

# 2.02(b)(4) OR NOT 2.02(b)(4): THAT IS THE QUESTION

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## I

### INTRODUCTION

For sixty years, the Model Business Corporation Act (MBCA) has been the product of careful study and improvement by the American Bar Association (ABA) Committee on Corporate Laws.<sup>1</sup> That careful improvement has, of course, been informed by corporate-law developments—both statutory and case law—in Delaware.<sup>2</sup> Some revisions to the MBCA have come about a few paces behind their Delaware analogs.<sup>3</sup> In a number of noteworthy instances, this has enabled the Committee on Corporate Laws to bring to bear perspective permitting the MBCA, at least in theory, to anticipate issues that have

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1. For a description of the evolution in study and improvement of the MBCA and in the constitution of the Committee on Corporate Laws, see generally Robert W. Hamilton, *The Revised Model Business Corporation Act: Comments and Observations*, 63 TEX. L. REV. 1455 (1985). See also MODEL BUS. CORP. ACT intro. at ix–xiii (2008).

2. Insight into Delaware corporate-law developments has been enhanced on the Committee on Corporate Laws by a substantial contingent of Delaware judges, practitioners, and academics among its members. During the author's tenure on the Committee, a former Chief Justice of the Delaware Supreme Court served as Committee chairman, another Delaware Supreme Court Justice (formerly a Vice Chancellor of the Delaware Court of Chancery) served as a member, as did two of the most well-known Delaware corporate practitioners, and two of the most celebrated academic experts on Delaware corporate law and corporate governance.

3. For a brief comparison of the MBCA and the Delaware General Corporation Law, see generally Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737 (2001). For a comparison of the MBCA and Delaware corporate law more generally, see William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 55–64 (2009). Over the years, the MBCA has taken the lead with some statutory innovations, such as elimination of legal capital rules, but many of its most significant successes have involved careful consideration of Delaware statutory or case law developments followed by innovations aimed at providing clearer and more directive statutory rules. Examples include the articulation of director liability standards in MBCA § 8.31, the quantitative safe harbor with respect to sale of “substantially all” the assets in MBCA § 12.02, the expanded director conflict-of-interest transaction provisions in MBCA §§ 8.60–8.63, and the statutory provision for business opportunities in MBCA § 8.70.

contributed to legal uncertainty in Delaware and to avoid those issues by taking a different, more-directive and bright-line approach to statutory drafting.<sup>4</sup>

This is an important attribute in a corporation statute that serves as a model for states that do not have, and never will have, the volume of corporate litigation and the resulting breadth, depth, and pace of corporate-case-law developments as does Delaware.<sup>5</sup>

One concrete example of this phenomenon can be seen by comparing the charter-option director-exculpation provision in section 102(b)(7) of the Delaware General Corporation Law (DGCL) to that adopted a few years later in section 2.02(b)(4) of the MBCA.<sup>6</sup> The exclusions to permissible exculpation in the Delaware provision are potentially broad and anchored in concepts like “good faith,” “duty of loyalty,” and “improper personal benefit.”<sup>7</sup> The MBCA exclusions eschew references to “good faith” and “duty of loyalty,” and instead focus on “the *amount* of a *financial* benefit received by a director to which the director is not entitled” and “intentional infliction of harm on the corporation or its shareholders.”<sup>8</sup>

The problem with broad exclusions anchored in baggage-laden, yet vague, terms like “good faith” and “duty of loyalty” is that such terms are malleable.<sup>9</sup> This has been evident over the last decade as Delaware courts have gone through confusing gyrations in defining when, in the face of a section 102(b)(7) exculpation provision, disinterested directors who have not obtained an improper benefit may nevertheless be liable for damages because alleged failings in oversight or decision-making constitute not just a breach of the duty of care, but a non-exculpable breach of “good faith” or the “duty of loyalty.”<sup>10</sup>

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4. See Carney & Shepherd, *supra* note 3, at 57 (“The [MBCA] . . . has favored bright line rules and well defined property rights over an ex post judicial consideration of where rights and duties lie.”); Dooley & Goldman, *supra* note 3, at 764–65 (“The most significant difference [is] the more directive, ‘bright line’ approach the [MBCA] adopts in some instances.”).

5. Thirty states have adopted all or substantially all of the MBCA as their general corporation statute, including Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. MODEL BUS. CORP. ACT intro. at ix n.1 (2008). Three other jurisdictions have statutes based on the 1969 version of the MBCA, namely Alaska, the District of Columbia, and New Mexico. *Id.* at ix n.2.

6. For comparisons of these two statutory provisions, see ABA Comm. on Corporate Laws, *Changes in the Revised Model Business Corporation Act—Amendment Pertaining to the Liability of Directors*, 45 BUS. LAW. 695, 696–701 (1990); Dooley & Goldman, *supra* note 3, at 743; James J. Hanks, Jr. & Larry P. Scriggins, *Protecting Directors and Officers from Liability—The Influence of the Model Business Corporation Act*, 56 BUS. LAW. 3, 23–28 (2000); Dennis R. Honabach, *Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 312–15 (2006).

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

8. MODEL BUS. CORP. ACT § 2.02(b)(4) (2008) (emphasis added).

9. See *infra* notes 33–71 and accompanying text.

10. See *infra* notes 33–71 and accompanying text.

After years of wandering in the wilderness, the Delaware courts have now made it relatively clear that only in the most extreme circumstances will a disinterested director who receives no personal benefit be found to have breached his or her duty of loyalty for lack of good faith as a result of a failure of oversight or a bad decision.<sup>11</sup> On the way to that conclusion, however, there was troubling uncertainty, and some confusing law was made.<sup>12</sup> If section 2.02(b)(4) had been the applicable statutory authority, there would have been no need for this flailing about.<sup>13</sup>

As a tribute to the MBCA, this article briefly recaps the development of charter-option provisions, the recent threat to their crucial role in Delaware, and how the MBCA approach should make it unnecessary for other states to go through the same travail.

