Structural Bias, R.I.P.?
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Structural bias has traditionally been a significant obstacle to adequate director monitoring. For a period of time early this century, the development of a fiduciary duty of good faith suggested that the Delaware courts were becoming serious about addressing structural bias, something we celebrated in previous work. Subsequent case law, however, calls into question how much force the duty of good faith has to address structural bias. In this article, we consider how that law has evolved, and whether other developments in this century, including the well-known monitoring failures at Enron, WorldCom, and Adelphia, proxy access, say on pay, independent director requirements, the increasing role of government in monitoring companies when Deferred and Non-Prosecution Agreements are entered into, and the rise of economic activism by hedge funds and corporate social responsibility, have affected whether directors will be subject to structural bias, and whether if they are so subject, they will be able to act on it.

I. The Concept of Structural Bias

Corporations are of course managed by their boards of directors. One important role directors have is to monitor their corporation and its officers. Notwithstanding the increasing emphasis on director “independence,” boards have traditionally been comprised of the “same sort” of people as each other and as the officers. Inside directors of course are officers of the corporation. But even the outside directors, increasingly a majority of the board, have a great deal in common with the officers. They typically belong to the same socioeconomic class as directors and officers generally, they often have similar social circles, and they are often top officers of other corporations. Many commentators have questioned whether their monitoring is less vigorous on account of this “structural bias.” In earlier work, we explained how we think structural bias functions to limit director monitoring:

[D]irectors defer to officers, or award officers generous compensation, because that’s how the directors would want to be treated if they were the officers—a pernicious golden rule. Compounding these effects, most boards are comprised of people selected by management; if they weren’t management’s friends before their board service, they may become so in the course of their board service. Furthermore, most directors are from the same social group as officers: they are often themselves officers or former officers of other corporations, lawyers, or bankers prominent in the business community. As

1 Our focus in this piece is mainly on the boards of public corporations. Different, albeit related, issues arise for closely held corporations, particularly those with a controlling shareholder or group.
members of the same social group, directors might naturally see issues from an officer’s perspective, rather than from the perspective of an employee, customer, or shareholder. For all these reasons, the board’s critical faculties may not be fully engaged because the directors are biased against corporate interests and in favor of the not-infrequently differing interests of officers, controlling stockholders, fellow directors, or themselves.  

Structural bias results in deference. If director-monitors are too deferential, they don’t provide enough of a check against officers’ ability and incentive to help themselves at the expense of their principals, the corporation and its shareholders (that is, “agency costs.”) And the check is very important insofar as we think that these agency costs are significant. Officers’ incentive to help themselves has been difficult to address and indeed, a leading supposed solution, giving officers an equity stake in the corporation, has at times been disastrous. The problem with fixed pay was laziness; the problem with equity stakes includes gaming performance measures and even performance itself. Officers’ ability to help themselves has also been challenging to address. As we will discuss further below, the market for corporate control is supposed to help constrain officers (or remove those who are not appropriately constrained), but judicial deference to directors’ choices as to when to merge and with who, and when not to merge, had somewhat muted the market’s force.

II. Structural Bias and Fiduciary Duty

How could courts deal with structural bias? Given that directors are supposed to solely be representing the interests of their principals, and not their own interests, structural bias would seem to be contrary to directors’ fiduciary duties. At best, they are not monitoring actively enough; at worst, they are serving their own interests, either in staying on the board or in bolstering the mutual-back-scratching norm. But in practice, courts have a very difficult time finding an appropriate doctrinal handle for structural bias.

The two main fiduciary duties are the duty of care and the duty of loyalty. The duty of care is notoriously toothless, certainly as a source of liability. The duty does influence behavior, but not in a way that could address structural bias. It is generally accepted that directors have a duty of care, in the sense that norms of the community, and judges’ pronouncements, say they do. But what directors do to abide by that duty tends to be narrowly process-based – hiring appropriate experts, having documents available in time for review, and so on. For quite a while, opinions have not offered much guidance as to what the duty of care requires --- since care violations don’t yield meaningful relief, the claims aren’t generally brought.

