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Outside Director Liability

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Abstract

Outside directors can do a bad job, sometimes spectacularly. Yet outside directors of U.S. public companies who fail to meet what we call their "vigilance duties" under corporate, securities, environmental, pension, and other laws almost never face actual out-of-pocket liability for good faith conduct. Their nominal liability is almost entirely eliminated by a combination of indemnification, insurance, procedural rules, and the settlement incentives of plaintiffs, defendants, and insurers. The principal risk of actual liability is under securities law, for an insolvent company (which can neither pay damages itself nor indemnify the director) with one or more seriously rich (hence worth chasing) directors, where damages exceed the *D&O* insurance policy limits and the director does not represent an institution that can indemnify him. The principal sanction against outside directors is harm to reputation, not direct financial loss.

In a companion paper, Bernard Black & Brian Cheffins, *Outside Director Liability Across Countries* (2003), we study six comparison common-law and civil-law countries (Australia, Britain, Canada, France, Germany, and Japan). We find huge differences in legal rules and nominal liability. Securities and corporate law risk recedes, while nominal liability under other laws becomes central. Yet we find a similar pattern of a tiny but nonzero risk of actual liability. This suggests that a barely open window of actual liability is a stable solution, both politically and in the *D&O* insurance market. A barely open window may also be a sensible policy solution, given the multiple goals of incenting directors to be optimally (not maximally) diligent, wanting directors to be aware of potential liability for misconduct yet not overly risk averse, and wanting good candidates to become directors. The details of where the liability risk comes from may have only a small effect on director behavior.

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Outside Director Liability

I. Introduction

Outside directors are at the core of most prescriptions for good corporate governance.¹ The Enron, WorldCom, Tyco, Adelphia and other recent scandals illustrate what can go wrong when insiders misbehave and outside directors don't catch the misfeasance. But what makes outside directors work hard and pay attention? What makes them meet what we will call their "vigilance duties" under corporate, securities, bankruptcy, *ERISA*, environmental, and other laws? What role does fear of personal, out-of-pocket liability (which we will call *actual liability*) play? What role does *nominal liability* play (where a director is potentially liable, but someone else pays any damages or legal expenses)?

These questions implicate multiple areas of law, standard corporate practices, the market for directors' and officers' (D&O) insurance, and the settlement incentives of plaintiffs, defendants, and insurers. We are unaware of a prior effort to assess outside directors' risk of actual liability across all relevant laws, taking into account corporate practice, procedural obstacles to derivative lawsuits, and what we will call the *three I's* -- indemnification, D&O insurance, and settlement incentives. Instead, scholars often address director liability under a single legal regime, most often corporate or securities law. They often focus on nominal rather than actual liability, or discuss inside and outside directors together.

The conventional wisdom in the U.S., with lawsuits against companies and directors common and settlement size increasing, is that "being an outside director is often too risky."² The scandal-responsive Sarbanes-Oxley Act is believed to bring "more potential liability if things go awry."³ Some recent court decisions are thought to further increase this risk. Fear of liability is a leading reason why potential candidates turn down board positions.⁴ The conventional wisdom *outside the U.S.* is

¹ See, e.g., *Tough at the Top: A Survey of Corporate Leadership*, *ECONOMIST*, Oct. 25, 2003, at 21.

² James Cox, *Boards Find it Harder to Fill Hot Seats; Scandals, Legal Threats Make Many Decline Slot*, *USA TODAY*, July 31, 2002 (cover story).

³ Carol Mymowitz, *How to Be a Good Director*, *WALL STREET JOURNAL*, Oct. 27, 2003, at R1.

⁴ See *What Directors Think* (survey by Korn/Ferry International and *Corporate Board Members Magazine*, 2002), question 21 (of 2042 respondents to an early 2002 survey, 48% have turned down board positions because they believed that "the risk was too great"); Korn/Ferry Press Release, *Fortune 1000 Board Members are Turning Down Directorships at Twice the Rate of Last Year Due to Personal Liability Risk* (Oct. 28, 2003) (23% of directors of Fortune 1000 firms turned down

even more strongly that U.S. directors face significant personal risk. Non-U.S. reformers often believe that their own directors could benefit from greater risk exposure, akin to the risk that they believe U.S. directors face.

The reality is otherwise. The risk of nominal liability is substantial. The risk of actual liability is not. Outside directors of U.S. public companies face a tiny risk of actual liability for good faith conduct, no matter how careless or reckless they are.

They almost never pay anything to anyone, whether for damages, fines, or legal expenses. The principal sanction against outside directors is harm to reputation, plus the nuisance of being sued.

The principal goal of this paper (Part II) is positive: to defend our claim that outside directors almost never incur actual liability for good faith conduct, under any source of law. We describe the narrow circumstances in which outside directors of public companies may face actual liability for good faith conduct. The principal liability window is under securities law, when the company is insolvent (and thus cannot indemnify the director), damages exceed the D&O insurance policy limits, and the director is wealthy enough to be worth chasing, yet does not represent an institution that can indemnify him. The Sarbanes-Oxley Act does not alter this conclusion. Contrary to conventional wisdom, Sarbanes-Oxley is likely to *reduce* outside directors' exposure.

We cannot prove a negative (the absence of personal liability). Moreover, settlements can be cloaked in opaque language that leaves unclear who paid what. Still, here is what we found, after an extensive search for cases involving actual liability of outside directors. Under securities law, we were able to confirm one case (and have heard anecdotes of several more) where the outside directors of an insolvent public company have paid some amount out-of-pocket for damages or legal expenses. Under corporate law, there is one famous case in which outside directors were found liable, *Van Gorkom* in 1985. Corporate law soon changed to prevent liability the next time; we know of no cases since. The Enron and WorldCom bankruptcies offer nice case studies. Both boards questioned little and missed much.

The resulting lawsuits will drag on for some time. Yet, as we discuss below, their outside directors do not appear to face a significant risk of actual liability.

Our broad, practice-sensitive approach to actual liability risk corresponds, we believe, to how directors respond to liability. They do not know in detail their liability risk under particular laws. They operate instead with a general sense of how likely they are to be found liable for *something*, under *some law* (nominal liability),

additional board seats in 2002 due to liability risk, compared to 13% in 2001). **[update when receive full 2003 Korn/Ferry survey].**

and how likely it is that nominal liability, if found, will result in actual liability. They likely care more about actual liability than about nominal liability. Yet, once one takes the three *I*'s into account, nominal liability can be large while actual liability remains small.

Directors' limited risk under corporate law has been explored before.⁵ The new claims in this paper are: (1) directors' risk under corporate law hasn't changed in the post-Enron era; and (2) more centrally, directors face a very small risk of actual liability regardless of the source of law.

Our second goal is also positive (Part III): If actual liability risk is small, its power to motivate outside directors to meet their vigilance duties is likely limited as well. What, then, does motivate them? Market forces play a role, but if they were sufficient, we wouldn't need formal legal duties. What role does nominal liability, without actual liability, play? In our view, nominal liability reinforces a number of "soft" sanctions, including reputation, cultural norms and sense of professionalism, the nuisance cost of being sued, procedural rules for board conduct. Nominal liability also contributes to a disconnect between perception and reality -- directors believe the risk of actual liability is greater than it is, and may act accordingly.

We turn in Part IV to some normative implications of our analysis. We sketch an argument, to be developed in future work, including a companion paper that surveys outside directors' liability across countries,⁶ that a change in the liability rules, unless implausibly extreme, won't greatly affect actual liability, given the mediating effect of the three *I*'s. We also suggest reasons why a barely open window of actual liability may be a sensible policy solution, given the multiple goals of incenting directors to be optimally (not maximally) diligent, wanting directors to be aware of liability for misconduct, yet not to be overly risk-averse or to resign at the first sign of trouble, and wanting good candidates to become directors. We argue that the differences in nominal liability across different legal regimes are hard to justify. Finally, we discuss some implications of our analysis for other countries that are considering adopting or adapting U.S. liability rules.

⁵ Most famously, by Joseph Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE LAW JOURNAL 1078-1103 (1968), at 1099 ("The search for cases in which directors of industrial corporations have been held liable in derivative suits for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack").

⁶ Bernard Black & Brian Cheffins, *Outside Director Liability Across Countries* (working paper 2003), available at <http://ssrn.com/abstract=438321> (Social Science Research Network).

A word on the scope of this article. We focus on the *financial* liability of *outside* directors of *public* companies, for *good faith* actions or omissions. We do not address liability for conflict-of-interest transactions, criminal liability (which has never been a concern for outside directors), or the liability of inside directors.

We assume that companies, through a charter provision and indemnification bylaws, limit director liability to the maximum extent legally possible, and buy D&O, environmental, and *ERISA* insurance with policy limits sufficient to cover all but extreme outlier claims. This is how almost all public companies behave. We consider director liability under corporate and securities law with some care, and address bankruptcy, environmental, pension (*ERISA*), workplace safety, and other laws in less detail. We may miss some possible bases for liability under these other laws, but not, we think, important ones. We do not address the functions that fiduciary duties play, apart from serving as a basis for nominal or actual liability -- for example, as a basis for injunctions.

Some terminology. We use the terms firm, company, and corporation interchangeably. We give *good faith* its classic meaning of loyalty to the corporation and its shareholders. The recent inattention cases (*Disney*, *Abbott Labs*) involve good faith conduct as we define it. We use the term *vigilance duties* to refer broadly to a director's obligations under all relevant laws to act responsibly and carefully, including the duty of care under corporate law and banking law, the duty of disclosure under corporate and securities law, duties to creditors under corporate and bankruptcy law, and assorted duties under environmental, pension, and other laws. One can also define vigilance duties by exclusion, as all director duties that can be violated *without* a conflict of interest, intentional misconduct, or other clear moral turpitude. We use the term "damages" to refer to all payments to plaintiffs or their counsel, whether after trial or in settlement, and to civil and criminal fines and penalties. We use the term "legal expenses" to refer to out-of-pocket costs to defend a lawsuit, including attorney fees. We use the term *inside director* to refer to a director who is, now or recently, an officer, a controlling shareholder, or a representative of a controlling shareholder; and the term *outside director* to refer to directors who are not inside directors.

One cannot study outside director liability without coming to appreciate that inside directors also rarely face actual liability for good faith conduct. Insiders, however, have far greater motive and opportunity to cross the line into bad faith conduct. They also occasionally face actual liability, albeit modest relative to their net worth, for conduct that may be reckless but does not involve direct financial self-interest, cooking the company's books, or other clear wrongdoing. Insiders' and outsiders' risks are related: insiders' concerns about liability help to shape the web of

protections that insulate all directors from actual liability. An extension of this work, that we hope to undertake, would assess inside directors' risk using similar analysis -- cutting across multiple areas of law, focusing on actual rather than nominal liability, and emphasizing settlement incentives and actual outcomes, not theoretical risk.

II. Outside Directors' Actual Liability Risk

What risk of actual liability does an outside director of a U.S. public company face? The director is, let's assume, confident that he can act in good faith (which largely means not having a personal financial interest in a transaction that he approves). The director is worried, however, about putting personal assets at risk of liability for unintentional conduct, whatever the standard of care (whether negligence, gross negligence, or the variant of recklessness that counts as "scienter" under the securities laws), and whatever the legal basis for liability (whether under corporate, securities, bankruptcy, banking, environmental, ERISA, workplace safety, or any other law). "How much risk do I face?", he asks counsel. "It's a risky world out there," counsel will likely reply. "The courts are expecting more of directors than ever." But, counsel may add, "it's much less risky if you hire my firm to help you through the minefields."

This experienced-based answer is partly right. The risk of nominal liability is significant, especially under securities law. New risks emerge with some regularity. Standards for director conduct are higher than they were even five years ago. Yet the risk of actual liability is extremely low, even without the advice that counsel hopes to be paid to offer. In our experience, few corporate lawyers or corporate law scholars fully understand why this is so. They often know pieces of the story we will tell, but rarely know the entire story. The reasons for the rarity of actual liability emerge only from the complex interplay among several legal regimes, procedural rules, corporate charter and bylaw provisions, and the three I's -- *indemnification*, *D&O insurance*, and the settlement *incentives* of plaintiffs, defendants, and insurers.

Our goal in this part is to map the narrow circumstances in which outside directors can face actual liability for good faith actions or omissions. This positive analysis is important for several reasons. First, outside directors are a core pillar of American corporate governance. But what motivates outside directors to try hard? Their direct financial stake in the firm is often a small fraction of their net worth and a tiny fraction of the firm's value. Most directors are busy people who are modestly compensated for serving relative to the opportunity cost of their time, and compensated mostly through a flat fee, which gives them little incentive to work hard at the margin. Fear of liability is one possible reason why outside directors might try to do a good job.

Section A reports data on the incidence of actual liability. Sections B-D consider corporate and securities law liability for *solvent* firms, as mediated by indemnification, insurance, and settlement incentives. Section E considers what changes if the firm is *insolvent*. Section F considers liability under other laws, including banking, environmental, ERISA, and workplace safety law.

A. Evidence and Sources

Table I presents our best knowledge about cases in which an outside director of a public company has paid out-of-pocket for either damages or legal expenses, under any source of law, in the 35 years (1968 - present) since Joseph Bishop described the lack of cases under corporate law (then the principal source of liability risk).⁷ Under securities law, we know of one confirmed case of actual liability and one possible case where outside directors are currently paying their own legal fees, with reimbursement through *D&O* insurance coverage possible but not certain. We discuss these two cases in Section E.5. We have heard but have not been able to confirm anecdotes of several more. We also know of one confirmed securities case where several outside directors who represented large institutional shareholders paid modest amounts to settle the case, which the institution indemnified. Under corporate law, there is the *Van Gorkom* case in 1985 (after which corporate law changed to prevent liability the next time), but we know of no case since then.

Table I: Outside Director Actual Liability, 1968-2003

Type of law	Number of Cases	
	Actually liable (not covered by indemnification or insurance)	Paid damages
corporate law	1 (<i>Van Gorkom</i> , 1985)	0 (paid by acquirer)
securities law	1 actual (settlement, 2002), 1 possible (<i>Peregrine Systems</i> , ongoing)	1
bankruptcy and insolvency law	0	0
other (environmental, ERISA, tax, workplace safety, etc.)	0	0

For securities law, which is the area of principal risk, there are almost no decided cases that might produce a verdict that exceeds the *D&O* policy limits or otherwise seriously impacts the defendant directors' net worth. Table II presents what we know about securities cases tried to a verdict against officers and directors

⁷ Bishop (1968), *supra* note xx.

of public companies from 1991 to date. During this period, there were 2930 federal securities cases filed and 1557 federal cases settled, through June 2003.⁸ We lack good data on state-law cases, but these might add a few hundred filed cases, almost all prior to 1998, after which the Securities Litigation Uniform Standards Act preempted most state cases.⁹ One source reports a partial count of 49 state cases between 1996 and 1998.¹⁰

For cases tried to verdict which include outside directors as defendants, we know of zero federal cases and one state case. The defendants won the state case. Moreover, the company was solvent and the directors were indemnified and insured.¹¹ Cases tried to verdict against insiders are also very rare. Since pleading standards were raised in 1995 by the Private Securities Litigation Reform Act (*PSLRA*), we know of: one trial against the former *CEO* of a bankrupt company, won by the defendant. We also know of two pre-*PSLRA* cases; one trial against a solvent company and its chairman for a statement by the chairman, won by the defendants; and one 1991 case against two officers of Apple Computer, won by the plaintiffs, where the officers were indemnified and insured.¹²

⁸ Data on filed and settled federal cases is from Elaine Buckberg, Todd S. Foster, Ronald I. Miller & Adam Werner, *Recent Trends in Securities Class Action Litigation: Will Enron and Sarbanes-Oxley Change the Tides?* (NERA Economic Consulting, 2003). Somewhat smaller numbers of cases are reported in Cornerstone Research, *Post-Reform Act Securities Case Settlements: Cases Reported Through December 2002*, available from Stanford Law School Securities Class Action Clearinghouse at <http://securities.stanford.edu>, and in PRICEWATERHOUSECOOPERS LLP, 2002 SECURITIES LITIGATION STUDY.

⁹ See Securities Litigation Uniform Standards Act of 1998, Pub. Law No. 105-353, *codified at* Securities Act § 16, 15 U.S.C. § 77p (200x); Exchange Act § 28(f), 15 U.S.C. § 78bb(f) 200x).

¹⁰ See PRICEWATERHOUSE COOPERS (2002), *supra* note xx.

¹¹ *Forge v. National Semiconductor Corp.* (CV770082, Cal Superior Court, Santa Clara County, 2000), see Sukhjot Purewal, *Class Loses in Santa Clara*, THE RECORDER, July 13, 2000.

¹² The post-*PSLRA* case is *Howard v. Everex Systems* (N.D. Cal. 2002). See Brenda Sandburg, *Ex-CEO Not Liable in Federal Trial*, NATIONAL LAW JOURNAL, Feb. 18, 2002. The defendant's legal expenses were covered by the D&O policy. Telephone conversation with Michael Davisson of Sedgwick Dietert Moran & Arnold (Dec. 2, 2003). The Apple Computer case produced a \$100 million jury verdict against two Apple Corp. executives. In re Apple Computer Securities Litigation (N.D. Cal. 1991). See Mark Cursi, *Apple Verdict Could Change Securities Cases*, THE RECORDER, June 6, 1991. The remaining defense-verdict case involved Biogen. See *Biogen Urges Law Changes After Fraud Case Victory*, BIOWORLD TODAY, May 8, 1998 [**need to confirm that the chairman was sued, as well as the company**]. Michael Davisson, *Is Anything But the Soft Market Driving D&O Policies*, DELAWARE CORPORATE LITIGATION REPORTER, Nov. 15, 1999, asserts that there are two other post-1995 trials, in addition to Everex, but his article does not name them and he could not recall them when we called him in late 2003 to inquire.

**Table II: Securities Cases Against Inside and Outside Directors:
Tried to Verdict, 1990-June 2003**

Type of law	Filed	Tried to Verdict			
		Against inside directors only	Plaintiff victories	Against outside directors	Plaintiff victories
federal securities law	2930	3 (1 since <i>PSLRA</i> in 1995)	1 (0 post- <i>PSLRA</i>)	0	0
state securities law	> 49	0	0	1	0

We are also aware of two securities cases tried to verdict against the general partners of limited partnerships.¹³ There are also a number of jury verdicts involving accountants or investment bankers.¹⁴ These cases, however, involve rather different settlement dynamics and policy concerns.

One cannot prove a negative (the absence of actual liability in Table I; the absence of cases tried to verdict in Table II). We made, however, extensive efforts to find counterexamples. We asked many securities lawyers, on both the plaintiff and defense side, as well as people at leading securities litigation consulting firms. Some of these people are thanked in the introductory footnote. In several cases, we asked them to survey their partners, to see if someone else knew of a case.¹⁵ We presented our work at practitioner conferences and asked the audience if they knew of counterexamples. We read widely, asked our academic colleagues, and vigorously chased down leads. We had a research assistant methodically scan practitioner journals that would be likely to report any cases.¹⁶ Moreover, the one actual liability case we know about that went to trial, *Van Gorkom*, produced huge publicity. Other

¹³ The limited partnership cases are *Koppel v. 4987 Corp.*, see 2001 U.S. Dist. LEXIS 377 (S.D.N.Y. 2001), *aff'd*, mem., xxx F.3d yyy (2d Cir. 2002) (defense verdict); and *In re Real Estates Associates Limited Partnership Litigation* (C.D. Calif. 2003) (plaintiff verdict), see 223 F. Supp. 2d 1109 (C.D. Calif. 2002), *Chimicles & Tikellis LLP Announces \$120 Million Judgment Entered By Federal District Court*, PR NEWswire, Apr. 30, 2003; *Chimicles & Tikellis LLP Announces \$83 Million Settlement of REAL Partnerships Class Action Has Received Court's Preliminary Approval*, PR NEWswire, Aug. 28, 2003.

¹⁴ See, e.g., *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11 Cir. 1997) (suit against Deloitte & Touche, company and directors dismissed).

¹⁵ The surveyed firms are [list to come].

¹⁶ Our research assistant searched the *Andrews Corporate Officers and Directors Liability Litigation Reporter*, for the period from November 1996 (the earliest date for which this journal is available online) through January 2004. [list of practitioner journals and dates scanned to come].

cases would likely be visible also, and thus hard to miss. We may have missed some cases, most likely quiet settlements, but feel comfortable that we didn't miss many.

B. Corporate Law Claims: Duty of Care Liability as Null Set

We begin our tour of director liability for good faith conduct by studying the corporate law liability of directors of solvent companies. We consider liability under Delaware law, because Delaware is the host state for most public companies. The Revised Model Business Corporation Act (*MBCA*) and other major state corporate laws are generally at least as favorable to outside directors as Delaware's. If they were not, these other states would be likely to lose many of the public company incorporations they now retain.

