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Brett H. Mcdonnell

ARTICLE

MEETING LOWERED EXPECTATIONS

BRETT H. MCDONNELL*

Lisa Fairfax's article thoughtfully questions the oversight duty of corporate directors at two levels. At one level, she argues that the legal doctrine defining the duty is inadequate: "immature, incoherent, and irrelevant," in her terms.[1] At another level, she suggests that the whole task of relying on directors to monitor large corporations is unworkable.[2] Perhaps somewhat paradoxically, I want to suggest that she is right that the task is unworkable, and yet with a few tweaks the law can spur directors to do that unworkable job. Obviously, that is not *exactly* what I want to suggest. Rather, I suggest that Fairfax is right in that the oversight task in large corporations is indeed unworkable if conceived ambitiously. So, we should not conceive it ambitiously. Rather, we should ask outside directors of public corporations to play a more modest role. They should help design an oversight system that has at least a fighting chance at identifying and responding to the main risks a corporation faces and play an ongoing role in maintaining and monitoring that system. So conceived, I argue that current law is not as bad as Fairfax suggests and with a few tweaks is capable of defining directors' duty of oversight to make it workable.

I approach these two arguments in the reverse order from Fairfax. In Part I, I consider what we can plausibly expect outside directors to do. Part II then considers how corporate law might nudge outside directors to properly perform their duties and how well current law succeeds in that endeavor.

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* Professor of Law, University of Minnesota Law; J.D., University of California, Berkeley; Ph.D., Stanford University; M.Phil., Emmanuel College, Cambridge; B.A., Williams College.

1. Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More Than It Can Deliver?*, 10 U. ST. THOMAS L.J. 416, 437 (2012).

2. *Id.* at 418.

I. Workable Oversight

Building upon previous work by herself[3] and others,[4] Fairfax suggests reasons why outside directors of large public corporations may not be up to the task of monitoring what is going on. Her reasons include:

- The size and complexity of modern corporations make oversight an immense undertaking;
- The scope of the oversight duty may be so broad as to be unmanageable;
- Directors may lack the capacity needed for the task; and
- Director independence requirements worsen the problem, leaving directors with less time and information.[5]

Some of Fairfax's reasons are clearly correct. Large, complex corporations, operating within sophisticated and rapidly evolving markets, are very hard to monitor. The recent financial crisis certainly illustrates that. Even leading investment banks, using the most sophisticated and au courant quantitative risk models, were wildly unprepared for how much risk their traders had exposed them to, and the havoc that rapid downturns in rarefied financial product markets could wreak.

But how hopeless the task is depends upon how one defines it. The task is certainly not to eliminate all risk—taking risk is a critical part of any dynamic economy. Nor is the task to rigorously and precisely quantify all sources of risk. Indeed, undue emphasis upon quantitative measures of risk may cause corporations to lose sight of un-quantified, but nevertheless real, sources of potential problems.

Identifying and addressing all major sources of risk that pose a material threat to the corporation, through a mix of quantitative and qualitative methods, comes closer to a realistic definition of the task. But, even this definition may be a bit too ambitious. The corporation, at least at its higher levels, will not be aware of *all* possible risks, and it will probably not even be aware of all material risks. Some possible sources of severe future problems may, indeed probably will, be hidden from corporate decisionmakers at any given time. But hopefully decisionmakers can at least be aware of most major sources of risk, and have in place a process that continually attempts to identify and further understand new, as well as existing, risks.

Defining the task more modestly means that most, if not all, corporations will be unaware of some major risks that could cause serious harm.

3. *See generally* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 Iowa L. Rev. 127 (2010).

4. *See, e.g.*, Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 Bus. Law. 921 (1999); William B. Chandler III, *On the Instructiveness of Insiders, Independents, and Institutional Investors*, 67 U. Cin. L. Rev. 1083 (1999); Ira M. Millstein, *The Evolution of the Certifying Board*, 48 Bus. Law. 1485 (1993).

