The Duty to Monitor under Delaware Law: from *Caremark* to *Citigroup*

by Eric J. Pan

Risk management is a corporate governance problem. A careful balance must be struck between the encouragement of entrepreneurial risk taking to grow the business and exploit new opportunities, on the one hand, and, on the other, the need for the board to ensure that those risks are taken in an appropriate and reasoned manner.

The catastrophic losses suffered by several large financial institutions are a reminder of the need for managing downside risks. They prompt the question: have corporate governance laws struck the right balance between risk taking and risk mitigation? This report provides an overview of Delaware law developments on the fiduciary duty to monitor, from the landmark *Caremark* case (1996) to the most recent *Citigroup* decision (2009).

One of the most difficult questions in corporate governance is whether the oversight responsibilities of the board of directors include the duty to prevent harm to the corporation. Delaware courts have refrained from holding corporate directors responsible for harmful outcomes that do not involve wrongful or illegal acts. By doing so, however, Delaware courts might have encouraged boards to be either ignorant or unquestioning of excessive risk taking by officers. The absence of adequate board oversight is partially to blame for the catastrophic losses suffered by Bear Stearns, Lehman Brothers, AIG, and Citigroup.

Consider, for example, the board of Citigroup. In early 2005, at the height of the real estate market, Citigroup's board decided that more of the firm's capital should be invested in securities and derivatives promising higher returns.[1] Investments in

[1] See Eric Dash and Julie Creswell, "Citigroup Saw No Red Flags Even as It Made Bolder Bets," *New York Times*, November 23, 2008; Ken Brown and David Einrich, "Rubin, Under Fire, Defends His Role at Citi," *Wall Street Journal*, November 29, 2008.

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mortgage-backed financial products proved especially lucrative. When the housing-price bubble began deflating in 2007, Citigroup failed to manage its exposure to the market downturn and suffered enormous losses. By October 2007, Citigroup wrote down $1.4 billion of its finance commitments.[2] The company eventually disclosed owning approximately $306 billion in troubled assets and reported losses of over $65 billion.[3] In late 2008 the firm had to submit to two government rescue packages, and its shareholders bore heavy losses.[4]

Six months after it began disclosing its financial problems, Citigroup announced it was seeking new directors who possessed "expertise in finance and investments."[5] The admission that the current board members did not possess the skills to fully understand the financial and investment decisions being made by the firm's employees prompts the logical question: Did the board do its job?[6]

The answer depends on whether the board had a duty to understand and monitor the firm's investments. Some business figures argued that boards of Citigroup and other troubled firms breached their duty to monitor. They accused those boards of violating a "clear-cut fiduciary responsibility to provide oversight."[7] If they had done so, perhaps the catastrophic losses suffered by these firms could have been prevented. Delaware courts, however, have taken a different view. In *In re Citigroup Inc. Shareholder Derivative Litigation*, the Delaware Court of Chancery dismissed an attempt to hold the Citigroup board liable for the firm's losses, finding that the board did not breach any of its fiduciary obligations.[8]

Why did the court excuse the Citigroup board? The court applied a fiduciary standard set by two landmark Delaware decisions—the 1996 Court of Chancery decision *In re Caremark International Inc. Derivative Litigation*,[9] which established the basic duties of the board to monitor corporate acts, and the 2006 Delaware Supreme Court decision *Stone v. Ritter*,[10] which reconceived the *Caremark* duties to be consistent with the duty of good faith and loyalty. Per *Stone*, a breach of the monitoring duty occurs when the board either "utterly fails to implement any reporting or information system or controls" or if "having implemented such system or controls, consciously fails to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[11] This standard poses three challenges for plaintiffs:

1. First, they must show scienter–that the board acted with actual or constructive knowledge that its inaction would harm the corporation.
2. Second, the board is responsible only for preventing wrongful or illegal acts. The board has no responsibility for preventing acts that lead to harmful business results.
3. Third, the board should not be held responsible for the after-effects of past decisions, no matter what events take place in the meantime.

2 See Citigroup Inc. Form 8-K, October 1, 2007, available at www.sec.gov.

3 See Dash and Creswell, *supra* note 1; Citigroup Inc. Form 8-K, November 23, 2008.

4 See Citigroup Inc. Form 8-K, October 30, 2008, announcing sale of $25 billion in preferred stock and warrants to the U.S. Treasury Department; Citigroup Inc. Form 8-K, November 26, 2008, announcing $40 billion capital benefit provided by U.S. Treasury Department, Federal Reserve Board and Federal Deposit Corporation. See also David Einrich, et al., "US Agrees to Rescue Struggling Citigroup," *Wall Street Journal*, November 24, 2008. Citigroup's share price fell 86 percent between December 31, 2004, and December 31, 2008. On December 31, 2004, Citigroup's stock was trading at $48.18 per share. On December 31, 2008, Citigroup's stock was trading at $6.71 per share.

5 http://www.citigroup.com/citi/corporategovernance/directorsearch.htm (last visited December 3, 2009). See also Eric Dash, "Dean of Harvard Business School May Join Citigroup's Board," *New York Times*, July 9, 2008, noting that none of Citigroup's independent directors, except for a recent addition to the board, had substantial finance experience.

6 See Paul L. Lee, "Risk Management and the Role of the Board of Directors: Regulatory Expectations and Shareholder Actions," *Banking Law Journal*, Volume 125, 2008, p. 679.

7 John Schnatter, "Where Were the Boards?" *Wall Street Journal*, October 25, 2008. Also see Paul Myners, "Banking Reform Must Begin in Boardroom," *Financial Times*, April 24, 2008.

8 *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009), hereinafter "Citigroup Deriv. Suit."

9 *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

10 *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

11 *Stone*, 911 A.2d 362, at 370.

