

Executive Compensation, the Business Judgment Rule, and the Dodd-Frank Act: Back to the Future for Private Litigation?



The Victorian wedding rhyme advising the bride to wear

*“Something old, something new
Something borrowed, something blue
And a silver sixpence in her shoe”*

is a good mnemonic device for the law of executive compensation after the Dodd-Frank Act.

The old business judgment rule remains. New shareholder votes on executive pay and golden parachutes arise. Compensation committee independence standards and compensation clawbacks are borrowed from the Sarbanes-Oxley Act. Plaintiff’s lawyers are singing the blues. And corporate executives still end up with all the silver in their shoes.

By Robert E. Scully Jr.

Not since the aftermath of the Great Crash of 1929 has the public demand for governmental regulation of executive compensation (and much more) in publicly traded stock corporations been so angry, loud, and persistent as it is today. According to John Kenneth Galbraith, that political reaction to the recent asset bubble and liquidity crisis was predictable:

Our political tradition sets great store by the generalized symbol of evil. This is the wrongdoer whose wrongdoing will be taken by the public to be the secret propensity of a whole community or class. We search avidly for such people, not so much because we wish to see them exposed and punished as individuals but because we cherish the resulting political discomfort of their friends. ... In the nineteen-thirties Wall Street was exceptionally well endowed with enemies.¹

So it is today. Bernard Madoff is a modern avatar of Richard Whitney. Both were paragons of the New York investment community who were eventually revealed as Ponzi scheme operators living sumptuously on the money stolen from their victims. Ken Lewis, the former chair of Bank of America, and Dick Fuld, the former chair

of Lehman Brothers, today face the same obloquy and have been the targets of congressional hearings similar to those conducted by the Senate Committee on Banking and Currency in the early 1930s that were directed at Albert Wiggin, the chair of Chase National Bank, and Charles Mitchell, the chair of National City Bank. The legal struggles of the executives leading Wall Street in the 1930s provide a rich and ironic historical background to today’s efforts at “regulatory reform.”

Remembering Albert H. Wiggin, Charles E. Mitchell, and George Washington Hill

In 1929, Chase National Bank’s Albert H. Wiggin received an annual salary of \$275,000. By comparison, a U.S. senator was paid \$10,000 at that time. Wiggin made an additional \$4,000,000 short selling Chase stock purchased with loans from Chase itself. When he was forced to retire after public hearings on stock exchange practices exposed his odiferous bet against his own company’s securities, the Chase board of directors nevertheless voted him a lifetime salary of \$100,000 per year.

In the November 1929 issue of *Time* magazine, National City Bank’s Charles E. Mitchell was described by Sen. Carter Glass of Virginia as the man “more responsible than all the others put together for the excesses that have

resulted in this economic disaster.² National City Bank paid Mitchell a salary of just \$25,000 in 1929.

However, the bank had an incentive system which may still hold some sort of record for munificence. After a deduction of 8 percent, 20 percent of the profits of the bank and its securities affiliate, the National City Company, were paid into a management fund. This was divided twice a year between the principal officers by an arrangement which must have made for an interesting half hour. Each officer first dropped in a hat an unsigned ballot suggesting the share of the fund that Chairman Mitchell should have. Then each signed a ballot giving his estimate of the worth of each of the other eligible officers, himself excluded. The average of these estimates guided the Executive Committee of the bank in fixing the percentages of the fund each officer was to have. ... For the full year 1928 his [Mitchell's] cut was \$1,316,634.14. 1929 was even better.³

Mitchell sold all of his National City stock to his wife at a loss of \$2.8 million and, in the process, eliminated his income tax liability for 1929. In February 1933, he candidly admitted under oath before the Senate Committee on Banking and Currency that the sale was purely for tax purposes. He was indicted for federal income tax fraud almost immediately. The prosecution team included then Assistant U.S. Attorney Thomas E. Dewey. Mitchell testified in his own defense for three and one-half days and was cross-examined for an additional two days. His defense was that he had relied in good faith on the advice of his tax lawyers. After a six-week trial at which he was defended by the legendary Max Steuer, a Manhattan jury acquitted Mitchell on June 22, 1933.