## II

### DEVELOPMENT OF CHARTER-OPTION PROVISIONS

The Delaware Supreme Court's decision in January 1985 in *Smith v. Van Gorkom*<sup>14</sup>—that disinterested directors of Trans Union Corporation were not protected by the business-judgment rule in their decision to sell the company and could, therefore, be personally liable for millions of dollars in damages—sent shock waves through the corporate world.<sup>15</sup> Faced with the fear of a mass exodus of qualified directors from the boardrooms of Delaware corporations, the Delaware legislature adopted section 102(b)(7) of the DGCL within eighteen months, authorizing charter provisions exculpating directors prospectively from liability for monetary damages to the corporation or its stockholders for breach of fiduciary duty.<sup>16</sup> Section 102(b)(7) explicitly excluded liability for:

1. “any breach of the director’s duty of loyalty to the corporation or its stockholders,”

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11. See *infra* notes 56–71 and accompanying text.

12. See *infra* notes 33–71 and accompanying text.

13. See *infra* notes 72–77 and accompanying text.

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

15. The literature on *Van Gorkom* is extensive. See, e.g., William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002); Charles M. Elson & Robert B. Thompson, *Van Gorkom’s Legacy: The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NW. U. L. REV. 579 (2002); Lawrence A. Hamermesh, *A Kinder, Gentler Critique of Van Gorkom and Its Less Celebrated Legacies*, 96 NW. U. L. REV. 595 (2002); Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477 (2000); Stephen A. Radin, *The Director’s Duty of Care Three Years after Smith v. Van Gorkom*, 39 HASTINGS L.J. 707 (1988); Bernard S. Sharfman, *The Enduring Legacy of Smith v. Van Gorkom*, 33 DEL. J. CORP. L. 287 (2008).

16. The new provision went into effect on July 1, 1986. See generally Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131, 1143–47 (2006); Hanks & Scriggins, *supra* note 6, at 23–25; Honabach, *supra* note 6, at 307–08.

2. “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law,”
3. illegal distributions under section 174 of the DGCL, or
4. “any transaction from which the director derived an improper personal benefit.”<sup>17</sup>

Over the next several years, two things happened. First, section 102(b)(7) exculpation provisions became standard features in Delaware certificates of incorporation, as stockholders of hundreds of existing corporations approved the addition of exculpation clauses in the certificate of incorporation and such provisions became routine in new incorporations.<sup>18</sup> Second, other state legislatures included director-exculpation provisions in their respective corporation statutes.<sup>19</sup>

17. DEL. CODE ANN. tit. 8, § 102(b)(7)(i)–(iv) (2001).

18. Virtually every public company incorporated in Delaware adopted an exculpatory clause under section 102(b)(7) of the DGCL. Hamermesh, *Why I Do Not Teach Van Gorkom*, *supra* note 15, at 490; Honabach, *supra* note 6, at 313.

19. Two statutory approaches emerged: the charter-option approach, first embodied by section 102(b)(7) of the DGCL, and self-executing statutes eliminating or limiting personal liability for money damages, with certain exceptions. Currently, all fifty states have adopted some version of a director-exculpation provision. These include seventeen states that have enacted provisions substantively identical to section 102(b)(7) of the DGCL. ALASKA STAT. § 10.06.210(1)(n) (2008); ARK. CODE ANN. § 4-27-202(B)(3) (2001); COLO. REV. STAT. § 7-108-402(1) (2006); DEL. CODE ANN. tit. 8, § 102(b)(7) (2001); 805 ILL. COMP. STAT. 5/2.10(b)(3) (2006); KAN. STAT. ANN. § 17-6002(b)(8) (2009); LA. REV. STAT. ANN. § 12:24(c)(4) (2009); MASS. ANN. LAWS ch. 156B, § 13(b)(1 1/2) (LexisNexis 2005); MINN. STAT. § 302A.251(4) (2004); MO. REV. STAT. § 351.055(2)(3) (2000); N.J. STAT. ANN. § 14A:2-7(3) (West 2003); N.D. CENT. CODE § 10-19.1-50(5) (2005); OKLA. STAT. ANN. tit. 18, § 1006(B)(7) (West 1999); OR. REV. STAT. § 60.047(2)(d) (2007); R.I. GEN. LAWS § 7-1.2-202(b)(3) (1999); TEX. REV. CIV. STAT. ANN. art. 1302, § 7.06(B) (Vernon 2003); W. VA. CODE ANN. § 31D-2-202(b)(4) (LexisNexis 2009). Tennessee has enacted a statute resembling DGCL § 102(b)(7), which does not include the charter-option exclusion relating to improper personal benefits. TENN. CODE ANN. § 48-12-102(b)(3) (2002). Fourteen states have enacted charter-option provisions substantively identical to Model Act § 2.02(b)(4). ARIZ. REV. STAT. ANN. § 10-202(B)(1) (2004); HAW. REV. STAT. §§ 414-2(b)(5), 414-222(b) (2008); IDAHO CODE ANN. § 30-1-202(2)(d) (2005); IOWA CODE § 490.202(2)(d) (2009); ME. REV. STAT. ANN. tit. 13-C, § 202(2)(D) (2005); MICH. COMP. LAWS SERV. § 450.1209(1)(c) (LexisNexis 2001); MISS. CODE ANN. § 79-4-2.02(b)(4)–(5) (2001); MONT. CODE ANN. § 35-1-216(2)(d) (2009); NEB. REV. STAT. § 21-2018(2)(d)–(e) (2008); N.H. REV. STAT. ANN. § 293-A:2.02(b)(4) (LexisNexis 1999); S.D. CODIFIED LAWS § 47-1A-202.1(4) (2007); UTAH CODE ANN. § 16-10a-841(1)(2009); VT. STAT. ANN. tit. 11A, § 2.02(b)(4) (1997); WYO. STAT. ANN. § 17-16-202(b)(iv) (2009). Alabama enacted a statute resembling MBCA § 2.02(b)(4) with an additional exclusion for a breach of the duty of loyalty. ALA. CODE § 10-2B-2.02(b)(3) (LexisNexis 1999). The remaining states have enacted charter-option provisions not strictly based on either Delaware or the MBCA, or have put in place self-executing statutory exculpation provisions that eliminate or limit director liability without the need for a provision in the corporate charter (although a corporation may typically opt into greater or lesser exculpation by a charter amendment). CAL. CORP. CODE § 204(a)(10) (West 1990); CONN. GEN. STAT. § 33-636(b)(4) (2007); FL. STAT. § 607.0831 (2007); GA. CODE ANN. § 14-2-202(b)(4) (2003); IND. CODE § 23-1-35-1 (2005); KY. REV. STAT. ANN. § 271B.2-020(2)(d) (LexisNexis 2003); MD. CODE ANN., CORPS. & ASS'NS §§ 2-104(b)(8), 2-405.2 (West 2008); NEV. REV. STAT. § 78.138 (2004); N.M. STAT. ANN. § 53-12-2(E) (LexisNexis Supp. 2005); N.Y. BUS. CORP. LAW § 402(b) (McKinney 2003); N.C. GEN. STAT. § 55-2-02(b)(3) (2009); OHIO REV. CODE ANN. § 1701.59 (LexisNexis 2009); 15 PA. CONS. STAT. ANN. § 1713(a)–(b) (West 1995); VA. CODE ANN. § 13.1-692.1 (2005); WASH. REV. CODE ANN. §§ 23B.02.020(5)(j), 23B.08.320 (West 1994 & Supp. 2010); WIS. STAT. ANN. § 180.0828 (2009). A