This report illustrates how Delaware courts define a board's duty to monitor. In addition to reviewing the foundational decisions on the subject, the report outlines the most recent cases where the courts have specifically considered shareholder lawsuits challenging a board's failure to prevent harm to the corporation. While applying the *Stone* precedent, such decisions reveal that the Delaware approach to the duty to monitor does not require boards to play a role in managing risk, or otherwise monitoring corporate activities that may result in harm to a corporation's business. Such a definition of the fiduciary standard places Delaware jurisprudence in conflict with recent calls for boards to play a more active role in risk management.[12]

Fiduciary Duty to Monitor

The duty to monitor is an obligation to prevent harm to the corporation. The board may breach its duty when harm occurs due to its inattention or inaction.[13] The scope of the duty depends on two elements:

1. What care must be taken by the board to detect possible harm?
2. What types of harm require board intervention?

Subjecting a board to liability for any harm to the corporation due to its inattention or inaction might cause a board to become cautious and overly sensitive to risks. An aversion to risk-taking activities could harm shareholders in two ways:

- the board may overinvest in monitoring and control mechanisms to limit the degree of risk assumed by the corporation; and
- the board may be prone to reject shareholder value-enhancing business decisions that involve greater risk.

Recognizing the chilling effect that the threat of legal liability might have on a board's business judgment, Delaware courts have sought to limit the scope of the duty to monitor. At issue are how Delaware courts developed these limits and whether the limits are appropriate. The three cases that have set forth the duty to monitor are *Graham v. Allis-Chalmers*, *Caremark,* and *Stone v. Ritter*. *Graham* introduced the notion that a board has a duty to act when it becomes aware of wrongdoing. *Caremark* explained why a board has an obligation not only to act in the face of obvious signs of wrongdoing, but also to be informed and vigilant of wrongdoing. *Stone* limited the *Caremark* standard by incorporating the duty to monitor into the duty of good faith and loyalty. A board's liability for failing to monitor is now conditioned upon proof of scienter, a key element to finding lack of good faith.

The *Graham* decision Decided in 1963, *Graham v. Allis-Chalmers Manufacturing Co.*[14] was the first Delaware case to recognize a duty on boards to prevent corporate misconduct. Allis-Chalmers shareholders had sued the board for not stopping employees from violating federal antitrust law. The Delaware Supreme Court rejected the claim, noting that the board was entitled to depend on the "honesty and integrity" of the corporation's employees. However, in reaching this conclusion the court acknowledged a fiduciary duty to monitor, with three basic characteristics:

1. First, the duty arises from the fiduciary responsibility to oversee management action, as the court qualified it as a part of the duty of care.[15]
2. Second, the duty was defined as a passive duty, where boards are responsible for halting misconduct only if "something occurs to put them on suspicion that something is wrong."[16] Under *Graham*, boards did not have an obligation to watch for misconduct or "install and operate

12 See, e.g., *Enterprise Risk Management–Integrated Framework*, Committee of Sponsoring Organizations (COSO) of the Treadway Commission, 2004; and *Risk Management Lessons from the Global Banking Crisis of 2008*, Senior Supervisors Group, Oct. 21, 2009, available at www.newyorkfed.org/newsevents/news/banking/2009/SSG_report.pdf. On the work of the Treadway Commission, the COSO Framework and the role of the corporate board in the oversight of the framework implementation, see Matteo Tonello, *Emerging Governance Practices in Enterprise Risk Management*, The Conference Board, Research Report 1398, 2007.

13 See William T. Allen, Reinier Kraakman, and Guhan Subramanian, *Commentaries and Cases on the Law of Business Organization*, 3rd ed. 2009, pp. 261-62.

14 *Graham v. Allis-Chalmers Manufacturing Co*., 188 A.2d 125 (Del. 1963).

15 For a discussion of the fiduciary duty of care and its practical applications for corporate directors, see Matteo Tonello, *Corporate Governance Handbook: Legal Standards and Board Practices*, The Conference Board, Research Report 1450, 2009, p. 14.

16 *Graham*, 188 A.2d at 130, citing for support the 19th century U.S. Supreme Court decision *Briggs v. Spaulding*, 141 U.S. 132 (1891).

a corporate system of espionage to ferret out wrongdoing."[17] Instead, boards would be liable only if they "ignored either willfully or through inattention *obvious* danger signs of employee wrongdoing."[18]

3. Third, boards only have a duty to stop corporate actions that are illegal, as the court declined to consider whether a board's duty extended to preventing bad business outcomes or other harmful results not involving violations of the law.

It was within this doctrinal framework that the Delaware Court of Chancery reconsidered the duty to monitor thirty-three years later.

The *Caremark* decision Chancellor William Allen's opinion in *In re Caremark International Inc. Derivative Litigation* remains the most complete exploration of the duty to monitor by a Delaware court, so much so that, to this day, duty to monitor claims are often referred to as "Caremark claims."[19] *Caremark* originated from a federal investigation of illegal payments made by Caremark International employees to physicians in exchange for patient referrals. Caremark paid out approximately $250 million to settle the charges.[20] Chancellor Allen had to decide whether the board breached its duty to monitor by allowing these violations to occur.

Relevant Provisions under Delaware General Corporation Law

The directors' role Under Delaware General Corporation Law Section 141(a), "[t]he business and affairs of every corporation … shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors … shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation."

Exculpatory clauses Section 102(b) (7) of the Delaware General Corporation Law states: "[T]he certificate of incorporation may also contain any or all of the following matters: (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title." A similar provision exists in the Model Business Company Act; see Section 2.02. The Delaware legislature added Section 102(b) (7) in 1986 in response to the decision in *Smith v. Gorkom*, the only case where a Delaware court held directors liable for breach of the duty of care.

17 *Graham*, 188 A.2d at 130.

18 Id. Emphasis added. Such obvious signs constitute "red flags" that demand board action. See *In re Citigroup Inc. Shareholders Litigation*, 2003 WL 21384599, p. *2 (Del. Ch. June 5, 2003) ("'Red flags' are only useful when they are either waved in one's face or displayed so that they are visible to the careful observer.").