5. Fairfax, *supra* note 1, at 444.

Moreover, even among the risks that corporations have accurately identified, the likelihood or degree of potential harm may have been underestimated. And for some risks that they have accurately identified, corporations may not have taken adequate precautions to reduce or contain them. Worse still, risks to one corporation may impose costs on others outside that corporation. Indeed, as the financial crisis vividly illustrated, risks can cascade across many sectors of the economy.[6] All true, and all part of life in a complex, evolving economy. We should not expect any amount of twiddling with corporate law doctrine to change those facts of life. But some improved identification and, where appropriate, reduction of risk at the margins should be achievable.

Fairfax also raises tough questions as to whether outside independent directors are the right persons to monitor risk. Such directors lack both time and access to much of the information about what is going on within their corporations.[7] Surely she is right that there are limits on how much detailed monitoring we can expect independent directors to do.

But do her points mean that independent directors have no useful role whatsoever to play in the monitoring process? After all, officers and employees have much more time and information to devote to the process. Moreover, for many sorts of risks, insiders have plenty good incentive to identify them and take appropriate precautions. Indeed, often their incentives will be stronger than those of outsiders because they have much more personally at stake in the success of the corporation.[8] For monitoring risks that do not affect insiders' personal interests in ways markedly different from the interests of the corporation as a whole, it would seem we could trust those insiders to do the job well.

But not all risks are like that. Some actions may pose risks for the corporation but benefit certain officers or employees personally. Insiders who do not expect to be with the corporation very long may not adequately consider the long-term interests of the business. Option or equity-based compensation schemes may give insiders incentive to prefer overly high volatility. And the differences between these sorts of risks and risks where we can trust the judgment of insiders do not come nice and neatly labeled. Any general risk oversight and management system will necessarily address both kinds of risks.[9]

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6. Claire Hill and I emphasize this aspect of risk oversight in a recent article. Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859, 859 (2013).

7. *See* Fairfax, *supra* note 1, at 444.

8. *See* Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 355–56, 361–63 (2008).

9. Hill & McDonnell, *supra* note 6; *see also* Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 981 (2009) (arguing that *Caremark* claims may be premised on enterprise risk management failures).

For these reasons, we should not trust inside officers and employees to fully design and implement risk-monitoring systems on their own. Disinterested outsiders should play a role in the process. And yet, for the reasons Fairfax stresses, we should not expect independent directors to play too significant a role in this process. Officers and employees necessarily will do much of the work. Officers, such as CEOs and CFOs, will play critical roles in creating and implementing risk oversight systems. Lower level officers and employees within the internal accounting and legal system will also be crucial, and most other managers and employees should play a role of some sort as well. Contributions should come from outsiders with particular expertise as well, including auditors, attorneys, and investment bankers.[10] A general risk oversight and management system created by both insiders and outsiders will be better equipped to address all types of risks.

And that is roughly the system we already have in place, although it is constantly evolving. CEOs, CFOs, and legal compliance officers sit at the top of internal bureaucracies handling finance, law, and compliance. Both legally and informally, we at least preach the virtues of shaping internal compliance cultures through such things as codes of conduct and certification of internal controls. CEOs and CFOs face potential liability should those certifications prove inaccurate.[11] There is a long tradition of legal, self-regulatory, and market-based attempts to strengthen the roles and performance of external gatekeepers such as auditors[12] and attorneys.[13] Yet more can and should be done to improve the performance of many, indeed all, of these players in the corporate drama. I am particularly interested in focusing more attention on the role of employees.[14]

That still leaves a limited but valuable role for independent outside directors. They have a leading part to play in analyzing the whole complicated system of risk oversight and management that emerges from the interaction of all of these different parties. Directors help design it and monitor how it is functioning. They should be constantly asking questions about whether and how the system can be improved. We look to them for this role because they have experience managing large complex organizations. Additionally, as outsiders, there is some reasonable chance that they will be willing to reform weak internal control systems that benefit inside officers.

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10. *See* John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance (2006); Research Handbook on the Economics of Corporate Law, Part III (Claire A. Hill & Brett H. McDonnell eds., 2012).

11. *See* Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. 7241 (2013).

12. Lawrence A. Cunningham, *The Influence of Law and Economics on Law and Accounting: Two Steps Forward, One Step Back*, *in* Research Handbook on the Economics of Corporate Law 298, 309–11 (Claire A. Hill & Brett H. McDonnell eds., 2012).