In 1990, the Committee on Corporate Laws finalized amendments to the MBCA embodying authorization for charter-option exculpation.<sup>20</sup> The exculpatory scope of new section 2.02(b)(4) of the MBCA was basically the same as in section 102(b)(7) of the DGCL: prospective only, directors only, and for monetary damages to the shareholders or the corporation.<sup>21</sup> The explicit carve-outs for non-exculpable liability were, however, significantly different.<sup>22</sup> They included liability for:

1. “the amount of a financial benefit received by a director to which the director is not entitled,”
2. “an intentional infliction of harm on the corporation or the shareholders,”
3. illegal distributions under section 8.33 of the MBCA, or
4. “an intentional violation of criminal law.”<sup>23</sup>

The most noteworthy differences in the exclusions are the absence of “duty of loyalty” and “good faith” as bases for exclusion. The Official Comment notes that such terms are absent in order to enhance clarity: “Terms such as ‘duty of loyalty,’ ‘good faith,’ ‘bad faith,’ and ‘recklessness’ seem no more precise than (and therefore as potentially expansive as) ‘gross negligence.’ All of these formulations are characterizations of conduct rather than definitions of it. Characterizations by nature tend to be more elastic than definitions.”<sup>24</sup>

Instead, the concept of non-exculpable self-dealing is embodied in the 2.02(b)(4) exclusions in the phrase “financial benefit received by a director to which the director is not entitled”—a much more concrete and narrow exclusion than “duty of loyalty” or “good faith.”<sup>25</sup> The reference to “financial benefit” also appears to be significantly more narrow than the section 102(b)(7) reference to “personal benefit.” The Official Comment notes that the “benefit

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relatively small number of states have encompassed officers in the statutory exculpation provisions. *See generally* Honabach, *supra* note 6, at 325–40.

20. *See generally* ABA Comm. on Corporate Laws, *supra* note 6. *See also* Hanks & Scriggins, *supra* note 6, at 25 (“The Committee on Corporate Laws watched this flurry of legislative activity in the mid-to late 1980s with an interest” while formulating what became section 2.02(b)(4).).

21. *See generally* ABA Comm. on Corporate Laws, *supra* note 6. *See also* Hanks & Scriggins, *supra* note 6, at 25.

22. *See* Dooley & Goldman, *supra* note 3, at 743 (“Section 2.02(b)(4) . . . contains the same exception for unlawful distributions, but the list of other unforgivable sins is somewhat differently defined: ‘the amount of a financial benefit’ to which the director was not ‘entitled; an intentional infliction of harm on the corporation or the shareholders [or] an intentional violation of criminal law.’ The ‘duty of loyalty’ exception that is listed in the Delaware statute covers more than improper benefits, as that ground is listed separately. Acts ‘not in good faith’ may also cover additional conduct. It is the belief of the [MBCA] drafters that its exceptions . . . offer more predictability.”); Hanks & Scriggins, *supra* note 6, at 26 (“Reflecting the Committee’s concern over the potential breadth and vagueness of the Delaware exceptions, the four exceptions to section 2.02(b)(4) are fewer and narrower than the exceptions to the Delaware statute.”).

23. MODEL BUS. CORP. ACT § 2.02(b)(4)(A)–(D) (2008).

24. *Id.* cmt. I.

25. *See supra* note 22.

must be financial rather than in less easily measurable and more conjectural forms, such as business goodwill, personal reputation, or social ingratiating.”<sup>26</sup> In addition, the MBCA exclusion relates only to the “amount of financial benefit” and not to liability for “any transaction” from which an improper benefit derives, as is the case with the Delaware exclusion.