The other possibility is the duty of loyalty. Loyalty as traditionally conceived encompasses, among other things, transactions in which directors or officers were “on both sides”-- on one side in their personal capacity and on the other acting for the corporation-- or an officer or director

competing with the corporation, taking a corporate opportunity, or otherwise privately benefiting from something belonging to the corporation (such as information). But loyalty encompasses much more. Indeed, *Stone v. Ritter* held that the duty of good faith was subsumed by, and was, part of the duty of loyalty.\(^3\)

Good faith seemed promising as a doctrinal handle for structural bias. Excessive deference in the form of rubber stamping decisions, signing off on high and only nominally performance-sensitive compensation packages, and generally, acting in accordance with what we termed the pernicious golden rule—a director monitoring the officers (only minimally) as he, in his capacity as an officer, would want officers, serving as directors, to monitor him—would seem contrary to a good faith duty to advance the interests of the corporation. And good faith is expressly not exculpated under DGCL Section 102(b)(7). But caselaw has been very sparing in finding liability for a breach of the duty of good faith. The articulation in *Disney* was stated to be “nonexclusive,” but subsequent articulations have not expanded on it. *Disney* held that:

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 interests 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 this duties.\(^4\)

This language is limiting. Even the most egregious and conscious mutual back-scratching would probably not qualify, and most structural bias is not that conscious. Rather, it is more likely to be “motivated reasoning,” in which the director “concludes” what serves him best to conclude.\(^5\) Still, many kinds of structural bias could be characterized as a conscious disregard of duty, insofar as directors are acting for a purpose other than advancing the best purposes of the corporation. This language could have been used to expand the potential for liability in various circumstances, and we argued for doing so shortly after the decision came out.\(^6\) Alas, the Delaware Supreme Court has subsequently used the “conscious disregard” language to limit the extension of liability for acting in bad faith. Citing the *Disney* language, it has said “But, if the directors failed to do all that they should have under the circumstances, they breached their duty of care. Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty.”\(^7\) That is a very difficult standard for plaintiffs to successfully demonstrate has been violated.

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3 *Stone v. Ritter*, 911 A. 2d. 362 (Del. 2006). See generally Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORD. L. REV. 1769 (2007) (hereinafter Stone). Indeed, in *Disney*, supra note 1, at 55, we argued that the duty of care is fundamentally a duty of loyalty insofar as it can be viewed as the directors and officers taking “leisure they are not entitled to.”

4 *In Re Walt Disney Co. Derivative Litig.*, 906 A. 2d 27, 62 (Del 2006), quoting Chancery Court opinion.


There is one doctrinal handle left. The discussion above largely discussed substantive causes of action—directors’ breaches of fiduciary duty. But where the breach harmed the corporation, while the corporation is initially charged with making the decision to sue, the plaintiff may be able to persuade the court that making demand on the corporation – that is, the board- is futile: that the corporation’s decision-making regarding the suit is sufficiently compromised that the plaintiff should be able to bring the suit itself. If what is at issue is a board decision, the relevant test is *Aronson v. Lewis*, which can be satisfied in one of two ways, by offering sufficient evidence that board independence may be compromised —that a majority of the board was not independent vis a vis the decision at issue—or by showing that the decision was not the product of a valid exercise of business judgment. Where the cause of action concerns a failure to make a decision, the *Rales* test applies— that the board would be able to make a valid decision regarding whether to bring a suit is what is considered.

So long as the plaintiff bears the burden at this juncture, its ability to persuade the court is quite limited. Let us return to the facts of the *Disney* case, quoted from above, in which the CEO selected the next president of Disney, his then close friend Michael Ovitz, and was heavily involved in negotiating a favorable (to the president) compensation package. When Ovitz left after an unsatisfactory 14 month tenure with $140 million in severance, plaintiffs sued. The case quoted above is the decision rendered after demand was deemed excused. But plaintiffs’ first attempt to get demand excused was not successful. In that case, plaintiffs made a variety of arguments under both prongs of Aronson. In its analysis of the first prong, the court found that the board’s independence was not compromised in any way cognizable under the law. The court discussed each director, expressly analyzing whether the director was “dominated” by Eisner, the CEO. Among the directors it concluded were not so dominated were Eisner’s children’s elementary school principal, whose yearly salary presumably was far lower than her pay for attending even one board meeting, and whose continued director status had to be dependent on retaining Eisner’s favor, and the president of Georgetown University, who, as a Jesuit priest, could not take a salary, but who could and did accept Eisner’s $1 million donation to Georgetown. But, again, the arguments as to the directors’ domination by Eisner were not legally cognizable – for a majority of the directors, including those described here, the canonical sorts of interest or lack of independence were not present. Notably, these findings (and the decisions which triggered the shareholders’ claims) were made at a time when the Disney board was generally regarded as a rubber-stamp board.