13. Richard W. Painter, *Transaction Cost Engineers, Loophole Engineers or Gatekeepers: The Role of Business Lawyers After the Financial Meltdown*, *in* Research Handbook on the Economics of Corporate Law 255, 263–70 (Claire A. Hill & Brett H. McDonnell eds., 2012).

14. *See generally* McDonnell, *supra* note 8.

The growing literature on enterprise risk management both describes evolving best practice and helps to shape it.[15] A recent survey of board involvement in risk oversight summarizes the board's core role as follows:

- Understand the entity's risk philosophy and concur with the entity's risk appetite;
- Know the extent to which management has established effective enterprise risk management of the organization;
- Review the entity's portfolio of risk and consider it against the entity's risk appetite;
- Be apprised of the most significant risks and whether management is responding appropriately.[16]

Admittedly, these roles are a bit ambiguous.

The survey found that boards report that they currently fall short of fully implementing these norms. But they are doing more than before, and the board's role, as set out above, is not completely unworkable or useless. Boards will not save the world nor corporations from all sorts of risks. For instance, many factors contributed to the financial crisis, poor board risk oversight probably being only a minor contributor.[17] Neither a drastic improvement in board risk oversight practice nor systemwide risk management generally would eliminate all future financial crises or other corporate-induced catastrophes.

The world is a dangerous place, and will remain so. Improved corporate risk management can play only a modest role in reducing that danger, and improved board oversight is just one element in improved risk management. But that should not stop those involved in corporate governance from doing what they can do at a reasonable cost. Outside directors can help design a corporation's oversight system, monitor its functioning, and ask probing questions to get a reasonably comprehensive understanding of the major risks the business faces and how management is responding to those risks.

15. *See generally, e.g.*, *Enterprise Risk Management—Integrated Framework: Executive Summary*, COMM. OF SPONSORING ORG. OF THE TREADWAY COMM'N, (Sept. 2004), http://www.coso.org/documents/COSO_ERM_ExecutiveSummary.pdf (describing fundamental concepts of enterprise risk management); Michelle M. Harner, *Barriers to Effective Risk Management*, 40 SETON HALL L. REV. 1323 (2010) (analyzing potential barriers to implementing meaningful enterprise risk management in the United States); Kristin N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors' Risk Management Oversight Obligations*, 45 U. MICH. J.L. REFORM 55 (2011) (proposing reforms that account for "the influence of cognitive biases and structural dynamics on risk governance").

16. *Board Risk Oversight: A Progress Report*, COMM. OF SPONSORING ORG. OF THE TREADWAY COMM'N, 4 (Dec. 2010), http://www.coso.org/documents/Board-Risk-Oversight-Survey-COSO-Protiviti_000.pdf.

17. Brett H. McDonnell, *Don't Panic! Defending Cowardly Interventions During and After a Financial Crisis*, 116 PENN ST. L. REV. 1, 11–14 (2011).

II. A Role for Corporate Law

Fairfax is not very pleased with the current state of law concerning the board's oversight duty in Delaware. She calls it "immature, incoherent, and irrelevant."[18] There is some truth to her claims, but the law is not quite so bad. Given the relatively modest but important role for boards, outlined in the last section, Delaware's law is not that far off from doing what it can do to nudge directors to properly perform their jobs. This section considers each of Fairfax's critiques in turn.

A. *Not Immature, But Evolving*

When Fairfax labels the oversight duty as "immature," she means that the legal doctrine is new and not fully developed. As a result, she claims that it does not provide enough guidance.[19] Fairfax admits that there is some non-legal authority that also helps guide the development of best practices, but argues that this too is still evolving and unclear in many instances.[20]

Where Fairfax sees uncertainty, I see a relatively robust, helpful, and commonsensical common law process. There is a fruitful feedback loop between the courts, corporations, and non-legal authorities such as COSO.[21] For example, if you ask an American director about *Caremark* duties, she is likely to have a decent sense of what you mean.[22] Knowing about the *Caremark* duties prods boards and their lawyers towards compliance while entities such as COSO provide guidance on how to use best practices. COSO and various consultants monitor what boards are doing and help articulate an ever-evolving understanding of best practice. All of that feeds back into the courts' articulation of what boards should be doing to comply with their duties. This is how the common law works.