19 Hillary Sale has called *Caremark* "one of the most prominent Delaware opinions of all time." See Hillary A. Sale, "Monitoring *Caremark's* Good Faith," *Delaware Journal of Corporate Law*, Volume 32, 2007, p. 719.

20 *Caremark*, 698 A.2d at 960-61.

Chancellor Allen concluded that the board of directors cannot assume that the corporation is operating in compliance with the law; instead, it has an obligation to invest in monitoring systems that are suitable to identify legal violations. Specifically, a board has "a duty to attempt in good faith to assure that a corporation's information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."[21] However, under the standard formulated in Allen's decision, finding a violation of this duty is far from easy as:

- the board must have failed to provide reasonable oversight in a "sustained or systematic" fashion,[22] and
- the information reporting system on which the board relied must have been an "utter failure."[23]

Actual failure to prevent wrongdoing does not in itself mean that the system is an utter failure: A court must also consider the design of the system. Caremark International had run training programs and distributed ethics manuals to its employees. The board also had reviewed the company's legal compliance systems even after outside auditors found no material weaknesses in the systems. Therefore, Chancellor Allen concluded that the board had made a good faith attempt to ensure compliance with the law.

The burden on boards to put into place information reporting systems went beyond what *Graham* contemplated, raising the question whether the Chancery Court was ignoring the earlier Delaware Supreme Court decision. But Chancellor Allen questioned whether, thirty-three years later, the Delaware Supreme Court still would believe that boards could justify not making any effort to ensure they collected information "respecting material acts, events or conditions within the corporation, including compliance with applicable statutes and

The Impact of *Caremark*: Practitioners' Views

"Failure of directors to promote adequate corporate programs within the corporation could lead to personal liability for losses due to such failure to provide appropriate corporate compliance programs. This concept of liability expands the director's responsibility beyond the traditional obligations of the duty of care and the countervailing concept of the business judgment rule."

Sherrie McAvoy and Carole L. Basri, *After* Caremark*: Personal Liability for Director's Failure to Implement Corporate Compliance Programs and the Need for Self-Assessment*, in Practising Law Institute Corporate Law and Practice Course Handbook Series, PLI Order No. B4-7185, June 1997.

"While *Caremark* may not have had the wide-ranging impact envisioned by some, and may actually have been overtaken by rules and regulations imposed by Congress, the SEC and self-regulatory organizations, it still has served a wake-up call to corporate America... emphasiz[ing] the need for increased monitoring of corporate affairs to catch problems before they get out of hand."

Eric Landau, Shawn Harpen, and Krisel A. Massey, *Revisiting* Caremark *and a Director's Duty to Monitor: The Chancery Court's Wake-up Call to Directors*, in Practising Law Institute Corporate Law and Practice Course Handbook Series, PLI Order No. 3220, March-June 2004.

21 Id., at 970.

22 Id., at 971.

23 Id.

regulation[.]"[24] He offered three reasons why *Graham* should be reinterpreted and, in doing so, provided the rationale for a more substantial duty to monitor:

1. **The "serious" role of boards** First, Chancellor Allen noted that, since *Graham*, the Delaware Supreme Court had recognized the "seriousness" of boards' role in the management of the corporation.[25] He specifically cited to the Delaware Supreme Court's decisions in *Smith v. Van Gorkom*[26] and *Paramount Communications v. QVC* as evidence of this change.[27] In *Van Gorkom*, *QVC*, and their progeny, courts held boards to a higher standard of review, requiring boards to demonstrate that they engaged in reasonable investigation and deliberation before approving certain corporate transactions. Similarly, boards should bear greater responsibility for monitoring the activities of the corporation.
2. **The inherent need for information systems** Second, Chancellor Allen argued that information reporting systems are essential to boards meeting their supervisory and monitoring role under Section 141 of the Delaware General Corporation Law–the statutory provision stating that the corporation shall be managed under the direction of the board.[28] (See "Relevant Provisions under Delaware General Corporation Law," p. 4). Chancellor Allen's explicit linking of the operation of information reporting systems with Section 141 is consistent with the notion that a board can only oversee management if it has a means of collecting information. Caremark was a complex enterprise. It had 7,000 employees divided into ninety different branches and a decentralized management structure. The complexity of the firm made it difficult for Caremark's board to monitor all aspects of the firm without an information reporting system. Thus, *Caremark* represented a shift in how Delaware courts viewed the role of corporate boards: Boards would be subject to a more literal interpretation of Section 141 and held responsible for the actions of officers and employees. The need for information systems is even greater today as corporations continue to grow in size and complexity.[29]
3. **A more lenient sentencing treatment** Third, Chancellor Allen believed that any rational board would install an information reporting system to take advantage of the benefits offered to corporations under the federal organizational sentencing guidelines. Pursuant to the guidelines, a judge may decide to lower a fine on a corporation for unlawful acts if he or she determines that the corporation had in place an "effective program to prevent and detect violations of law."[30] Consequently, the guidelines "offer powerful incentives for corporations today to have in place compliance programs."[31] Even after the U.S. Supreme Court in *United States v. Booker* declared aspects of the sentencing guidelines unconstitutional,[32] the sentencing guidelines remain very influential,[33] and the U.S. Attorneys' Manual continues to direct prosecutors to take into account "the existence and effectiveness of the corporation's pre-existing compliance program."[34]

Prior to *Caremark*, Delaware courts expected little board involvement in the day-to-day work of the corporation, looking to the board only in the case of fundamental or self-

24 Id., at 969.

25 Id., at 970.

26 *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

27 *Paramount Communications v. QVC*, 637 A.2d 34 (Del. 1994). In *Van Gorkom*, the Delaware Supreme Court found the board to be grossly negligent and without the protection of the business judgment rule when it approved the sale of the corporation without a substantial inquiry into the terms of the offer. In *QVC*, the Delaware Supreme Court decided that the board breached its duty under *Revlon v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173 (Del. 1986), by failing to obtain the best price for the company in a change of control transaction.

28 *Caremark*, 698 A.2d at 970.