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8 473 A. 2d 805 (Del. 1984)
9 634 A.2d 927 (Del. 1993)
10 “[W]hether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.”
11 In Re Disney Derivative Suit, 731 A.2d 342 (Del. Ch. 1998).
All this being said, on their next attempt, plaintiffs did succeed in getting demand excused under Aronson’s second prong. The winning argument was not wholly irrelevant to the issue of structural bias – presumably not making a good faith to inform themselves of the matters on which they were making decisions reflected that they intended simply to say yes, and save themselves the trouble of a diligent inquiry. Also, it should be noted that a recent case, Del. Cnty. Emps. Ret. Fund v. Sanchez, finds a lack of director independence based on ties that include some financial ones and, significantly, a long-standing friendship. Courts generally reject friendship as a sufficient tie—however, this friendship was close, and had lasted 50 years. There was language consistent with courts’ making a more active inquiry in determining independence, perhaps making the plaintiffs’ burden in demonstrating lack of independence a bit easier to meet. But these facts seem so extreme that courts could readily continue as they have unless they very much want to ease the plaintiffs’ burden in this regard.

If the plaintiff does manage to show that demand is futile and the corporation tries to terminate the litigation by showing that a “special litigation committee” decided that proceeding with the litigation would not be in the corporation’s best interests, the burden is then on the committee to show that it is indeed independent. The required showing at that juncture readily accommodates considerations of structural bias. In the well-known Oracle case, then Vice-Chancellor Strine stated that

Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement. Homo sapiens is not merely homo economicus. We may be thankful that an array of other motivations exist that influence human behavior; not all are any better than greed or avarice, think of envy, to name just one. But also think of motives like love, friendship, and collegiality, think of those among us who direct their behavior as best they can on a guiding creed or set of moral values.

Nor should our law ignore the social nature of humans. To be direct, corporate directors are generally the sort of people deeply enmeshed in social institutions. Such institutions have norms, expectations that, explicitly and implicitly, influence and channel the behavior of those who participate in their operation. Some things are "just not done," or only at a cost, which might not be so severe as a loss of position, but may involve a loss

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13 The appeal was Brehm v. Eisner, 746 A.2d 244 (Del. 2000), reversing and remanding in part and giving plaintiffs the opportunity to replead. On repleading, demand was excused. In Re Disney Derivative Litigation, 825 A.2d 275 (Del. Ch. 2003).
14 124 A.3d 1017 (Del.2015).
15 In re Oracle Corp. Derivative Litigation, 824 A.2d 917 (Del. Ch. 2003).
of standing in the institution. In being appropriately sensitive to this factor, our law also cannot assume — absent some proof of the point — that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk.\textsuperscript{16}

So, in these very limited circumstances, structural bias can yield success for the plaintiffs— an ability to continue the suit or a good position from which to negotiate a settlement.

One area where Delaware courts have recognized a systematic structural bias problem, and crafted intermediate standards of review to apply in such situations, involves mergers and acquisitions and takeovers. The general contours of the law have of course been settled for some time. Where boards take defensive actions against threatened hostile takeovers, the \textit{Unocal} standard applies.\textsuperscript{17} Where they sell off control of the corporation, the \textit{Revlon} standard applies.\textsuperscript{18} We have previously argued that these standards fall on a continuum of degrees of scrutiny that Delaware courts apply based on the degree of concern surrounding potential structural bias in recurring kinds of situations.\textsuperscript{19} But there are some points, some relating to recent developments, that warrant discussion.

First, and this is not new, nothing in law itself pushes directors to consider any offer or, even in a Revlon context, to do a good job in getting a deal at all. When Revlon applies, if the directors accept a deal, they must take the best one. But if they don’t accept a deal, judges will not second-guess the process by which they got to that point.\textsuperscript{20} Second, recent caselaw increases the burdens to plaintiffs seeking to impose liability when a transaction is approved by a fully informed majority of disinterested shareholders. In the 2015 case \textit{Corwin v. KKR Financial Holdings, LLC.},\textsuperscript{21} Chief Justice Strine affirmed the Chancery Court’s holding that “the business judgment rule is...the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders.” And this was so even if Revlon would have applied. The court held that Revlon was primarily designed to allow for relief pre-closing; it was not designed for post-closing money damages. While disinterested shareholder approval says something in favor of a transaction, should it suffice to yield business judgment deference? Maybe not, if the reason for the affirmative vote is that shareholders think the management is so problematic that this transaction is the best they can do—a deal with a better suitor is unlikely, and, perhaps, the company’s future if the transaction does not occur is worse. Finally, of course, recall \textit{Lyondell Chemical Company v. Ryan},\textsuperscript{22} which articulated an extremely

