Managing Expectations
Does the Directors' Duty to Monitor Promise More than it Can Deliver?

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This article grapples with whether we are expecting too much from the oversight doctrine.[1] The directors' oversight duty refers to directors' responsibility to actively monitor corporate officers, employees, and corporate affairs more generally.[2] Directors breach their oversight duty when officers and employees engage in wrongdoing that causes harm to the corporation, and that wrongdoing can be attributed to directors' failure to monitor.[3] In other words, oversight liability holds directors liable for their *failure to act* under circumstances where it can be proven that directors should have acted and their actions could have prevented corporate harm.[4]

The significance of directors' oversight duty has grown at least in part because it better captures the role directors' play in the modern corporation. To be sure, directors can have both a managerial role and a monitoring role over corporate affairs.[5] However, most directors of today's public corporations are not primarily responsible for managing the day-to-day affairs of the corporation; instead, directors entrust officers and employees with managing the corporate enterprise, and thus are primarily tasked with monitoring officers and employees to ensure that they manage in the corporation's best interests.[6] The responsibilities directors undertake when carrying out this monitoring role often implicate the oversight duty.

The significance of directors' oversight duty took center stage during the financial crisis. Commentators agree that one of the primary causes of the financial crisis was that banks and other entities took on too much risk.[7] As a corollary, commentators complained that directors failed to monitor officers and employees to ensure that they were not engaging in overly risky or

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[1] The duty of oversight is also refer to as the duty to monitor. While this paper will use those terms interchangeably, it will primary refer to the monitoring duty as the duty of oversight since the Delaware case law most often describes the duty as oversight. *See* Stone v. Ritter, 911 A.2d 362, 370 (2006) (defining the necessary conditions for "director oversight" liability).

[2] *See id.*; *see also* Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 Del. J. Corp. L. 1, 14 (2001).

[3] *See Stone*, 911 A.2d at 369, 370 (referring to oversight liability as the failure to act in the face of a known duty to act).

[4] *See Stone*, 911 A.2d at 370; In re Caremark International, Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

[5] *See* Kelli Alces, *Beyond the Board of Directors*, 46 Wake Forest L. Rev. 783, 790-805 (2011) (discussing boards as monitors and managers); Lynne Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 San Diego L. Rev. 781 (2003); Jill Fisch, *Taking Boards Seriously*, 19 Cardozo L. Rev. 265, 269 (1997).

[6] *See* The Corporate Laws Committee, CORPORATE DIRECTOR'S GUIDEBOOK—SIXTH EDITION, 66 Bus. Law. 975, 985 (2011); Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 Minn. L. Rev. 541, 551 (2010).

[7] *See* Martin Petrin, *Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective*, 5 Va. L. & Bus. Rev. 433, 436-37 (2011); Robert Miller, *The Board's Duty to Monitor Risk After* Citigroup, 12 U. Pa. J. Bus. L. 1153, 1153 (2010); Robert Miller, *Oversight Liability for Risk-Management Failures at Financial Firms*, 84 S. Cal. L. Rev. 47, 50 (2010); Stephen Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. Corp. L. 967, 970 (2009); Lucian Bebchuk and Holger Spamann, *Regulating Bankers' Pay*, 98 Geo. L. J. 247, 247 (2009).

fraudulent transactions.[8] The corporate governance crisis of 2002 involving Enron and other corporate giants drew similar complaints that directors had failed to properly monitor the accounting practices within such corporations.[9] To be sure, few have suggested that directors more robust adherence to their responsibilities could have completely prevented either the financial crisis or the 2002 governance crisis. However, both crises raised important questions regarding whether corporate malfeasance and its resulting damage could at least have been minimized if directors had taken more seriously their responsibility to actively oversee corporate affairs—that is, if directors had not been "asleep at the switch." In other words, these crises suggested that better outcomes could have resulted if directors had more robustly complied with their fiduciary duty of oversight.

As a consequence, regulators and corporate governance experts have come to view shoring up directors' oversight role as critical to ensuring better corporate governance, and preventing corporate misconduct.[10] Of course, no one expects that enhancing directors' oversight role will eradicate corporate misdeeds. However, there is a belief that such an enhancement will reduce instances of abuse. Hence, there appears to be a growing desire to make the oversight role more robust to ensure that directors pay greater attention to their monitoring responsibilities so that they can be more informed regarding what is occurring within the corporation, better prepared to respond to those occurrences, and better equipped to prevent inappropriate conduct.