29 See, e.g., Peter T. Muchlinski, *Multinational Enterprises and the Law*, 2007, p. 58, discussing the complexity of modern U.S. corporations.

30 See Note 3(k) of the commentary to Section 8A1.2 of the *U.S. Sentencing Guidelines Manual*.

31 *Caremark*, 698 A.2d at 969. See also Diana E. Murphy, "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics," *Iowa Law Review*, Volume 87, 2002, p. 697, describing the incentive that corporations have under the guidelines to implement compliance programs.

32 *United States v. Booker*, 543 U.S. 220 (2005).

33 See Paul Fiorelli and Ann Marie Tracey, "Why Comply? Organizational Guidelines Offer a Safe Harbor in the Storm," *Journal of Corporate Law*, Volume 32, 2007, pp. 475-78. The impact of the sentencing guidelines also plays a bigger role in the pre-charge stage of corporate prosecutions when prosecutors negotiate deferred and non-prosecution agreements to corporations in return for governance reform. See Peter J. Henning, "The Organizational Guidelines: R.I.P.?" *Yale Law Journal Pocket Part*, Volume 116, 2007, p. 312, available at www.thepocketpart.org /2007/03/20/henning.html.

34 See *U.S. Attorneys' Manual* 9-28.800, "Principles of Federal Prosecution of Business Organizations," available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.000. The SEC also rewards corporations that seek out and report wrongdoing. The SEC policy, articulated in the Seaboard Report, grants corporations better enforcement treatment for, among other things, self-reporting misconduct. See Report of the Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions Exchange Act Release No. 44,969, 76 SEC Docket 296 (October 23, 2001).

dealing transactions. Pre-*Caremark* case law perpetuated a CEO-centric model of corporate governance with little obligation on boards to supervise officers and employees. *Caremark* gave more substance to the duty to monitor. Taken to its logical extension, *Caremark* shifted the burden onto boards to put into place and evaluate the adequacy of its internal control and information reporting systems and to take into consideration the legal and economic environment of the corporation. With *Caremark*, "[c]ourts have embraced the model of an activist board and are indicating their willingness to impose liability on directors who fail to research, investigate, and ask challenging questions. No longer can independent directors rubber-stamp management recommendations without mastering the financial details of proposed transactions."[35]

This is how companies and their legal advisers responded to *Caremark* until the Delaware courts limited the duty to monitor in *Stone v. Ritter*.

The *Stone* decision The Delaware Supreme Court's response to the Chancery Court's *Caremark* decision came ten years later, in 2006. Although the court adopted Chancellor Allen's reasoning in *Caremark* (including his reinterpretation of *Graham*), it cut back the scope of the *Caremark* standard in *Stone* by redefining the duty to monitor as part of the duty of good faith and loyalty.[36] (See "The Duty of Good Faith," p. 8). Therefore, the effect of *Stone* was to limit the scope of the duty to monitor.

The limiting of the duty to monitor occurred in three steps:

1. By equating the duty to monitor with the duty of good faith.
2. By subsuming the duty of good faith into the duty of loyalty (instead, Chancellor Allen had considered the duty to monitor to be part of the duty of care).[37]
3. By recognizing scienter as an element of bad faith and requiring plaintiffs to meet a high standard of scienter to hold directors liable.

The re-categorization of the duty to monitor as part of the duty of loyalty removed monitoring failures from Section 102(b) (7) exculpation. (See "Relevant Provisions under Delaware General Corporation Law," p. 4). However, it also made it more difficult to show that directors breached their duty to monitor.

In *Stone*, the Delaware Supreme Court reformulated the *Caremark* standard as a two-part test, where liability stems from either:

I. "**utterly fail[ing]** to implement any reporting or information system or controls" or

II. "having implemented such system or controls, **consciously fail[ing]** to monitor or oversee its operations".[38]

Most notably, the court identified a scienter requirement to prove a breach of the duty to monitor, stating "imposition of liability requires a showing that the directors *knew* that they were not discharging their fiduciary obligations."[39] In order to show scienter, plaintiffs must plead "particularized facts... that [the directors] had 'actual or constructive knowledge' that their conduct was legally improper."[40] The question that was left unanswered is how difficult it would be to satisfy this requirement.

35 See Jill E. Fisch, "Taking Boards Seriously," *Cardozo Law Review*, Volume 19, 1997, pp. 266-67.

36 *Stone*, 911 A.2d at 368.

37 See *Caremark*, 698 A.2d at 967.

38 See *Stone*, 911 A.2d at 370. Emphasis added. In re-formulating the Caremark standard the court borrowed language from the definition of good faith–specifically the use of the word "conscious"–first set forth by Chancellor Chandler in *Disney II* as a "conscious disregard of for one's responsibilities" (emphasis added). Thus, there is an explicit connection between the duty to monitor standard set forth in *Caremark* and the duty of good faith standard set forth in the *Disney* cases.

39 Id., citing with approval Guttman, 833 A.2d at 506. Emphasis added. See also *Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007); *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) ("Where, as here, directors are exculpated from liability except for claims based on "fraudulent," "illegal" or "bad faith" conduct, a plaintiff must also plead particularized facts that demonstrate that the directors acted with scienter.")

40 *Wood*, 953 A.2d at 141. See also *Guttman*, 823 A.2d at 506 ("[The *Caremark* standard] premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs.").

The Duty of Good Faith

In *Brehm v. Eisner* (2006) – the final of the so-called *Disney* cases, involving a shareholder lawsuit against the Walt Disney Company board for failing to exercise proper oversight on the negotiation of the compensation granted to Disney President Michael Ovitz – the Delaware Supreme Court considered three possible categories of bad faith.[a]

1. **Intent to do harm** The first category of bad faith conduct is conduct with intent to do harm.[b] There was no question that such conduct constituted bad faith.
2. **Negligence with no harmful intent** A second category is gross negligence without intent to do harm. As gross negligence was well understood as a violation of the duty of care,[c] the court reasoned that gross negligence could not be bad faith since a director was protected from personal liability by Section 102(b)(7) or enjoyed indemnification under Section 145 of the Delaware General Corporation Law.[d]
3. **Intentional dereliction of duty** The tough case is the third category "which falls in between the first two categories of (1) conduct motivated by subjective bad intent and (2) conduct resulting from gross negligence."[e] In the view of the court, Chancellor Chandler's definition of bad faith – intentional dereliction of duty, a conscious disregard for one's responsibilities – fit this last category.