In the more than two decades since statutory authorization of exculpation swept the country, exculpation provisions have become a crucially important part of the balance that U.S. corporate law has maintained between holding directors’ feet to the fire and attracting the best and the brightest into the corporate boardroom.<sup>27</sup> Delaware courts have read charter-option provisions forcefully to permit summary dismissal of damage claims sounding only in purported breaches of the duty of care.<sup>28</sup> In fact, some Delaware-law experts maintained that damage claims against directors for breach of the duty of care had effectively ceased to exist in Delaware and that the Delaware duty of care had become, essentially, a non-legally-enforceable rule or standard carrying “hortatory value but no formal legal sanction.”<sup>29</sup>

Until the last decade, the practical differences between the Delaware exclusions and those in the MBCA had not proven terribly important.<sup>30</sup> Critics had pointed out that the border between duty of care and duty of loyalty was murky and that inclusion of the vague term “good faith” as a separate exclusion invited the court and parties to treat that concept as a separate fiduciary duty

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26. MODEL BUS. CORP. ACT § 2.02(b)(4) cmt. I (2008).

27. See, e.g., Bruner, *supra* note 16, at 1133 (“The historical development of U.S. corporate law, or at least corporate fiduciary duties, can be understood as an effort to establish and continually recalibrate this balance between providing a remedy for shareholders harmed by directors’ wrongdoing, while ensuring that qualified individuals will choose to fill corporate board positions and take appropriate risks for the benefit of those shareholders.”).

28. See, e.g., Malpiede v. Townson, 780 A.2d 1075 (Del. 2001). In *Emerald Partners v. Berlin*, 726 A.2d 1215, 1222–34 (Del. 1999), however, the Delaware Supreme Court held that 102(b)(7) exculpation is in the nature of an affirmative defense that the directors seeking its protection must prove. *But cf.* Allen et al., *supra* note 15, at 463 (“A section 102(b)(7) defense is more properly viewed—and should be treated—as a statutory immunity rather than as an affirmative defense. But however the section 102(b)(7) defense may be viewed, it is (we venture) unsound policy to impose this method of establishing the defense on the directors.”). Section 8.31(a)(1) of the MBCA puts the burden of proof on the plaintiff to show that no defense interposed by a director under a section 2.02(b)(4) charter-option provision precludes liability.

29. Lawrence A. Hamermesh, *Twenty Years after Smith v. Van Gorkom: An Essay on the Limits of Civil Liability of Corporate Directors and the Role of Shareholder Inspection Rights*, 45 WASHBURN L.J. 283, 284, 288 (2006). See also Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1623, 1695 (2001) (“We have argued . . . that the duty of care is best understood as an NLERS [non-legally-enforceable rule or standard] whose legal nonenforceability is provided by the business judgment rule.”).

30. See Honabach, *supra* note 6, at 315 (“The practical distinction between Delaware’s exceptions, particularly its broad duty-of-loyalty exclusion and ‘good faith’ exception and the MBCA’s more narrowly circumscribed exclusions had, until recently, not proven to be significant, even though Delaware’s pattern theoretically requires the courts to explore the murky boundary between the duties of care, good faith, and loyalty. Recent developments, however, have made the distinction quite important.”).

with an even murkier form, instead of a mere element of the duty of loyalty.<sup>31</sup> The potential for migration of some subset of duty-of-care claims into the duty-of-loyalty exclusion or even into a stand-alone “good faith” exclusion had been noted,<sup>32</sup> but did not really explode upon the scene until after Enron, WorldCom, and Sarbanes-Oxley.

### III

#### EXPLOITING THE MURKINESS: THE TRIAD, THE DUTY OF GOOD FAITH, AND RECASTING DUTY OF CARE AS DUTY OF LOYALTY

The first case to receive truly national attention in which the Delaware Court of Chancery refused to dismiss fiduciary-duty damages claims on summary judgment in the face of section 102(b)(7) exculpation on grounds that a disinterested board might have breached an independent and non-exculpable duty of “good faith” was Chancellor William B. Chandler’s 2003 opinion in *In re The Walt Disney Company Derivative Litigation*.<sup>33</sup> Chancellor Chandler found the allegations regarding the board’s “ostrich-like” inattention to the hiring, determination of employment terms, and termination of super-agent-turned-corporate-executive Michael Ovitz could, if true, have amounted to “conscious disregard” of the board’s fiduciary duties going beyond duty of care and breaching the duty of good faith.<sup>34</sup> The court stated, “Where a director consciously ignores his or her duties to the corporation, thereby causing economic injury to its stockholders, the director’s actions are either ‘not in good faith’ or ‘involve intentional misconduct.’ Thus, plaintiffs’ allegations support claims that fall *outside* the liability waiver provided under Disney’s certificate of incorporation.”<sup>35</sup>

The 2003 *Disney* holding did not occur in a vacuum. The Delaware courts had, for at least a decade, fairly regularly referred to “good faith” in a way that could be interpreted as an independent duty, sometimes even referring to a

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31. See, e.g., *id.*; Bruner, *supra* note 16, at 1135 (“[T]he manner in which the statute was drafted essentially invited the interpretation of good faith as a newly freestanding concept independent of the duty of loyalty, of which it was previously thought to be a component.”); Hamermesh, *supra* note 29, at 286 (The good faith exclusion in section 102(b)(7) “has been perceived as enigmatic and therefore mischievous” and “may have contributed to the repeated suggestion by the Delaware Supreme Court that a director’s ‘duty of good faith’ represents a type of obligation distinct from long-recognized duties of care and loyalty.”).

32. For examples of the kind of “recharacterization” warnings made very soon after adoption of section 102(b)(7), see Leo Herzel, Richard W. Shepro & Leo Katz, *Next-to-Last Word on Endangered Directors*, 65 HARV. BUS. REV. 38, 43 (1987) (“With only a little effort, courts could find directors liable for disloyalty where before they would have found them liable for negligence.”); Radin, *supra* note 15, at 746 (“These exclusions—the precise reach of which will almost certainly be the subject of substantial litigation in coming months and years as plaintiffs attempt to ‘recharacterize their claims and tailor them to fit one of the excepted categories.’”).

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

34. *Id.* at 288–90.

35. *Id.* at 290.