Greater clarity in the oversight doctrine now would be premature—we still do not really *know* what works best. We are learning. If courts or governmental agencies tried to impose specific oversight practices, they would run a great risk of imposing bad ones. For example, consider the widespread pre-crisis use of value at risk models as the key quantitative measure of risk.[23] Value at risk has its uses, but it turns out to be conceptually

18. Fairfax, *supra* note 1, at 427.

19. *Id.*

20. *Id.* at 428. COSO is the leading non-legal authority, *see Enterprise Risk Management—Integrated Framework: Executive Summary*, *supra* note 15; *Board Risk Oversight: A Progress Report*, *supra* note 16.

21. *See Enterprise Risk Management—Integrated Framework: Executive Summary*, *supra* note 15; *Board Risk Oversight: A Progress Report*, *supra* note 16.

22. The reference is of course to the pivotal Delaware case which announced the modern legal concept of the oversight duty. *See generally In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

23. *See generally* Philippe Jorion, Value at Risk: The New Benchmark for Managing Risk (2001).

flawed, particularly in how it ignores low-probability but high-potential-damage sources of risk.[24] Had courts or agencies gone too far in imposing a requirement to rely on value at risk, they would have made the financial crisis even worse. Moreover, diversity among corporations in the type of risk oversight and management techniques they use is itself attractive. That is partly true because it helps us learn more. Beyond that, too much homogeneity in how all corporations function could be a source of systemic risk when flaws in the process cause all companies to respond to a given stress in the same way.[25] An overly prescriptive rule for risk oversight may impose damaging uniformity.

That said, I very much agree with Fairfax concerning one specific current source of uncertainty in the Delaware case law. In two crisis-related cases, the courts have evaded deciding whether the *Caremark* duty to monitor extends beyond the monitoring of legal risk to the monitoring of business risk.[26] As Claire Hill and I have argued elsewhere, the courts are being too cautious on this point.[27] They should follow what the *Caremark* court clearly implies and extend the oversight duty to business risk generally. Even Steve Bainbridge agrees![28]

B. Not Incoherent, But Pragmatic

Fairfax's criticism of Delaware's case law as "incoherent" stems from *Stone v. Ritter*.[29] In that case, the Delaware Supreme Court upheld *Caremark*, thus affirming that there is a duty for boards to monitor legal compliance. However, the court's doctrinal analysis surprised many. It analyzed the oversight duty as an element of the requirement that directors must act in good faith, and in turn described good faith as an element of a director's duty of loyalty. Prior to *Stone*, most analysts understood *Caremark* as an element of the duty of care.[30]

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24. *See* Benoit Mandelbrot & Nassim Nicholas Taleb, *How the Finance Gurus Get Risk All Wrong*, FORTUNE, July 11, 2005, http://money.cnn.com/magazines/fortune/fortune_archive/2005/07/11/8265256/.

25. Charles K. Whitehead, *Destructive Coordination*, 96 CORNELL L. REV. 323, 326–30, 346–48 (2011).

26. *See* Fairfax, *supra* note 1, at 429–30. *See also In re* Citigroup Inc. Shareholder Derivative Litig., 964 A.2d 106, 126 (Del. Ch. 2009) (holding that plaintiffs' complaint did not properly allege demand futility regarding their *Caremark* claim for breach of the duty of oversight); *In re* Goldman Sachs Derivative Litig., 2011 WL 4826104 *22 (Del. Ch. Oct. 12, 2011) (holding that the court need not reach the issue of whether the duty of oversight includes the duty to monitor business risk).

27. Hill & McDonnell, *supra* note 6.

28. Bainbridge, *supra* note 9.

29. 911 A.2d 362 (Del. 2006).

30. This includes the author of *Caremark* himself—he included *Caremark* in the care chapter of his corporate law casebook. *See* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 278–285 (3d ed. 2009).

So, why does this analytical oddity matter in practice? Fairfax suggests several reasons. For one, since oversight more naturally fits within the duty of care analysis, the oddity of the court's holding increases the uncertainty surrounding the doctrine.[31] She also suggests that the holding creates uncertainty concerning the application of the business judgment rule.[32] The standard for violations of good faith remains murky, and the relationship to exculpatory clauses, she argues, becomes unclear given *Stone*.