In trying to distinguish between the duty of good faith and duty of care, the Delaware Supreme Court defined bad faith in terms of an extremely severe form of carelessness (*i.e.*, greater than gross negligence). Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is *qualitatively more culpable than gross negligence*, should be proscribed. A vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith.[f] What the court did not resolve was whether the duty of good faith was independent of both the duties of care and loyalty, or whether good faith was an egregious duty of care violation. The court expressly refrained from addressing the issue.[g]

In deciding *Stone* less than five months after *Brehm*, the Delaware Supreme Court grasped the opportunity to settle once and for all the meaning of the duty of good faith. Since *Stone* was a case about a *Caremark* claim, it also represented the first chance for the court to opine on the duty to monitor standard since *Graham* and *Caremark*.

Stone was a derivative suit by shareholders of AmSouth Bancorporation against the board for allowing employees to violate reporting requirements under various banking and anti-money-laundering regulations. As AmSouth's certificate of incorporation included a Section 102(b)(7) exculpatory provision, plaintiffs attempted to characterize the failure to monitor as an act of bad faith.[h] The Delaware Supreme Court rejected the claim. The company had in place a comprehensive information reporting system, and the board helped design the compliance program. Even though the program proved to be flawed, the court found that the board pursued its monitoring responsibilities in good faith.

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a See *In re Walt Disney Co. Derivative Litigation*, 731 A.2d 342 (Del. Ch. 1998) (dismissal of original complaint); *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (partial reversal of dismissal); *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003) (refusal of motion to dismiss), hereinafter "*Disney I*;" *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. 2005) (decision on the merits), hereinafter "*Disney II*;" *Brehm v. Eisner*, 906 A.2d 27 (Del. 2006) (affirmation of lower court decision), hereinafter "*Brehm*."

b *Brehm*, 906 A.2d at 64.

c See *McPadden v. Sidhu*, 2008 WL 4017052 (Del. Ch. Aug 29, 2008) ("Delaware's current understanding of gross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason.").

d See *Brehm*, 906 A.2d at 64-66. See also, e.g., *Rothenberg v. Santa Fe Pacific Corporation*, 1992 WL 111206, p. *4 (Del. Ch. May 18, 1992) (unpublished opinion), noting that Section 102(b)(7) protects directors from liability for gross negligence.

e *Brehm*, 906 A.2d at 66.

f Id.

g Id., fn. 112.

h See *Stone, et al. v. Ritter, et al.*, 2006 WL 302558 (Del. Ch. Jan. 26, 2006) (unpublished opinion), referring to the plaintiffs' argument in the answering brief that demand should be excused because the board failed to make a good faith attempt to fulfill its fiduciary duties.

First, the Delaware Supreme Court upheld Chancellor Allen's interpretation of *Graham* – eliminating any doubt that Chancellor Allen's decision in *Caremark* was not good law. Even though *Graham* did not expressly recognize any duty on the board to make an effort to be informed of the activities of the corporation, the court agreed with Chancellor Allen that boards had a duty to be reasonably informed and to ensure that adequate information reporting systems are in place.[i] However, the court also made clear that the failure of a board to meet its *Caremark* duty was a failure to act in good faith (as opposed to a breach of the duty of care, as determined by Chancellor Allen).

Furthermore, the court declared that the duty of good faith was a subsidiary element of the duty of loyalty. While in *Brehm* the duty of good faith appeared to be a non-exculpable violation of the duty of care, the court in *Stone* flatly rejected this notion as well as the notion that the duty of good faith was independent from the duties of care and loyalty, ending the doctrinal debate about the existence of a triad of fiduciary duties.

[i] See *Stone*, 911 A.2d at 369.

Recent Case Law Developments

In the few years since *Stone*, courts have opined on a handful of duty to monitor cases, providing some data points to consider how well the post-*Stone* standard encourages monitoring efforts by boards. In almost all cases, the courts reviewed duty to monitor claims as part of motions to dismiss, usually in the context of plaintiffs arguing demand futility by showing that directors faced a substantial likelihood of personal liability from the claims.[41] There has been only one case where parties have litigated in full the merits of a duty to monitor claim. The courts either have focused on whether plaintiffs have pled sufficient facts to meet the scienter requirement or, in the case of *Citigroup*, have excused the board from monitoring business risk.

The *Desimone* decision In several cases, plaintiffs have had difficulty demonstrating scienter. For example, *Desimone v. Barrows*, a 2007 decision, concerned a derivative action against the directors of Sycamore Networks, Inc. for allowing the backdating of stock options.[42] The plaintiff argued that the granting of the backdated stock options by certain officers was "an abdication of the board's duty to monitor the corporation's compliance with applicable laws and regulations."[43] In order to make a successful duty to monitor claim, however, Vice Chancellor Strine noted that the plaintiff had to plead the existence of facts suggesting that the board actually *knew* that the internal controls of the corporation were inadequate in detecting the backdating and that the board chose to ignore the inadequacies.[44]

The plaintiff could not do so. The best evidence of scienter the plaintiff could produce was the existence of an internal memorandum describing the backdating activities. The memorandum did not impress Vice Chancellor Strine, who noted that the plaintiff failed to show that the board knew of the contents of the memorandum.[45]

[41] See *Rales v. Blasband*, 634 A.2d at 927, 934 (Del. 1993).

[42] *Desimone*, 924 A.2d 908.

[43] Id. at 939.

[44] Id. at 940. See also p. 942, regarding the potential liability of members of the audit committee.