“triad” of fiduciary duties—care, loyalty, and good faith.<sup>36</sup> This triad of duties eventually found its way into commentary.<sup>37</sup> The Enron and WorldCom fiascos had generated outrage toward “Corporate America” and its managers. This outrage, combined with the unprecedented federal intervention into corporate governance embodied by Sarbanes-Oxley and related reforms undertaken by the Securities and Exchange Commission and stock exchanges, put pressure on the Delaware judiciary (as well as other traditional sources of corporate law, such as the ABA Committee on Corporate Laws) to begin talking about evolving expectations for directors and stiffer legal duties.<sup>38</sup>

By 2002, it appeared on several fronts that the Delaware Supreme Court was not just talking tough. In a twelve-month stretch from mid-2002 to mid-2003, the Delaware Supreme Court issued written opinions in six major cases involving director fiduciary-duty claims or related matters.<sup>39</sup> In every one of those cases, the Delaware Supreme Court held for shareholders and against directors, reversing Chancery Court decisions at least in part and in some cases making significant new law that did not favor protection of directors.<sup>40</sup> For example, the Supreme Court extended *Unocal*-enhanced scrutiny<sup>41</sup> to director

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36. See, e.g., *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1164 (Del. 1995); *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001); *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *McMullin v. Beran*, 765 A.2d 910, 920 (Del. 2000); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 731 (Del. Ch. 1999). For overviews of the development of the fiduciary duty of good faith from the adoption of section 102(b)(7) of the DGCL through *Disney* and beyond, see Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 563–81 (2008); and Hilary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 457–82 (2004).

37. See, e.g., Ellen Taylor, *New and Unjustified Restrictions on Delaware Directors' Authority*, 21 DEL. J. CORP. L. 837, 881–82 (1996) (“Although the Delaware courts frequently include the duty of good faith in the litany of fiduciary duties alongside the duties of loyalty and care, they have not described or explained this duty in nearly as much detail as the others.”); E. Norman Veasey, *Corporate Governance and Ethics in the Post-Enron WorldCom Environment*, 38 WAKE FOREST L. REV. 839, 849 (2003) (“In many ways, the law of the fiduciary duties of due care, loyalty, and good faith evolved in Delaware jurisprudence in the 1980s and 1990s through the hostile takeover phenomenon and into the sophisticated arena of mergers and acquisitions designed by skillful and imaginative professionals.”).

38. See, e.g., Bainbridge et al., *supra* note 36, at 574 (“[T]he proponents of creating a freestanding duty of good faith saw it as a mechanism by which Delaware law could respond at the state level to the same set of concerns that had motivated SOX and the stock exchange listing standards.”); David Marcus, *The New Disney Ruling: A Response to Changing Times*, DEL. L. WKLY, Aug. 31, 2005, at 3. (“With the state fearing further federal incursion into the realm of corporate law, its courts were showing that they too could be hard on dubious behavior, a message Chandler’s 2003 decision reinforced.”); Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371, 1382 (“In the wake of Enron, the judiciary will come under increasing pressure from stockholder-plaintiffs to approach these questions in a more cold-eyed manner.”).

39. See *Krasner v. Moffett*, 826 A.2d 277 (Del. 2003); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003); *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003); *Levco Alt. Fund Ltd. v. Reader's Digest Ass'n*, 803 A.2d 428 (Del. 2002); *Telxon Corp. v. Meyerson*, 802 A.2d 257 (Del. 2002); *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113 (Del. 2002).

40. See cases cited *supra* note 39.

41. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (holding that because a board may act in its own interests when addressing a pending takeover bid, there is an enhanced duty

decisions to agree to merger deal-protection measures,<sup>42</sup> and expanded the scope of decisions subject to the withering *Blasius*<sup>43</sup> standard of review.<sup>44</sup>

It was in this environment that the 2003 *Disney* decision caught the attention of the corporate legal world. Corporate lawyers across the country began writing warning letters to their clients noting not only the potential for loss of 102(b)(7) exculpation, but also the potential for loss of indemnification rights under section 145 of the DGCL, if alleged problems in decision-making or oversight were found to constitute a breach of good faith instead of a breach of duty of care.<sup>45</sup> Legal academics began trying to limn the new good-faith duty.<sup>46</sup>

The ensuing trial in the *Disney* case was one of the longest and most highly publicized in the history of the Delaware courts.<sup>47</sup> In August 2005, Chancellor Chandler issued his long-awaited post-trial opinion, finding the Disney directors not liable for breach of fiduciary duty.<sup>48</sup> The Chancellor was critical of many aspects of the process leading to the hiring of Ovitz, the determination of his terms of employment, and, to some extent, his termination.<sup>49</sup> He singled out Disney CEO Michael Eisner, who he characterized as “imperial” and “Machiavellian,” for special criticism.<sup>50</sup>

Nevertheless, he concluded that the Disney directors (including Eisner) had not acted in bad faith and conscious disregard of their responsibilities.<sup>51</sup> He warned, however, that it “is precisely in this context—an imperial CEO or

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which requires judicial examination at the threshold before the decision is entitled to the business judgment rule).

42. *Omnicare*, 818 A.2d at 933–39.

43. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988) (holding that where board actions are done for the primary purpose of impeding the exercise of stockholder voting power, the board must demonstrate a compelling justification for the action).

44. *MM Cos.*, 813 A.2d at 1132 (extending *Blasius* to a board decision, the primary purpose of which is to dilute the impact of a shareholder vote as opposed to the outright thwarting of the shareholder franchise).

45. “Good faith” is an explicit condition not only for director exculpation under section 102(b)(7) of the DGCL, but also for director reliance on “information, opinions, reports, or statements” under section 141(e) and director indemnification under section 145(a).

46. See, e.g., Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 21–31 (2006); Sale, *supra* note 36, at 482–95.

47. See Yvette Kantro, *A Rundown on the Press’s Perspective of the Walt Disney Verdict*, DEL. L. WKLY., Aug. 24, 2005, at 5. (“Last fall, the press went into overdrive as it covered the trial-cum-circus that pitted the Magic Kingdom against its shareholders. Sidney Poitier and other Hollywood luminaries descended on bucolic Georgetown for the two-month affair, which was chronicled by big-time journalists such as James Stewart and Dominick Dunne.”).