\begin{itemize}
\item \textsuperscript{16} \textit{Id.} at 938
\item \textsuperscript{17} \textit{Unocal Corp. v. Mesa Petroleum Co.}, 493 A.2d 946 (Del. 1985).
\item \textsuperscript{18} \textit{Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.}, 506 A.2d 173 (Del. 1986).
\item \textsuperscript{19} See Hill & McDonnell, Stone, supra note 3, at 1793.
\item \textsuperscript{20} For this point we are indebted to Lyman Johnson.
\item \textsuperscript{21} C.A. No. 9210-CB, (Del., October 2, 2015)
\item \textsuperscript{22} 970 A.2d 235 (Del. 2008)
\end{itemize}
high standard for Revlon liability, which it referred to as liability under a good faith standard under the broader umbrella of the duty of loyalty: “[B]ad faith will be found if a ‘fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties’,,,, Only if [the directors] they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty…. [T]he inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price.”

Why is structural bias so much of a concern? For the reasons we discussed in the quote from our paper above. What prevents boards from doing the job they should be doing, the job that would serve shareholders best? Lax monitoring is one reason, and undue deference to officers is an important reason for the laxity. Areas often discussed are compensation decisions – consider in this regard the well-known book PAY WITHOUT PERFORMANCE, which in effect argued that compensation decisions reflected cronyism rather than market forces and decisions as to who to merge with and who not to merge with. But the effects of deference go beyond these two areas. For instance, we might expect that structurally biased boards, boards inclined to defer, may not see red or even yellow flags, and may not uncover wrongdoing when it would be undesirable from the officers’ perspective for them to do so. This is perhaps the most significant cost, from a societal perspective and perhaps from a shareholder perspective as well. (Just ask the shareholders of Enron.) “Good faith” seemed like the best doctrinal handle since there was no breach of the traditional duty of loyalty. To be in good faith would seem to require being independent, disinterested sufficiently informed, and having a rational belief that one is acting in the best interests of the corporation. This is not just a ‘convenient’ doctrinal handle—it seems to capture what is at issue. Structurally biased directors may behave in ways that are not consistent with a “rational belief” that they were acting in the best interests of the corporation. But the duty of good faith has been interpreted only to require that there not be affirmative bad faith. Structural bias rarely, if ever, takes the form of affirmative bad faith.

III. The Diminishing Force of Structural Bias?

The foregoing establishes that at least fiduciary duty law is not good at reining in structural bias. We think that structural bias has traditionally been a significant problem. But what about now? We argue below that there are reasons to suppose that boards are less structurally biased, and that there may be some effective counterweights. We can’t conclude that corporate governance is therefore “better” – but it seems to be rather different, with different issues. The increasing influence of activist shareholders has been much remarked upon, but what is interesting for us is the interaction between that influence and the other changes in corporate governance, notably

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23 Id. at 243-4
25 See generally Section 4.01(c) of the ALI Principles of Corporate Governance. See also Melvin A. Eisenberg, The Duty of Good Faith in Corporate Law, 31 Del. J. Corp. L. 1 (2006)
including proxy access, say on pay, pressure to eliminate staggered boards and poison pills, as well as the rise in corporate social responsibility. We return to these matters later in this section.

Yet another factor to be considered is the effect of debacles such as Enron, WorldCom and Adelphia. In each case, the board did not follow up on red flags that, certainly in retrospect, should have been obvious. Why not? Excessive deference arguably reflecting structural bias. The bankruptcy examiner in WorldCom said: “Most of the deviations from proper corporate behavior of which we took note resulted from the failure of Board of Directors to recognize, and to deal effectively with, abuses reflecting what our reports identified as a “culture of greed” within the corporation’s top management.” “Board members exercised little diligence, asked few questions and eventually became a mere rubber stamp for the ambitions of these two individuals. There was created within the Board what we styled a “culture of accommodation” which ceded virtually unlimited power to Messrs. Ebbers and Sullivan.”