[45] Id., p. 940.

The plaintiff in *Desimone* gave Vice Chancellor Strine very little to work with to evaluate the possible merits of the claim. The plaintiff sloppily prepared his pleading, making little effort to collect the necessary facts to support his assertions.[46] Nonetheless, Vice Chancellor Strine's discussion of the duty to monitor claim indicated what he expected the plaintiff to plead. The focus of the duty is on what the directors knew as opposed to what they should have known. Thus, the plaintiff would have succeeded only if he presented facts that demonstrated actual knowledge by the board that its monitoring systems were deficient or actual knowledge of the wrongdoing.

The *Wood v. Baum* decision In *Wood v. Baum*, decided in 2008, the Delaware Supreme Court considered a duty to monitor claim against the board of directors of a limited liability company for failing to maintain adequate accounting and financial reporting controls.[47] As in *Desimone*, the court concluded that the plaintiff failed to establish that the directors *knowingly* participated in the illegal acts.[48] The plaintiff argued that the directors should be deemed to have had knowledge of the illegal acts because they:

- signed the publicly filed documents that contained the misstatements;
- approved the transactions that later proved to be improper; or
- served on the audit committee that failed to catch the questionable accounting practices.

However, the Delaware Supreme Court rejected such argument and affirmed that the lack of good faith could not be inferred based upon what directors should have known or the many opportunities they had to discover the wrongful actions, but only upon evidence that they knew of or participated in the illegal acts.

Conversely, there have been three cases where courts have looked favorably on duty to monitor claims. Collectively, however, they offer limited guidance to plaintiffs.

The *Araneta* decision *ATR-Kim Eng Financial Corporation v. Araneta* (unpublished opinion) is the only case where parties have litigated in full a duty to monitor claim.[49] The case revolved around a joint venture between ATR and Carlos Araneta in which Araneta controlled ninety percent of the joint venture company. ATR accused Araneta, who was chairman of the joint venture's three-person board, of transferring key assets from the joint venture to his family members, leaving ATR with a ten percent stake in a worthless company. The duty to monitor claim pertained to the role of the two other directors who permitted Araneta to transfer the assets. Vice Chancellor Strine called them "stooges for Araneta."[50] They did not hold board meetings, they did not question changes made to the company name, they allowed themselves to be removed from the board without explanation, and they possessed little knowledge of the company's activities.

Describing *Araneta* as a *Caremark* claim is awkward. In citing to *Caremark*, Strine characterized the defendants' failure to carry out their basic responsibilities as directors to be a failure to implement a reporting system. But this case had nothing to do with a reporting system. It had to do with board members who showed themselves incapable of independent thought, judgment, or initiative. *Araneta* was about an extreme set of facts. It left unanswered whether the duty to monitor has any impact on directors who are more careful in carrying out their basic responsibilities.

46 Id., at 917-18, describing the plaintiff's effort put into his pleading as insubstantial.

47 *Wood*, 953 A.2d at 139. The appeal followed a dismissal of the complaint by the Court of Chancery.

48 Id., at 142. As in *Desimone*, the court criticized the plaintiff in *Wood* for not conducting a sufficient degree of fact-finding to plead sufficient facts to support his monitoring claim.

49 See *ATR-Kim Eng Financial Corporation v. Araneta*, 2006 WL 3783520 (Del. Ch. Dec. 21, 2006).

50 Id., at * 1.

The *AIG* decision *American International Group v. Greenberg, et al.* centered on a series of fraudulent schemes perpetrated by AIG officers.[51] Vice Chancellor Strine decided that two of the defendants, who served as directors and officers of the company, "knowingly tolerat[ed] inadequate controls and knowingly fail[ed] to monitor their subordinates' compliance with legal duties."[52] The defendants had knowledge because they held the highest positions in AIG ("top dog[s]"[53]), and it was unlikely certain illegal transactions could have been conducted without their knowledge.[54]

Vice Chancellor Strine was willing to draw such inferences for two reasons despite the fact that the plaintiffs did not provide evidence of direct knowledge of the fraudulent transactions. First, he was so horrified by the magnitude and consistency of the fraudulent conduct carried out by the corporation that he went so far as to describe the defendants as being part of a "criminal organization."[55] Strine found it unbelievable that such extensive fraud could take place without some knowledge on the part of the defendants. Second, the defendants were not only directors but also senior officers of the corporation. In discussing the role each defendant played in the corporation, Vice Chancellor Strine continuously noted that the corporate divisions involved in the fraud were under the defendants' supervision.[56]

In this case, the defendants had direct control over the corporate operations involved in the commission of illegal acts. Not surprisingly, the strength of the control makes it easier for courts to infer the existence of knowledge. Such inference would be unlikely in the case of outside directors who do not commonly exercise such control.

Given the unusual facts of the case, the *AIG* decision does not give comfort that Vice Chancellor Strine's willingness to enforce the duty to monitor in this particular case will impact many other cases.

The *Countrywide* decision The other case to excuse demand for a *Caremark* claim was *In re Countrywide Financial Corp. Derivative Litigation*.[57] *Countrywide* was a decision of the U.S. District Court of the Central District of California. The plaintiffs in *Countrywide* sought to hold various directors of Countrywide Financial responsible for approving an increase in the origination of non-conforming loans, extension of loans in contravention of company underwriting standards, and a failure to maintain appropriate reserves and allowances to offset the company's riskier loan portfolio.[58] Like the Citigroup board, the Countrywide board approved a strategy and a set of business practices that exposed the firm to greater risk.

The plaintiffs argued that the Countrywide directors violated Section 10(b)[59] of the Securities Exchange Act of 1934, as well as their duty to monitor under Delaware law. Scienter is an element of both claims, but the scienter standard in federal securities law is arguably broader than that of Delaware law. Most federal courts, like the court in *Countrywide*,[60] have held that recklessness (or "deliberate recklessness" in the case of the Ninth Circuit) constitutes scienter for purposes of Section 10(b) and Rule 10b-5.[61] A showing of recklessness

51 *American International Group v. Greenberg, et al.*, 2009 WL 366613 (Del. Ch. Feb. 10, 2009).