The next day, the front-page headline in the *New York Times* read: "Mitchell Cleared, Weeps at Verdict; Ovation in Court." The lead captured the feeling of the moment:

The gray and gloomy old structure downtown known as the Federal Building, scene of much human drama and tragedy in past years, has never witnessed a more dramatic scene than the acquittal of Charles E. Mitchell yesterday afternoon. A moment before the jury returned its "not guilty" verdict, it is doubtful whether a single person in the courtroom, outside of the jury box, expected an acquittal. Even the close friends and associates of Mr. Mitchell were plainly worried.⁴

Mitchell subsequently lost his civil tax case and eventually paid \$1.1 million in taxes and penalties on Dec. 27, 1939.⁵

Lavish executive compensation was as common then as it is now. In 1930, George Washington Hill, president of the American Tobacco Company, received a salary and bonus totaling more than \$1 million. Curiously, four of the five vice presidents of the American Tobacco Company received more than \$2 million each. The following year, the company adopted a stock option plan that allowed its executives to buy company stock—then trading at \$112 per share—at a par value of \$25 per share. Margin loans for the full purchase price were arranged for the executives and provided

by Guaranty Trust Company. The stock purchase options were worth \$1.1 million to George W. Hill and \$1.4 million to each vice president of the American Tobacco Company.⁶ When unhappy shareholders complained and sued to rescind the plan in the Supreme Court of New York, the case was removed to federal court; the U.S. Supreme Court dismissed the case on forum non conveniens grounds.⁷

Undaunted, the dissident shareholders sued again in the Southern District of New York and challenged the executive compensation bylaw that allocated 10 percent of the company's annual net profits as additional bonus compensation to Hill and to his five vice presidents. This time around, the shareholders fared slightly better. They obtained a temporary restraining order from the district court preventing bonus payments under the bylaw. Then, on appeal from the Second Circuit's reversal of that injunction order, the shareholders persuaded the U.S. Supreme Court that they were entitled to attempt to prove that the bonuses were "so large as in substance and effect to amount to spoliation or waste of corporate property."⁸ To this day, defense counsel for directors cite *Rogers v. Hill* for the proposition that the law of waste is the only substantive legal limit on executive compensation set by an independent board of directors.

The Business Judgment Rule and Executive Compensation in the Twenty-First Century

Not much has changed in the law of executive compensation over the last 80 years. Stephen Radin, in his comprehensive revision of the venerable treatise, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, recently devoted 170 pages to a description of the current law of director and officer compensation as developed in the state courts under the business judgment rule.⁹ As Radin puts the matter with sterling simplicity, "Where compensation is approved by a majority of a corporation's disinterested and independent directors, most courts evaluating reasonableness have utilized either a business judgment rule standard, a waste analysis, or some combination of the two."¹⁰ Radin thoroughly documents his observation that trial and appellate judges are reluctant to second-guess compensation decisions made by independent directors that appear to be good faith business decisions, rather than self-dealing or "unconscionable" gifts of corporate assets.¹¹ Radin's summary of executive compensation cases from *Rogers v. Hill* to *In re Walt Disney Co. Derivative Litigation* substantiates the well-known truism that "[t]he business judgment rule is a standard of judicial review of director conduct, not a standard of conduct."¹²

Numerous recent high-profile decisions rejected shareholders' challenges to the executive compensation packages of Michael Ovitz at Walt Disney Co., Franklin Raines at Fannie Mae, Robert Elkins at Integrated Health Services Inc., and Richard Grasso at the not-for-profit (and thus somewhat atypically state-regulated) New York Stock Exchange. All these cases were decided before 2008 under the well-worn business judgment rule—the same corporate law principle applied to the compensation plans of Albert H. Wiggin and George Washington Hill in the 1930s. The decisions thus perpetuated the laissez faire approach that has been the hallmark of judicial consideration of executive compensation packages.