48. *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff’d*, 906 A.2d 27 (Del. 2006).

49. See *id.* at 697–99, 760–79.

50. *Id.* at 760.

51. *Id.* at 763, 771–73, 777–79. The Chancellor also concluded that the Disney directors were not grossly negligent in breach of their duty of care and that their decisions relating to Ovitz were protected by the business judgment rule. *Id.*

controlling shareholder with supine or passive board”—that the issue of conscious disregard and lack of good faith can come into stark focus.<sup>52</sup>

In June 2006, the Delaware Supreme Court affirmed the Chancellor’s August 2005 post-trial opinion.<sup>53</sup> In doing so, the court elucidated somewhat the types of director behavior that would constitute a failure of good faith and consequently not be subject to the protections of the business-judgment rule, charter-option exculpation, or indemnification:

A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interest of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.<sup>54</sup>

In November 2006, the Delaware Supreme Court made an important clarification relating to the duty of good faith: it was not an independent duty, but instead an element of the duty of loyalty. *Stone ex rel. AmSouth Bancorporation v. Ritter* was a *Caremark*<sup>55</sup> duty-of-oversight case.<sup>56</sup> Plaintiffs alleged that directors of AmSouth Bancorporation had failed to implement adequate internal controls that would have detected or prevented illegal activities that resulted in fifty million dollars in corporate fines and civil penalties.<sup>57</sup> In affirming the Chancery Court’s dismissal on summary judgment, the Delaware Supreme Court held that a breach of good faith was the standard for liability in oversight cases under *Caremark* and that good faith, rather than being an independent duty, was only an element of the duty of loyalty.<sup>58</sup> This meant, however, that “the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest.”<sup>59</sup> Such a breach of the good faith element of duty of loyalty could occur where “(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, [they] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems.”<sup>60</sup> The Court went on: “Where directors fail to act in the face of a known duty to act, thereby demonstrating a

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52. *Id.* at 760 n.487.

53. *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

54. *Id.* at 67.

55. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (holding that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that a failure to do so under some circumstances, may . . . render a director liable for losses caused by non-compliance with applicable legal standards.”).

56. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362 (Del. 2006).

57. *Id.* at 365–66.

58. *Id.* at 369–70.

59. *Id.* at 370.

60. *Id.*

conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.”<sup>61</sup>

*Stone v. Ritter* worked some interesting jurisprudential sleight-of-hand, transforming oversight cases from duty-of-care claims to duty-of-loyalty claims.<sup>62</sup> It clarified that good faith was not an independent duty, but an element of the duty of loyalty. At the same time, it clarified that a disinterested board obtaining no improper financial benefit may still commit a breach of the duty of loyalty by not acting in good faith. To do so, however, requires utter failure to attend to a known duty and makes proving an oversight case “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”<sup>63</sup>

It took two more years for the Delaware Supreme Court to clarify what this ability to recast duty-of-care claims into duty-of-loyalty claims via good faith would mean for decision-making, as opposed to oversight, cases. In 2008, Vice Chancellor Noble had caused something of an uproar by refusing to dismiss post-merger *Revlon*<sup>64</sup> claims against the board of Lyondell Chemical on summary judgment based on Lyondell’s section 102(b)(7) charter-option exculpation provision.<sup>65</sup> Vice Chancellor Noble had concluded that there were material facts in dispute regarding whether the board had “fail[ed] to act in the face of a known duty to act” under *Revlon*, thereby “demonstrating a conscious disregard for their responsibilities” and a breach of the duty of loyalty by failing to discharge that fiduciary obligation in good faith.<sup>66</sup>

In April 2009, the Delaware Supreme Court overturned the *Lyondell Chemical* ruling, holding that the Chancery Court had wrongly equated an imperfect attempt to comply with *Revlon* duties with a “conscious disregard” of those duties.<sup>67</sup> Reviewing its previous decisions relating to “conscious disregard” and the good faith element of the duty of loyalty in *Disney* and *Stone*, the Delaware Supreme Court concluded that “there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties.”<sup>68</sup> In the context of a *Revlon* sale of control,

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61. *Id.*

62. See Bainbridge et al., *supra* note 36, at 597 (referring to this sleight-of-hand as “simply shoddy” and “brazen”); Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 *FORDHAM L. REV.* 1769, 1769 (2007) (“The court . . . threw in a bit of a shocker in *Stone*, characterizing [*Caremark*], until then a paradigmatic duty of care case, as a duty of loyalty case.”).

63. *Stone*, 911 A.2d at 372 (quoting *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)).

64. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986) (requiring directors to attempt to obtain the highest price reasonably attainable for shareholders when a sale of the corporation becomes inevitable).

65. *Ryan v. Lyondell Chem. Co.*, No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008) *appeal granted, stay granted*, No. 401, 2008 WL 4294938 (Del. Sept. 15, 2008) and *rev’d*, 970 A.2d 235 (Del. 2009).

66. *Id.* at \*19 (quoting *Stone*, 911 A.2d at 370).

67. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009).

68. *Id.* at 243.

“conscious disregard” and a non-exculpatory breach of the good-faith element of the duty of loyalty require a showing that directors “utterly failed to attempt to obtain the best sale price.”<sup>69</sup>

A relatively consistent message in the Delaware Supreme Court’s opinions in *Disney*, *Stone*, and *Lyondell Chemical* is that conscious disregard of duties is qualitatively different from flawed performance of duties, even very seriously flawed performance. Conscious disregard requires an utter failure to do the job that is sustained and systematic, combined with knowledge of the utter insufficiency or a conscious turning away from known problems. It is a very high bar for a shareholder plaintiff to clear.<sup>70</sup> But the incentives for doing so are great,<sup>71</sup> and it is far from clear whether we have seen the last chapter in the corporate-plaintiff-bar’s efforts to recast duty-of-care damages claims into non-exculpable duty-of-loyalty claims through the alchemy of “good faith” and “conscious disregard.”