52 Id., at *23.

53 Id., at *22.

54 Id., at *22-24.

55 Id.

56 See, e.g., id., at 23 ("Similarly, given Matthews' sensitive position and overall power and influence within AIG, I cannot assume at this stage in the litigation that AIG Financial Products, a subsidiary under Matthews' supervision, took part in a scheme to collude with competitors in rigging markets without Matthews knowing about it.").

57 *In re Countrywide Financial Corp. Derivative Litigation*, 554 F.Supp.2d 1044 (C.D. Cal. 2008).

58 Id., at 1050-51.

59 Section 10(b) of the Exchange Act, as amended, codified at 15 U.S.C. § 78j(b), provides (in pertinent part) that: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange… (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement… any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

60 Id., at 1057.

61 See James D. Cox, Robert W. Hillman and Donald C. Langevoort, *Securities Regulation: Cases and Materials*, 2006, at 672-73. SEC Rule 10b-5, enacted under Section 10(b) of the Exchange Act, as amended, and codified at 17 C.F.R. § 240.10b-5, prohibits any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security.

alone, however, is not enough to satisfy the scienter requirement needed to show lack of good faith under Delaware law.[62] The court in *Countrywide* did not acknowledge any possible difference and applied the same scienter standard in evaluating both the federal and state law claims.[63]

The effect of this application of the federal standard of scienter is apparent in how the court evaluated the plaintiffs' claims. Rather than demanding that the plaintiffs present facts demonstrating actual knowledge by the directors of the wrongful acts conducted by the officers and employees of the company, the court, for example, was willing to infer knowledge of the directors by virtue of the fact the directors served on at least one of the key board committees "charged with oversight of Countrywide's risk exposures, investment portfolio, and loan loss reserves. . . . As such, they were in a position to recognize the significance of these red flags, and, accordingly, investigate the extent to which underwriting standards had been abandoned."[64] In short, the directors should have known, or were at least reckless in not knowing, because it was their job to know.

The court was persuaded by the plaintiffs' allegation that the failure of the board to prevent the violation of the company underwriting standards "simply does not square with the specific and comprehensive monitoring duties assigned to the members of the Board."[65] It is also striking that the federal court was willing to conclude that the directors failed to act in the face of red flags. At the time, there was a public report issued by a coalition of banking regulators condemning the type of lending practice engaged in by Countrywide and competing lenders were reporting distress during the same period.[66] Such events are analogous to the events that took place prior to the near failure of Citigroup, where there were well-publicized concerns about the soundness of the mortgage securities and housing markets and reports of losses mounting at competing financial institutions.

The federal court was happy to make certain inferences in the absence of actual evidence of knowledge to uphold a duty to monitor claim that likely would not have survived a Delaware court.

The *Citigroup* decision Decided in February 2009, *In Re Citigroup Inc. Shareholder Derivative Litigation* is the most important case in this overview of recent case law on the duty to monitor, as it illustrates the substantive limits of the duty. Chancellor Chandler considered a shareholder derivative suit against the Citigroup board for failing to prevent the losses incurred by the bank from investing in mortgage-backed securities. The plaintiffs argued that the Citigroup board failed to adequately oversee and manage the corporation's risk exposure and ignored several red flags that warned the board of the deteriorating subprime mortgage market.[67]

Chancellor Chandler rejected the plaintiffs' claims on two grounds.

1. First, a board cannot be held liable for failure to monitor business risk.[68] It only can be held responsible–if at all–for failing to prevent or halt legal violations and other acts of misconduct.[69]
2. Second, a board cannot be held liable for making business decisions that later prove to have been unwise.[70]

62 See, e.g., *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008).

63 See *Countrywide*, 554 F.Supp.2d at 1077 ("Thus, the standard for holding a director liable for a failure of monitoring is a 'scienter'-based one." *Desimone*, 924 A.2d at 935. "The finding of a strong inference of at least deliberate recklessness in [the discussion of scienter under Section 10(b)], applies equally to the analysis of the failure of oversight claims.").

64 See *Countrywide*, 554 F.Supp.2d at 1060. The court specifically identified the relevant board committees to be the Audit & Ethics Committee, Credit Committee, Finance Committee, and Operations & Public Policy Committee.

65 Id., at 1066 ("The purpose of the [Board] Committee system is to monitor the operation, financial performance, and risk position of the Company."). The court in Countrywide also cited for support the First Circuit decision in *Miss. Pub. Emps. Retirement Sys. v. Boston Scientific Corp*., 523 F.3d 75, 90-91 (First Cir. 2008). In that case, the federal court not only inferred scienter but also inferred the existence of a highly effective internal control and information reporting system because the company operated in a highly regulated industry. Such leaps of logic would be unheard of in a Delaware court.

66 See *Countrywide*, 554 F.Supp.2d at 1082.

67 See *Citigroup Deriv. Suit*., 964 A.2d at 114-15, 126-27 ("The allegations in the Complaint amount essentially to a claim that Citigroup suffered large losses and that there were certain warning signs that could or should have put defendants on notice of the business risks related to Citigroup's investments in subprime assets.").

68 Id., at 124.

69 Id., at 129-31.

70 Id.

Expanding the duty to monitor to hold boards responsible for bad business outcomes would place the court in the inappropriate position of second-guessing the business judgment of the board.[71] Doing so would undermine the purpose of the business judgment rule, which is "to allow corporate managers and directors to pursue risky transactions without the specter of being held personally liable if those decisions turn out poorly."[72] In addition, evaluating the board's success at monitoring business risk would mean judging the merits of a business decision after the fact. Chancellor Chandler noted that such evaluation would unleash the dangers of hindsight bias (*i.e.*, the tendency for someone with knowledge of an outcome to exaggerate the extent to which they believe that outcome could have been predicted).[73]

Chancellor Chandler's reasoning raises questions about the internal consistency of the duty to monitor. First, it is unclear why business risk should be treated differently from legal risk. Both types of risk are part of managing the business enterprise. It seems fantastic that the duty to monitor requires boards—entities that often consist of few legal and compliance professionals—to ensure legal compliance, and yet it incentivizes boards to take no responsibility for the business results of the company—a complete disregard for the principle that the corporation shall be managed by or under the direction of the board.

