationships and the conflicts of interest that come with them.
- Our team of offshore-based attorneys and former government prosecutors has deep experience tracing, freezing, and recovering misappropriated assets hidden in cross-border and offshore structures.
- Our deep experience coordinating claim enforcement and monetization strategies across jurisdictions, often involving assets and adversaries in Brazil and other Latin American countries, with enforcement lawyers across key offshore financial centers, South America, Asia, EMEA, and the U.S.

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