One wonders how Ovitz, Raines, Elkins, and Grasso might have fared if their cases had been decided after September 2008. That is when Wall Street imploded in another liquidity crisis reminiscent of the Great Crash of 1929 and Congress began investigations into the manipulation of the markets in sub-prime mortgage pass-through securities, collateralized debt obligations, and credit default swaps. Public sentiment was running high against highly paid Wall Street executives who made millions trading before the markets tanked. Trial judges could be excused for sharing the outrage widely expressed by the media, politicians, and the public.

The Dodd-Frank Wall Street Reform and Consumer Protection Act: Executive Compensation Reform

On July 21, 2010, after almost two years of investigations, conference committee horse-trading, and filibuster threats, Congress passed and President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, which contained Subtitle E, “Accountability and Executive Compensation.” Pub L 111-203; H.R. 4173. Although this massive bill newly federalizes a great deal of corporate and securities law, the legislation largely preserves the century-old practice of adjudicating claims of directors’ liability for approving payment of excessive executive compensation under the business judgment rule.

Section 951 of the act amends the Securities Exchange Act of 1934 by adding § 14A (a)(1), which requires a shareholder vote on a “separate resolution” to approve executive compensation disclosed in accordance with the then applicable proxy solicitation rules established by the Securities and Exchange Commission (SEC). The required resolution—colloquially referred to as “say on pay”—must be included in the proxy materials not less often than once every three years. In addition, every six years the proxy materials must include another opportunity for shareholders to decide whether their votes on the mandatory executive compensation resolution should occur more often than every three years. § 14A (a)(2). Shareholders also get to vote on all “golden parachute compensation” disclosed in any required proxy solicitation material requesting shareholder approval of an acquisition, merger, consolidation, or proposed sale of all or substantially all of the assets of an issuer. § 14A (b).

Most important, the act specifically provides that these shareholder votes shall not be binding on the issuer or the board of directors of the issuer ... and may not be construed (1) as overruling a decision by such issuer or board of directors, (2) to create or imply any change to the fiduciary duties of such issuer or board of directors, (3) to create or imply any additional fiduciary duties for such issuer or board of directors, or (4) to restrict or limit shareholder proxy access to make proposals related to executive compensation. § 14A(c).

The New “Say on Pay” Resolutions: A Useful Political Tool But Useless to Plaintiffs

Will these nonbinding referendums have any impact on the potential civil liability of directors for approving alleg-

edly excessive executive compensation that the shareholders reject? Not likely. First, the act does not pre-empt state fiduciary duty law or entirely occupy the field of director liability for excessive compensation. Instead, the act focuses on the process by which public company executive compensation is set, thereby reinforcing the primacy of the business judgment rule in determining executive compensation. Second, the act makes the shareholder resolutions nonbinding and adopts rules of construction that severely limit the usefulness of the “separate resolutions” to shareholder litigants. Congress thereby preserved the classic foundation of the publicly traded stock corporation: the crucial separation of ownership and control between the shareholders and the board of directors.

The cynical trial lawyer could be forgiven for anticipating future wrangling over the relevance of nonbinding shareholder resolutions that reject executive compensation awards as evidence of misconduct by the board. The directors of a reporting corporation, when exercising their informed, good faith business judgment, must review and consider the persuasive force of a shareholder resolution—especially one mandated by a federal statute—that repudiates a compensation award. The magnitude of the shareholder majority that does not approve the compensation award would be one important consideration. So would the similarities between any executive compensation plans previously approved or not approved by the shareholders and the one under consideration by the board.