Searching for the word “passive” in the examiner’s report yields 7 mentions, 4 of which are critical references to the board’s passivity and the remainder of which are judgments that had the board been non-passive, it would almost certainly have rejected a particular transaction that it in fact accepted.

Since then, there has been increasing emphasis on the need for directors to be more active in their monitoring. An article in Business Week makes the point:

For most of the 1990s, Walt Disney Co. occupied a prominent place in BusinessWeek's rankings of America's worst corporate boards. Directors there were long on ties to CEO Michael D. Eisner and short on management expertise. Although performance was strong, oversight was minimal. The company's reaction to this dubious distinction? With its stock climbing and shareholders happy, it more or less ignored the issue, saying only that Disney's strong performance spoke for itself. That's how most investors seemed to regard corporate governance in the '90s as well: in theory, a laudable goal, but one with only marginal relevance in the real world.

Those days ended with a bang when the debacle at Enron Corp. exposed just how vulnerable even the largest companies were to fraud and manipulation.... As the list of companies engulfed in scandal grows--from Enron to Tyco to WorldCom-- [a corporate governance revolution] is gaining momentum. Top executives who once blithely ignored criticism of their clubby boards are scrambling to institute reforms. Directors whose main

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contribution to boardroom debate had been golf scores and gossip are returning to the classroom to learn how to read a balance sheet. Compensation committees that routinely awarded massive pay packages to poorly performing CEOs are having second thoughts.

Boards are instituting sweeping changes in their composition, structure, and practices on a scale not seen since skyrocketing executive pay gave birth to the modern governance movement in the 1980s.\textsuperscript{28}

Whether those days really ended with a bang with Enron can perhaps be disputed. Not many years later, some of the most visible and lauded companies at the heart of American capitalism crashed in flames as part of the financial crisis of 2007-08. Many have argued that poor corporate governance and lack of adequate board oversight were a major source of the problem.\textsuperscript{29} These lessons seem to be hard ones for many boards to learn.

One change instituted in response to concerns about board inaction is the increasing emphasis on independent boards. This began well before Enron and the other debacles. In an article published in 2002, Professors Sanjai Bhagat and Bernard Black stated that

Over the last thirty years, American corporate boards have undergone a gradual but dramatic change. In the 1960s, most had a majority of inside directors. Today, almost all have a majority (usually a large majority) of outside directors, most have a majority (often a large majority) of independent directors, and an increasing number have only one or two inside directors. This pattern reflects the conventional wisdom that the board’s principal task is to monitor management, and only independent directors can be effective monitors. In contrast, an insider-dominated board is seen as a device for management entrenchment.\textsuperscript{30}

Various legal changes, notably in Sarbanes Oxley, adopted in response to Enron and the other debacles, also emphasized more independence on boards and board committees.

Might the increasing emphasis on independence on boards “solve” the problems of structural bias? We think the answer to this question is no. It seems plausible to characterize the main problems with structural bias as relating to compensation, too-ready acquiescence to officers’ decisions as to mergers and acquisitions and other important strategic matters, and lack of

\textsuperscript{30} Sanjai Bhagat & Bernard Black, \textit{The Non-Correlation Between Board Independence and Long-Term Firm Performance}, 27 J. CORP. L. 231, 232 (2002). There is considerable disagreement as to whether board independence has an effect on firm performance. This paper finds that it has no positive effect, but a later paper by one of the same authors finds that for a period later than that measured in this paper, it does have a positive effect. Sanjai Bhagat & Brian Bolton, \textit{Director Ownership, Governance and Performance}, 48 J. FIN. & QUANT. ANALYSIS 105 (2013).
vigilance in spotting red and yellow flags of serious misconduct or difficulties. Even if all directors were nominally independent, one can readily imagine structural bias yielding less than desirable results.

Indeed, the relationship between structural bias and board independence is complicated. Structural bias can stem from actual relationships and connections – it can also stem from more attenuated relationships and connections, a mutual interest in norms of high compensation and deference to officers, and shared mindsets generally. The former might be addressed by definitions of independence that are relevant for Federal law, such as the definitions in the NYSE and NASDAQ rules. But the latter would not be. Enron had a majority independent board, but one which was clearly not inclined to aggressively question what management was doing. And the latter has arguably been very important indeed, as debacles where serious malfeasance was not uncovered would seem to indicate. With a more critically-minded board, would the GM ignition switch (which may have killed several people), Takata air bag (ditto), or VW emissions-test-gaming scandals have been discovered sooner? The examiner’s report on GM does not expressly fault the board, but does note a general corporate culture of “salutes” and “nods” which indicated that issues that had been raised would not be followed up on. Information as to this governance failure, and those at Takata and VW, is still being uncovered. It is possible that the boards were exemplary, but also possible that there was at least acquiescence, if not worse, in a culture that did not sufficiently discourage- or perhaps even encouraged-ignoring or concealing bad news that could dent profits or result in reputational harm or liability.