Directors owe fiduciary duties to the corporation and can be liable for breach of these duties. In the usual depiction, which we adopt here, directors owe two basic fiduciary duties -- the duty of care and the duty of loyalty. In this depiction, good faith is defined broadly to include all actions other than personally profiting at the corporation's expense (classic duty of loyalty) and ignoring known misfeasance by company officers, and is basically synonymous with the absence of a duty of loyalty violation. Thus, the relevant duty for good faith conduct by outside directors is the duty of care. This broad definition of good faith creates a linguistic problem when we discuss recent cases (*Disney*, *Abbott Labs*) which suggest that extreme inattention, heretofore seen as raising only a duty-of-care issue, might involve bad faith. These inattention cases involve good faith conduct as we define it.

The care/loyalty dichotomy is overly simple as a depiction of directors' obligations. Directors have two other identifiable fiduciary duties -- a duty of disclosure and a duty of special care when one's company is a takeover target.¹⁷ However, the care/loyalty dichotomy is sufficient when assessing outside director liability. Absent a conflict-of-interest, an outside director's failure to ensure proper disclosure is treated as a duty of care violation. So too for an outside director's decision to accept or oppose a takeover offer. For simplicity, we adopt here the care/loyalty dichotomy.

Lawsuits for breach of fiduciary duty can be either *direct* (brought by the shareholder directly against the directors), or *derivative* (brought by a shareholder in the name of the corporation, with damages paid to the corporation). The sometimes fine distinctions that control which suits may be brought directly and which must be

¹⁷ See Bernard Black, *The Core Fiduciary Duties of Outside Directors*, ASIA BUSINESS LAW REVIEW 3-16 (July 2001), available at <http://ssrn.com/abstract=270749> (Social Science Research Network).

brought derivatively are not worth exploring here. Suffice it to say that directors face more risk in derivative suits (because indemnification is limited), but shareholders prefer direct actions when possible (because derivative suits face strong procedural hurdles).¹⁸

Below, we consider first suits for damages (subsections 1-3). We then consider what changes if the suit is for injunctive relief (subsection 4), or is brought under the duty of loyalty even though the director in fact acted in good faith (subsection 5). To offer our conclusion first: the risk of actual liability for damages is small thanks to legal rules and charter provisions that limit this risk. The risk of actual liability for legal expenses is small because these expenses can generally be paid by the company. D&O insurance covers the small risks that remain. Settlement incentives further reduce whatever risk exists. The net risk is extremely close to zero.

1. Nominal Liability: Business Judgment Rule and Liability-Limiting Charter Provisions

The duty of care sounds scary: A conventional statement of the duty is that directors must act "with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances."¹⁹ However, Delaware has long limited director liability for breach of the duty of care through a lax standard for measuring compliance with this duty -- the *business judgment rule*, under which a director who is reasonably informed and acts in good faith is irrebuttably presumed to have satisfied the duty of care. The nominal standard for satisfying the business judgment rule scrutiny is gross negligence in becoming informed.²⁰ The *de facto* standard, outside the takeover context, is likely

¹⁸ On the direct versus derivative distinction and the procedural aspects of derivative suits, see, e.g., WILLIAM ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION ch. 10 (2003).

¹⁹ AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS [below, ALI PRINCIPLES OF CORPORATE GOVERNANCE] § 4.01 (1994); see also MODEL BUSINESS CORPORATION ACT § 8.30(b) (1984) (directors must "discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances"). In Delaware, the duty of care is a common law duty that is not defined in the corporate statute.

²⁰ Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

lower than this, and catches only "directors who failed to pay *any* attention to corporate business."²¹

The business judgment rule, as a defense against liability for breach of the duty of care, proved to be permeable in one famous 1985 takeover case --*Smith v. Van Gorkom*²². This decision led to a crucial change in Delaware law and practice. Delaware adopted a new corporate law rule, § 102(b)(7), under which companies can adopt charter provisions that limit or eliminate the liability of directors (but not officers) for breach of the duty of care.²³

Almost all public companies have used this freedom to eliminate director liability for breach of the duty of care.²⁴ Shareholders routinely support charter amendments to adopt these provisions. Thus, the small risk of actual liability for breach of the duty of care that was once present is now almost gone. The Delaware courts, relying on section 102(b)(7) charter provisions, routinely grant motions by outside directors to dismiss duty of care claims for damages.²⁵

²¹ I DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 167 (5th ed. 1998) (emphasis in original) (collecting cases).

²² 488 A.2d 858 (Del. 1985). In hindsight, we can understand *Van Gorkom* as applying not the usual lax business judgment rule scrutiny of ordinary decisions, but instead a heightened, intermediate level of scrutiny to decisions by a target board of directors to accept or oppose a takeover bid. See Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NORTHWESTERN UNIVERSITY LAW REVIEW 521-566 (2002).

²³ DEL. GEN. CORP. L. § 102(b)(7) (adopted 198x). This provision allows a company charter to include "A provision eliminating or limiting the liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director [other than] (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 [for declaring an improper dividend]; or (iv) for any transaction from which the director derived an improper personal benefit." Despite the complex and overlapping wording of the exclusions, the import is clear enough. A company's charter can limit or eliminate liability for good faith conduct (which would be judged under the duty of care, not the duty of loyalty).

The MBCA is even broader. It allows a company charter to eliminate a director's liability "except liability for (A) the amount of a financial benefit received by a directors to which he is not entitled; (B) an intentional infliction of harm on the corporation; (C) [an improper dividend or share repurchase]; or (D) an intentional violation of criminal law." MODEL BUS. CORP. ACT § 2.02(b)(4).

²⁴ See Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY LAW JOURNAL 1155-1189 (1990), at 1160-61 (over 90% of the sample companies had adopted § 102(b)(7) provisions).

²⁵ See *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001). A complaint that states a mixed care/loyalty claim (with enough particularized facts to make the loyalty claim plausible) will still survive a motion to dismiss. *Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001).

A sliver of duty-of-care exposure may remain, involving gross inattention, severe enough for a court to conclude that the directors acted in bad faith. Two recent cases illustrate this new class of claims:

(i) a Delaware case involving Disney's lavish severance agreement with Michael Ovitz, which paid Ovitz \$140 million in cash and vested stock options for less than a year of work. The Delaware Chancery Court found that the alleged facts, if proven, would sustain a claim of intentional failure by the board to review Ovitz's compensation package, and this could involve bad faith and thus not be protected by Disney's § 102(b)(7) charter provision.²⁶

(ii) an Illinois case involving Abbott Laboratories, where the board failed to follow up on several FDA warning letters about production weaknesses at one Abbott Labs facility, the FDA eventually imposed a \$150 million fine and suspended production until the problems could be fixed.²⁷

These cases stretch what counts as bad faith conduct, to permit a corporate law recovery in what would normally be a duty-of-care case, despite a § 102(b)(7) provision. *Abbott Labs* even finds in Delaware law a vague duty of good faith, in addition to the conventional duties of care and loyalty. It suggests that directors may face some incremental risk outside Delaware, as inexperienced judges apply, and perhaps misapply, the governing corporate law.²⁸

²⁶ See *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003); Patrick McGeehan, *Case Could Redefine Board Members' Liability*, NEW YORK TIMES, June 14, 2003.

²⁷ See *In re Abbott Laboratories Derivative Shareholders Litigation*, 325 F.3d 795 (7th Cir. 2003) (applying Illinois law); see also *McCall v. Scott*, 239 F.3d 808 (6th Cir. 2001), *supplemented*, 250 F.3d 997 (6th Cir. 2001) (complaint alleges directors consciously disregarded known risk of health care fraud by senior management; if proven, this would be evidence of bad faith). Other variations on the theme of gross inattention are possible. For an article noting that it might be possible to construct a good faith claim based on insufficient audit committee effort plus a claim that the committee members knew or should have known their effort was insufficient, see Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUSINESS LAWYER 1371-1402 (2002), at 1385-95.

²⁸ In *Abbott Labs*, the 7th Circuit interpreted Illinois corporate law, which it says follows Delaware. The court found that directors have three duties, a duty of care, a duty of loyalty, and a duty of good faith. However, the Delaware cases, fairly read, do not create a duty of good faith distinct from the duty of loyalty. See ALLEN & KRAAKMAN (2003), *supra* note xx (recent textbook, one of whose authors is a former Delaware judge, adopting the standard division of fiduciary duties into care and loyalty); cf. Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DELAWARE JOURNAL OF CORPORATE LAW 971-998 (1994) (referring to the "duty of good faith and loyalty") (Mr. Horsey is a former Delaware Supreme Court Justice).

At this point, *Disney* and *Abbott Labs* have merely survived a motion to dismiss. If they survive a motion for summary judgment, the settlement incentives discussed below make settlement likely, which would leave indemnification and *D&O* coverage available. Even if the directors go to trial and lose, *D&O* coverage should remain available.²⁹ Thus, the risk of actual liability for even extreme nonfeasance seems highly remote.

Even if damages are a remote risk, the need to pay lawyers is not. We therefore turn next (subsections (2-3)) to indemnification and insurance, and ask how well they protect directors against legal expenses in duty of care cases and against any risk of damages liability for extreme inattention. We then consider the risk that a director who in fact acted in good faith will be found to have violated the duty of loyalty (subsection (4)).

2. Indemnification

Indemnification plays two distinct roles. First, for duty-of-care suits, directors may have to pay legal expenses to defend against a lawsuit, even though they are not liable for damages. The suit could be for damages or, perhaps more likely, for an injunction. Injunction claims arise in two principal contexts: suits by a bidder in a takeover contest and suits by plaintiffs' lawyers seeking conduct remedies plus attorney fees.³⁰ Second, especially under other bodies of law, where the § 102(b)(7) shield is not available, indemnification provides a key protection against liability for damages.

We focus here on indemnification for legal expenses. There are two related risks -- the risk of paying expenses out-of-pocket in first instance, and the risk of not recovering these payments from the company or an insurer. Both of these exposures are eliminated by a combination of indemnification (this subsection) and *D&O* insurance (subsection (3)).

²⁹ This conduct should not fall within the standard *D&O* policy exclusion for intentional misconduct. If it did, we believe that huge market pressure would arise for policies to cover this sort of nonfeasance.

³⁰ For recent settled cases involving conduct remedies, see Patrick McGeehan, *Sprint Settles Suits with Policy Shift and \$50 Million*, NEW YORK TIMES, Mar. 20, 2003 (Sprint settles securities class action with \$50 million payment and settles fiduciary duty lawsuit by agreeing to corporate governance changes); Press Release, *Westell Technologies Announces Settlement*, BUSINESS WIRE, Feb. 20, 2003.

Under Delaware corporate law § 145(e), a corporation *may* advance legal expenses to a director to defend a direct or derivative suit.³¹ The corporation *may* also indemnify a director for these expenses (in other words, not demand repayment of the advance), if the director "acted in good faith and in a manner [he] reasonably believed to be in or not opposed to the best interests of the corporation."³² In a direct suit, both expenses and damage awards are indemnifiable. In a derivative suit, expenses are indemnifiable; damages are not. The key point for corporate lawsuits is that the company can indemnify directors against legal expenses, whether a corporate lawsuit is direct or derivative. If damages are awarded in a derivative suit, indemnification for expenses is only available if the judge finds this appropriate.³³ But damage awards are rare, thanks to § 102(b)(7). If any are made, presumably under an expanded notion of bad faith, the plaintiffs will have no incentive to oppose a request by the company that the judge approve indemnification for expenses.

Almost all public companies have turned the "may" of Delaware § 145 into "shall" by adopting bylaws that provide that the company *shall* advance expenses to and indemnify directors, officers and employees to the fullest extent permitted by

³¹ DEL. GEN. CORP. L. § 145(e) allows a corporation to pay a director's legal expenses "in advance of the final disposition of [an] action, suit, or proceeding [if the director agrees] to repay such amount if it shall ultimately be determined that [the director] is not entitled to be indemnified by the corporation."

³² DEL. GEN. CORP. L. § 145(a) addresses indemnification for direct (non-derivative) suits and provides that "A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any . . . action suit or proceeding [other than a derivative suit] by reason of the fact that the person is or was a director . . . or was serving at the request of the corporation as a director . . . of another [entity], against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actual and reasonably incurred by the person . . . if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation . . .". DEL. GEN. CORP. L. § 145(b) addresses derivative suits and is worded similarly to § 145(a), except that it permits indemnification only for legal expenses, not for judgments, fines and amounts paid in settlement.

The *MBCA* is broader than Delaware law. A company's charter may permit or require indemnification and advancement of expenses for all actions except "(A) receipt of a financial benefit to which [the director] is not entitled; (B) an intentional infliction of harm on the corporation or its shareholders; (C) [an improper dividend or share repurchase]; or (D) an intentional violation of criminal law." MODEL BUS. CORP. ACT § 2.02(b)(5), *see also id.* §§8.51(a), 8.53, 8.58(a).

³³ For derivative suits, DEL. GEN. CORP. L. § 145(b) permits indemnification "in respect of any claim . . . as to which such person shall have been adjudged to be liable to the corporation . . . only to the extent that the Court of Chancery . . . shall determine . . . in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity."

Delaware law.³⁴ Thus directors will *always* have their expenses covered if they act in good faith. Directors will also be generous to their fellow directors in deciding whether conduct was in good faith.

In theory, a firm could refuse to pay an outside director's expenses and force the director to sue to recover them. However, this seems unlikely in the real world absent clear bad faith conduct. Many suits are against most or all directors, so the directors will be voting to reimburse themselves. Even if not, directors will usually be sympathetic to a fellow director. One can imagine collegial loyalty dissipating if there is abrupt board turnover. But even so, the company's current directors will likely vote to spend the shareholders' money to treat even former directors as they would want to be treated themselves. Consistent with this analysis, there are occasional court battles between a company and an officer over indemnification, but none involving outside directors.³⁵

The requirement that conduct be in or not opposed to the firm's interests does not affect this analysis. Good faith conduct will be arguably in or not opposed to the corporation's interests, and other directors will likely give their fellow director the benefit of any doubt. This is especially true given that: (i) the directors will be advised by counsel on their legal obligation to advance expenses and on the risk that a bald refusal to do so could be bad faith conduct that would expose the directors to (largely theoretical, to be sure) risk of liability; and (ii) if they refuse to advance expenses, they can expect to be sued themselves, and will likely lose the suit.

The bottom line on advancing expenses is simple: We know of no case where a solvent public company has not honored a bylaw requiring it to pay outside directors' legal expenses.

3. *D&O Insurance*

D&O insurance plays the same two roles as indemnification. It protects directors against paying legal expenses in a duty-of-care lawsuit, and against paying damages under other bodies of law. It thus gives directors a second layer of protection against actual liability. Delaware law allows a company to purchase *D&O* insurance for both damages and legal expenses in a suit for breach of fiduciary

³⁴ These bylaws are expressly permitted by DEL. GEN. CORP. L. § 145(f). See also MODEL BUS. CORP. ACT § 8.58(a). The bylaws are broader than, and therefore supersede, legal rules that make indemnification mandatory in some cases. See DEL. GEN. CORP. L. § 145(c); MODEL BUS. CORP. ACT § 8.52.

³⁵ See, e.g., *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178 (Del. Ch. 2003).

duties.³⁶ In practice, essentially all public companies do so.³⁷ Defense counsel send their legal bills to the company and the insurer, who allocate payment responsibility between them. The directors don't pay a penny and may not even see the bills.

For most claims, especially direct claims, *D&O* insurance and indemnification overlap. The principal advantages of insurance, compared to indemnification, are.

- D&O coverage remains available even if the firm is insolvent.
- Insurance, unlike indemnification, covers damage awards in a derivative suit.
- D&O coverage will usually protect directors against the already low risk of a refusal by the company to advance expenses or pay indemnification.

D&O policies contain a number of standard exclusions. Most centrally for our purposes, they exclude coverage for claims based on intentional misconduct (the standard phrasing is "criminal or deliberately fraudulent acts"). Often, the exclusion covers only adjudicated intentional fraud, explicitly found in the main case, *not* conduct which the insurer can claim involved intentional fraud in a separate battle over insurance coverage. D&O policies also exclude most duty-of-loyalty cases by excluding transactions from which the director gains an improper personal profit (the standard phrasing is "the gaining of any personal profit or advantage to which the insured is not legally entitled").³⁸ These exclusions are narrower than the bad faith exception to § 102(b)(7). Thus, even if directors face duty-of-care liability under an expanded notion of bad faith, they should still be insured against both damages and legal expenses.

D&O policies have a maximum payout amount. However, insurers are willing to sell, and companies routinely buy, policies with limits high enough to cover any plausible legal expenses and all but the most extreme settlement amounts. Insurers are also willing to sell, and companies routinely buy, policies without

³⁶ DEL GEN. CORP. L. § 145(g) gives a corporation "power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation . . . against any liability asserted against such person . . . in any such capacity . . . whether or not the corporation would have the power to indemnify such person against such liability." See also MODEL BUS. CORP. ACT § 8.57.

³⁷ See TILLINGHAST TOWERS PERRIN, 2002 DIRECTORS AND OFFICERS LIABILITY SURVEY 17 (98% of U.S. firms with over 500 shareholders respondents had D&O insurance).

³⁸ JOHN F. OLSON, JOSIAH O. HATCH III & TY R. SAGALOW, , DIRECTOR AND OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 12.12 (2003); see also MODEL BUS. CORP. ACT, Official Comment to § 8.57 (D&O policies "typically do not cover . . . dishonesty, self-dealing, bad faith, knowing violations of [law] or other willful misconduct.").

copayments or meaningful deductibles.³⁹ Our risk analysis would change if a company buys too little insurance. Indeed the one securities case discussed above in which outside directors made personal payments involved insufficient insurance.

There are technical issues involved in ensuring that the *D&O* policy will remain available come what may and will cover all of a director's potential nominal liability. Important current issues include (i) severability of *coverage* (does the policy cover good faith conduct by one director, even if another director's misconduct makes coverage unavailable for that director); (ii) severability of the *application* (does the policy cover outside directors, even if the officers misrepresented the company's legal or financial situation in applying for coverage); (iii) "time gap" risk (the company must have a new policy in place before the old one runs out); and (iv) "complementary coverage" risk (*D&O* policies often exclude claims that are expected to be covered by other insurance policies, including environmental and *ERISA* claims).⁴⁰

When a new coverage risk arises, several factors reduce the chance of actual liability. First, loss of *D&O* coverage does not affect other layers of protection. Second, the new risk is typically short-lived. Market pressures cause changes in contracting practice that reduce or eliminate coverage risks once they arise -- as has been the case for severability of coverage. For application severability, insurers, for a price, will either offer application severability or else sell separate noncancelable coverage for outside directors (either dedicated coverage for nonindemnified claims or a separate policy covering only the outside directors). Moreover, courts often interpret the policy to provide coverage to outside directors, or the insurer uses the threat of non-coverage to negotiate a lower coverage limit, but the insurer usually does not walk away entirely.⁴¹

³⁹ See TILLINGHAST TOWERS PERRIN (2002), *supra* note xx, at 36 (94% of surveyed firms purchase insurance with no deductible for personal coverage, most have no copayments, the exceptions on copayment are "almost exclusively" New York corporations, which must comply with a New York insurance rule that requires a \$5,000 deductible, plus a 0.5% copayment for the first \$1 million in damages); OLSON, HATCH & SAGALOW (2003), *supra* note xx, § 12.20. Policies often include significant deductibles for payments that would, but for the insurance, be made by the company, either directly or through indemnification.

⁴⁰ For an overview of current coverage issues, see *Directors & Officers Liability Insurance: Striking Out Risk* (2003 Special Supplement to *Corporate Board Member Magazine*) We discuss additional coverage issues specific to bankrupt firms in section D *infra*.

⁴¹ See Christopher Oster, *Insurers Seek to Trim Their Exposure on Directors Policies*, WALL STREET JOURNAL, Jan. 28, 2003, at C1 ("insurers seeking to get out of a policy will [often] try to negotiate a deal with the policyholders, perhaps agreeing to pay some amount less than the full coverage"); Barbara Aarsteinsen, *Less For More*, CANADIAN INSURANCE, March 1, 2003 (describing the new "dedicated Side A" and "independent director liability" coverage offered by AIG and Chubb).

An unquantifiable yet important factor in assessing the importance of coverage holes, both known and yet to be discovered, is how aggressively insurers will exploit a new hole. There is reason to believe that a *D&O* insurer which developed a reputation for using coverage holes to walk away entirely, leaving outside directors facing actual liability, would suffer reputational damage in the *D&O* insurance market. In many situations, the insurer will judge that this damage will exceed the savings from avoiding coverage and will negotiate a compromise.