But would an adverse shareholder resolution constitute admissible evidence of gross negligence by the directors who approved the compensation award? The derivative plaintiff will argue that both the resolution and the tally of the votes for and against the resolution must be admissible because they are mandated by federal law! The directors surely will contend that the resolution is nonbinding and is, therefore, either irrelevant or unduly prejudicial to the directors whose decision is under review. A court might be tempted to admit the resolution and apply the “rules of construction” established in § 14A of the act to broadly restrict the use of the evidence in deciding whether the directors violated their fiduciary duties in setting compensation.

In practice, the issue either will not arise or will turn out to be much ado about nothing if it does arise because § 952 of the act creates a set of game-changing “Compensation Committee Independence” rules. Those rules, if followed, will completely insulate the directors of publicly traded corporations against all challenges—except claims of waste—to their business judgments regarding executive compensation. Thus, paradoxically, the Compensation Committee Independence rules in the act render the “say on pay” resolutions as useful to plaintiff’s lawyers as an ashtray on a motorcycle.

Independence of the Compensation Committee: The Key to Judicial Deference

In Delaware, for example, any board that delegates its executive compensation decisions to an “independent compensation committee” avoids “a high level of judicial scrutiny” under the business judgment rule.¹³ A shareholder

challenging a decision of such an independent compensation committee is limited to proving either that corporate assets were wasted or that the committee directors reached their decision “by a grossly negligent process that includes the failure to consider all material facts reasonably available.”¹⁴ The opinion of the shareholders as expressed in the “say on pay” resolutions is simply one of the material facts that the compensation committee must consider. The weight the committee gives the opinion—if any—is up to the members of the committee. The Delaware Supreme Court has emphatically stated that Delaware courts “do not measure, weigh or quantify directors’ judgments. We do not even decide if they are reasonable in this context. Due care in the decision making context is *process* due care only.”¹⁵

Under the act, every reporting company must establish and maintain an independent compensation committee of the board of directors as a condition of having the company’s securities listed on an exchange. That provision is copied directly from § 301 of the Sarbanes-Oxley Act of 2002, which directs the national securities exchanges to prohibit the listing of the securities of a company that does not maintain an audit committee composed of independent members of the board (among other requirements). In essence, the Dodd-Frank Act does for independent compensation committees what the Sarbanes-Oxley Act did for independent audit committees.¹⁶ The definition of “independence” found in § 952 (a)(3) of the act will be set by rules adopted by the SEC and, therefore, may differ somewhat from the flexible definition of “independence” developed in Delaware case law.¹⁷

Nevertheless, a Delaware corporation that complies with the new SEC rules governing the independence of its compensation committee members should, by doing so, also satisfy the independence standards for committee members recognized in the Delaware cases. If, as expected, the federal regulatory and state common law independence standards turn out to be substantially equivalent, reporting companies in compliance with the act should receive the extremely deferential standard of review of their executive compensation awards afforded by the business judgment rule in any derivative suit challenging their executive compensation awards under applicable state law.

Under both Delaware law and the Dodd-Frank Act, the directors of a corporation exercise business judgment, not the shareholders. The fairness or reasonableness of the amount of executive compensation set by an independent compensation committee is simply not an issue reviewable by the Delaware Chancery Court or the SEC. Even though an independent compensation committee’s failure to review and consider a “say on pay” resolution could tend to prove that a compensation award was the product of a “grossly negligent process,” the actual weight given to the resolution during committee deliberations is not relevant and is therefore inadmissible evidence in a shareholder derivative suit. As a result, the mere fact that a shareholder resolution rejected the substantive outcome of a compensation committee’s decision is not probative evidence in a breach of fiduciary duty claim against any of the corporation’s directors. Those conclusions follow directly from the fact that

“say on pay” resolutions were designed as corporate political referendums giving expression to shareholders’ views. The practical utility of such resolutions is found in their ability to persuade the incumbent directors to conform their decisions to the will of the shareholders or risk future ouster from office—not to impose personal liability on the directors for their executive compensation decisions.