But other factors may be limiting the effect of structural bias. One is the impetus behind the post-Enron push for independence: that too-deferential boards may have allowed the debacles to occur. The push thus has been not just for more independence but also for more critical monitoring, which can be done by any director, even including an inside director. We gave

32 The internal report of Anton Vakulas, of Jenner & Block, on GM’s ignition switch, including what was and was not known within GM as to the dangers of the switch, is available at https://www.washingtonpost.com/apps/g/page/business/general-motors-report-regarding-ignition-switch-recall/1085/
35 Report, supra note 19, at 255-6.
examples of what seem to have been lax monitoring above - but perhaps, without the push for boards to be more vigilant, there would have been even more such examples. And directors may have been chastened by their or their peers’ service on boards of companies whose difficulties they failed to detect.\textsuperscript{37} Then again, that didn’t seem to help the seemingly asleep-at-the-wheel boards of the corporations that led the world into the financial crisis. But maybe the lessons learned from that even worse crisis have finally chastened directors. Though the short gap between Enron and Lehman Brothers does leave much room for skepticism on this point.

What about director equity, also meant to help directors overcome structural bias and consider their own economic interests rather than simply deferring to the officers? Certainly, director equity has its strong proponents, but it has its perils too, as directors acquire a community of interest with officers in gaming stock prices and other stock-relevant measures. Enron is the poster child for this peril.

Consider too the increasing emphasis on compliance programs for directors to “abide by” their Caremark duties.\textsuperscript{38} Even if directors are highly unlikely to be liable for breach of their Caremark duties, companies are increasingly devoting time and attention to compliance duties for many reasons, including a shift in norms as well as Federal law and practice. One important part of this story is Deferred and Non-Prosecution Agreements, which often address governance issues, and mandate particular types of arrangements.\textsuperscript{39} But here too, we should not rush to conclude that governance has really improved as a result. The agreements have indeed led to the growth of a number of arrangements and changes in personnel. But whether they have led or will lead to significant improvements in actual performance remains very much an open question.\textsuperscript{40}

Other factors include shareholder activism, both of the governance variety and the economic variety, and the associated legal developments, especially those relating to governance activism. For many years, shareholders of public companies have been able to have their governance proposals (including proposals relating to executive compensation) included in management’s proxy statement under certain circumstances. This process by itself can provide a counterweight to structural bias even if management succeeds in its attempts not to include the proposals, or the proposals fail to gain significant support. Consider in this regard the proposals by the AFL-CIO, which management of various large companies succeeded in excluding from their proxy statements, that compensation committee members could not be CEOs of other companies.\textsuperscript{41}

The AFL-CIO has also focused on director compensation, arguing that if it is too high, directors

\textsuperscript{37} See Andrew Countryman, \textit{Worldcom Mess Hasn’t Disqualified Former Directors,\ CHI. TRIB.}, March 7, 2004, available at http://articles.chicagotribune.com/2004-03-07/business/0403070504_1_worldcom-district-judge-denise-cote-board-assignments. This article can be read as making the opposite point, though – that the directors should be viewed as tainted and compromised but are not viewed in that manner.

\textsuperscript{38} \textit{In re Caremark International Inc. Derivative Litigation}, 698 A.2d 959 (Del. Ch. 1996),

\textsuperscript{39} \textit{See generally Wulf Kaal & Timothy Lacine, The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013, 70 BUS. LAWYER 61 (2014/2015)}

\textsuperscript{40} Id. at 254.

\textsuperscript{41} http://www.cfozone.com/index2.php?option=com_content&do_pdf=1&id=6135
might be more apt to approve high executive compensation packages. It is an open question, though, whether any of this type of focus on executive compensation is having an actual effect on limiting compensation.