Application severability illustrates this dynamic. In a number of recent cases, insurers have invoked application fraud and sought to rescind coverage for all directors. In most of these (including Adelphia, Enron, Qwest, Sunbeam, Tyco, and WorldCom), the outside directors ended up covered, sometimes with reduced limits, after a court order or a negotiated settlement.⁴² In several (Cutter & Buck, Homestore.com, HealthSouth), the coverage dispute is ongoing but the company is solvent. Thus, the dispute involves whether the company or the insurers will pay legal fees and damages, not whether the directors will pay.⁴³ We defer to Section *E* discussion of Pregrine Systems, the one case we know of in which the company is insolvent, insurers have sought to rescind coverage, and the coverage dispute has not yet been resolved.

A final risk is that the insurer will go broke, as Reliance did in 2001.⁴⁴ *D&O* insurance is often provided in layers by two or more insurers. If a lower insurer goes bankrupt, and the higher policies "drop down" to cover the hole left by the bankrupt insurer, sufficient coverage will usually remain. If drop-down is uncertain, as it is for many policies, the higher insurers may use their arguments against drop-down to push the company (if solvent) to cover the missing layer, or may agree to drop down

⁴² See Jonathan C. Dickey, Amy L. Goodman, Lisa A. Fontenot, John D. van Loben Sels & Gillian McPhee, *Indemnification and Insurance for Directors and Officers of Public Companies: What Directors and Officers Need to Know in the Post-Enron World* 22-24, in R. FRANKLIN BALOTTI, JONATHAN C. DICKEY & AMY GOODMAN EDS., *DIRECTORS AND OFFICERS IN THE SPOTLIGHT: LIABILITY, INDEMNITY AND INSURANCE* (2003). For an overview of the mixed case law on application fraud, see OLSON, HATCH & SAGALOW (2003), *supra* note xx, § 12.34-.35.

⁴³ See Douglas McLeod, *HealthSouth Woes Continue as Insurer Seeks D&O Rescission*, BUSINESS INSURANCE, Oct. 20, 2003; Douglas McLeod, *Cutter & Buck Fights to Keep D&O Coverage*, BUSINESS INSURANCE, Jan. 20, 2003; Joyzelle Davis & Robert Burgess, *Homestore Insurer Seeks to Void Directors and Officers Policy*, BLOOMBERG NEWS, Oct. 3, 2002; .

⁴⁴ On Reliance, see *Penn. Battles for Reliance Cash*, INSURANCE CHRONICLE, Aug. 13, 2001; Geraldine Fabrikant, *Private Concern, Public Consequences*, NEW YORK TIMES, June 15, 2003 (Reliance provided \$20 million out of a total of \$50 million in *D&O* insurance for the Trace directors). When an insurer fails, the failure is often not total. Its remaining assets will be divided among the claimants; state insurance funds may provide additional recovery sources.

in exchange for reduced exposure. As for application severability, insurers have incentives to negotiate rather than walk away, especially if walking would leave the directors exposed. Thus far, to our knowledge, the risk of bankruptcy of a lower insurer, with no drop-down, has not led to actual director exposure.

The bottom line for duty of care lawsuits, from a combination of the business judgment rule, § 102(b)(7), indemnification, and insurance: We know of no cases of actual liability for either damages or legal expenses since *Van Gorkom*.

4. *Duty of Loyalty Claims (With No Loyalty Breach in Fact)*

The last class of corporate law actions we need to consider are those claiming breach of the duty of loyalty, even though the director *in fact* acted in good faith. Section 102(b)(7) won't apply, so damages are available. Moreover, the availability of damages for loyalty claims ensures that plaintiffs will make these claims whenever possible.⁴⁵ In a world with decisionmaker error, some of these claims will have a chance of winning at trial, and hence also have settlement value before trial.

This is a narrow set of cases. Outside directors can usually avoid a significant personal financial interest in the company's actions, apart from routine director compensation, which the Delaware courts don't treat as a duty of loyalty issue. If such an interest surfaces (say for an out-of-the-ordinary-course transaction between two companies when a director has positions at both), the director can protect himself by abstaining from the decisionmaking process at both companies. To be sure, a director may overlook a financial interest, or a court may see a conflict where the director didn't. But these will usually be minor conflicts that often won't produce enough potential damages to interest plaintiffs' counsel.

Still, such claims can arise. Most will settle. Both sides will agree to treat the conduct as being in good faith, because this keeps the *D&O* policy available to pay the claim.⁴⁶ One can imagine a derivative lawsuit (hence no indemnification), plus facts strong enough to produce a settlement exceeding the policy limits. But the situation we address here (a perceived conflict, despite actual good faith conduct) is

⁴⁵ A mixed care/loyalty claim, unlike a pure duty of care claim, can survive a motion to dismiss. See *Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001).

⁴⁶ One can imagine a *D&O* insurer objecting to an agreement between plaintiff and defendant to treat the directors' conduct as being in good faith, but so far as we know, this does not happen in practice. The practice of relying on company counsel to defend the case means that the insurer will usually lack sufficient information to make such a claim. Moreover, an insurer who challenged a settlement on this basis, where actual misconduct was debatable (the director in fact acted in good faith), would likely suffer reputational harm that would outweigh any near-term savings.

unlikely to produce a plausible claim for damages that exceeds reasonable policy limits.

To sum up where we are so far, a combination of the business judgment rule, § 102(b)(7), indemnification, and insurance narrowly limits the actual liability risk that outside directors face under corporate law. Small theoretical risks remain. However, settlement incentives, which we discuss in the next section, largely eliminate these small remaining risks. For example, if a loyalty claim does not settle, and the judge wrongly finds liability, the § 102(b)(7) and indemnification shields vanish. *D&O* insurance becomes less than fully reliable because the adverse outcome may give the insurer a defense under the policy. However, as we discuss in the next section, the risk of losing indemnification and *D&O* coverage creates strong pressure on *both* sides to settle.

C. Settlement Incentives in Corporate Law Cases

Settlement incentives are a minefield of complexity. Even two-party (plaintiff and defendant) incentives have given rise to a substantial literature.⁴⁷ The incentives of plaintiffs' counsel, who commonly represents a diffuse class of often passive shareholders, add further complexity.⁴⁸ So does the divergence of interest between directors (who make settlement decisions for companies) and shareholders (who effectively pay the company's share of the settlement). *D&O* insurers' incentives add yet another layer. In this article, we can only sketch the main lines of plaintiffs', directors, and insurers' incentives. To simplify the analysis, we treat plaintiffs' counsel as the effective party in interest. To provide a focus for the analysis, we assume a duty-of-loyalty cases (without a loyalty breach in fact). Most of the settlement incentives we discuss also apply to the new "bad faith" duty-of-care cases and to securities and other non-corporate-law litigation.

The bottom line is simple: There are powerful incentives pushing toward settling and toward doing so with payment coming entirely from indemnification, insurance, or both. The best evidence of this is that our discussion is entirely

⁴⁷ For a survey, see Bruce L. Hay & Kathryn E. Spier, *Settlement of Litigation*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442-450 (Peter Newman ed. 1998).

⁴⁸ See, e.g., John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMPORARY PROBLEMS 5-81 (Summer 1985); John Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUMBIA LAW REVIEW 370-438 (2000); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation*, 7 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 55-87 (1991).

speculative. We don't cite any decided cases that impose actual liability on outside directors, because after § 102(b)(7), we don't know of any.⁴⁹

1. Defendant Directors

The defendant directors' incentives to settle are obvious: If a director settles, damages and legal expenses will be paid by indemnification, insurance, or both. If the director goes to trial and loses, he is not indemnified for damages, may also lose indemnification for expenses, may lose D&O coverage, and thus faces a risk of actual liability. In all likelihood, the company's senior officers will be sued as well; The potential for lawsuit defense to distract the senior officers from running the business increases the incentive for the defendants to settle.

One can imagine a director refusing to settle because he believes that he will be found not liable and doesn't want to bear the reputational cost of a settlement, but misjudging the outcome. However, examples of such misjudgment leading to actual liability don't exist. Such a misjudgment is most likely when the misconduct was marginal. If so, indemnification, insurance, or both may remain available despite a loss at trial.⁵⁰

In a direct lawsuit, indemnification is available in a settlement but might not be after a loss at trial. Typically, the board of directors will approve indemnification as part of the settlement, and the company will pay the damages directly, rather than the director paying and then seeking reimbursement. The need for board approval is not a significant obstacle. Most suits are against multiple directors, and even if not, directors won't want their fellows to take the risk of going to trial, when they wouldn't want to take this risk themselves.

In a derivative suit, indemnification is not available for damages and might not be available for legal expenses. This imposes a further constraint -- the case must settle within the policy limit (less defense costs, which will be paid from of the D&O policy) or the directors will face actual liability. However, plaintiffs' and insurers' incentives make such a settlement almost always achievable.

⁴⁹ Liability for "true" duty of loyalty violations is beyond the scope of this article. However, the settlement incentives that we discuss greatly reduce the risk of actual liability for true violations, as well as the alleged-but-not-true violations we address in text.

⁵⁰ Under many *D&O* policies, if the insurer wants to settle and the defendant does not, the insurer can invoke a "hammer" clause which makes the defendant liable for a combination of damages and legal expenses that exceed the rejected settlement amount plus legal expenses incurred up to that date. See *AIG/National Union Directors' and Officers' Liability Insurance Form § 5* in OLSON, HATCH & SAGALOW (2003), *supra* note xx, app. 12-1.

2. *Plaintiffs*

Plaintiffs' incentives to settle are less obvious than the directors' incentives, but are at least as powerful. Unless a defendant director is seriously wealthy, the plaintiff will settle to avoid the risk of either losing or winning! Let's see why. A successful plaintiff in a duty of loyalty case may have foregone access to the "deep pockets" provided by indemnification and the *D&O* policy, and be left with a wholly or largely uncollectible judgment. Moreover, the plaintiff faces an almost certain appeal, with the director's legal expenses advanced by the company or the *D&O* policy. The case will likely have been a close one (remember that the director in fact acted in good faith). Thus, the plaintiff faces a good chance of losing on appeal. Far better to settle within the policy limits.⁵¹

Plaintiffs' unwillingness to risk success on the merits helps to ensure that settlement within the policy limits is achievable. Indeed, plaintiffs face an odd settlement dynamic. They often can't negotiate too hard for settlement at or too close to the policy limit, even in a strong case, because if the case goes to trial, the outcome could be either that the directors aren't liable or that the directors are liable but the insurer isn't, with the plaintiff losing either way.

In a derivative suit, the plaintiff's incentive to settle is reinforced because indemnification is not available for damages, leaving the *D&O* policy as the principal deep pocket. The policy will first be used to pay the defendants' legal expenses. The longer the case goes on, the smaller the amount that is left to pay the plaintiffs. In contrast to standard litigation, where plaintiffs care about their own but not the defendants' costs, plaintiffs care about defense costs too. Settlement, ideally early, reduces these costs.

For a derivative suit, or a direct suit that is close to the direct/derivative line, the plaintiff has a further incentive to settle. The trial court's decision that a derivative suit has overcome the procedural hurdles to these suits, or that a case is direct rather than derivative, is appealable after trial. If the plaintiff wins, the defendants will reraise on appeal the legal arguments on these issues, with some chance of success.

⁵¹ For more detailed analysis of the settlement incentives of plaintiffs' counsel, see John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: the Implications of Economic Theory for Private Enforcement Through Class and Securities Actions*, 86 COLUMBIA LAW REVIEW 669-727 (1986); James D. Cox, *Making Securities Class Actions Virtuous*, 39 ARIZONA LAW REVIEW 497-524 (1997).

3. Insurers

In addressing insurers' incentives, we focus on cases where indemnification is unavailable or uncertain. If indemnification is available, the insurer's consent to a settlement is desirable but not, in the end, necessary. The directors can settle, cause the company to indemnify them, and the company can battle later with the insurer over whether the insurer should reimburse the company.

A typical *D&O* policy requires the insurer to consent to a settlement, but provides that consent can't be unreasonably withheld.⁵² An insurer will weigh the certain loss from a settlement against the expected loss *to it* from going to trial. The cap on its exposure gives the insurer asymmetric payoffs, relative to the expected outcome for all possibly liable parties (company, directors, and insurer). This payoff pattern could lead an insurer to reject a settlement offer within the policy limits that an uninsured defendant would accept. The insurer's potential defense to liability under the policy if the directors are found not to have acted in good faith increases the payoff asymmetry for duty-of-loyalty cases. So does the insurer's relative risk neutrality, where the directors are likely to be highly loss-averse. Thus, one might think that obtaining insurer consent could be a substantial barrier to settlement, especially as the settlement amount approaches the policy limits.

Countervailing factors, however, ensure that insurers will almost always settle within the *D&O* policy limits if plaintiffs' counsel will do so. One critical factor is procedural. *D&O* policies, unlike most forms of insurance, allow the defendants to choose their own defense counsel, rather than rely on the insurer's counsel. This ensures a vigorous and expensive defense, for which the insurer will pay. It also deprives the insurer of the information needed to oppose a settlement favored by the defendant directors and their counsel, if the settlement is at all plausible.⁵³

A second factor is the insurer's possible liability for refusal to settle if the case is lost at trial and damages exceed the policy limits. In addition to the contractual requirement that the insurer not unreasonably withhold consent, there is often a state law claim for bad faith refusal to settle, with punitive damages

⁵² See OLSON, HATCH & SAGALOW (2003), *supra* note xx, § 12.27; *Directors & Officers Liability Insurance: Striking Out Risk* (2003), *supra* note yy, at 11-12.

⁵³ In insurance lingo, the *D&O* policy contains neither a duty (of the insurer) to defend, nor a right to defend. See Joseph F. Johnston, Jr., *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUSINESS LAWYER 1993-2036 (1978), at 2023; OLSON, HATCH & SAGALOW (2003), *supra* note xx, § 12.23-.24.

available,⁵⁴ and an implied covenant of good faith and fair dealing under which:

Insurers generally are considered to be bound . . . to accept settlements within the policy limits when failure to accept such settlements might well result in excess liability for the insured; failure to accept such a settlement may result in insurers' being held liable for the amount in excess of the aborted settlement that the defendants must later pay.⁵⁵

The insurer's risk is magnified because many directors have the resources to bring such a suit (often with the company paying their legal expenses), and because the insurer has refused to settle without full information about the case.

A third factor is the expense of litigating rather than settling. If the insurer refuses to settle, it ensures that further litigation will be highly costly. Counsel for the company and the directors will pull out all stops, at the insurer's expense, to prevent a finding of liability. The insurer cannot closely police legal expenses without opening itself up even more strongly to a suit for unreasonable or bad faith refusal to settle, compounded by refusal to pay for a proper defense. The insurer will need its own counsel; the directors may insist on separate counsel as well. If the directors lose at trial, an appeal is virtually certain. The insurer must weigh the possible gain from going to trial against the certain payment of these expenses if it rejects a settlement.

Many *D&O* policies have policy limits that are a modest multiple (not infrequently only 2-3 times) of potential defense costs, if a case is tried full-bore, through trial and appeal. An effort to model insurers' incentives is beyond the scope of this paper. But it should be apparent that the lower the ratio of the policy limit L to the expected legal defense costs for a full-bore trial and appeal D_{trial} , the more likely the insurer is to be willing to settle if plaintiff and defendant are willing.

A fourth factor is potential reputational cost to the insurer from refusing to settle within the policy limits, leading to an adverse verdict and actual liability for directors. The mere refusal to settle will be known within the community of law firms who commonly act as corporate and securities defense counsel to public companies. It will hurt the insurer's future business prospects, even if the case is won at trial, because directors won't want to face the time commitment, aggravation, stress, and ex ante risk of a trial.

A refusal to settle, followed by a loss at trial that exposes directors to actual

⁵⁴ See, e.g., Alan Sykes, *Bad Faith Refusal to Settle by Liability Insurers*, 23 JOURNAL OF LEGAL STUDIES 77-110 (1994); Alan Sykes, *Judicial Limitations on the Discretion of Liability Insurers to Settle or Litigate*, 72 TEXAS LAW REVIEW 1345-1374 (1994).

⁵⁵ See OLSON, HATCH & SAGALOW (2003), *supra* note xx, § 12.27.

liability, would cause severe reputational harm to the insurer. The outcome will likely be widely publicized, in the financial press, by corporate and securities defense firms, and by the insurer's competitors. In addition to its potential obligation to cover this actual liability under the implied covenant of good faith and fair dealing, an insurer would face market pressure to cover any out-of-pocket payments the outside directors would otherwise and to settle before a decision on appeal is reached.

Putting all this together, it is highly likely that the insurer will either settle within the policy limits, if the plaintiff and defendant will do so, or will cover the directors' personal exposure if the insurer rejects such a settlement. Settlement incentives, then, greatly reduce the small risk of actual liability that otherwise remains under corporate law. Relaxing the assumption that insurers will settle if plaintiffs and defendants will a little bit (all that is needed to make it fully realistic) would open up additional small risks of actual liability, but would not appreciably change our overall conclusion that directors face a tiny risk of actual liability; the principal source of risk is securities law, and the risk arises primarily when the firm is bankrupt.

D. Securities Law Claims

A typical securities class action alleges that the company has caused investors to misprice its shares or other securities either by saying something material that is untrue or misleading, or failing to say something material. We will refer to these twin possibilities as "misdisclosure." There are two basic types of claims: (i) claims under the Securities Act of 1933 ("Securities Act") for "primary" offerings of securities by the company to investors; and (ii) claims under the Securities Exchange Act of 1934 ("Exchange Act") based on "secondary" trading between investors. For both, outside directors' liability is effectively capped at 150% of their proportionate liability, with share of total fault determined through special jury instructions.⁵⁶

We assume that the company is solvent, but relax this assumption in the next section. We address both Securities Act and Exchange Act claims but, for simplicity, ignore control person liability.⁵⁷ Control person allegations are often made against outside directors. To oversimplify some complex doctrine, these claims often survive a motion to dismiss, because the plaintiffs must plead only

⁵⁶ See Securities Act § 11(f)(2), 15 U.S.C. § 77k(f)(2) (200x), Exchange Act § 21D(f), 15 U.S.C. § 78u-4(f) (200x). The proportionate liability rule falls away if the defendant had actual knowledge of the misdisclosure, but actual knowledge would violate our assumption of good faith.

⁵⁷ See Securities Act § 15, 15 U.S.C. § 77o (200x); Exchange Act § 20(a), 15 U.S.C. § 78t(a) (200x).

control but not scienter. The defendants have the burden, at a later stage, of showing good faith (roughly equivalent to lack of scienter).⁵⁸ Still, control person claims generally fail if the underlying direct claim fails. Thus, these claims don't significantly increase directors' exposure.⁵⁹ We also ignore claims under state securities law and the common law of fraud. Most of these state law claims are preempted by federal law.⁶⁰ Considering them would not affect the main lines of our analysis. We address here only private lawsuits; we consider government actions in Section F and Part III.C.1.

We focus below on elements of our risk analysis that change when we switch from corporate to securities law. We continue to assume that the outside directors acted in good faith and therefore without actual knowledge of misdisclosure. However, they could have been negligent or reckless. They also face a risk that a jury will so find, even if they weren't negligent or reckless in fact. Delaware corporate law claims are heard by expert judges. In contrast, securities law claims are decided by nonexpert jurors (plaintiffs invariably demand a jury trial). A jury decision on complex disclosure issues injects a large random element into trial outcomes.

1. Nominal Liability under the Securities Act and Exchange Act

Under the Securities Act, the company is strictly liable for misdisclosure in the "prospectus" (the offering document for the securities). The directors are also liable but have a due diligence (roughly speaking, a non-negligence) defense.⁶¹ If the company is solvent, plaintiffs have little reason to aggressively pursue the outside

⁵⁸ See, e.g., *S.E.C. v. First Jersey Securities*, 101 F.3d 1450, 1472 (2d Cir. 1996); *In re Enron Derivative, Securities and ERISA Litigation* 258 F. Supp. 2d 576, 597-98 (S.D. Texas, Houston Div. 2003); *In re Initial Public Offering Securities Litigation*, 241 F.Supp. 281, 392-398 (S.D.N.Y. 2003) (discussing pleading and proof requirements under Exchange Act § 20(a) in different circuits).

⁵⁹ It is clear under the Exchange Act, and likely under the Securities Act, that the proportionate liability limits on director liability, discussed above for direct claims, also apply to control person liability, so potential damages are the same either way. See Securities Act §§ 11(f)(2), 15, 15 U.S.C. §§ 77k(f)(2), 77o (200x); Exchange Act § 21D(f), 15 U.S.C. § 78u-4 (200x).

⁶⁰ See Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. Law No. 105-353, codified at Securities Act § 16, 15 U.S.C. § 77p (200x); Exchange Act § 28(f), 15 U.S.C. § 78bb(f) (200x). Since the adoption of SLUSA, state-law only securities claims have essentially disappeared. See PRICEWATERHOUSECOOPERS LLP, 2002 SECURITIES LITIGATION STUDY 1. State claims are still sometimes appended to federal claims.