While this article agrees that directors must take their monitoring role more seriously, it nevertheless questions whether reliance on oversight offers false hope for those seeking to enhance corporate governance and prevent corporate misconduct for several reasons. First, the oversight doctrine may be too immature and incoherent, undermining the extent to which it can provide meaningful guidance for directors seeking to comply with the oversight duty. Second, the nearly insurmountable standard for imposing liability for oversight breaches at best may render the doctrine irrelevant for purposes of encouraging appropriate director behavior, and at worst may undermine the extent to which directors feel compelled to take their oversight role seriously. Third, even if such a compulsion exists, the size and complexity of the modern corporation may make it impractical for directors to successfully engage in oversight. Finally, the nature of directors' role in the public corporation, as outsiders serving part-time, may make it unreasonable to expect that directors have the expertise, knowledge, or capacity to effectively monitor the business affairs of large, and increasingly complex, corporations. In this respect, efforts at enhancing oversight may be doomed to failure, suggesting that it may be ill-advised to fixate on invigorating oversight as a means for enhancing corporate governance, or otherwise preventing the next corporate crisis.

Part I discusses the evolution of the oversight doctrine and its significance to corporate crises. Part II examines the manner in which Delaware courts' interpretation of the oversight doctrine may undermine its ability to encourage directors to more effectively comply with their oversight responsibilities. Part III analyzes the manner in which the nature of the modern

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[8] *See* Bainbridge, *supra* note __ at 972; Petrin, *supra* note __ at 436-437; Miller, *supra* note __ at 1154.
[9] *See* Janet Kerr, *Developments in Corporate Governance: The Duty of Good Faith and Its Impact on Director Conduct*, 13 Geo. Mason L. Rev. 1037, 1038 (2006); Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability under the Sarbanes-Oxley Act*, 55 Rutgers L. Rev. 1, 12 (2002).
[10] *See* Bainbridge, *supra* note __ at 972; Petrin, *supra* note __ at 436-437; Miller, *supra* note __ at 1154.

corporation, as well as the current expectations regarding directors' roles within the corporation, may undermine the workability of a robust oversight doctrine. Part V concludes by assessing the impact of the shortcomings associated with the oversight doctrine.

I. Oversight and the Financial Crisis

A director's oversight duty represents the duty to monitor and pay attention to corporate affairs.[11] This means that oversight liability arises as a result of inaction, as opposed to director conduct or decision-making. Oversight liability is imposed when director inattention can be viewed as allowing or failing to prevent misconduct that results in harm to the corporation.[12] Oversight raises the question, when will a directors failure to act lead to liability? This section discusses oversight, its evolution, its increased importance to the modern corporation, and the oversight issues that get spotlighted during large scale corporate crises.

A. The Growing Significance of Oversight to Directors' Role in the Modern Corporation

Fiduciary duty law has traditionally focused on two duties: the duty of care and the duty of loyalty.[13] The duty of care focuses on the attentiveness directors must have when making decisions.[14] Pursuant to the duty of care, directors are required to take actions in the best interests of the corporation, which essentially means that directors must make decisions only after being reasonably informed about the issues relevant to those decisions.[15] Traditionally, the duty of loyalty addressed situations in which directors had a conflict of interests or there was potential self-dealing by a director.[16] The duty of loyalty seeks to ensure that in those situations, directors do not place their own interests before the interests of the corporation and its shareholders.[17] Both the duty of care and the duty of loyalty essentially guide directors' behavior when they are taking some action.

By contrast, the oversight duty addresses directors' responsibility for their inaction.[18] That is, it seeks to assess whether, and under what circumstances, directors can be held liable when actions taken by employees or officers result in liability.[19]

Directors' oversight duty has gotten renewed attention precisely because it best captures the nature of directors' role in the modern corporation. Directors' role in the corporation encompasses both a monitoring responsibility as well as managerial role in which directors make specific decisions regarding corporate affairs.[20] On the one hand, directors only make decisions

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[11] *See supra* note __.
[12] *See Stone*, 911 A.2d at 370.
[13] *See* Julian Velasco, *How Many Fiduciary Duties Are there in Corporate Law?,* 83 S. Cal. L. Rev. 1231, 1232(2010) (noting that historically there were two main duties in corporate law, the duty of care and the duty of loyalty).
[14] *See* Smith v. Van Gorkom, 488 A.2d 858, 875 (Del. 1985); *see also* CORPORATE DIRECTOR'S GUIDEBOOK, *supra* note __ at 990.
[15] *See id*.
[16] *See* CORPORATE DIRECTOR'S GUIDEBOOK, *supra* note __ at 992; Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363 (Del. 1993); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Bainbridge, *supra* note __ at 585.
[17] *See id*.
[18] *See supra* note __.
[19] *See id*.
[20] *See supra* note __.

regarding discrete transactions, such as mergers and other fundamental matters that occur a few times during the life cycle of a corporation. On the other hand, as corporations have become larger and more complex, directors' monitoring role has eclipsed their managerial role because directors delegate the active management to officers, but retain the responsibility to monitor and oversee those officers to ensure that their management is consistent with the corporation's best interest.[21] The increased emphasis on director independence has encouraged and facilitated the shift towards monitoring boards because the vast majority of public company directors do not hold employment positions within the corporation. As a result, they are less likely to be engaged with the day-to-day operations of the corporation.[22] This shift towards boards as monitors not only means that modern directors have primarily taken on the role of monitors, but also means that the oversight doctrine is increasingly more relevant to directors' role within the corporation. Consequently, in many cases when corporate decisions result in loss, directors are not involved in such decisions. To the extent directors conduct can be deemed blameworthy, that conduct centers around their failure to properly monitor. Thus, assessments regarding the contours of the oversight role—and when liability attaches in that role—have grown in significance for modern corporations.