Dodd-Frank has many relevant provisions. It requires the NYSE and NASDAQ require that all listed companies’ compensation committees be comprised solely of independent directors. It requires public companies to offer their shareholders advisory say on pay, and paved the way to today’s proxy access regime, in which shareholders under some circumstances can propose board nominees for inclusion on management’s proxy statement. Some of those directors could come from quite different social and economic circles—they might not just not be ‘biased’ in the same direction as directors generally, but even be ‘biased’ in opposing directions. Dodd-Frank also requires public companies to disclose whether their board chairs were also their CEOs and explain why the two positions were held by the same person or different people. In this regard, shareholder proposals are made to separate the CEO and Board Chairman; these proposals sometimes succeed. The idea is to limit the power of the CEO—the CEO might be less able to influence (dominate?) the board. But there is much question how much any of these provisions have accomplished. Say on pay is controversial, and seems to have had at most quite a limited effect. Widespread use of proxy access is just getting started—it will take time to discover what effects it will have. Research on CEO/board chair separation shows little or no effect on performance.

And mention must be made of the now-terminated Shareholder Rights Project at Harvard, which fought mightily and rather successfully, especially to make boards de-stagger and return to annual elections, and to otherwise cause companies to be less well-defended against possible acquirers.

The role of proxy advisory firms such as Institutional Shareholder Services, which give recommendations as to how shares should be voted, also warrants a mention. Such firms may have and express negative views about particular transactions, or particular aspects of a company’s corporate governance that insulate the company from being taken over. They also may express negative views about directors who vote in ways that the firms disagree with, recommending that shareholders vote against such directors. A director’s self-interest in getting a high favorable vote from shareholders may thus conflict with his self-interest to defer to the

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42 Dodd-Frank Section 951, Securities Exchange Act Section 14A
43 Dodd-Frank Section 952. Securities and Exchange Act Section 10C(a).
44 Dodd-Frank Section 971, Securities and Exchange Act Rule 14a-8.
45 An example is Bank of America. But, perhaps astoundingly, after the shareholders voted to separate the two positions, several years later the board reversed the separation; after an outcry, it held a shareholder vote and this time, prevailed to allow the same person to hold the two positions. See Michael Corkery, Victory for the Chief and the Board at Bank of America Over a Dual Role, N. Y. TIMES, Sept. 22, 2015, available at http://www.nytimes.com/2015/09/23/business/dealbook/bank-of-america-shareholders-allow-ceo-to-keep-chairmans-role.html.
officers. However, it is debatable as to how well advisory firms can discern the interests of shareholders as they cover hundreds of public companies, and whether their own incentives are aligned with the interests of shareholders.

We turn now to economic activists. Here, the influence has been enormous, as such activists pressure managements to do their bidding, including putting particular directors on the board—directors who are not infrequently paid bonuses by the activists for succeeding in raising the target’s stock price. 47 Many have characterized these activists as having a “playbook” – a few techniques that should quickly raise stock prices, such as paying out dividends or buying back stock (and perhaps, borrowing money to do so), selling all or part of the company, and perhaps reducing the company’s costs. Companies may try to pre-empt activist approaches by doing some or all of these things before they are requested (or demanded) by activists. Whether the activists’ ideas for the companies they target are good for shareholders is highly controversial as is whether their ideas are good for the broader society, a subject we discuss at length in other work. 48 But as with all of the developments discussed in this part, we must note a counterweight: the response- and to some extent backlash-against economic shareholder activism. Those who might have reviled corporate managers for their cronyism now may find themselves allied with those managers and their lawyers as they seek to fight the economic activists—insofar as economic activists are seen as effectively dismantling corporations, including by limiting funds spent on research and on employees, corporate managers more interested in the survival of their corporations seem preferable, to many constituencies. Furthermore, insofar as corporate managers seek to pre-empt the activists by themselves taking some steps from the activist playbook and thereby staying in power, structural bias would seem to have triumphed again. Again, the literature is vast, and we seek only to mention the issue here.

In some ways reflecting the rise of shareholder activism and in some ways reflecting the backlash against that rise, one should note the increasing role of corporate social responsibility. Sometimes as part of shareholder activism, and sometimes in response to pressures from the greater society (or perhaps, hopes to pre-empt regulatory changes), companies are increasingly characterizing themselves as responsive to the interests of other stakeholders even when doing so runs contrary to the economic interests the managers might have and deferential directors might accept.