#### IV

##### MODEL ACT SECTION 2.02(b)(4): ANTICIPATING THE PROBLEM

If the intention of state legislatures, in the wake of *Smith v. Van Gorkom*, was to authorize exculpation of disinterested and well-intentioned directors from open-ended compensatory money damages to the corporation or shareholders no matter how incompetently they may make a decision, then section 2.02(b)(4) of the MBCA is a better statute than section 102(b)(7) of the DGCL for several reasons. First, it avoids the vague exclusion for “acts or omissions not in good faith”—the language that has given rise to confusion in Delaware and provided the mechanism for transforming some subset of duty-of-care breaches into non-exculpable duty-of-loyalty breaches (even if that subset appears to be extremely small under the current state of Delaware case law). Second, instead of excluding “any breach of the director’s duty of loyalty” and inviting this whole re-characterization effort, section 2.02(b)(4) provides an exclusion for the core concrete element of traditional duty-of-loyalty breaches—“a financial benefit to which the director is not entitled.”<sup>72</sup>

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69. *Id.* at 244.

70. For post-*Stone* and post-*Lyondell* cases summarily dismissing *Revlon* and *Caremark* damages claims based on shareholder-plaintiff failure to clear the bar, see *In re The Dow Chem. Co. Derivative Litig.*, No. 4349-CC, 2010 WL 66769 (Del. Ch. Jan. 11, 2010) (*Caremark* claims); *In re NYMEX S’holders Litig.*, No. 3621-VCN, 2009 WL 3206051 (Del. Ch. Sept. 30, 2009) (*Revlon* claims); *Wayne Cnty. Emps.’ Ret. Sys. v. Corti*, No. 3534-CC, 2009 WL 2219260 (Del. Ch. July 24, 2009), *aff’d*, 996 A.2d 7965 (Del. 2010) (*Revlon* claims).

71. Hill & McDonnell, *supra* note 62, at 1773 (“Plaintiffs’ lawyers are not stupid, nor are they immune to the effect of incentives.”).

72. See Bainbridge et al., *supra* note 36, at 585 (“The duty of loyalty traditionally focused on cases in which the defendant fiduciary received an improper financial benefit.”). The “improper personal benefit” exclusion in 102(b)(7) is less precise because it refers to “personal benefit” instead of “financial benefit.” Because it is separate from the “good faith” and “duty of loyalty” exclusions, it also invites the argument that breaches of “good faith” and “duty of loyalty” need not involve improper

In addition, section 2.02(b)(4) caps the damages recoverable for improper financial benefit at the “amount of” such benefit—the traditional restitutionary recovery for duty-of-loyalty breach. Section 102(b)(7) has no such limitation, inviting open-ended compensatory damages claims relating to any transaction from which improper benefit was derived or anything that might be shoe-horned into the rubric of breach of good faith or duty of loyalty.<sup>73</sup> Finally, the section 2.02(b)(4) exclusion for “intentional infliction of harm on the corporation or its shareholders” draws a much firmer state-of-mind liability line than “good faith” or “duty of loyalty” for those cases in which directors should be open to compensatory damages even though they have not necessarily derived an immediate financial benefit themselves.<sup>74</sup> “Intentional infliction of harm” is the asymptote toward which Delaware courts are headed in their post-*Lyondell* trajectory,<sup>75</sup> but Delaware’s “good faith” jurisprudence will most likely restrain them from ever reaching the same clarity and will continue to leave room for mischief and uncertainty.<sup>76</sup> The MBCA also permits corporations, by

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benefit to directors, as the Delaware Supreme Court held in *Stone v. Ritter*. See *supra* notes 56–63 and accompanying text.

73. This is one of Professor Bainbridge’s principal criticisms of *Stone v. Ritter*’s transformation of *Caremark* cases into duty-of-loyalty claims. See Bainbridge et al., *supra* note 36, at 585 (“By subsuming good faith into the duty of loyalty, however, *Stone* extends the domain of the duty of loyalty to cases in which the defendant received no financial benefit. In such cases, the traditional remedy is inapt. . . . Liability for acts in bad faith thus will look a lot more like that imposed in cases involving a breach of the duty of care than the duty of loyalty. . . . [T]he relevant question is whether the corporation was harmed and, if so, by what amount.”).

74. MODEL BUS. CORP. ACT § 2.02(b)(4) cmt. I (2008) (“There may be situations in which a director intentionally causes harm to the corporation even though the director does not receive any improper benefit. The use of the word ‘intentional,’ rather than a less precise term such as ‘knowing,’ is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director’s action, or failure to act, will cause harm, rather than a general intent to perform the acts which cause the harm.”).

75. See cases cited *supra* note 70 (illustrating how the court summarily dismissed several *Revlon* and *Caremark* claims post-*Stone* and post-*Lyondell*); cf. Louisiana Mun. Police Emps.’ Ret. Sys. v. Fertitta, No. 4339-VCL, 2009 WL 2263406, at \*8 (Del. Ch. July 28, 2009) (noting that “[t]his is not a case to which *Lyondell* speaks,” the court refused to dismiss the claims against the directors because “it did not involve simply disinterested directors acting in a flawed manner . . . [rather] the board knowingly preferred the interests of [Fertitta] to those of the corporation or the minority,” which invoked the duty of loyalty). Under *Fertitta*, I believe a court would have come out the same way under the “intentional infliction of harm” exclusion to section 2.02(b)(4) of the MBCA.