I think that *Stone*'s treatment of good faith and the oversight duty, as an element of loyalty, is both more defensible and less important than Fairfax suggests. It is more defensible for reasons already suggested above.[33] Although oversight obviously has commonalities with the duty to take reasonable care, as I argue above, monitoring for business risk is naturally bound up with monitoring for loyalty violations. We want independent directors involved in that monitoring precisely because of insiders' temptations to monitor too little. Thus, the duty to monitor has ties to the duty of loyalty as well. It is located conceptually in between loyalty and care.

Claire Hill and I have suggested that Delaware courts should, and do, use the concept of good faith to address circumstances that fall within this middle ground between loyalty and care.[34] We characterize standards of review that Delaware courts have adopted as falling along a spectrum, involving more or less stringent review of board behavior based upon how strong our reasons are for distrusting directors' judgment under the circumstances implicated for different standards.[35] This analysis helps explain what Fairfax finds puzzling and unsatisfying. Since they are classified as an element of the duty of loyalty, violations of the duty of oversight are not exculpated[36] or protected by the business judgment rule.[37] However, it is very hard for plaintiffs to show that such a violation has occurred. This reflects a deliberate and sensible balance. If the duty of oversight were not placed under a loyalty or good faith analysis, then in every corporation which contains an exculpation clause (which is to say, virtually every corporation), oversight cases would be automatically dismissed, and directors would know that they would be automatically dismissed. As it is, plaintiffs have an opportunity to show that a board has complied with its duty in such a shoddy way that it has acted in bad faith, and so is subject to suit. The

31. Fairfax, *supra* note 1, at 430.

32. *Id.* at 430–31.

33. *See* text accompanying note 9.

34. *See* Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1795–96 (2007).

35. Not all agree on the validity of our spectrum analysis. *See, e.g.*, Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1277–99 (2010).

36. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

37. This is "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." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

burden on the plaintiff is high because our reasons for distrusting boards are weaker here than in classical loyalty cases involving clear conflicts of interest. However, that burden is not infinitely high because we do have *some* reason for distrusting boards.[38]

C. Not Irrelevant, But Norm-Influencing

This brings us to Fairfax's third complaint about Delaware law; it is "irrelevant." Her core point here is that the courts have raised the bar for proving liability under the oversight duty so high that, in practice, defendants need not fear liability at all, and plaintiffs have little incentive to sue given that their suits are highly likely to be thrown out.[39] As Fairfax rightly notes, plaintiffs must show that a board failed completely to establish a monitoring system, failed to monitor an established system, or ignored red flags.[40] Courts have made each of these arguments extremely unlikely to succeed.

That is right, but the law may still do some good, especially with a little tweaking. The main legal question is what it takes for plaintiffs to survive a motion to dismiss a suit on the ground that demand on the board was not excused.[41] Under the *Aronson* standard,[42] plaintiffs must have specific information in their complaints that creates a reasonable doubt as to whether the defendants violated the oversight duty. Once plaintiffs have surmounted that barrier in the suit, the settlement value of the case will go way up. Given the large amounts potentially at stake, even a slight chance of liability may make directors take notice.

It is true that this standard is hard to meet. But Delaware courts have shown a willingness at the pleading stage to accept that the complaint is specific enough to create a reasonable doubt as to whether defendants have violated the oversight duty. Hence, more facts are needed and the case may continue. One example involving the duty of good faith is the famous *Disney* case, involving compensation paid to Michael Ovitz.[43] That case applied the same basic good faith standard that the court affirmed in *Stone*.[44] Maybe even closer to home, in the very *Citigroup* case where the court dismissed the oversight claim, it allowed a waste claim to continue.[45] Waste claims are notoriously hard for plaintiffs—the standard is every bit as diffi-

38. Hill & McDonnell, *supra* note 34, at 1787.

39. Fairfax, *supra* note 1, at 440.

40. *Id.*

41. Oversight cases will generally arise as derivative claims.

42. *See* note 37 and accompanying text.

43. *See In re* Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003).

44. *Id.* at 285–87.

45. *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 139–40 (Del. Ch. 2009).

cult as the *Caremark* standard.[46] Courts generally dismiss waste claims quickly. But sometimes they do not, as in *Citigroup*. The same may become true for oversight claims—indeed, there is at least one instance where Delaware courts have chosen not to dismiss an oversight claim.[47] Fairfax minimizes this case as involving extreme neglect on the part of the board.[48] But that characterization is always open to plaintiffs, and the courts may accept it in cases where they are suspicious of the board.