Second, Chancellor Chandler justifies not extending the duty to monitor to include business risk by concluding it would undermine the protection of the business judgment rule. His reasoning, however, indicates an overly narrow interpretation of the duty to monitor. The duty to monitor, as noted by Chancellor Allen in *Caremark*, pertains to unconsidered inaction—action that does not result from a decision of the board.[74] In *Citigroup*, the board made a decision that ultimately led to the investment losses that threatened the firm's solvency, but the plaintiffs sought to characterize the board's behavior as a failure to monitor because the board did not appear to monitor the progress of the investment strategy after its original authorization. At question is not whether the board exercised good business judgment, which is not for a court to decide, but whether the board exercised *any* judgment after the original decision. When a board fails to follow up on a past decision and ignores developments that may reveal a corporate strategy to be flawed, the outcome should be considered the result of unconsidered inaction. That is why *Citigroup* should be a duty to monitor case.

Conclusion

The management of risk is a corporate governance problem. Every day, corporate officers and employees make decisions that may put the entire business organization at risk. A careful balance must be struck between encouraging entrepreneurial risk taking—to take chances to grow the business and exploit new opportunities—and the need for control and supervision by the board to ensure that risks are taken in an appropriate and reasoned manner. The catastrophic losses suffered by several large financial institutions are a reminder of the need for managing downside risks and prompt the question as to whether corporate governance laws have struck the right balance between risk taking and risk mitigation.

Courts, especially the Delaware courts, play a crucial role in adjusting this balance. This report has offered a brief overview of Delaware case law developments on the fiduciary duty to monitor business risk, from the landmark *Caremark* case (1996) to the most recent *Citigroup* decision (2009). In particular, the report has shown why the most recent developments in Delaware courts have failed to meet the expectations of shareholders, regulators, and even the directors themselves about how risks should be taken and managed.

In the fallout of the financial crisis, boards of directors are under unprecedented pressure to strengthen their risk oversight practices. Recent surveys show that discussions on how to jump-start a comprehensive risk management program have rapidly taken center stage in today's board

71 Id., at 124-26.

72 Id. See also *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

73 See *Citigroup* Deriv. Suit, 964 A.2d at 124, fn. 50.

74 See *Caremark*, 698 A.2d at 968.

agendas.[75] This trend can only intensify in response to increasing demands from shareholders and the inclusion of risk management as one of the top priorities described in the Obama Administration's white paper on financial reforms.[76] In December 2009, the SEC adopted new rules requiring enhanced proxy disclosures on the possible influence of the company's compensation policies on risk taking and the functions performed by corporate directors in the context of risk management.[77] Legislation recently introduced in Congress would also mandate the creation of risk committees at the board level.[78] Industry associations and self-regulatory bodies (such as the National Association of Corporate Directors (NACD)[79] and the International Organization of Securities Commissions (IOSCO))[80] have called for soft laws and the codification of best practices in this field.

Delaware courts have tremendous influence over prevailing corporate governance standards.[81] Opinions and commentary by judges develop and define norms and best practices that affect director behavior, often more so than the threat of legal liability.[82] The business community rightly expects courts of law to use future duty to monitor cases to reinforce the importance of the board's role in overseeing the management of business risk.

This report is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content.

75 See, for example, Mark S. Beasley, Bruce C. Branson, and Bonnie V. Hancock, *Report on the Current State of Enterprise Risk Oversight*, North Carolina State University-ERM Initiative, March 2009, available at www.erm.ncsu.edu

76 *Financial Regulatory Reform: A New Foundation*, U.S. Department of the Treasury, June 2009, available at www.financialstability.gov/docs/regs/FinalReport_web.pdf

77 SEC Release 33-9089 ("Proxy Disclosure Enhancements"), December 16, 2009.

78 In particular, *The Shareholder Bill of Rights Act of 2009* (S.1074), introduced on May 22, 2009 and sponsored by Senator Charles Schumer (D-NY), calls for separate risk committees composed entirely of independent directors.

79 *Risk Governance: Balancing Risk and Reward*, National Association of Corporate Directors (NACD) Blue Ribbon Commission, October 19, 2009, available for a fee at www.nacdonline.org

80 *Unregulated Financial Markets and Products–Final Report*, International Organization of Securities' Commission (IOSCO) Technical Committee, September 4, 2009, available at www.iosco.org/library/pubdocs/pdf/IOSCOPD301.pdf

81 See Claire A. Hill and Brett McDonnell, "Executive Compensation and the Optimal Penumbra of Delaware Corporate Law," University of Minnesota Law School Research Paper No. 09-21 (2009), available at ssrn.com/abstract=1422012, forthcoming in the *Virginia Law and Business Review*. Others have also commented on how decisions and commentary by judges change board behavior. See Edward B. Rock, "Saints and Sinners: How Does Delaware Corporation Law Work?" *UCLA Law Review*, Volume 44, 1997, p. 1089; Edward B. Rock and Michael L. Wachter, "Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation," *University of Pennsylvania Law Review*, Volume 149, 2001, p. 1619; Margaret M. Blair & Lynn A. Stout, "Director Accountability and the Mediating Role of the Corporate Board," *Washington University Law Quarterly*, Volume 79, 2001, p. 403, 442.

82 See, e.g., Myron Steele and J.W. Verret, "Delaware's Guidance: Ensuring Equity for the Modern Witenagemot," *Virginia Law and Business Review*, Volume 2, 2007, p. 189; E. Norman Veasey and Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective of Some Key Developments," *University of Pennsylvania Law Review*, Volume 153, 2005, p. 1399.

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