76. The advantages of section 2.02(b)(4) over section 102(b)(7) have not to date been seriously tested by case law. There is very little case law on director exculpation that has been produced outside the Delaware state courts. Most of what exists are decisions by federal courts or other state courts applying Delaware law and dealing with a section 102(b)(7) exculpation provision. See, e.g., *In re Abbott Lab. Derivative S’holder Litig.*, 325 F.3d 795, 809–11 (7th Cir. 2003); *Sherman v. Ryan*, 911 N.E.2d 378, 395–96 (Ill. App. Ct. 2009); *Elloway v. Pate*, 238 S.W.3d 882, 889–91 (Tex. Ct. App. 2007). There are only a handful of cases actually interpreting exculpation provisions from other state statutes. Most of those cases involve statutory provisions with all or some of the exclusion elements from section 102(b)(7), and they turn to Delaware case law in interpreting relevant provisions, even when the language differs somewhat. See, e.g., *In re Avado Brands, Inc.*, 358 B.R. 868, 879–91 (Bankr. N.D. Tex. 2006); *Blake v. Smith*, No. 0300003B, 2006 WL 4114305, at \*6 (Mass. Super. Ct. Dec. 11, 2006); *Markewich ex rel. Medtronic, Inc. v. Collins*, 622 F. Supp. 2d 802, 808–13 (D. Minn. 2009); *Green v. Condra*, No. 08 CVS 6575, 2009 WL 2488930, at \*9 (N.C. Super. Ct. Aug. 14, 2009). Research in

charter amendment, to extend the same clarity that 2.02(b)(4) brings to exculpation to corporate indemnification. Section 2.02(b)(5) of the MBCA permits inclusion in the articles of incorporation of “a provision permitting or making obligatory indemnification of a director for liability . . . to any person for any action taken, or any failure to take any action, as a director, except liability for” the same excluded areas as in 2.02(b)(4). Such a charter provision would eliminate the requirement in section 8.51 of the MBCA that indemnification be permitted only when a director has “conducted himself or herself in good faith.”<sup>77</sup>

## V

### CONCLUSION: COMPLEMENTARY SOURCES OF LAW

There are commentators who would probably point to the whole line of Delaware “good faith” cases as a classic example of the “indeterminacy” problem of Delaware corporate law.<sup>78</sup> Noting that the drafters of the MBCA foresaw the potential problems perfectly and precluded them in the wording of the exclusions under MBCA section 2.02(b)(4),<sup>79</sup> these same commentators might conclude that this is just one more reason why the MBCA is a superior body of corporate law and why Delaware’s continued dominance as a corporate home is a “mystery.”<sup>80</sup>

But comparing the MBCA to Delaware corporate law as a whole is an exercise in comparing apples to oranges.<sup>81</sup> A bare corporation statute cannot

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connection with this article revealed only one reported case in which a court has interpreted a state provision substantially identical to section 2.02(b)(4) of the MBCA. In *Herbal Care Sys., Inc. v. James Plaza*, No. cv-06-2698-PHX-ROS., 2009 WL 692338, at \*1 (D. Ariz. Mar. 17, 2009), the federal district court in Arizona refused to dismiss claims against a director of an Arizona corporation under the Arizona version of 2.02(b)(4) where the director allegedly harmed the corporation by intentionally directing revenues away from the corporation to businesses he controlled or from which he received compensation. The district court ruled that such allegations, if proven, could mean the director had received a “financial benefit” to which he was not entitled or that he had intentionally inflicted harm on the corporation. *Id.* at \*4.

77. MODEL BUS. CORP. ACT § 2.02(b)(5) (2008).

78. For a recent example of commentary decrying the indeterminacy of Delaware corporate law, see Carney & Shepherd, *supra* note 3.

79. *See id.* at 57 (“The [MBCA] has made an effort to provide greater clarity for a variety of transactions through bright line rules and safe harbors. In short, it has favored bright line rules and well defined property rights over an ex post judicial consideration of where rights and duties lie.”).

80. The “mystery” of Delaware’s continued dominance as a corporate home in light of the relative indeterminacy that plagues Delaware corporate law and the relative clarity available in the MBCA is the central premise of the article by Professors Carney and Shepherd. *See id.*

81. The fruit analogy is borrowed from Chancellor Chandler. *See* William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd’s “The Mystery of Delaware Law’s Continuing Success,”* 2009 U. ILL. L. REV. 95, 97 (“Carney and Shepherd, however, conspicuously fail to identify a jurisdiction that actually functions as a haven of certainty for businesses seeking to incorporate or reincorporate. Their apples-to-oranges approach attempts to compare a fully implemented legal regime with a set of statutory provisions isolated from real disputes, ignoring the dynamic nature of corporate law as it is actually practiced.”). *See also* Lawrence

meaningfully be compared to a full body of statutory and judge-made law that develops in real time based on a continuous flow of fast-paced, complex disputes argued by some of the most able corporate-law experts in the country.<sup>82</sup>

For sixty years, the two most important sources of evolving U.S. corporate law have been the legislature and courts of Delaware and the drafters of the MBCA. The two have played cooperative and complementary roles. Delaware has provided the flesh and bone of corporate law by acting as the forum for resolving the ongoing issues great and small involving corporations and their constituencies. The Committee on Corporate Laws has provided the most influential model corporation statute for states other than Delaware, where the courts do not treat a continual flow of corporate-law disputes.

One of the most important features of the MBCA has been greater statutory clarity and more bright lines aimed at anticipating future problems and providing greater guidance. In this respect, section 2.02(b)(4) of the MBCA has the attributes of a particular success. The only “mystery” is why more states outside Delaware have not adopted it.<sup>83</sup>

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Hamermesh, *How We Make Law in Delaware, and What to Expect from Us in the Future*, 2 J. BUS. & TECH. L. 409, 410 (criticizing the Delaware “indeterminacy rap”).

82. See Chandler & Rickey, *supra* note 81, at 95. See also Hamermesh, *supra* note 81, at 410.

83. See *supra* note 19.