⁶¹ See Securities Act § 11(a)(2), (b)(3), 15 U.S.C. § 77k(a)(2), (b)(3) (200x); JOHN C. COFFEE, JR. & JOEL SELIGMAN, SECURITIES REGULATION: CASES AND MATERIALS 875-915 (9th ed. 2003) (discussing the due diligence defense).

directors. Even if plaintiffs name the outside directors as defendants, they usually won't seriously pursue this claim.

For Exchange Act claims, the company is liable if those responsible for the disclosure acted with "scienter." Officers and directors who had scienter with respect to the misdisclosure are also liable. Scienter is generally defined as encompassing intentional misdisclosure, conscious knowledge of misdisclosure, or strong recklessness (approaching conscious knowledge) with respect to disclosure accuracy.⁶² Plaintiffs can usually prove scienter more easily against inside than against outside directors. The insiders have greater access to internal documents, emails, and such that disclose the company's true financial position. Once again, if the company is solvent, plaintiffs rarely seriously pursue a claim against the outside directors.

The difference between Securities Act and Exchange Act liability is sharpened by the pleading rules added to the Exchange Act by the Private Securities Litigation Reform Act of 1995. These rules require the court to stay discovery until the court has heard a motion to dismiss. A motion to dismiss will be granted unless the complaint "state[s] with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁶³ Without discovery, plaintiffs often can't meet this pleading standard. Their best chance is to find evidence that the director sold the company's shares in significant volume with suspicious timing, and claim that these trades provide a "strong inference" of scienter. Well-counseled outside directors can protect themselves by not selling shares while on the board, selling on a pre-established schedule, selling only a small fraction of their holdings in any (say) six-month time period, or selling only to pay the exercise price of stock options.⁶⁴ An Exchange Act pleading can also be sustained if the directors ignored warnings of fraud in news stories, other public sources, or internal documents that

⁶² See Exchange Act § 10(b), 15 U.S.C. § 78j(b) (200x); Exchange Act Rule 10b-5, 17 C.F.R. 240.10b-5 (200x); COFFEE & SELIGMAN (2003), *supra* note xx, at 1117-1130 (discussing the culpability standard under Rule 10b-5). For forward-looking statements the culpability standard is "actual knowledge" under both the Securities Act and the Exchange Act. See Securities Act § 27A(c)(1)(B); 15 U.S.C. § 77z-1(c)(1)(B); Exchange Act § 21E(c)(1)(B), 15 U.S.C. § 78u-5(c)(1)(B).

⁶³ Exchange Act § 21D(b)(2)-(3), 15 U.S.C. § 78u-4(b)(2)-(3) (200x).

⁶⁴ Exchange Act Rule 10b5-1, 17 C.F.R. § 240.10b5-1 (200x), provides a safe harbor from insider trading liability for sales on a predetermined schedule. Compliance with the safe harbor should suffice to defeat an inference of scienter based on the timing stock sales.

the plaintiffs have gained access to.⁶⁵ Still in practice, outside directors usually face greater risk for Securities Act than for Exchange Act claims.⁶⁶

Some nuances. First, some *D&O* policies covers only directors and officers only, others cover the company also. The company will be more willing to settle with the insurer's than with its own money. If the *D&O* policy covers only directors and officers, plaintiffs have an incentive to sue the officers, the outside directors, or both, as well as the company. Second, if a case goes to trial, the proportionate liability provisions of the *PSLRA* will produce separate judgments against each defendant. However, fact patterns where the outside directors' proportionate share of liability exceeds the available *D&O* coverage should be rare, if the company has a typical-size policy. Even if (somehow) not, the company and the insurer can pay the entire judgment. The directors are then potentially liable for contribution, but the board will presumably decide not to sue them for contribution.⁶⁷ If made with proper procedures (by a special litigation committee composed of non-liable directors), this decision is hard to challenge under applicable derivative suit rules.

One might wonder why, if the company is solvent and thus can pay damages, plaintiffs ever sue outside directors, rather than only suing the company and the insiders, against whom proof is easier. There are two principal reasons. The first involves the risk that the plaintiffs will prove intentional misdisclosure against the insiders, which will makes *D&O* insurance unavailable for them and perhaps for the company also -- or prove enough to give the insurer has a plausible claim that the policy doesn't cover the insiders' conduct. To maximize the likelihood that the *D&O* policy will be available, the plaintiffs will often sue the outside directors as well. Second, suing all directors may increase the pressure on the company to settle before trial.

2. Indemnification

Because the company is always directly liable in a securities case, indemnification is a secondary concern. Still the rules on indemnification are

⁶⁵ See, e.g., *In re Lernout & Hauspie Securities Litigation*, 286 B.R. 33 (D. Mass 2002) (directors ignoring auditors' warnings about lack of internal controls).

⁶⁶ Accord, Barbara Ann Banoff, *Gatekeeper Liability Under Section 11 of the Securities Act of 1933: So Why Isn't the Grass Growing on Wall Street?*, 55 ADMINISTRATIVE LAW REVIEW 267-273 (2003).

⁶⁷ See Securities Act § 11(f); 15 U.S.C. § 77k(f) (200x); Exchange Act § 21D(f), 15 U.S.C. § 78u-4(f) (200x).

peculiar. Securities lawsuits are direct, not derivative. Thus, indemnification is permitted under Delaware law if the director acted in good faith, and is mandatory under a typical indemnification bylaw.

In contrast, the *SEC*'s position is that indemnification, even against ordinary negligence liability under the Securities Act, is "against public policy as expressed in the [Securities] Act and is therefore unenforceable."⁶⁸ The *SEC* stretches its statutory authority by requiring a company that wants the *SEC* to let a public offering go effective promptly (that is, every company) to promise that if a director seeks indemnification, other than for expenses of a "successful defense," the company:

will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the [Securities] Act.⁶⁹

The *SEC*'s position has never been tested in court. In a settled case, the company pays the judgment, the directors are therefore successful on the merits (they didn't pay damages), and their expenses can be indemnified. Plaintiffs have no incentive to challenge indemnification. From their perspective, there are two principal sources of funds to pay damages: the company and the *D&O* policy. If indemnification of expenses were disallowed, *D&O* insurance would still cover them, so the overall pool of funds to pay damages would remain the same. Moreover, plaintiffs have neither any incentive, nor reasonable prospects of success, in challenging insurability, which even the *SEC* agrees is appropriate.⁷⁰

Because of the *SEC*'s anti-indemnification policy, if a case goes to trial, the directors face some risk of not being indemnified, with greater risk for damages than for legal expenses. But there are good reasons why no case yet addresses this issue. As discussed above, plaintiffs have little reason to sue outside directors. Moreover, both sides have strong incentives to settle, discussed above for corporate cases and in the next section for securities cases. The limits on indemnification if a case goes to

⁶⁸ Regulation S-K, Item 510, 17 C.F.R. § 229.510 (200x). The *SEC* would presumably take a similar view for scienter-based liability under the Exchange Act.

⁶⁹ Regulation S-K, Item 512(h)(3), 17 C.F.R. § 229.512(h)(3) (200x).

⁷⁰ See Securities Act Rule 461(c), 17 C.F.R. § 230.461(c) (200x). There are cases upholding the *SEC*'s anti-indemnification policy for underwriters and legal counsel. See, e.g., *Eichenholtz v. Brennan*, 52 F.3d 478 (3d Cir. 1995); *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970). *Asdar Group v. Pillsbury, Madison and Sutro*, 99 F.3d 289, 291 (9th Cir. 1996). However, the balance of policy factors is more favorable for director than for underwriter or lawyer indemnification, especially for legal expenses.

trial enhance those incentives. The combination of insurance and proportionate liability give directors little reason to worry, even if they to suffer an adverse outcome in court on both liability and indemnification.

3. *Insurance*

D&O insurance gives outside directors a third layer of protection against actual liability, for both damages and legal expenses. Our discussion in Section B.3 of *D&O* coverage issues for corporate law claims largely carries over to securities cases. One twist: The insurer has a defense to payment under the insurance policy if the director has committed "criminal or intentionally fraudulent acts." This concern is already small for outside directors who in fact acted in good faith. It recedes even further in securities cases. In a corporate case, plaintiffs must show bad faith to get past the § 102(b)(7) shield. They might inadvertently prove enough to give the insurer a defense to payment. In a securities case, there is a larger gap between the culpability that plaintiffs must show to establish liability (negligence under the Securities Act or scienter under the Exchange Act) and the intentional misconduct that might give the insurer a defense to coverage. Plaintiffs will try *not* to prove actual intent to mislead, even when intent actually or arguably exists, to ensure that the *D&O* policy remains available to pay damages. The larger gap between the culpability that plaintiffs need to show, and the culpability they will try not to prove, reduces the risk that plaintiffs will inadvertently prove too much.

4. *The Effect of the Sarbanes-Oxley Act*

The Sarbanes-Oxley Act does not change the existing securities law standards for director liability, and thus does not directly affect our analysis of directors' exposure. It may increase or decrease the practical exposure faced by audit committee members, when the firm is insolvent. But the sign of any effect is uncertain, and the likely magnitude seems small.⁷¹

On one hand, the Sarbanes-Oxley Act increases the audit committee's duties. With more duties, there is more that can go wrong. \Sarbanes-Oxley also increases the information flow to the audit committee. This will leave a paper trail that could help plaintiffs to sustain an Exchange Act claim, which requires a showing of

⁷¹ For a broader argument that Sarbanes-Oxley will have only a modest effect on corporate governance, see Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Might Just Work)*, 36 UNIVERSITY OF CONNECTICUT LAW REVIEW 915-988 (2003).

scienter.⁷² However, plaintiffs have no incentive to pursue such a claim as long as the company is solvent. It will still be easier to show scienter for inside directors than for audit committee members.

On the other hand, the Sarbanes-Oxley Act requires the *CEO* and *CFO* to certify the firm's financial statements, so they can no longer claim ignorance of misdisclosure by subordinates.⁷³ Many *CEO*'s and *CFO*'s will likely respond to their own greater exposure by becoming more conservative in their accounting. This should reduce the number of accounting restatements and thus the number of viable cases that plaintiffs can bring. Also, within a system of proportionate liability, *CEO/CFO* certification increases their likely share of total fault, which implies less exposure for the outside directors.

The Sarbanes-Oxley Act also gives the SEC power to fine a company for securities law violations and make the fines available to settle investor claims.⁷⁴ The SEC used this authority in the WorldCom bankruptcy to create a \$750 million fund, which will be the principal settlement pot in the ongoing securities litigation.⁷⁵ The more that bankrupt companies pay some damages themselves, the weaker are the plaintiffs' incentives to chase directors' personal assets.

The bottom line for securities claims against solvent companies: The company is directly liable and pays damages and legal expenses; *D&O* insurers often pay as well; outside directors do not pay.

E. What Changes if the Firm is Insolvent?

Thus far, we have assumed that the firm is solvent. We have looked for risks of actual liability under corporate and securities law, and found none with real-world importance. We consider in this section what changes if the firm is insolvent. Our risk analysis will change in important ways, and our bottom line conclusion will change also, from near-zero risk if the company is solvent to greater, albeit still small risk if the company is insolvent.

⁷² See John C. Coffee, Jr., *Is It Safe to Go on the Audit Committee?*, NEW YORK LAW JOURNAL, May 2, 2003.

⁷³ See Sarbanes-Oxley Act §§ 302, 906, xx U.S.C. §§ xxx, yyy (200x).

⁷⁴ See Sarbanes-Oxley Act § 308(a), codified at 15 U.S.C. § 7246(a) (200x).

⁷⁵ See Barnaby J. Feder, *WorldCom Agrees to Pay \$750 million in S.E.C. Suit*, NEW YORK TIMES, July 8, 2003, at C6.

In many countries, corporate, bankruptcy, or insolvency law imposes liability on directors who allow the firm to go bankrupt, with some level of culpability (negligence, gross negligence, recklessness, intent).⁷⁶ U.S. bankruptcy and insolvency law has never taken this route. Fraudulent conveyance law, for example, lets the company's creditors recover amounts that the company paid improperly. It does not make the directors liable for approving the improper payments. Thus, the relevant question is whether (and how) the directors face greater exposure under corporate or securities law for conduct that would already put them at risk of nominal liability, whether the company is solvent or not.

If the company is insolvent, it likely cannot pay damages, and may be unable to advance or pay legal expenses. Thus, the directors' principal protection will come from the D&O policy. Some additional technical D&O issues arise in bankruptcy. The most visible current issue involves ensuring that the directors' claim takes priority over the company's claim to the policy proceeds. After a few disputes, none of which caused the directors to lose coverage, this issue is being solved.⁷⁷ The directors also need to be covered if they are sued by the bankruptcy trustee. Here too, this issue is largely resolved, without directors facing actual liability.⁷⁸ There is also increased risk of a policy gap, because bankruptcy court consent is needed to renew the policy when it expires.⁷⁹ As for *D&O* coverage generally, when a new hole arises, market pressures are likely to cause a change in contracting practice that

⁷⁶ See Black & Cheffins (2003), *supra* note xx, at yy-zz (UK law, [add other countries as relevant]).

⁷⁷ The principal risk is when the *D&O* policy covers both the directors and the company (so-called Side C or "entity" coverage). The bankruptcy trustee may then claim that the policy belongs to the bankrupt company, not (or at least not only) to the directors. *D&O* insurers have responded by clarifying that the directors' coverage takes priority over the company's coverage and by offering separate policies (or separate coverage limits within the overall policy) covering just the directors and officers. Some companies have also dropped entity coverage. See Timothy W. Burns, *Advising Corporate Boards on Directors' and Officers' Insurance*, LEXISNEXIS CORPORATE GOVERNANCE REPORT (Sept. 2003) (describing this issue as a "minor concern"); Dickey et. al (2003), *supra* note xx, at 16-22; Joseph M. McLaughlin, *Directors' and Officers' Liability: D&O Insurance Policies in Bankruptcy*, NEW YORK LAW JOURNAL, Aug. 29, 2002, at 5-6; Randy Paar, *D&O Insurance and Bankruptcy: The Enron Experience and the Dangers Faced by Senior Management*, 14 SECURITIES REFORM ACT LITIGATION REPORTER 7-10 (Oct. 2002).

⁷⁸ See the discussion of the insured-versus-insured exclusion in JOHN H. MATHIAS, JR., TIMOTHY W. BURNS, MATTHEW M. NEUMEIER & JERRY BURGDOERFER, *DIRECTORS AND OFFICERS LIABILITY: PREVENTION, INSURANCE AND INDEMNIFICATION* § 8.02 (2003).

⁷⁹ See Sean W. Gilligan & Richard S. Rosenstein, *The Latest Growth Industry in Bankruptcy: Suing a Debtor's Officers and Directors*, CONNECTICUT LAW TRIBUNE, Nov. 5, 2001.

closes the hole. Moreover, an insurer which relies on a new hole to deny coverage risks reputational harm if the directors end up being actually liable.

1. Legal Expenses

Assume, generally counterfactually, that the *D&O* policy is either not available or is insufficient to cover defense costs. The corporation could be barred from advancing expenses if creditors object and the bankruptcy court rules in the creditors' favor. However, such objections are uncommon.⁸⁰ Typically, the debtor's board runs the company during the bankruptcy process. Creditors have to pick their fights with the debtor. Disputing whether the company can pay the directors' legal defense costs makes debtor noncooperation likely across a host of issues and is probably not a sensible strategy if the debtor's board behaves reasonably.

To be sure, if the company is being liquidated rather than reorganized, the creditors may care less about debtor cooperation. If creditors successfully object to payment of legal expenses, directors who paid their own expenses would become general unsecured creditors, who likely would not be fully paid in the bankruptcy proceeding. Moreover, legal expenses can continue after the company has been liquidated or sold.

2. Damages

When we turn from legal expenses to damages, the situation becomes more complex. To simplify the analysis, we will assume that the company cannot pay indemnification. An indemnification claim is a general unsecured claim, which will often be of doubtful value. Moreover, the judge may invoke equitable subordination and pay other claims first. We also assume that the company cannot pay damages.

Corporate law. Under corporate law, not much changes, because the risk was so small to begin with. The principal concern is a duty of loyalty claim (even though the director in fact acted in good faith). *D&O* insurance should still cover this claim. Because the underlying claim is weak (given our assumption that the director acted in good faith), a plausible settlement is unlikely to exceed the policy limits. The settlement pressures discussed above make it highly likely that such a settlement can be reached.

Securities law. For securities suits, the company can no longer pay damages. Thus, the directors' first two layers of protection (the company's primary liability and indemnification) vanish. Only the third layer, *D&O* insurance, remains.

⁸⁰ See Susanne Murray, *Bankruptcy and D&O Coverage*, DIRECTORS & BOARDS (June 2001).

However, the *D&O* policy limit will often be less than the sum of legal defense costs plus alleged damages. *Scienter* remains hard to prove in an Exchange Act case, but a Securities Act claim will often be viable, and exposes the directors to negligence-based liability.

To simplify the analysis, we assume a worst case scenario. Damages exceed the *D&O* policy limits, perhaps by a lot. The outside directors would, to high probability, be found negligent (or, for an Exchange Act case, sufficiently reckless), if the case goes to trial. We explore in the next subsection the powerful settlement incentives that ensure that, even in this extreme situation, most cases will settle within the policy limits and the outside directors will not face actual liability.

3. *Settlement Incentives in Securities Cases Against Directors of Insolvent Companies*

The conventional wisdom in securities cases is that the plaintiffs' bar almost always settles, and almost always does so within the policy limits, even when the company is solvent.⁸¹ The available data is consistent with this. Trials are rare; and settlements involving actual liability are extremely rare (Section A). There is a sharp decline in the ratio of actual payment to potential damages as potential damages in securities cases increase. Cases involving over \$500 million in potential damages settle for a median of 2 cents per dollar of potential damages.⁸² Moreover, payments by insureds in excess of policy limits are negligible across all lines of insurance, not just *D&O* insurance.⁸³

⁸¹ See Press Release, Chubb Vice Chairman Urges Insurers to Counteract Egregious Class Action Securities Suits to Prevent the Erosion of the D&O Liability Insurance Marketplace, Business Wire Feb. 5, 2003 (John Degan, Vice-Chairman of Chubb, a leading D&O insurer, explains that "the plaintiffs' bar . . . almost methodically settles case after case for the limits of available insurance"); Cox (2002), *supra* note xx [James Cox, *Boards Find it Harder to Fill Hot Seats; Scandals, Legal Threats Make Many Decline Slot*, USA TODAY, July 31, 2002 (cover story).]

⁸² See Mukesh Bajaj, Sumon Mazumdar & Atulya Sarin, *Securities Class Action Settlements: An Empirical Analysis* table 7 (working paper 2000) and Cornerstone Research, *Post-Reform Act Securities Case Settlements: Cases Reported Through December 2002* figure 5 (both available from Stanford Law School Securities Class Action Clearinghouse at <http://securities.stanford.edu>).

⁸³ A bit of data: The Texas Department of Insurance reports comprehensive data on all closed claims involving Texas-licenses insurers. In 2000 (the most recent year for which data is available), there were 9,000 closed claims with payments over \$25,000. Insurers paid a total of \$1.2 billion. Insured made payments due to damages exceeding policy limits in 14 cases (0.15% of all cases), and paid a total of \$854,000 (0.07% of total payments). See TEXAS DEPARTMENT OF INSURANCE, THE 2000 TEXAS LIABILITY INSURANCE CLOSED CLAIM ANNUAL REPORT, at www.tdi.state.tx.us [**check for more recent data**].

Incentives to settle within the policy limits only increase when the company is insolvent, and thus unavailable to pay damages. To understand how exceptions may arise and why they are rare, we explore settlement incentives with some care, focusing on differences between incentives in securities cases with an insolvent company) and corporate law cases (discussed in Section C). As we did for corporate law cases, we treat plaintiffs' counsel as the real party in interest and assume that the directors will settle within the policy limits if the plaintiffs will. We discussed for corporate law cases the reasons to believe that the insurer will either settle within the policy limits, or if it rejects such a settlement, will cover the outside directors' actual liability after a loss at trial; we assume that insurers will so act in the discussion below.

The key question is whether plaintiffs will settle within the policy limits. Multiple factors create incentives for plaintiffs to do so. Unless one or more directors has serious personal wealth or represents an institution that can indemnify the director, the plaintiffs' calculus is usually easy. There are important downside risks from proceeding to trial, and limited upside. One downside risk is obvious -- plaintiffs might lose the case altogether. A second risk is more subtle: The plaintiffs might prove too much against the insiders. If only the insiders are found liable, the insurer may deny coverage on the grounds that the misdisclosure was intentional. Even if the outside directors are also liable and remain insurable, recovery may be reduced because proportional liability rules limit the damages for which outside directors are responsible. The two risks interact. Plaintiffs must be careful not to prove too strong a case, lest they give the insurer a defense to payment. This increases their risk of losing the case altogether, against the insiders, the outside directors, or both.

A third downside risk is that the directors will fight hard to avoid actual liability. Their hefty legal fees will be paid by the *D&O* policy, thus shrinking a principal deep pocket that the plaintiffs hope to collect from. If the directors lose at trial, an appeal, with accompanying delay and legal expense, is certain. Meanwhile, plaintiffs' counsel must work harder too, and any recovery is delayed for years.