Admittedly, I would have liked to see Delaware courts apply a slightly easier standard for plaintiffs in good faith cases. I have argued for that in the past,[49] and been disappointed in subsequent developments.[50] Even with the standard the courts have followed, I would like to see them reject a motion to dismiss slightly more often. *Goldman Sachs* and *Citigroup* were both plausible candidates to survive a motion to dismiss; it is a bit disappointing that both cases were rejected.

Beyond whatever direct incentive the threat of liability creates, there is a further question as to whether Delaware law may help create, shape, or reinforce norms of proper behavior among directors. As Fairfax notes, some have stressed this norm-reinforcing function of Delaware corporate law.[51] Insofar as they are right, even with very low chances of liability, the oversight duty may still affect board behavior. However, Fairfax questions this norm-reinforcing role of Delaware corporate law. First, she argues that to work it probably has to be linked to *some* chance of liability, otherwise it is not clear that directors will take the court seriously.[52] I suspect that she is right, but it is quite possible that the chance of liability need not be very high at all. As I just argued, I think there is some chance of liability for breach of the duty of oversight, although I would like to see the courts increase that chance just a bit by denying a few more motions to dismiss—in good part to ensure that the norm function does work.

Second, Fairfax says that when courts dismiss cases at the pleading stage, it undermines their ability to provide the sermons that help set

46. *See* Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111, 120–22 (2010).

47. *See, e.g.*, ATR-Kim Eng Fin. Corp. v. Araneta, 2006 WL 3783520 *20 (Del. Ch. Dec. 21, 2006).

48. Fairfax, *supra* note 1, at 436.

49. *See* Hill & McDonnell, *supra* note 34, at 1769.

50. Of particular note is *Lyondell Chemical Co. v. Ryan*, where the Delaware Supreme Court overturned a Chancery Court decision and held that the standard of conduct needed to satisfy directors' duty to act in good faith is lower than the standard needed to meet the duty to act with due care. 970 A.2d 235, 242–43 (Del. 2009).

51. *See* Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 VA. L. & BUS. REV. 333, 354–57 (2009); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1829 (2001); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1270 (1999); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

52. Fairfax, *supra* note 1, at 438.

norms.[53] I do not think that is right. Delaware's judges can sermonize in the process of dismissing a case. Indeed, they do so with some regularity. The rhetoric is along the lines of "the directors here fell well short of best practices, and they could have done a variety of things better, including . . . [listing some best practices], but their behavior does not arise to the level of misbehavior that gives rise to liability . . . ." Indeed, my biggest complaint with the opinions in *Citigroup* and *Goldman Sachs* is not that the courts dismissed the oversight claims—there were plenty of decent reasons for doing so—but rather the defensive rhetoric that refused to question the boards' behavior at all, especially in *Citigroup*.[54]

Finally, Fairfax questions the interest of Delaware courts in engaging in sermons, given their failure to do so given perfectly good opportunities in *Citigroup* and *Goldman Sachs*.[55] She has a good point here. In those cases, there were two companies at the center of one of the worst financial collapses in world history. Perhaps in the case of *Goldman Sachs*, their relative foresight in reducing their exposure to toxic mortgages before most of their peers,[56] gives a pretty good reason for not lecturing them on oversight; but surely the court should have laid it on thick for *Citigroup*, a far less well-managed company. Yet the rhetoric in *Citigroup* is all about deference and the business judgment rule.[57] If that decision represents the consensus view of Delaware judges at this point, then I think Fairfax is right about their lack of interest in sermonizing. But, I continue to hope that Delaware judges can and, in the not too distant future, will do better than they did in *Citigroup*.

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53. *Id.*

54. *See* Hill & McDonnell, *supra* note 6, at 876.

55. Fairfax, *supra* note 1, at 443.

56. *See* WILLIAM D. COHAN, MONEY AND POWER: HOW GOLDMAN SACHS CAME TO RULE THE WORLD 489–546 (2011).

57. With the notable exception of the refusal to dismiss the waste claim.