The 29 states that have adopted most or all of the Model Business Corporations Act of 2005 as their general corporation statute are likely to reach the same conclusion. The Model Business Corporation Act does not contain a “codification” of the business judgment rule. However, “its principal elements, relating to personal liability issues, are embedded in [§ 8.31(a)(2)].”¹⁸ Under § 8.31 of the act, “Standards of Liability for Directors,” an independent director who is not engaged in self-dealing is not liable to the corporation for damages resulting from a decision made in good faith that the director reasonably believed was in the best interests of the corporation, unless it was the result of “a sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making (or causing to be made) appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefor.”¹⁹

This personal liability standard is indistinguishable from Delaware’s business judgment rule when applied to executive compensation decisions, as explained by the court in *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (Del. 2006). Under *Disney*, an independent director on a compensation committee would have to be almost completely clueless to be liable for a “sustained failure” of due care in setting executive compensation. If the proper processes are followed in assembling the relevant information and deliberating about it, the substance of the data and the weight given to each item are immaterial. All that matters is the integrity of the process.

Incentive Compensation Clawback Policies: The New Enforcement Gizmos

The Dodd-Frank Wall Street Reform and Consumer Protection Act expands on the compensation “clawback” concept introduced in § 304 of the Sarbanes-Oxley Act. Section 954 of the Dodd-Frank Act requires all listed companies to adopt their own internal “clawback” policies covering incentive-based compensation. The details regarding the contents of such policies will be set by SEC regulations. At a minimum, however, each policy must provide that, if the company is required to prepare an accounting restatement because of material noncompliance with any financial reporting requirement of the securities laws, the company will recover all “excess” incentive-based compensation paid to any “executive officer” during the previous three years. The excess compensation to be recovered is the amount by which the prior payments—or transfers of property, including stock options—exceeded what would have been paid under the restated financials. The excess compensation must be recovered from the

executive despite the fact that the act does not require knowledge of, or participation in, any misconduct on the part of the overpaid executive. This is a Draconian clawback remedy that makes the now passé Sarbanes-Oxley clawback seem a trifle.

Exchange-traded corporations might simply adopt a conforming policy and incorporate it by reference in the employment agreements of all “executive officers.” The corporation could then enforce the policy as a covenant of each executive officer’s employment contract. Amendment of the corporation’s bylaws is another obvious way to adopt and enforce the required clawback policy while perhaps avoiding compulsory counterclaims “arising out of” the executive’s employment contract. Bylaws are, by definition, the corporation’s internal operating rules with which all executives must comply and are enforceable by a corporation against its officers and directors as simple contracts.²⁰ Under the internal affairs doctrine, a basic choice of law rule, the law of the place of incorporation is the applicable law in a suit to enforce a bylaw.²¹ Inasmuch as the majority of listed corporations are incorporated in Delaware, that state’s law would apply in most clawback bylaw enforcement cases.

The SEC regulations and clawback drafters will need to establish important details, including answers to the following questions:

- Who are the “executive officers” covered by the policy?
- What is “incentive-based compensation?”
- Are discretionary year-end “bonuses” incentive-based compensation?
- Are future retirement benefits, payable under supplemental retirement benefit plans and calculated using incentive compensation awards, subject to forfeiture?
- If the executive contributed incentive-based compensation to a deferred compensation plan, are the investment gains in the plan subject to disgorgement?
- If gains are realized on subsequent sales of stock acquired through exercise of incentive stock options, must they be disgorged?
- Can the income tax payments made by the executive on the compensation when it was paid be offset against the recoupment claims?