Moreover, the upside from a large damages award is limited. By the time of trial, the directors may well have done some financial planning -- moving assets offshore, into their spouses' names, children's trusts, hard-to-collect-on assets, and the like. The remaining assets must be further discounted by the legal fees needed to collect them. Once again, plaintiffs bear both their own and the directors' legal fees, because the *D&O* policy will pay the directors' fees.

This calculus can change if a director is seriously wealthy or represents a deep-pocketed institution, or the *D&O* policy is too small to offer a meaningful

recovery. The one case of actual liability discussed above involves both seriously wealthy director defendants and a small *D&O* policy. Occasional cases also exist where a director who represents and is indemnified by an institution agrees to pay a modest amount to settle a securities lawsuit. An example: One of us (Black) was an expert witness in a Securities Act case against the directors of an insolvent company with a \$20 million *D&O* policy, versus roughly \$125 million in potential damages. The company had several representatives of venture capital firms on its board. The case was settled with gross payout of around \$25 million, including around \$5 million from the venture capital funds. The defendants' legal fees were around \$7 million, and plaintiffs' collected around \$18 million.

However, even if a director has serious wealth or is indemnified, plaintiffs face strong incentives to settle for a modest payment before trial, as this example suggests. If the case goes to trial, the outside directors' liability is limited to 150% of proportionate fault. Usually, most of the fault lies with the insiders, and perhaps the auditors or investment bankers. Each outside director's share of fault is further limited because there are many of them. Put these factors together, and a single director's share of fault will rarely exceed 5% or so.

A numerical example can illustrate this effect. The numbers are invented but we think they are realistic. Assume that the outside directors are together 25% at fault. This estimate is generous, given that the directors likely only failed to catch someone else's wrongdoing. Of this, assume that 20% is assigned to the audit committee members, and 5% to other outside directors, and a 5-member audit committee. Each audit committee member is then 4% at fault, which means a 6% (150% of 4%) cap on actual exposure.

To extend this example, assume that the company has \$50 million in *D&O* coverage, and one wealthy outside director. If the plaintiffs settle early, they will collect, let's say, \$40 million. If they pursue a trial, the defendants' expenses will jump to \$20 million, leaving \$30 million in recoverable insurance proceeds, of which \$3 million will be allocated to the wealthy director's share of the damage award. Plaintiffs' effective legal cost (the opportunity cost of counsel's time less any incremental fee award) will increase by \$5 million as well. We can then ask at what damage award the plaintiffs will break even by going to trial. The answer is \$300 million.⁸⁴ Add in a multiyear payment delay for trial and appeal, and the breakeven could be \$400-500 million, even if the case is a slam-dunk winner.

⁸⁴ The breakeven damages award X occurs when the defendant's personal payment ($.06 \times X - \$3$ million paid by insurance) exceeds the loss due to higher legal expenses (\$10 million in reduced insurance proceeds + \$5 million plaintiffs' costs). Breakeven occurs when $.06 \times X = \$18$ million, or $X = \$300$ million.

Let's now add trial risk. Outside directors who have acted in good faith and regularly attended board meetings will usually be able to present a respectable defense. The plaintiffs face a number of risks if they go to trial. They might simply lose. They might prove too much, and lose some or all of the D&O policy coverage. They might misjudge defendants' legal expenses, which deplete more of the D&O policy than they had expected. They might misjudge the percentage of fault that the jury will find for the outside directors. Plaintiffs' counsel faces reputational as well as financial risk -- their reputation will improve after a win at trial, but weaken after a loss. Put all this together, and it is hard to imagine that the plaintiffs will go to trial unless their expected judgment if they win is twice the breakeven level -- call this \$1 billion in round numbers.

The numbers in this example are invented, but the general point remains: A very small number of securities cases offers the combination of one or more seriously wealthy outside directors, very large potential damages, a high chance of proving negligence against the directors (so that the risk of losing at trial is low), yet not too high a chance of proving intent against the insiders. Yet only in these cases will plaintiffs plausibly reject a settlement within the policy limits and chase the directors' personal wealth.⁸⁵ As discussed above, the Sarbanes-Oxley Act makes it possible for a bankrupt company to partly pay investor claims through a settlement with the SEC, which is then incorporated in a bankruptcy reorganization plan. This partial payment, when available, makes it still more remote that plaintiffs will chase directors' personal assets.

The available data, summarized in Part II.A, are consistent with the existence of strong pressure to settle, and to do so within the policy limits. Trials against outside directors of bankrupt companies simply do not exist. Indeed, trials against outside directors of solvent companies almost never occur either. Settlements outside the policy limits are rare too.

We turn next to two sets of case studies, to illustrate the litigation and settlement dynamics. In subsection 4, we study Enron and WorldCom as examples of high-profile bankruptcies that will likely not lead to any actual liability. Subsection 5 then considers the two cases we know of that either have produced (a 2002 settlement) or may produce (Peregrine Systems) actual liability, to see what we can learn from these rare cases.

⁸⁵ Coffee (2003), *supra* note xx [NYLJ article], argues that the enhanced information flow to audit committees members under the Sarbanes-Oxley Act may make it possible for plaintiffs to claim actual knowledge of misdisclosure. This would get the plaintiffs around the proportionate liability rules, but at the cost of eliminating D&O coverage. We doubt that many plaintiffs' counsel will think this a sensible tradeoff.

4. Two Case Studies: Enron and WorldCom

Enron and WorldCom offer nice case studies of directors' risk in securities cases involving bankrupt companies. In each, the company went bankrupt and thus couldn't pay damages itself. Potential damages are huge and greatly exceed D&O policy limits. The company's visibility ensures that the cases will be prosecuted vigorously and the court won't dismiss possibly viable claims. There is little doubt that both companies' disclosure was misleading, nor that the directors missed much that they might have seen and accepted much that they might have questioned.⁸⁶ At least one Enron director, Robert Belfer, is wealthy enough to be worth chasing.⁸⁷ So, collectively, are the WorldCom directors, a number of whom sold their companies to WorldCom and then sold enough WorldCom shares, soon enough, to retain significant personal wealth. As cases where outside directors have reason to fear actual liability, Enron and WorldCom are as good as it is likely to get. The last word on these lawsuits won't be written soon, but the early words are encouraging for the outside directors.

Enron. The Enron directors needed bankruptcy court approval for the D&O policy to pay their defense costs. They received it.⁸⁸ The derivative lawsuits were consolidated into the bankruptcy proceeding and stayed by the bankruptcy court.⁸⁹ There is no evidence of self-dealing by the outside directors, so the derivative suits may vanish altogether, or else be settled together with the securities claims.

Plaintiffs raised Securities Act and Exchange Act claims against the outside directors, alleged control person liability under both statutes, and raised Texas securities law claims as well. But the Exchange Act claims were dismissed for failure to plead facts giving rise to a strong inference of scienter. The only concrete facts raised by the plaintiffs involved the directors' sales of Enron shares. These

⁸⁶ See, e.g., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. (Feb. 1, 2002) ("Powers Report"); In re WorldCom, Inc., *First Interim Report of Bankruptcy Court Examiner Dick Thornburgh* (S.D.N.Y., Nov. 4, 2002).

⁸⁷ On Robert Belfer's post-Enron wealth, see Leslie Eaton & Geraldine Fabrikant, *Enron Loyalty Costs N.Y. Family Billions*, N.Y. TIMES, Jan. xx, 2002. Director Ronnie Chan has serious wealth in Hong Kong, but likely doesn't have significant U.S. assets or could move them offshore before trial.

⁸⁸ See *N.Y. Judge Signs Final Order Allowing Payment of Enron's Legal Costs*, ANDREWS DELAWARE CORPORATE LITIGATION REPORTER, Jan 6, 2003.

⁸⁹ See *Oregon State Court Should Define "Derivative," Enron Bankruptcy Judge Rules*, ANDREWS ENRON LITIGATION REPORTER, Oct. 17, 2002.

sales, the court found, were too small and erratic to meet the pleading burden.⁹⁰ The court deferred decision on the Texas law claims, allowing plaintiffs to replead, but these claims seem likely to vanish also. The Securities Act claims, in contrast, survived a motion to dismiss. Due diligence is an affirmative defense that is premature in a motion to dismiss, where the court examines only the sufficiency of the complaint.

Theoretical risk remains. The remaining Securities Act claims total roughly \$1 billion, and exceed Enron's roughly \$450 million D&O insurance policy. Yet these claims are a small part of a case with dozens of important defendants and nominal claims likely approaching \$50 billion. It seems likely that the outside directors will be able to settle within the policy limits.⁹¹ Conceivably, Mr. Belfer might chip in a million or two as well.

WorldCom. The news for the outside directors is even better in *WorldCom*. Exchange Act claims against the audit committee members were dismissed for failure to plead facts giving rise to a strong inference of scienter. A claim against outside director Stiles Kellett, who chaired the compensation committee survived, thanks to some odd dealings (he sold *WorldCom* stock at an opportune time, received *IPO* allocations from Salomon Smith Barney, along with *CEO* Ebbers and *CFO* Sullivan, and was alleged to have received other irregular benefits from Ebbers). The other outside directors were not even charged with Exchange Act violations. Securities Act claims survive as well, because due diligence can only be raised as an affirmative defense.⁹²

After some early skirmishing over application fraud, *WorldCom*'s primary D&O insurer agreed to cover the outside directors. Moreover, *WorldCom* will emerge from bankruptcy with a \$750 million fund (\$500 million in cash, \$250 million in shares) to pay securities claims, based on a civil penalty levied by the *SEC* but made available to pay securities claims.⁹³ Finally, under *WorldCom*'s plan of

⁹⁰ In re Enron Corp. Securities, Derivative & ERISA Litigation, 258 F. Supp. 2d 576 (S.D. Texas, Houston Div. 2003)

⁹¹ For news accounts viewing the Enron decision as a victory for the directors, see Kurt Eichenwald, *Enron's Outside Directors Win a Round in Court*, N.Y. TIMES, Mar. 14, 2003, at C6; Mary Flood, *Ruling Lessens Case Against Enron's Outside Directors*, HOUSTON CHRONICLE, Mar. 15, 2003, at A2.

⁹² In re WorldCom, Inc. Securities Litigation, 2003 WL 21219049 (S.D.N.Y., May 19, 2003).

⁹³ On the skirmishing between *WorldCom* and its D&O insurers, see Dickey et. al (2003), *supra* note xx, at 22-23; Douglas McLeod, *AEGIS filing Argues Chapter 11 Plan Limits WorldCom D&O Cover*, BUSINESS INSURANCE, Sept. 22, 2003. On the SEC penalty, see Barnaby J. Feder, *WorldCom Agrees to Pay \$750 Million in S.E.C. Suit*, NEW YORK TIMES, July 8, 2003.

reorganization, its directors will be covered for up to \$25 million in legal expenses. This, plus the SEC-derived fund, is expected to be sufficient to cover settlement of the securities claims. Indeed, an earlier version of the Plan of Reorganization called for full indemnification; this was reduced to \$25 million for expenses when the SEC penalty was agreed on.⁹⁴

5. *Two Case Studies of How Actual Liability Can Arise*

We turn next to the one confirmed and one possible case of outside liability that we have been able to track down. The confirmed case involves a confidential settlement, described to us by counsel for one of the directors as a "perfect storm." The fraud was large, the company was insolvent, several outside directors had serious personal wealth, the *D&O* policy was small, and the *D&O* insurer had a plausible application fraud defense to coverage (which the insurer compromised by paying a significant part but not all of the coverage limits). The outside directors paid approximately \$500,000 each; five of them had no other indemnification or insurance to cover this payment.

The analysis of settlement incentives in subsection 3 can help us understand why the directors paid in this case. The key elements, in addition to an insolvent company, are (i) lack of a respectable *D&O* policy; (ii) a plausible insurer defense to payment, which let the insurer negotiate for a still lower payment; and (iii) the presence of several wealthy directors, not just one, which increased the directors' combined percentage of plausible fault under proportionate liability. In round numbers, at time of settlement, the *D&O* policy there, net of defense costs already incurred and the value of the insurer's defense to coverage, offered a recovery of perhaps \$2 million. The presence of several wealthy directors, not just one, made the percentage of collectible damages perhaps as much as 20% of a \$100 million fraud claim. Thus, plaintiffs could settle within the policy limits for \$2 million, or chase the directors with potential upside of \$20 million. Meanwhile, the directors would exhaust the *D&O* policy if they went to trial, and incur further legal expenses fighting with the insurer over full coverage. Even if the directors won, would pay more in legal expenses than they settled for.

⁹⁴ See *In re WorldCom Inc., Debtors' Modified Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* §§ 1.109, 1.125, 4.10, 8.07 (Oct. 21, 2003), and Order Confirming Debtors' Modified Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated Oct. 21, 2003 (Bankruptcy, S.D.N.Y., Oct. 31, 2003). For the original plan, see *In re WorldCom Inc., Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (Apr. 14, 2003).

In the remaining case, involving Peregrine Systems, the insurers, *AIG* and *Chubb*, have sought to rescind coverage, claiming application fraud. Their petitions have been stayed by the bankruptcy court. In the meantime, various actions against the directors are proceeding. The principal target is Peregrine's wealthy founder and former non-executive chairman John Moores. One need shed no tears for Mr. Moores, who sold Peregrine shares for around \$600 million and likely faces only the risk of giving back some of his gains. At least some of the other outside directors sold enough shares, soon enough, so that they are well in the money for their overall involvement with Peregrine.

The early outcome of the lawsuits is favorable for the outside directors. The court dismissed Exchange Act claims for failure to show scienter; it also dismissed control person claims. But the outside directors still face with Securities Act claims and state law claims. For now, they must pay their own legal expenses and hope for reimbursement by the *D&O* insurers.⁹⁵ In Peregrine too, the total *D&O* policy is small (\$20 million), which may be why no one has yet aggressively challenged the insurers' refusal to pay.

These two cases, taken together, confirm important parts of our analysis. An adequate insurance policy, that is a multiple of plausible legal defense costs, is important. Today, that might be a minimum of \$30 million. *D&O* coverage issues are indeed a risk to which directors should ideally attend, though in practice many won't do so. Risk arises principally under the Securities Act, and is indeed limited to insolvent companies with seriously wealthy directors. At the same time, non-wealthy directors can get caught in the litigation net, even if they are not worth suing on their own.

F. Other Laws and Government Enforcement

We have thus far discussed liability under corporate, securities, and bankruptcy law. Directors can have vigilance duties and accompanying risk of nominal or actual liability under other laws as well. The principal risk areas include banking, environmental, ERISA, and workplace safety law. The claim will typically be that the directors failed to take some action they should have taken, or failed to

⁹⁵ On the securities law claims, see *In re Peregrine Systems, Inc. Securities Litigation*, Civ. No. 02cv870-J (S.D. Calif., Nov. 21, 2003); Bruce V. Bigelow, *Judge Rules on Claims in Suits Against Peregrine*, *SAN DIEGO UNION TRIBUNE*, Dec. 2, 2003. There is also private litigation against John Moores. For various elements of this case, see Scott Bigelow, *CFO's Cooperation Takes Peregrine Probe to Next Level*, *SAN DIEGO UNION-TRIBUNE*, Apr. 27, 2003; Don Bauder, *Texans File Suit Against Moores and Colleagues*, *SAN DIEGO UNION-TRIBUNE*, Feb. 28, 2003; Complaint, *Securities and Exchange Commission v. Peregrine Systems* (S.D. Calif. 2003).

supervise well enough to prevent the company from violating the relevant law. The claim could arise either in a private lawsuit (when a private right of action is available) or in a government suit seeking damages or a civil penalty. Indeed, in other countries, liability under corporate and securities law is often secondary, and liability under other laws is often the principal perceived risk.

We sketch here the principal risks. We focus on civil liability. Criminal sanctions usually require intent and have not yet, to our knowledge, been applied to outside directors.

Direct claims. These claims will usually be direct claims by the government or private claimants against the company, directors, or both. Directors will usually be protected by both indemnification and insurance. The risks of actual liability fall into two broad categories. First, the company may be insolvent, and thus unable to pay indemnification. If so, insurance will usually provide backup coverage, but with some risk of liability exceeding the policy limits, and some risk of a policy gap, in which this particular liability is excluded from the D&O policy, yet not adequately addressed by a risk-specific policy. For example, D&O policies commonly exclude environmental and ERISA claims, so companies need separate environmental and ERISA coverage.

Second, a court could decide that a particular liability isn't indemnifiable, similar to the SEC's view on securities law liability. However, insurance should usually provide backup coverage, subject again to the risk of a policy gap or of liability exceeding the policy limits.

Third, the director runs a risk that the regulatory agency will not settle unless the director makes some out-of-pocket payment. The *SEC*, in particular, has sometimes negotiated settlements with insiders in which some portion of the fine or restitution is explicitly nonindemnifiable and noninsurable.⁹⁶ However, thus far, the *SEC* has only pursued insiders on this basis. If it were to seek fines against outside directors, it seems likely that the fines would be small and the real sanctions would be reputational. We discuss reputational sanctions, including the *SEC*'s occasional efforts to seek non-financial sanctions against outside directors, in Part III.C.1.

⁹⁶ For a securities law example involving inside directors, see Floyd Norris, *6 From Xerox to Pay S.E.C. \$22 Million*, NEW YORK TIMES, June 6, 2003, at C1 (for \$22 settlement by six Xerox officers. Xerox reimburses them for \$19 million and pays their legal costs; the remaining \$3 million reflects fines, for which *SEC* rules do not permit indemnification). See also Testimony by SEC Chairman William H. Donaldson Before the Senate Committee on Banking, Housing and Urban Affairs 17 (May 7, 2003) (describing the SEC's settlement with two analysts, Henry Blodget and Jack Grubman, in which half of Blodget's \$4 million settlement, and half of Grubman's \$15 million settlement, were noninsurable and non-tax-deductible penalties).

ERISA. Enron illustrates the *ERISA* risk. A private lawsuit, and a related suit by the Department of Labor, made failure-to-supervise allegations against all outside directors and other defendants for two Enron pension plans that held Enron shares, seeking to recover the \$1.5 billion that the plans lost when Enron collapsed. Apparently, the Enron board was supposed to and did appoint a trustee (Northern Trust) for the Enron Employee Stock Ownership Plan, but Enron officials then failed to sign a contract with Northern. This left the plan without a trustee and left the plaintiffs and the Department of Labor with a barely plausible claim against the Enron directors for lack of oversight. The complaints allege that the power to appoint the trustee makes the board members *ERISA* fiduciaries, and that the directors breached this fiduciary duty by failing to appoint a trustee. The private lawsuit against the compensation committee members (but not the other outside directors) survived a motion to dismiss; the Department of Labor case has not yet reached this stage.⁹⁷

The cases seek to stretch existing law. It is not clear that the power to appoint a trustee make the outside directors fiduciaries under *ERISA*, even those on the compensation committee. Nor is it clear that their failure to notice that a trustee wasn't formally hired is neglect sufficient to establish liability. But if the directors are fiduciaries, the standard of care is simple negligence.

The risk of actual liability seems small. Enron has an *ERISA* policy, with a \$95million limit, that covers the directors.⁹⁸ The same settlement incentives that produce securities settlements within policy limits ought to operate here as well. Indeed, the *ERISA* plaintiffs argued to the bankruptcy judge, in an effort to persuade him to unfreeze the *ERISA* policy, that the policy coverage was "the only [recovery] the *ERISA* plaintiffs are likely to find available."⁹⁹ Still, some risk exists of liability exceeding the policy limits, from a source the Enron directors never thought about.

Banking - derivative claims. Under banking law, some claims are derivative rather than direct claims, which would make indemnification unavailable. Under federal banking law, a federally chartered bank can sue its directors for gross

⁹⁷ See *In re Enron Corporation Securities, Derivative and "ERISA" Litigation*, 2003 WL 22245394, xxx F.Supp.2d yyy (S.D. Texas, Houston Div. 2003); Press Release, U.S. Labor Department Sues Enron, Executives and Plan Officials for Failing to Protect Workers (Aug. 25, 2003), available at www.dol.gov; Complaint, *Chao v. Enron Corp.* (S.D. Texas, Houston Div., 2003).

⁹⁸ See *Texas Plaintiffs Ask Court to Put their Bran on \$85M Enron ERIA Policy*, CORPORATE OFFICERS AND DIRECTORS LIABILITY LITIGATION REPORTER, Apr. 8, 2002 (the \$95 million coverage cited in text includes \$10 million that is reserved for defense costs; if defense costs exceed this amount, the directors' costs will be covered from the base \$85 million policy).