Of course, these paragraphs are very brief summaries of the issues raised in what is an extraordinarily extensive literature. We should note here, though, that the issues are generally framed within the category of the relative power of shareholders and directors, and which is more apt to be acting in a manner that would most benefit the corporation. The term “structural bias” is not generally the handle used, nor is fiduciary duty necessarily given pride of place in the

analysis. But we think the issues can properly be framed in terms of structural bias, a point to which we return in the next Part.

IV. What Follows?

Thus far, we have argued that structural bias has been a significant problem, and that fiduciary duty law—even the most ‘likely’ candidate, the duty of good faith— is not good at addressing it, at least in many of structural bias’s most common manifestations. While defining, much less measuring, structural bias is difficult, directors may, on account of being ‘the same sort’ of people traveling in the same sort’ of circles, and seeing the world similarly, have been less inclined to take positions contrary to those of the officers—to second-guess officers’ pay packages, second-guess their decisions as to mergers and acquisitions, and, look more actively for indications that problematic or even illegal activity might be occurring. It may be, though, that the present-day counterweights mean that on net, structural bias is less of an issue than it has historically been.

That may not be true—for each trend identified in the previous Part, we saw reasons to doubt the effectiveness of that trend. We do not fully agree among ourselves how much the developments discussed above have really reduced structural bias across most public corporations. But let us assume that the developments have indeed had such an effect (at least this seems particularly plausible in the case of economic activism). That does not at all mean that the problems of corporate governance have been solved. They have not even necessarily improved the way corporations operate. We must still ask: Are we better off now than we were when the counterweights were less effective, or do we simply have different problems? We have several preliminary thoughts.

The counterweights work in a variety of different ways. Some involve including on a board members not inclined to defer—perhaps those obtaining seats via proxy access, or those representing shareholder activists who gain their seats as part of a negotiation or even in a proxy fight, and who may get additional compensation for, effectively, doing the activists’ bidding. (We previously noted that “independent” directors were thought to be less inclined to defer, but that definitions of independence do not get at many of the most important ‘causes’ of structural bias.) The criticisms are well-known. Collegiality can be sacrificed, and, as to the economic activists, the counterweight pushes very aggressively and not infrequently, successfully, towards steps that may not be best for the company’s long-term prospects.

What about shareholder proposals and the other mechanisms by which shareholders get to weigh in on what the company is doing? Certainly, say on pay has been roundly criticized as a ritual that simply validates high pay packages rather than doing what was intended. The counterargument is either that the reason shareholders are voting for pay packages is because they always did approve of them, or that they approve of the packages companies, needing to

49 Hill is more inclined to think that the developments have pressured boards and reduced bias than McDonnell is.
seek approval, are now paying. More broadly, shareholder voice of this sort has been criticized as having ‘too much’ of an effect-taking time to no good end- or not enough of an effect, insofar as companies may not listen.

What about the increasing emphasis on compliance, both within companies trying not to run afoul of laws, and in conjunction with regulators when regulators conclude the companies may have run afoul of laws? Regulators have been criticized for being too heavy handed, or not heavy handed enough.

What about the increasing societal pressure for directors to take a more critical perspective? An interesting analogy can be made to the “watch lists” that some governance activists have kept—telling companies not ‘adopt these specified reforms,’ but rather, ‘we will be watching to see that you improve your performance.’ Empirical work comparing that approach to approaches that had involved more specificity as to what a company was supposed to do seemed to support the idea that watch lists might be more effective.\textsuperscript{50} We do not want to overstate the support for this result. But we do want to suggest that the overall climate—including the emphasis on independence, that directors have been chastised in some notorious corporate debacles, that shareholders get more of a voice in various contexts, the emphasis on compliance, which results in more critical inquiries being encouraged within a companies, that economics activists are pushing companies to do certain things and some companies are pushing back—is one which, on balance, may require corporate decision-making to be a more reasoned and less reflexive process than it sometimes has been. There are costs, though—costs of deliberation and wading through different arguments and contending with more different constituencies. And there may be some voices that, at least from a societal perspective, and maybe even from a shareholder perspective, perhaps should not be heard, or at least not loudly—‘reduce taxes by moving to another country; reduce R and D spending because we need to show a short-term pop in our earnings.’ The safest prediction is that boards will be subject to more pressures from more directions than had previously been the case.

\textbf{V. Conclusion}

[To come]

\textsuperscript{50} [citation][See generally https://www.sec.gov/spotlight/dir-nominations/sonnenfeld012004.pdf]