Section 954 is an important development for federal trial lawyers. The Dodd-Frank Act does not create any kind of private right of action, and the federal courts have refused to imply a private right of action under the similar provisions of the Sarbanes-Oxley Act.²² The federal courts are likely to stick to their guns in finding that no private right of action has been created by these nearly identical provisions of the act. Therefore, clawback enforcement litigation is likely to be brought in a variety of state and federal courts. Because enforcement of an internal corporate policy does not seem to present a federal question, even one mandated by federal law, federal courts will be limited to deciding diversity cases and cases brought by the SEC itself. All other cases will end up in state courts.

Litigators handling these private incentive-based com-

pensation recoupment claims must be sensitive to the professional ethical issues such cases present. Accounting restatements have become increasingly common, and most current executive officers have incentive compensation plans of some kind. Now, every accounting restatement by a public company makes all the top managers immediately and simultaneously liable to the corporation for recoupment of their excess incentive-based compensation. The company’s lawyers are ethically required to clarify their roles as representatives of the corporation, advise the executives of the potential adversarial relationship between the corporation and the executives, disclose that the corporation’s lawyers cannot represent the executives personally, and advise the executives that they may want to obtain independent counsel.²³ This situation creates an unpleasant working relationship for all involved because outside counsel must continue to work with the top executives on other matters during the resolution of the recoupment claims. A committee of independent members of the board of directors will need to be created to manage the recoupment claim process, deal with the shareholder demands for prompt recovery, and approve the terms of any settlements. Sadly, the innocent executives probably face dismissal and civil litigation if voluntary repayment terms cannot be arranged with the corporation.

Congress expressed no overt concern about the transparency of the compensation recoupment process. Therefore, corporations may seek to adopt binding arbitration clauses in their clawback policies or bylaws as a way to reduce the time, expense, and publicity involved in enforcement efforts.²⁴ Indeed, it will be interesting to see what position the SEC takes on inclusion of mandatory arbitration provisions in clawback policies. If mandatory arbitration is permitted, as it has been for other Securities Exchange Act claims since 1987,²⁵ much of the enforcement could take place out of public view before specially selected neutral parties.

Both government regulators and the courts should encourage private settlements between corporations and their current and former executives regarding the terms for repayment of disputed amounts of “excess” incentive-based compensation. Those settlements may become quite complex. Executives are likely to request multiyear installment payment plans (which may not be compatible with the Sarbanes-Oxley Act’s restrictions on loans to executives), no security for repayment, and amendment of corporate and personal tax returns to recover the income taxes already paid on the “excess” compensation, not to mention broad releases of all other claims arising out of the accounting restatement.

The corporation may have legitimate economic incentives to accept some discount of the recoupment claims or consider lenient payment terms. Retention of executives who have done nothing wrong, but face recoupment anyway, will be a major consideration for the directors. On the one hand, there is always the high cost of litigation to consider (unless the corporation’s clawback policy makes the executive liable for all enforcement expenses and he or she has reachable assets) and there also may be some

risk of loss in litigating the remedy if it will be difficult to prove what the executive's incentive compensation would have been under the accurate financials. On the other hand, there is no risk of loss on the liability issue because of the no-fault nature of the recoupment claim.

If the SEC regulations or exchange listing standards impose substantive limits on permissible discounts and repayment terms, the incentives for voluntary settlements by the parties will be considerably reduced—and that would be regrettable. Presumably, the business judgment rule will apply to the independent directors' approval of the settlement terms, which will be entitled to judicial deference just like any other business decision is.

Private Executive Compensation Litigation Goes Back to the Future

As Yogi Berra would say: "It's déjà vu all over again." The Dodd-Frank Wall Street Reform and Consumer Protection Act adds the delisting sanction as the cudgel of its regulatory reform of executive compensation. Most public companies must comply, because they cannot afford to "go private" and lose access to capital markets caused by failure to create an independent compensation committee—and a clawback policy—in compliance with the SEC's rules. The act does not, however, alter the shareholder derivative litigation landscape in any fundamental way. The well-publicized convictions of William Lerach and Melvyn Weiss may have discredited the plaintiff's bar and persuaded Congress to turn to delisting and clawback of excessive incentive-based compensation, instead of tightening of fiduciary duty standards, as their preferred remedies. Perhaps Sen. Dodd, Rep. Frank, and their colleagues believed that SEC and national exchange oversight of the executive compensation process will be more consistent, coherent, and efficient than prolonged and expensive private fiduciary duty litigation would be. Clearly, the enforcement nod under the Dodd-Frank Act went to the SEC rather than to the private bar.