⁹⁹ *Id.*

negligence in approving loans. This cause of action isn't affected by a § 102(b)(7) charter provision, because the federal cause of action overrides the state limit on liability.¹⁰⁰

A solvent bank isn't likely to sue its own directors.¹⁰¹ Thus, the principal risk is for directors of an insolvent bank. The Federal Deposit Insurance Corporation (FDIC) steps into the bank's shoes and has an incentive to sue the directors if they are plausibly liable, if only to recover from the *D&O* policy. The suit is derivative in nature, so indemnification is available for legal expenses but not for damages, if the bank is still able to pay these expenses. The *D&O* policy is available to cover damages and any legal expenses that the bank can't or won't cover.

The outside directors of an insolvent bank thus face actual liability if damages plus legal expenses exceed the policy limits. This is similar to their exposure under securities law. The same settlement incentives come into play, and usually produce settlement within the policy limits. As for securities cases, the liability risk is for a claim that exceeds the policy limits, for a director with enough personal wealth to be worth chasing. There may be additional risk because the FDIC's lawyers could refuse to settle and instead pursue an individual to deter future misconduct, whereas securities plaintiffs lawyers will simply try to maximize expected dollar recovery.

G. Summary

We have not exhausted the possible bases for claims against outside directors, but we believe that we have covered the main areas of concern. The bottom line: there is lots of nominal liability, primarily under securities law. There are theoretical windows of actual liability, primarily if the company is bankrupt. Yet even for bankrupt companies, the combination of insurance and settlement incentives ensure that outside directors face only a tiny risk of actual liability. The near-total lack of cases involving actual liability of outside directors is not luck, but the predictable outcome of the multiple, overlapping liability-limiting factors we have discussed.

¹⁰⁰ 12 U.S.C. § 1821(k) (200x); *see* *Atherton v. Federal Deposit Insurance Corp.*, 519 U.S. 213 (1997).

¹⁰¹ A few banks sued their officers in the 1980s to collect on the *D&O* policy; insurers then amended their policies to prevent these suits. *See* OLSON, HATCH & SAGALOW (2003), *supra* note xx, § 12.14 (discussing the "insured vs. insured" exception that is now standard in *D&O* policies).

III. The Role of Reputational Sanctions and Social Norms

If actual liability doesn't do much to get outside directors to work hard, what does? Purely market-based incentives are surely important. Yet if they were sufficient, legal rules would be superfluous. We therefore explore here what role the nominal liability of outside directors may play, even without actual liability. In our view, four factors importantly affect directors' vigilance: concern for reputation; social norms, including directors' sense of professionalism; the nuisance cost of being sued; and procedural rules for board conduct, established by law and common practice. All are importantly connected with formal legal duties. Thus, they cannot be fully supplied by purely market-based institutions.¹⁰²

Sections A-B set the stage for our analysis by discussing outside directors' direct financial incentives and the potential for D&O insurers to monitor directors. These sources of incentives are useful, but likely insufficient by themselves. Sections C-G discuss softer constraints, including reputational sanctions, social norms and director professionalism, the nuisance cost of being sued, the value of procedural rules and norms, and the possibility that directors wrongly fear actual liability. Section H summarizes the value and limits of these alternative source of vigilance incentives.

A. Direct Financial Incentives

The potential for market-based financial gain or loss can create vigilance incentives. One source is ownership of the company's shares and options. For example, Enron director Robert Belfer sold his family company to Enron in exchange for Enron shares and then kept the shares. Most of his family fortune then went down with the Enron ship. Most of the WorldCom outside directors held large positions in WorldCom shares, because they joined the WorldCom board after selling their company to WorldCom.¹⁰³ Whatever led Mr. Belfer and the WorldCom directors not to see the internal rot at Enron and WorldCom, their financial incentives were ample.

Indeed, legal and market institutions often develop in complementary ways.

¹⁰² Cf. James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW AND CONTEMPORARY PROBLEMS 1-38 (1997), at 35-36 (addressing litigation against corporate defendants generally, treating financial cost as the primary deterrent, but also mentioning reputation and nuisance cost).

¹⁰³ See Floyd Norris, *Board That Made Decisions in Haste with No Questioning*, NEW YORK TIMES, June 10, 2003, at C1.

If legal sanctions are weak, companies are more likely to develop market-based substitutes.¹⁰⁴ It may be no accident that the for outside directors to own few shares has come to be seen as poor governance.¹⁰⁵

To be sure, most outside directors own far fewer shares than Mr. Belfer or the WorldCom directors. Most directors now own enough shares so that a collapse in share price will hurt their pocketbooks at least a bit, yet have only a modest fraction of their net worth invested in a company's shares. Limited share ownership relative to net worth (albeit likely more than at present) may be optimal. A director with too much financial wealth invested in a single company may be more risk-averse than shareholders would want. This problem seems intractable. If a director owns too few shares, he has limited incentive to be vigilant. If he owns too many shares, he may be vigilant but risk-averse. Providing director compensation partly through stock options rather than shares can reduce this tension, but imperfectly, because option holders' incentives can change dramatically when share price changes.

A second source of financial incentives involves director compensation. A company that performs poorly is more likely to be acquired or go bankrupt. Either way, the outside directors will likely lose their positions and accompanying income stream. This source interacts with legal rules. The increasing formal legal requirements and informal expectations for directors have led to corresponding increases in compensation, which now averages about \$64,000 annually for a large public company, with some companies over \$100,000 annually.¹⁰⁶ The present value of expected future director compensation is likely 5-10 times annual compensation, depending on the director's age and tenure.

Unfortunately, the incentive effect of direct director compensation is ambiguous. A director can lose this income stream by being too lax, but can also place this income stream at risk by being vigilant and annoying the CEO or other directors. Moreover, we want outside directors to be willing to resign their positions when the company does something they strongly disagree with, especially in situations involving aggressive accounting, conflict of interest, or other ethical

¹⁰⁴ See Marcel Kahan and Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Takeover Law and Adaptive Behavior*, 69 UNIVERSITY OF CHICAGO LAW REVIEW 871-915 (2002).

¹⁰⁵ See, e.g., Sanjai Bhagat, Dennis C. Carey & Charles M. Elson, *Director Ownership, Corporate Performance, and Management Turnover*, 54 BUSINESS LAWYER 885-919 (1999); Charles M. Elson and Robert B. Thompson, *Van Gorkom's Legacy: The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NORTHWESTERN UNIVERSITY LAW REVIEW 579 (2002).

¹⁰⁶ See *Tough at the Top: A Survey of Corporate Leadership*, ECONOMIST, ECONOMIST, Oct. 25, 2003, at 21, 22 (citing director compensation results from a Korn Ferry survey).

overtones. This makes it unclear whether higher compensation, at the margin, would enhance or weaken directors' vigilance incentives.

Given the uncertain relationship between ongoing compensation and incentives, a promising structure might involve a large up-front grant of restricted stock, options, or both, to be held until the director leaves the board, plus modest annual compensation. Yet this remains an uncommon pattern.

Indeed, share and option ownership by outside directors remains modest. We lack good current data, but a study by Bhagat, Carey and Elson found that in 1993, the median director of a large firm (S&P 500 size) held shares worth \$108,000, and options worth an additional \$45,000. This data includes inside directors, who usually own more than outside directors. Thus, it *overstates* the median ownership by outside directors.¹⁰⁷ This is a fraction of the present value of expected future direct compensation. Thus, it seems likely that direct market-based financial incentives often will not provide strong vigilance incentives.

B. Monitoring By D&O Insurers

A second potential source of market incentives for outside directors to act properly is risk monitoring by D&O insurers. If better-governed companies face lower risk of nominal liability, then companies should invest in governance to reduce their premiums. Insurers can advise them on how to do so. And if outside directors care about the company's D&O cost, they should be willing to be vigilant and otherwise improve the firm's governance.¹⁰⁸

Unfortunately, there are problems with both parts of this syllogism. First, D&O insurers routinely advise clients that securities litigation risk (the principal risk that most companies face) is not significantly affected by a firm's governance practices -- at least those practices that insurers can measure, such as the identity and background of board members, the proportion of independent directors, the existence of board committees and the like. The firm's industry, share price volatility, and trading volume matter; governance measures don't, at least not much.¹⁰⁹ To be sure, a study of Canadian firms by John Core finds evidence that D&O premia correlate

¹⁰⁷ See Bhagat, Carey & Elson (1999), *supra*, note xx, Table 5.

¹⁰⁸ See Cox (1997), *supra* note xx, at 29-35. Cox offers a more optimistic view than we do about both the deterrent effect of D&O insurance cost and the insurer's screening ability.

¹⁰⁹ See, e.g., Jonathan Dickey, Powerpoint Slides for Directors' Consortium session on D&O Insurance, Aug. 20, 2003 (Stanford, California), at 3 ("no underwriting credit [is] being extended for good corporate governance").

with "excess" CEO compensation (CEO compensation higher than that at other similar firms), which is a plausible proxy for poor board functioning in general.¹¹⁰ We have also heard anecdotal evidence that insurers press for governance changes as part of contractual negotiations over coverage limits and rates. However, these efforts appear to be primarily at the low-governance-quality end of the spectrum.

Second, D&O cost affects outside directors' incentives only indirectly, by affecting the firm's profits. This takes us back to the direct financial incentives discussed in Section A. Moreover, D&O insurance cost has only a modest effect on the firm's overall profitability. The variance in that cost based on governance would have an even smaller effect.

In short, it seems likely direct financial incentives often won't be adequate to ensure director vigilance. We therefore turn in the rest of this Part to partly or mostly nonfinancial incentives.

C. Director Concern for Reputation

A key element of directors' incentives to be vigilant is their concern for their own reputation. Much of the information on reputation is delivered by a vigorous financial press, eager to report on board missteps. Reputational risk has financial implications, including loss of future directorships and other business opportunities. But an important component is nonfinancial (what do your friends think of you, perhaps even what you think of yourself).

Like share ownership, reputation offers both gains if the company does well and losses. has both a positive and a negative side. The financial press reports on successes as well as failures; on good boards and well-run companies as well as bad ones. Directors can gain prestige, and perhaps other opportunities, if their company performs well or the board responds promptly to management problems. Other things equal, that makes reputation a more symmetric and therefore better source of incentives than actual liability, much as share ownership offers more symmetric incentives than option ownership.

1. Sources of Reputational Sanctions

Reputational gains or losses from serving as a director can partly, perhaps mostly, occur independent of legal duties or nominal liability. However, formal

¹¹⁰ See John Core, *The Directors' and Officers' Insurance Premium: An Outside Assessment of the Quality of Corporate Governance*, 16 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 449-477 (2000).

duties and nominal liability interact with reputational sanctions. Publicity risk is correlated with being sued. Adverse publicity can be reinforced by losing a lawsuit, a legal decision that criticizes the directors' conduct, or press quotes from experts who explain the legal duties that the directors may have violated.

A second source of reputational risk is direct government enforcement. Since 1990, the *SEC* has had the power to seek a court order barring someone who has committed securities fraud from serving as an officer or director of a public company "if the person's conduct demonstrates unfitness to serve as an officer or director of [a public company]." ¹¹¹ The *SEC* can also claim that an outside director violated Rule 10b-5 by recklessly ignoring signs of financial fraud, and seek an injunction against future violations, a civil penalty, or both. ¹¹² The schedule of permissible fines is complex, but a director's likely maximum exposure is \$100,000 per offense. ¹¹³ This is low enough so that the director's loss is primarily reputational rather than financial. Since 2002, the *SEC* has new, as yet unused power to impose a cease and desist order against future violations and an officer and director bar through administrative proceedings, instead of seeking a court order. The legal standard is the same as for a court order, and the *SEC*'s order can be appealed to the federal appeals courts. ¹¹⁴

Finally, the *SEC* has occasionally issued reports concluding that outside directors didn't meet their obligations under the securities laws, without seeking formal sanctions. These are a pure exercise in public shaming, intended to dissuade other directors from placing themselves in a position to be similarly criticized.

Formal *SEC* power is one thing, using it is another. The *SEC* has sought bars against persons serving as officers and directors rarely, and only against insiders who

¹¹¹ Securities Act § 20(e), 15 U.S.C. § 77t(e) (200x); Exchange Act § 21(d)(2), 15 U.S.C. § 78u(d)(2) (200x) (Sarbanes-Oxley Act § 305 lowers the standard from "substantial unfitness" to "unfitness").

¹¹² See Securities Act § 20(d)(1), 15 U.S.C. § 77t(d)(1) (200x); Exchange Act § 21(d)(3)(A), 15 U.S.C. § 78u(d)(3)(A) (200x).

¹¹³ The highest category of fines is for a violation involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," which results in a "significant risk of substantial losses to other persons." The maximum fine for this category is the greater of \$100,000 per offense or the director's pecuniary gain as a result of the violation. An outside director who acts in good faith usually won't have pecuniary gain. Securities Act § 20(d)(2)(C), 15 U.S.C. § 77t(d)(2)(C) (200x); Exchange Act § 21(d)(3)(B)(iii), 15 U.S.C. § 78u(d)(3)(B)(iii) (200x).

¹¹⁴ See Securities Act § 8A(f), 15 U.S.C. § 77h-1(f) (200x); Exchange Act § 21C(f), 15 U.S.C. § 78u-3(f) (200x) (these provisions were added by Sarbanes-Oxley Act § 1105). The judicial review provisions are in Securities Act § 9(a), 15 U.S.C. § 77i(a) (200x) and Exchange Act § 25(a), 15 U.S.C. § 78y(a) (200x).

have committed intentional fraud.¹¹⁵ Even then, the courts will only impose a bar if the *SEC* can show a likelihood that the misconduct will be repeated.¹¹⁶ This might be hard to show for an outside director whose misconduct reflects neglect rather than intent.

SEC reports criticizing outside directors are also rare. There were several in the mid-1970s, but only two in the last 25 years.¹¹⁷ The most recent involved the board of Cooper Industries in 1994 (for their failure to respond aggressively to evidence of criminal misconduct by corporate officers) and two outside directors of W.R. Grace in 1997 (principally for not ensuring disclosure of a former CEO's retirement benefits).¹¹⁸ The *SEC* was criticized for the Grace report, including a dissent by Commissioner Wallman, for its apparent opinion that outside directors couldn't safely rely on disclosure decisions made by counsel.¹¹⁹

In 2003, for the first time, the SEC brought and settled an administrative cease-and-desist proceeding against an outside director who ignored strong warning signs of financial fraud. It also brought a court action against a second director of the same company, Chancellor Corp., claiming that the director "recklessly signed [misleading financial statements] and took no care to ensure their accuracy," and

¹¹⁵ For citations to the principal cases, see X LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 4914 (3d ed. 1993).

¹¹⁶ See *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995) (reversing district court's approval of lifetime director-officer ban against an officer-director-founder because the court did not explain why repeat violations were likely without the ban); Jayne W. Barnard, *When is a Corporate Executive "Substantially Unfit to Serve"?*, 70 NORTH CAROLINA LAW REVIEW 1489-1522 (1992).

¹¹⁷ The early reports are: *Report of Investigation in the Matter of National Telephone Co.*, Exchange Act Release No. 14,380 (1978); *Report Regarding the Investigation of Gould, Inc.*, Exchange Act Release No. 13,612 (1977); and *Report of Investigation in the Matter of Stirling Homex*, Exchange Act Release No. 11,516 (1975).

¹¹⁸ See *Report of Investigation in the Matter of the Cooper Companies, Inc. as it Relates to the Conduct of Cooper's Board of Directors*, Exchange Act Release No. 35,082 (1994); *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Concerning the Conduct of Certain Former Officers and Directors of W.R. Grace & Co.*, Exchange Act Release No. 34-39157 (1997) (criticizing the conduct of outside directors Eben Pyne and Charles Erhart); *In the Matter of W.R. Grace & Co., Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Ordering Respondent to Cease and Desist*, Exchange Act Release No. 34-39156 (1997) (related consent decree finding that Grace failed to adequately disclose retirement benefits received by former CEO J. Peter Grace, Jr., as well as a proposed-but-not-completed transaction between Grace and J. Peter Grace III).

¹¹⁹ In addition to Commissioner Wallman's dissent, see Bruce A. Hiler & Ira H. Raphaelson, *When Reasonable Reliance Isn't Enough: The Evolving Standards for Board Oversight*, *INSIGHTS*, Jan. 1998, at 2 (Mr. Hiler is a former SEC enforcement division attorney).

seeking an injunction against future securities law violations. The SEC likely brought this court action because the outside director refused to consent to a cease and desist order.¹²⁰ The SEC has yet to seek a penalty against an outside director. It will be some time before we know how active, or how successful, the SEC will be in pursuing these sorts of reputational sanctions against outside directors.

2. Evidence on the Importance of Reputation

There is no direct way to measure the importance of reputation as both a reason why directors serve and an incentive for them to be vigilant. Thus, we are restricted to various indirect measures. One question on which some data exists is how reputation affects a director's prospects of becoming a director at another firm. Stuart Gilson reports that directors of bankrupt firms often resign and post-bankruptcy hold significantly fewer positions on other companies' boards.¹²¹ A similar effect seems likely for firms that undergo scandals of various sorts, but avoid bankruptcy. More subtly, Coles and Hoi report that directors of Pennsylvania firms which opted out of some or all of the extreme Pennsylvania antitakeover law got more directorships at other firms over the next 3 years than directors of firms that did not opt out.¹²²

One can also ask why directors agree to serve. Important elements include the prestige from this high-visibility position, and the opportunity for contacts with other powerful people. Directors generally want to serve on boards of well-run companies, and boards with high-profile directors. They shun the boards of troubled companies.¹²³

¹²⁰ On the cease and desist order, see *In the Matter of Michael Marchese*, Exchange Act Release No. 47732 (Apr. 24, 2003); SEC Litigation Release No. 18104 (Apr. 24, 2003). The facts stated in the order suggest recklessness but not actual knowledge. Mr. Marchese later resigned from the Chancellor board and wrote a letter to the SEC saying he suspected financial fraud. On the court action, see *Complaint, Securities and Exchange Commission v. Chancellor Corp.* (D. Mass. 2003), at www.sec.gov/litigation/complaints/comp18104.htm; Otis Bilodeau, *SEC Going After Board Members Who Ignore Corporate Misdeeds*, BLOOMBERG NEWS, Aug. 21, 2003.

¹²¹ Stuart C. Gilson, *Bankruptcy, Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control When Firms Default*, 27 JOURNAL OF FINANCIAL ECONOMICS 355-387 (1990).

¹²² Jeffrey L. Coles & Chun-Keong Hoi, *New Evidence on the Market for Directors: Board Membership and Pennsylvania Senate Bill 1310*, 58 JOURNAL OF FINANCE 197-230 (2003).

¹²³ See MYLES MACE, *DIRECTORS: MYTH AND REALITY* 105-106 (1971); JAY W. LORSCH & ELIZABETH MACIVER, *PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS* 23-26 (1989); James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations*

Beyond this admittedly sketchy data, we can offer only anecdotes. One published anecdote is William Sahlman's famous 1990 article, *Why Sane People Shouldn't Serve on Public Boards*.¹²⁴ Sahlman cites three main reasons for not serving, all flowing from lawsuit risk. In order of importance, they are harm to reputation, the time drain and "hassle" of a lawsuit, and financial risk. He complains about "frivolous lawsuits, which sap valuable time from directors and damage reputations regardless of blame." Sahlman also cites financial risk, but dismisses director protection statutes like § 102(b)(7), as addressing "only the financial risk," not the risk to reputation or time. David Skeel collects other examples of public shaming of corporate boards by activist shareholders and the business press.¹²⁵ Finally, we can offer our own effort to ask many directors and lawyers why lawsuits affect outside directors' incentives, given that outside directors so rarely face actual liability. Concern for reputation is a common answer.

D. Cultural Norms and Professionalism

Vigilance duties can also form the basis for social norms. Most directors are successful, proud professionals, who want to do a good job and in so doing, reinforce their sense of self-worth. Consistent with this view, surveys report that "opportunity to learn" and "challenge as a director" rank high, and compensation ranks low, as reasons for serving. Outside directors aren't in it for the money, or so they say.¹²⁶ These statements are self-serving, but nonetheless often right. For many directors, the opportunity cost of their time exceeds their compensation, even without the financial and nonfinancial risks created by nominal and actual liability.

Board meetings ensure that directors meet regularly with other directors as a kind of mixed business-social group, a good setting for reinforcing professional norms. Directors who serve on more than one board can transfer norms from one company to another. So can magazines aimed at directors, news stories in the financial press, director training sessions, even lawyers' advice. In short, the elements are in place for strong propagation of behavior norms.

and Legal Implications of Corporate Cohesion, 48 LAW AND CONTEMPORARY PROBLEMS 83-135 (1985), at 93-95.

¹²⁴ See William A. Sahlman, *Why Sane People Shouldn't Serve on Public Boards*, HARVARD BUSINESS REVIEW, May/June 1990, at 28-32.

¹²⁵ David A. Skeel, Jr., *Shaming in Corporate Law*, 149 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1811-1868 (2001); see also James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOKLYN LAW REVIEW 3-45 (1999).

¹²⁶ See LORSCH & MACIVER (1989), *supra* note xx, at 26-30.

These norms interact with law and with reputational sanctions (which themselves interact with law). Formal legal duties help to define what the norms are. Counsel can explain the legal duties. Reputational sanctions for breaching the norms further reinforces them.

Nominal liability can help a director who wants to do the right thing to persuade fellow directors to do likewise. So can even a bit of actual liability risk. A director can use liability as a nonconfrontational reason to oppose a dodgy action proposed by management. ("I'd like to do this, John, but it's just too risky.") Nor can the managers simply respond "don't worry about liability, you are insured and indemnified." Partly this response lacks rhetorical force. Partly the outside directors will sensibly respond -- but what if insurance runs out and the firm can't or won't indemnify me. What about my reputation? Partly this response raises the specter of liability for bad faith conduct.

E. The Nuisance Cost of Being Sued

A further incentive for vigilance is simply the nuisance cost of being sued, and especially of being deposed. The deposition itself is an unpleasant, full day, sometimes more, often plus travel. Even minimal preparation takes a second day; discovery requests are a further nuisance. Directors' aversion to being deposed interacts with actual liability risk to oneself or fellow directors. Even a small risk of actual liability for oneself or others, which can be affected by what one says at deposition, makes the deposition highly stressful, because directors fear saying the wrong thing. It also interacts with reputational concerns, as directors fear saying something embarrassing. For some directors, the time cost of a lawsuit implies a dollar cost in lost income. Still, we think it appropriate to treat nuisance cost as primarily non-financial rather than financial.

For supporting evidence, we must rely principally on anecdotes. Consider, then John Olson's lament about the litigation risk faced by audit committee members:, which focuses on reputation risk and nuisance:

None of [the defenses against actual liability] offers effective protection against the embarrassment, potential damage to reputation, and just plain distraction and harassment that come when directors are sued and forced to defend themselves.¹²⁷

Sahlman's article on *Why Sane People Shouldn't Serve on Public Boards*, discussed in Section C, provides additional evidence. The time and hassle of a lawsuit is his

¹²⁷ John F. Olson, *How to Really Make Audit Committees More Effective*, 54 BUSINESS LAWYER 1097-1111 (1999), at 1104.

second key reason for not serving.¹²⁸ A second source is the Congressional testimony, self-serving to be sure, of executives supporting the Private Securities Litigation Reform Act. They repeatedly mention the time cost of being sued and deposed.¹²⁹ Outside directors presumably feel similarly.

F. Procedural Rules and Norms

A final role of nominal liability is to establish a base of procedural norms that govern how directors should behave in recurring situations. Over the last 20 years, the Delaware courts have adopted procedural rules and expectations that push companies to have a majority of outside directors, and to have conflict-prone decisions taken exclusively by unconflicted directors. The audit committee's role in reviewing a company's financial statements has steadily increased since the 1970s, a trend that was reinforced by the Sarbanes-Oxley Act. Lawyers tell directors how they are supposed to behave, and the directors, for the most part, comply.

These procedures affect conduct, both directly and through their effect on professional norms. For every case where passive outside directors approve a management self-dealing proposal, there is another where directors reject a management proposal. For every case where passive outsiders approve a freezeout of minority shareholders at a low price, there is another where active outsiders extract most of the surplus that is there to be extracted. The recent trend towards controlling shareholders taking freezeout offers directly to shareholders, instead of negotiating with a special committee of independent directors, is a sign of the success of the special committee procedure.

An odd dynamic may be at work in corporate law, where the absence of liability frees the courts to establish stricter procedures. If a breach of the rules, judged in hindsight, were enough to establish liability, which would be insurable but not indemnifiable, that would give the courts pause in creating strict rules for director conduct. Post § 102(b)(7), however, the sanction is only an injunction plus the embarrassment of being told how one should have behaved. The reduced sanctions make stronger procedures possible.¹³⁰

¹²⁸ See Sahlman (1990), *supra* note xx.

¹²⁹ See *Private Litigation Under the Federal Securities Laws*, Hearings before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, 103rd Congress (1993).

¹³⁰ For us, a case like *Caremark*, which announced, albeit in dictum, a director obligation to monitor the firm's legal compliance, is conceivable only because directors would not face monetary sanctions if they fail to do so vigorously enough. In re *Caremark International Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

G. Directors' Mistaken Fear of Actual Liability

Finally, directors may be vigilant because they wrongly fear actual liability. The risks of being sued are high. Directors know they are insured and indemnified. But they also understand that indemnification isn't always available and that *D&O* insurance is complicated and possibly unreliable too. They have never thought through the settlement dynamics that push all sides to settle within the policy limits.

Directors rely on lawyers, the trade press, and *D&O* insurers to tell them about the risks they face. All three sources tell directors that they must be careful and vigilant and that standards are tougher than ever. These sources often stress directors' nominal liability, not the factors that limit actual liability.

Lawyers likely exaggerate the risks. As Langevoort and Rasmussen note, doing so is "a natural by-product of professional self-interest and self-definition."¹³¹ Some lawyers do not distinguish between the risks faced by inside directors for intentional wrongdoing or willful blindness, and the risks faced by outside directors for lack of vigilance. Some emphasize the risks of losing of indemnification or insurance, rather than how often coverage is actually lost or how often directors actually pay anything.¹³² Some worry about *SEC* power to fine directors, without mentioning that the maximum fines for good faith conduct are small, or that the *SEC*

¹³¹ Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 375-440 (1997); see Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEORGETOWN LAW JOURNAL 797-832 (2001), at 823-825. For an example of lawyers' pessimistic nonsense (strong words, advisedly used), see James L. Griffith & Mark J. Gundersen, *Protection from Liability in the Post-Enron Era (Part II)*, METROPOLITAN CORPORATE COUNSEL (Jan. 2001). They complain that "there is no sure protection afforded by D&O policies. In many instances you are at the mercy of the lawyers who drafts the complaint A claim of dishonesty or intentional wrongdoing can defeat your chance for coverage."). This is simply not how D&O policies work.

¹³² Dickey et. al (2003), *supra* note xx, offer a good example. They carefully review the skirmishing over D&O coverage in a number of recent high-profile cases, including Adelphia, Enron, HealthSouth, Sunbeam, Tyco, and WorldCom. *See id.* at 22-24. The directors have now been covered on all of these cases except HealthSouth, where the dispute is not yet resolved. *See* Douglas McLeod, *HealthSouth Woes Continue as Insurer Seeks D&O Rescission*, BUSINESS INSURANCE, Oct. 20, 2003. HealthSouth is not bankrupt, so the dispute is between the company and the insurers over who will pay the directors' legal fees and damages, not whether someone will pay. The authors, however, draw the ominous lesson that "just because your company has a D&O insurance policy in place, that does not necessarily mean the coverage will be there to provide protection for you". *Id.* at 3.

has never ever sought to fine an outside director for such conduct.¹³³

In writing this paper, we asked many lawyers, on both the plaintiff and defense side, about their experience. What cases did they know of where outside directors faced actual liability? A common first response was that directors face lots of risk today. When we pressed on the extent of actual, as opposed to nominal liability, a common second response was that there weren't many cases (implying that there were some), or that there were "a few" cases where directors faced actual liability. Only when we pressed for actual examples did "not many" or "a few" become no cases at all, save for *Van Gorkom* or (equivalently) "I'll have to ask my partners," plus scattered cases which turned out to involve only insiders. For defense lawyers, two cases that have merely survived a motion to dismiss (*Disney* and *Abbott Labs*) are a worrisome new trend that portends future risk.

Most outside directors are business executives. They are used to getting cautious "lawyers' advice." They likely discount the risks somewhat, and thus partly compensate for lawyers' bias. On the other hand, the outside directors' incentives are skewed enormously toward risk aversion. The directors face unknown but potentially bankrupting liability risk. Their upside is modest financial and reputational gains. On balance, risk aversion likely outweighs discounting, leading the directors to take the lawyers' exaggeration and exaggerate it further.

D&O insurers are also likely to exaggerate risk, the better to sell strong coverage. As far back as 1968, Joseph Bishop remarked on "the aggressive and imaginative propaganda of underwriters pushing [*D&O*] insurance."¹³⁴ Today, the need for *D&O* insurance is real. The insurers can offer data on the likelihood that a company will be sued in the next five years, even if it is apparently well-governed, and the likely size of damage claims. But they still have an incentive to exaggerate the risk of nominal liability -- and thus of actual liability if a director isn't insured. When these warnings are coupled with the complexity of *D&O* insurance, and lawyers' warnings about the exceptions to *D&O* coverage, directors likely hear the message that risk is pervasive and *D&O* insurance is incomplete protection.

In this story, director vigilance is a house built on the sand of director ignorance. Directors' misplaced fear of actual liability then reinforces professional norms of conduct. These norms would also weaken if directors were better

¹³³ See, e.g., Evelyn Cruz Sroufe & Michael Marron, *Why Corporate Lawyers Lose Sleep: The Impact of Some Recent Cases on Counseling Boards of Directors*, in R. FRANKLIN BALOTTI ET. AL. EDS. (2003), *supra* note xx. at 51, 53.

¹³⁴ Bishop (1968), *supra* note xx, at 1078.

informed. Overall legal incentives to be vigilant (and risk-averse) would then be larger than our story supposes.

This director-error story is surely partly right. Yet one should not overstate directors' fear of actual liability. When asked in surveys if they worry about liability, most answer yes. But only a minority worry a lot.¹³⁵ When directors are asked why they turn down additional board positions, liability risk is one factor, but generally not the most important factor. In any case, the surveys do not distinguish between fear of being sued, being found nominally liable, and being found actually liable.¹³⁶ Seriously wealthy people continue to serve as outside directors. Most outside directors, even those with significant wealth, do not shield assets through the various asset-protection trusts or other devices.¹³⁷ They could, but do not, routinely purchase personal liability insurance, to protect them against gaps in other protections against liability. And companies do not routinely offer advice to directors on personal insurance or asset protection trusts -- as they might if the risk were higher.

H. Summary

In sum, what we can call "soft" incentives, with sources in concern for reputation, sense professionalism, director culture, the nuisance cost of being sued, and the substantive effects of procedural rules, contribute importantly to director vigilance. Nominal liability, in turn, contributes importantly to these soft incentives, even without actual liability. Indeed, the lack of actual liability may foster the development of strong procedural rules and norms.

These soft incentives are imperfect. But so too is the threat of actual liability. Any assessment of the overall effectiveness of the U.S. system for encouraging directors to be vigilant would be radically incomplete without recognizing that actual liability is a part -- likely a small part -- of a larger whole.

¹³⁵ For example, a 2002 survey by McKinsey found that 22% of respondents felt "very much", and 62% felt "somewhat" that they faced "a significant risk of being held personally liable". McKinsey & Co., *The Need for Informed Change in the Boardroom* (May 2002).

¹³⁶ See LORSCH & MACIVER (1989), *supra* note xx, at 24-26. The Lorsch and MacIver survey data is from the late 1980s, which was a period of heightened director fear of liability in the wake of *Van Gorkom*. The more recent Korn/Ferry surveys cited in note 3 *supra* suggest that directors are worried about liability, but do not provide a comparative ranking of risks [**need to confirm when get full 2003 Korn/Ferry**].

¹³⁷ For example a recent article on asset protection trusts mentions doctors and executives as among those likely to create such trusts, but not outside directors. See Rachel Emma Silverman, *Litigation Boom Spurs Efforts to Shield Assets*, WALL STREET JOURNAL, Oct. 14, 2003, at D1.

In arguing that nominal liability supports soft incentives, we do not intend to suggest that the U.S. level of nominal liability is optimal. The *PSLRA* was expected to reduce the number of suits but turned out not to. The conventional non-U.S. wisdom is that the U.S. has far too many lawsuits -- and not only against directors. This might be right. We could retain significant soft incentives with many fewer lawsuits, partly because with fewer suits, the reputational effect of each would increase. Today, shareholders see many corporate and securities suits as providing mostly noise rather than a signal of management or director quality.¹³⁸

Moreover, the current level of corporate and securities litigation is expensive. The damages are mostly a wealth transfer from some investors to others. But payments to plaintiffs' and defense counsel are a net cost, as are the transaction costs of *D&O* insurance. A crude estimate of that cost might be ~\$5 billion per year. It seems plausible to us -- though unprovable one way or the other -- that we could get similar soft incentives with, say, half of the current number of lawsuits.

IV. Implications

Outside directors face a tiny risk of actual liability for good faith conduct. This weakens the vigilance incentives that legal liability is thought to provide. Direct market incentives are also limited. The soft sanctions discussed above surely help, but vigilance incentives could well remain suboptimal. Commentators sometimes lament the weak direct sanctions against directors, and propose to increase them.

We address briefly in this Part several facets of these proposals. In Section A, we ask whether it is realistically possible to expose outside directors to a meaningful risk of actual liability. We argue that powerful political and market forces stand in the way. Section B then sketches an argument for why a tiny bit of actual liability might be sensible policy.

These sections are only sketches. We leave fuller analysis to future work, which will build both on this paper and on our companion paper, *Outside Director Liability Across Countries*, which studies the liability of outside directors of public companies in three common law Australia, Canada, and the United Kingdom) and

¹³⁸ For evidence that this conventional wisdom might be partly right, see Marilyn F. Johnson, Karen K. Nelson & A.C. Pritchard, *Do the Merits Matter More? Class Actions Under the Private Securities Litigation Reform Act* (working paper 2002), available at <http://ssrn.com/abstract=349500> (finding no evidence that proxies for lawsuit merits predict the likelihood of being sued prior to the 1995 adoption of the *PSLRA*, and stronger but still mixed evidence thereafter).

three civil law (France, Germany, and Japan) countries.¹³⁹ Section *C* argues that the differences in nominal liability between corporate law and securities law are hard to justify. Section *D* discusses implications of our analysis for emerging markets that are considering adopting liability rules similar to those in the United States.

A. Is More Liability Risk Possible?

Suppose we wanted to expose outside directors to a meaningful risk of actual liability. Could we? It is difficult to see how meaningful risk would emerge from any plausible legal reform, given the powerful mediating effect of the three I's. To illustrate the obstacles, we consider "capped liability" proposals, which would cap directors' liability in various ways. For example, New York requires company-paid *D&O* insurance to include a minimum deductible and copayment. This could leave the director of a large company paying a (trivial) maximum of \$10,000 out-of-pocket.¹⁴⁰ But New York also lets a company eliminate duty of care liability in its charter, permits full indemnification for securities and other direct claims, and doesn't limit private insurance.¹⁴¹ Virginia caps corporate law damages for non willful conduct at the greater of \$100,000 or one-year's compensation, but lets a company eliminate duty of care liability in its charter, and permits full insurability and indemnification for both direct and derivative claims.¹⁴² The American Law Institute's *Principles of Corporate Governance* recommends that charter provisions be allowed to reduce duty of care liability only to the director's annual compensation from the corporation, not to zero. However, the *ALI Principles of Corporate Governance* would let a company buy *D&O* insurance without a deductible or copayment, and sometimes let them indemnify the director as well.¹⁴³ On the securities side, the ALI's proposed *Federal Securities Code* would have limited damages and costs payable by an individual defendant to \$100,000 for Exchange Act filings but would not have capped Securities Act liability. The Federal Securities

¹³⁹ Black & Cheffins (2003), *supra* note xx.

¹⁴⁰ See NEW YORK BUSINESS CORPORATION LAW § 726(a)(3) (200x) (insurance contract must provide for a deductible and copayment acceptable to the superintendent of insurance); NEW YORK CODES RULES AND REGULATIONS title 11, part 72 (2003) (for a nonindemnifiable claim against a director of a company with assets over \$20 million, the director must pay a deductible of \$5,000, plus coinsurance of 0.5% of the first \$1 million of damages).

¹⁴¹ See NEW YORK BUSINESS CORPORATION LAW § 402(b), 721-722 (2003).

¹⁴² See VIRGINIA CODE §§ 13.1-692.1 to -704 (2003).

¹⁴³ See ALI PRINCIPLES OF CORPORATE GOVERNANCE (1994), *supra* note xx, § 7.19 (199x).

Code ducks the question of indemnification and does not limit insurance.¹⁴⁴ Similar academic proposals exist as well.¹⁴⁵

None of these laws and proposals create meaningful exposure to actual liability. Moreover, constructing a tougher regime that would create meaningful exposure is fraught with difficulty. Imagine a strengthened variant of the proposal in the *ALI Principles of Corporate Governance*, in which outside directors of public companies are liable for damages up to 5 times their annual pretax compensation from the company, or roughly \$300,000 for a typical outside director of a large public company. This seems about as high a damage level as one could reasonably impose, without inducing too much risk aversion or too little willingness to serve. To enhance willingness to serve, one could apply further caps (say the lowest of lifetime director compensation from the company, 5 times annual compensation, or 10% of the director's net worth). This cap would apply to liability for non-self-interested conduct under all sources of law. The company could neither indemnify directors nor insure them against this level of liability, nor could they buy private insurance. We would permit indemnification and insurance for legal expenses, lest a director who breached no duty be bankrupted by the effort to defend himself.

This intrusive regulation has multiple problems. Here are some of the major issues that occur to us:

- What is the justification for barring directors from buying insurance, but not others in arguably similar situations of trust and responsibility (trustees, lawyers, physicians)?
- Why should we bar a company or insurer, which is liable for legal expenses that can easily reach \$10 million for a case that goes to trial, from settling a case against a director for a fraction of that amount, which the company or insurer couldn't do under this system, because it couldn't force the director to settle?
- Should we allow settlements with all funds coming from the company or insurer, say with the ostensible justification of limiting legal expense? This is a case of damned

¹⁴⁴ For the liability cap, see AMERICAN LAW INSTITUTE, FEDERAL SECURITIES CODE § 1708(c) and comment 1 (1980); David S. Ruder, Francis M. Wheat & Louis Loss, *Standards of Conduct under the Federal Securities Acts*, 27 BUSINESS LAWYER 75-93 (Feb. 1972 special issue), at 88-90 (remarks of Prof. Loss). On indemnification and insurance, see FEDERAL SECURITIES CODE § 1724(e) and comments 4-5, 7.

¹⁴⁵ See Alfred F. Conard, *A Behavioral Analysis of Directors' Liability for Negligence*, 1972 DUKE LAW JOURNAL 895-919, at 913-915 (proposing to cap directors' negligence-based liability at one year's aftertax compensation and ban indemnification and insurance); Bishop (1968), *supra* note xx, at 1091-1094 (proposing to ban indemnification and insurance against directors' liability for conduct worse than simple negligence).

if you do, and damned if you don't. If such settlements are permitted, this would vitiate the goal of creating meaningful actual liability. If they are not permitted, we would face other problems, including disguised side payments, designed to reach settlement and save on legal fees (the director pays a modest amount; the company reimburses the director indirectly, through compensation for future services).

- Directors would face fiduciary duty issues. Can a director refuse to pay \$100,000 to settle a case, and thus force the company, directly or through insurance, to spend \$10 million in defense costs?
- A capped liability rule would have to be adopted at the federal level to be effective. It would thus federalize important aspects of state corporate law, and forego the benefits of state experimentation.
- Are we confident enough in the policy judgment that mandatory limits on insurance and indemnification are desirable to override the imperfect inference that current indemnification and insurance practice is tolerably efficient, or it wouldn't be so dominant in the market?

But let us pass on these policy questions and assume such a law is adopted. It's hard to see why anyone would sue. A recovery of \$300,000 (or even 5-10 times that if there are a number of defendants) isn't enough to interest a plaintiffs' law firm, which could recover only a fraction of this amount in fees. Thus, we would need a way to pay plaintiffs' legal fees for successful suits even if damages are minimal, as a bounty for lawyers to bring these cases. But it seems decidedly odd to pay (say) \$5 million to plaintiffs' counsel, and force the defense to spend another \$10 million, all to pursue a \$250,000-\$1,000,000 claim. Moreover, who would police how much plaintiffs' counsel spent? For all the weaknesses of the current system, in which plaintiffs' counsel earns a fraction of the class recovery, their fees are at least tied to *something*, in some loosely rational way.

Moreover, the bounty would presumably have to be available only if the plaintiffs win at trial, not for a settlement. Otherwise, plaintiffs counsel will have strong incentives to settle before trial for a minimal dollar recovery, lest they lose at trial and thus lose any recovery. Defendant directors and companies will also happily settle for nominal damages before trial, to reduce both legal fees and the risk of an adverse verdict. A likely outcome would be a large payment of legal fees to plaintiffs' counsel, and a tiny payment by the director (say a fraction of one year's compensation). Investors will indirectly pay both sides' legal expenses, without the actual liability that supposedly justifies the expense. If we force cases to trial, we will also force a fair number of innocent outside directors to undergo the serious unpleasantness and time cost of a trial. Should we compensate them too? Whether

we do or not, this risk will increase director willingness risk-aversion or willingness to serve.