If congressional appropriations for the SEC are adequate to assure vigorous enforcement (despite massive federal government deficits and the potential for "regulatory capture" of the SEC rule-making process), the choice eventually may prove wise. It is hoped that SEC enforcement and oversight will be enough, because Congress did nothing to create economic incentives for the plaintiff's bar to pursue excessive executive compensation claims as derivative actions.

Future shareholder derivative suits challenging executive compensation in publicly traded corporations are likely to have the same outcomes in 2015 as they did in 1933. Judges will continue to defer to the business judgment of the independent directors. The threshold issue in every case will be whether the shareholder plaintiffs can adequately plead and prove that the board's compensation committee is not really "independent" or that "independent" does not mean the same thing to the SEC and the Delaware Chancery Court. Resolving these issues remains a near impossible feat of lawyering, just as it was during the Great Depression.

Put simply, it looks like it's back to the future for private litigation of executive compensation disputes. **TFL**

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Endnotes

¹John Kenneth Galbraith, *THE GREAT CRASH: 1929*, 154 (1954).

²Thomas F. Huertas and Joan L. Silverman, *Charles E. Mitchell: Scapegoat of the Crash?*, 60 *BUS. HIST. REV.*, 81 (1986).

³Galbraith, *supra* note 1, at 152–53.

⁴*N.Y. TIMES*, June 23, 1933, at 1.

⁵Galbraith, *supra* note 1, at 154.

⁶*Rogers v. Guar. Trust Co.*, 288 U.S. 123, 135 (1933) (Stone, J., dissenting).

⁷*See id.* at 132–33.

⁸*Rogers v. Hill*, 289 U.S. 582, 591 (1933).

⁹Stephen C. Radin, *THE BUSINESS JUDGMENT RULE, FIDUCIARY DUTIES OF CORPORATE DIRECTORS*, 900–1070 (Aspen ed., 6th ed. 2009)

¹⁰*Id.* at 906, n.2624 (extensive citations omitted).

¹¹*Id.* at 906–08

¹²*Id.* at 11.

¹³*Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 746 (Del. Ch. 2007), *appeal dismissed*, 929 A.2d 784 (Del. 2007) (unpublished).

¹⁴*Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000).

¹⁵*Id.* (emphasis in original).

¹⁶*Compare* Sarbanes-Oxley Act § 301 (15 U.S.C. § 78f (m) (3)) *with* Dodd-Frank Act § 952 (Compensation Committee Independence).

¹⁷*See In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 941 (Del. Ch. 1993) (independence is always a contextual question).

¹⁸Model Bus. Corp. Act § 8.31 (Official Comment, Note on the Business Judgment Rule at 8-65) (2005).

¹⁹*See id.* at § 8.31(a) (2) (iv).

²⁰William M. Fletcher, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 4195 (perm. ed. rev. vol. 1992).

²¹*Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

²²*See, e.g., In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230–33 (9th Cir. 2008); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779, 793 (D.C. Cir. 2008) (directors' decision not to sue CEO and COO under § 304 of the Sarbanes-Oxley Act was covered by the business judgment rule because no private right of action exists).

²³MODEL RULES OF PROF. CONDUCT R 1.13. (Comment 7).

²⁴*See, e.g., OM Group Inc. v. Mooney*, 2006 U.S. Dist. LEXIS 1446 (M.D. Fla. 2006).

²⁵*Shearson/Am. Exp. Inc. v. McMabon*, 482 U.S. 220, 238 (1987).