Another troubling feature is that such a bounty would likely have to be available only for, or at least be much larger for, suits against outside directors. Otherwise, plaintiffs' counsel will pick the low-hanging fruit and sue only inside directors. Insiders' culpability is usually easier to show, and damages will be far higher because executives are paid far more than outside directors. Suppose then that the bounty is available only for suits against outside directors. If plaintiffs' counsel sues only the outside directors, they will face dicey legal ethics issues, because suing outside directors promises higher legal fees while suing insiders promises higher damages. Some plaintiffs would sue outside directors for not catching the insiders' misdeeds while leaving the culpable insiders untouched, surely an odd result. Meanwhile, suing both insiders and outsiders would require arbitrary cost-allocation decisions, in separating legal work into bounty-eligible and ineligible components.

But onward. Suppose that we provide bounties only for suits against outside directors, and force cases to trial. We would have still other problems. We'd have to multiply the legal fees for successful cases to offset the risk of recovering nothing if the plaintiff loses. Say that of every dollar or hour invested by plaintiffs' counsel, 1/3 is for preliminary investigations or complaints that are then abandoned, while the other 2/3 is for cases that go to trial, and that plaintiffs win half of the tried cases. Then we would have to require a losing defendant to pay plaintiffs \$15 million in legal fees, even though their time charges are only a third of that. The company or insurer of a losing director(s) would now pay \$25 million in combined fees, to take a \$250,000-\$1,000,000 case to trial.

How mandatory trials would work if there are multiple defendants is entirely unclear. We would have tough allocation issues if the plaintiffs sue six directors, and win damages against two of them. And the whole system would collapse if a company hired outside directors without serious personal wealth, did not indemnify its outside directors for legal expenses beyond the mandatory indemnification required by corporate law, bought either no *D&O* coverage or a policy with low limits, and trusted that no one would then bother to sue its directors.

This dog, in short, won't hunt. We would build a highly complex system, that would require extensive regulatory oversight and tweaking to work at all. This complex system would surely create perverse incentives the designers never anticipated, and would be vulnerable to subversion and side payments. These problems arise because the system is, at its core, an effort to force plaintiffs to spend

huge dollars on legal expenses to sue outside directors, and companies to pay huge dollars to defend these suits, for a trivial dollar recovery.

We have considered here only one family of possible efforts to create meaningful risk of actual liability. But many elements of our analysis will generalize to other variations. Any increase in actual liability will have to be modest, lest directors be dissuaded from serving or become too risk-averse. Any reform will have to overcome the three I's and the market forces that support them. This will demand complex, intrusive regulation. Like any market-displacing regulation, such a system will foster evasion by companies, plaintiffs, and defendants who want to reach a mutually agreeable settlement. It will also surely create perverse incentives, which will be difficult to anticipate in advance. The regulation would have to be federal to be effective, which will make it hard to revise over time in light of experience. One has to wonder whether the effort is worthwhile, given the modest deterrence benefits to be gained from a modest amount of additional liability.

Moreover, such an effort has no natural political supporters and would face strong political opposition from plaintiffs' counsel, defense counsel, management, and directors. The last case of actual liability, in *Smith v. Van Gorkom* (1985), produced an outcry from directors and a legislative response. Before that, the basic indemnification statutes and the practice of purchasing D&O insurance were legislative and market responses to the initial emergence of apparent risk in the 1960s, largely in response to the emergence of securities fraud cases.¹⁴⁶ Any resulting legislation would likely be narrow and exception-ridden, which could leave us with the costs of a complex regulatory structure, but perhaps few of the benefits. The New York, Virginia, *ALI Principles of Corporate Governance*, and Federal Securities Code examples discussed above show how easily loopholes can gut a proposal of real-world force.

B. The Policy Logic of Tiny Liability Risk

We argued in Section A that it would be extremely hard to greatly expand outside directors' risk of actual liability. We suggest here that there may be policy logic to a barely open liability window. We first develop some reasons why the optimal level of outside director vigilance may be less than is commonly supposed.

¹⁴⁶ The basic Delaware and Model Business Corporation Act provisions on indemnification and D&O insurance were adopted in 1967; New York's provisions were adopted in 1963. On these amendments and the director outcry that produced them, see Johnston (1978), *supra* note xx, at 1995-2005; Joseph Bishop, *New Cure for an Old Ailment: Insurance Against Directors' and Officers' Liability*, 22 BUSINESS LAWYER 92-114 (1966); Bishop (1968), *supra* note xx.

We next consider why directors can have significant vigilance incentives even with zero or very low risk of actual liability.

We have neither data nor a model to offer. Still, our analysis suggests that a tiny risk of actual liability may provide a sensible balance among the multiple goals of inducing directors to be optimally diligent, capturing the vigilance benefits from making directors aware of potential liability for misconduct, yet not wanting directors to be overly risk averse, not wanting good candidates to decline to become directors, and not wanting directors to resign their positions at the first sign of trouble.

1. Does Minimal Actual Liability Risk Produce Suboptimal Vigilance?

Outside directors are part-timers. There are good reasons for this. A principal reason is that the best overseers of corporate action may well be businesspeople in the prime of their own careers, for whom running a business is a more valuable activity than overseeing someone else doing so. These directors' time is precious. If being an outside director demands too much time, they will refuse to serve, or their own boards will deny them permission to serve.

Moreover, the experience needed to oversee effectively will often come only from one's own experience. To be sure, many directors are retired from business careers, but retirement correlates with increased age, reduced ability, and reduced knowledge of the current business environment. Indeed, governance recommendations often include a retirement age of 70 or so, not much over the age when outside directors are likely to retire from their primary occupations.

A greater time commitment means that the best candidates will serve on fewer boards -- a trend we already observe.¹⁴⁷ Most governance commentators applaud this trend. We are not so sure. The wisdom to direct effectively may come partly from one's own business career, but partly from experience on other boards. A director who serves on one board and spends 200 hours per year, may not be more effective than a director who spends 100 hours on each of two boards, but brings to each the experience gained on the other.

Greater time commitment will require higher pay. This too, is of uncertain benefit. Higher pay makes it more likely that a director will care enough about losing this compensation to think twice when facing a choice between resigning and going along with a questionable decision. A director who has no (or fewer) other board positions loses diversification of his future directorship opportunities, which

¹⁴⁷ [data on declining number of board seats to come]

could increase the disincentive to rock the boat. A retired director may be especially reluctant to give up his only board seat, lest he be left with nothing productive to do, or to tell his friends about.

Greater vigilance also means more frequent and longer board meetings, more reports to the board from company officers, more officer time spent preparing reports and attending board meetings, more cautious decisions (since outside directors' incentives are skewed, likely inevitably, against taking large risks), slower decisions, and more money invested in legal advice and internal oversight mechanisms.

Some outside directors will serve on key committees, especially the audit committee, whose role has been steadily enhanced over time, and notably so by the Sarbanes-Oxley Act. Some will chair committees. As boards shrink, partly in response to beliefs about optimal governance and partly because growing time demands make it harder for companies to find suitable directors, the committee workload of each outside director grows.

In short, enhanced vigilance means more time spent on each board, more compensation, fewer other board positions, slower and more cautious decisions, and more board-derived expense. Up to some unquantifiable point, these are good things. Beyond that point, they are not. The optimal level of overall vigilance will likely be larger for big companies than for small ones. Yet at the same time the optimal level of attention to an issue of given dollar size will likely be larger for small companies than for large ones. Yet legal rules are rarely flexible enough to permit less overall vigilance at smaller companies, or less vigilance at big companies about items that are large in dollars yet small relative to company size -- such as Michael Ovitz' \$140 million severance package from Disney. Given the current pressures and time demands on outside directors in general, and audit committee members in particular, it not obvious how many public companies suffer from suboptimal outside director vigilance, despite the current near-absence of actual liability risk.

2. Vigilance Incentives Under Different Levels of Actual Liability Risk

We consider in this subsection how different amounts of nominal and actual liability are likely to affect director incentives. We begin with the extreme case of zero nominal actual liability.

Zero liability might be hard to achieve, even if we wanted to. As risk declines toward zero, directors' incentives to settle may recede; so will their willingness to insist that the company buy *D&O* insurance without deductibles, copayments, or loopholes. There will always be extreme cases that tempt judges or

regulators to invent a way around liability bars or tempt insurers to deny coverage. The *Disney* and *Abbott Labs* cases show this process in the courts; the application fraud disputes show it in the *D&O* marketplace. Thus, some risk will likely creep back in through the back door.

Vigilance incentives would exist even if directors had a rock-solid guarantee against nominal or actual liability for good faith conduct, such as section 102(b)(7) was arguably intended to provide for corporate law claims. Share ownership and important parts of the soft constraints we discussed in Part III would remain as sources of incentives.

Moreover, firms might revamp their director compensation to compensate for the lack of nominal or actual liability. Director compensation involves complex tradeoffs. Greater firm-paid share ownership means greater cost to the firm, greater incentives for directors to be vigilant, but could also lead directors to be risk-averse if they own too many shares. Moreover, directors have vastly different background wealth. Share ownership amply incents one director may be trivial for another.

At the same time, when we move from zero liability to our actual system, with substantial nominal liability but near-zero actual liability, vigilance incentives are likely to improve significantly, due to the interaction between nominal liability and vigilance incentives discussed in Part III.

Imagine beginning with optimal outside director compensation and zero liability, and adding some increment of actual liability to investors. This liability provides skewed incentives. The director gains no incentive to increase firm value; only a large incentive to avoid downside risk. In effect, the law obligates directors to sell a kind of put option to investors. This makes directors, like any put option sellers, more risk-averse. Companies will also have to pay the put option's expected cost by increasing the director's other compensation. They may decide to compensate directors partly with call options rather than shares, to offset the risk-aversion created by the liability put option. It is not apparent that a compensation package that includes a liability put option is better than one that does not. Thus, the principal value of actual liability may be for companies that otherwise wouldn't develop sensible director compensation.

Next imagine increasing the level of actual liability risk to well above current levels -- a larger implicit put option, sold by outside directors to shareholders, but paid for by the shareholders *ex ante* through higher director compensation. We will induce more effort -- but that may not be an improvement, if effort levels are already adequate on average. We will induce more risk aversion -- which is unlikely to be optimal if director compensation schemes are sensibly designed. We will likely

dissuade wealthy candidates from serving. Yet they possess one key independence attribute -- they don't mind the loss of compensation from resigning. We may, to some extent, dissuade good candidates from serving generally. Directors will be more likely resign, perhaps en masse, when a company gets into trouble -- hardly a good outcome. Large outside shareholders would have greater reason not to put their own nominees on company boards, thus weakening one source of monitoring.

Moreover, investors are not clamoring for greater outside director liability. They do not protest indemnification bylaws and zero-deductible *D&O* policies. They routinely approve section 102(b)(7) provisions. To be sure, the power of this inference is limited. Consider section 102(b)(7) provisions. There is some evidence of an adverse price effect from adoption of these provisions, even if not enough to dissuade shareholders from approving them.¹⁴⁸ Also, directors offer shareholders only the choice between eliminating liability to the maximum extent permitted by section 102(b)(7) and not limiting liability at all. Capped liability might be optimal, but shareholders are not given this option. Still, investor acceptance of indemnification, insurance, and 102(b)(7) provisions provides some evidence that investors are comfortable with a low level of actual liability risk.

In the end, actual liability may provide a net benefit for the minority of companies where directors are miscompensated, meet too seldom, and work too little. But it will likely have a net cost for companies where directors are sufficiently motivated already. We do not know how to estimate the benefits or costs of such a move. But can say that there are not obvious social gains from significantly increasing outside directors' actual liability. That, coupled with the extraordinary difficulty of doing so (Section A), may be sufficient reason not to try.

In suggesting that a tiny bit of actual liability could be optimal, we have ignored the details of how that liability risk arises -- including the body of law, the standard of care, whether liability is capped, etc. In our view, directors respond to the perception of some risk, somewhere, much more than to the details of how risk arises. The basic question that an outside director has to ask is likely to be at a high level of generality: Am I at risk from for outcomes not fully in my control? They do not know, or ask, about the different levels of risk under, say, the Securities Act versus the Exchange Act, or corporate versus securities law.

¹⁴⁸ See Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA LAW REVIEW 1-74 (1989).

C. Corporate Versus Securities Liability: Does the Pattern Make Sense?

We have suggested above that the details of where directors are nominally or actually liable are likely of second-order importance. Still, our current liability rules and practices, viewed across both corporate and securities law, reflect some puzzling policy choices. The three *I*'s aside, corporate law policy analysis, embodied in the business judgment rule, § 102(b)(7), procedural limits on derivative suits, and permissive indemnification and insurance provisions, supports protecting directors against liability for good faith conduct. The principal reasons include: liability will chill directors from taking risks, even good risks; liability will discourage good directors from serving; even expert Delaware judges aren't good at judging in hindsight whether directors acted sensibly or not; the risk of loss due to directors' good faith mistakes or omissions isn't different in kind from other investment risks that shareholders accept; this risk is one that shareholders can reasonably evaluate and protect against by diversifying.

In contrast, securities law imposes liability on outside directors for negligent (for public offerings) or reckless (for losses from market trading) failure to ensure proper disclosure. We focus here on the sharp difference between corporate law's protection of, and Securities Act liability for, ordinary negligence. Unlike corporate law, companies cannot limit securities law liability in their charters. Moreover, a non-negligent director has little chance of winning early dismissal, thanks to rules that make due diligence an affirmative defense, that is premature at the motion to dismiss stage, and fact-intensive and hence hard to establish at summary judgment. Moreover, we trust directors' fates not to expert judges, but to the hindsight-biased judgment of randomly chosen juries. The SEC then adds its own view that indemnification for negligent conduct is contrary to public policy (the courts' views are unknown).

Yet the policy concerns that underlie corporate law's limits on nominal liability, let alone actual liability, and its permissive stance on indemnification, largely apply to securities cases as well. The magnitude of harm is similar. So are the potential for investors to protect themselves by diversifying, the factors that foster director vigilance even without liability, and the reasons to worry that actual liability will make directors risk-averse or unwilling to serve.

Thus, there is a tension between corporate and securities law, especially between duty of care liability and Securities Act liability. For nominal liability, unless one wholly rejects the policy concerns that animate corporate law's limits on liability, it is hard not to conclude that the Securities Act, provides too much liability. For actual liability, the SEC's stance against indemnification for negligence-based

Securities Act liability is dubious. No sane outside director would willingly face actual liability on this basis. Yet that is the outcome the SEC apparently supports.

Moreover, actual liability risk in securities cases emerges only if the firm is bankrupt, a low-probability event that is largely not under outside directors' control. This perversely encourages directors to flee a firm at the first sign of financial weakness and gives new directors an incentive not to join such a board, perhaps reinforcing its troubles. These incentives are reinforced by possible reputational harm from having served on the board of a bankrupt company.

It is only because securities cases almost universally settle, *D&O* insurance is universally purchased, and settlement occurs with the company as primary obligor or else within policy limits, that the *SEC*'s anti-indemnification policy remains untested. It is only, we believe, because this policy remains untested that it survives. The outcry from companies and directors against this policy would be enormous -- properly so, in our view -- if it caused outside directors to face actual liability for simple lack of due diligence.

This odd outcome -- a longstanding, loony, yet untested SEC policy -- is circular in an important way. The policy increases the pressure for directors to settle by increasing the risk of actual liability if a case goes to trial. This settlement pressure helps to ensure that the policy is never tested, which then permits it to survive.

If one could build a system of outside director liability from scratch, we would likely want similar standards of care across corporate duty of care, Securities Act, and Exchange Act liability. There are, to be sure, differences among these three areas that might suggest a need for somewhat different liability standards. For example, public offerings involve a greater risk of capital misallocation than market trading. But these differences seem second order, especially since most directors will be only weakly aware of any gradations that the law creates.

In this counterfactual world, scholars would dispute what the common standard of culpability should be. But most likely, that common standard would be closer to the extreme neglect that is loosely embodied in the business judgment rule or the severe recklessness (approaching conscious awareness) that is roughly the Exchange Act standard today, than to the simple negligence standard of the Securities Act. Most likely too, given the large nuisance and dollar costs of defending a lawsuit, a consensus view would be that plaintiffs should have to make an initial showing, indicating some probability of success on the merits, to survive a motion to dismiss. Here too, this is the pattern today under corporate law and the Exchange Act; the Securities Act is an outlier.

Extending this analysis, one would want to rethink culpability standards, and what plaintiffs must show to avoid complaint dismissal or summary judgment, in other areas as well, including *ERISA* liability and control person liability under the securities laws. Nominal *ERISA* liability, in particular, is rarer than Securities Act liability, but even scarier -- the standard of care for *ERISA* fiduciaries is that of a prudent *expert*. Control person liability, meanwhile, has a pleading structure similar to Securities Act liability. It is almost impossible for non-culpable defendants to get a case dismissed quickly, because while culpability must eventually be found, plaintiffs must plead only control.

D. Implications for Emerging Markets

Outside the United States, company law reform proposals often include transplanting American fiduciary duty rules, often together with enforcement mechanisms such as derivative and class action suits. These rules are seen abroad as important to the perceived success of U.S. corporate governance (notwithstanding Enron and the like). We speculate briefly here as to the likely impact of these rules in other legal and economic environments.

Our analysis of director incentives -- including the small role of actual liability and the complex, indirect role of nominal liability -- suggests caution in assuming that a transplant will work well. To begin with, the top U.S. corporate governance issue is motivating directors to be vigilant in ensuring good management decisions and, to a lesser extent, good financial disclosure.¹⁴⁹ Good disclosure is policed primarily through disclosure rules, active analysts, and accountant and investment banker liability. Insider self-dealing is uncommon, thanks to courts that vigorously attend to duty-of-loyalty violations, criminal prosecutors with the skill to pursue complex insider trading and other self-dealing cases, and strong cultural norms against insider self-dealing. In most of the world, in contrast, the dominant concerns are financial disclosure and controlling self-dealing. U.S. concern over outside director vigilance may seem like a high-class problem to have. Different concerns may call for different legal responses.

If, despite these differences, other countries adopt U.S.-style director duties, one wonders whether they will also adopt our rules that foster nominal liability while limiting actual liability. If not, they are adopting a very different regime. Conversely, if other countries limit actual liability in the American manner, they may lack the institutions that, in the US, produce vigilance despite the low risk of actual liability? For example, the power of reputational sanctions depends on overall

¹⁴⁹ See Mark J. Roe, *Corporate Law's Limits*, 31 JOURNAL OF LEGAL STUDIES 233-271 (2002).

cultural norms in which insiders stealing from companies is really bad behavior, and outsiders allowing the theft is moderately bad. Reputational constraints will be far weaker in a country (Brazil, say, or so we have been told) where controlling shareholders expect to extract large private benefits from controlled companies and aren't ashamed to disclose their self-dealing to their friends. Reputation will also be a weaker constraint in a country with a weak financial press. That might call for stronger legal constraints.

More generally, strong securities markets are fostered by a host of interconnected legal and market institutions. Legal complements include: attorney fee rules; whether the board can control derivative lawsuits; the availability of class actions; honest and competent judges; acceptance of circumstantial evidence; and reasoned written decisions by courts. Nonlegal complements include: competitive product markets, where bad business decisions can lead to failure; accounting rules and a strong accounting profession; some legal liability for accountants and investment bankers; a vigorous business press; and a cohort of potential independent directors with reputations worth preserving.¹⁵⁰ In the United States, these complementary institutions contribute to a governance equilibrium where low levels of actual liability coexist with reasonable levels of director vigilance. For countries lacking similar complementary institutions, one should be cautious about assuming that U.S.-inspired legal rules will produce sensible outcomes.

V. Conclusion

The United States has, almost unnoticed and unintended, developed a system in which outside directors face extensive nominal liability, but nearly zero actual liability. Both market and political forces make the near-absence of actual liability a stable solution, almost irrespective of the nominal liability rules.

This system appears odd. It becomes even odder if one focuses on the details of where actual liability risk is present or absent. But it is not crazy. The limited deterrence provided by actual liability is supplemented by market incentives and by reputation and other soft incentives, which in turn are reinforced by nominal liability.

We may have a sensible level of both actual liability and director vigilance, without creating in directors too much risk-aversion or unwillingness to serve.

The stable and perhaps sensible nature of this outcome is reinforced by the comparative analysis that we undertake in our companion paper. The United States

¹⁵⁰ See Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA LAW REVIEW 781-855 (2001).

has far more nominal corporate and securities liability than any other country. Yet other developed countries, though they have far less nominal liability, and often have it in different areas of law, have similar levels of actual director liability -- almost but not quite none. As we discuss in the companion paper, this is no accident.

A subtheme of this paper is that the actual and nominal liability of outside and inside directors should be analyzed separately. The policy factors that justify very low actual liability risk for outside directors weaken for insiders. Not accidentally, insiders' exposure to actual liability is greater -- though still small. Whether insiders face a sensible level of actual liability risk is a fruitful topic for future research.

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