B. Oversight Comes of Age

There always has been an implicit understanding that directors have the responsibility to oversee corporate affairs, even when they are not personally responsible for such affairs. Corporate statutes provide that all corporate affairs must be managed by or under the direction of the board of directors.[23] This inherent responsibility to manage all corporate affairs has been interpreted to mean that directors have an obligation to monitor the decisions of those to whom they have delegated authority.[24]

Earlier cases recognized this responsibility, emphasizing directors' duty to be attentive to corporate matters even when they are not personally involved in such matters.[25] As one court put it, "[d]irectors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect."[26] Moreover, courts recognized that directors may be held liable for their failure to pay attention to corporate affairs when such failure could be viewed as contributing to liability-causing behavior.[27] In particular, courts have reasoned that directors' inattention is problematic not only because better monitoring can prevent wrongdoing, but also because officers and employees may be more likely to engage in misconduct if there is a perception that no one is paying attention to their actions.[28] Courts have noted that a directors' failure to act can contribute to the climate and continuation of

[21] *See id.*
[22] *See* Fisch, *supra* note __ at 269; Alces, *supra* note __ at 790; Dallas, *supra* note __ at 781.
[23] *See* Del. Code Ann. Tit. 8, § 141(a) (2010); Model Bus. Corp. Act § 8.01(b) (2009).
[24] *See* Model Bus. Corp. Act § 8.30 (b) (noting that directors must devote attention to their oversight function).
[25] *See* Briggs v. Spaulding, 141 U.S. 131, 147 (1891); Francis v. United Jersey Bank, 432 A.2d 814, 829 (N.J. 1981) (citing earlier cases, and noting that directors were "under a continuing obligation to keep informed about the activities of the corporation," and to "monitor corporate affairs and policies").
[26] *See id*.
[27] *See id*. at 44.
[28] *See id*.

wrongdoing, and thus can represent a substantial reason for the corporate loss resulting from such wrongdoing.[29] In this regard, courts have acknowledged the importance of directors' duty to pay attention, and have been willing to hold directors liable for breaching that duty. Nevertheless, Delaware courts did not formally consider the nature and scope of directors' oversight responsibility until 1963.

When the Delaware Supreme Court initially addressed the issue, the Court acknowledged directors' oversight responsibility, but set the bar for compliance so low as to render the oversight doctrine largely irrelevant. In *Graham v. Allis-Chalmers Mfg. Co.*, several employees of Allis-Chambers Manufacturing Co. ("Allis-Chambers") were found to have violated federal antitrust laws related to price fixing, resulting in liability to the corporation. [30] The Delaware Supreme Court concluded that there was no evidence that the directors had any actual knowledge of illegal activity, or that the directors had knowledge of facts that should have put them on notice about such activity.[31] Nevertheless, shareholders brought suit alleging that directors had breached their fiduciary duty by failing to take steps designed to put them on notice of illegal activities by company employees.[32] The Court began by acknowledging directors' duty to supervise corporate affairs—their oversight duty.[33] However, in the Court's view, this duty did not require directors to actively monitor the corporation and seek to ensure that officers and employees did not engagement in wrongdoing.[34] Instead, directors had the right to rely on the honesty and integrity of their subordinates until something occurs to put them on notice of wrongdoing.[35] The Court reasoned that because the Allis-Chambers directors had no knowledge of illegal activity, and had no reason to suspect such activity, they could not be held liable for breaching their oversight duty. As the Court phrased it, "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."[36] The notion that directors had no responsibility to monitor corporate actions unless they had reason to suspect wrongdoing, often referred to as being confronted with "red flags," meant that the oversight duty required relatively passive conduct from directors. The *Graham* court therefore recognized the oversight duty, but did not require directors to exert any affirmative effort to comply with it.

In the 1996 case of *In re Caremark International Inc., Derivative Litigation*, the Delaware Chancery Court breathed new life into the oversight duty, not only making clear that the responsibility existed, but also making clear that directors had an affirmative obligation to comply with that responsibility.[37] In *Caremark*, the Delaware Chancery Court had to review a proposed settlement of a derivative suit. The underlying suit involved claims that directors of Caremark International, Inc. ("Caremark") had breached their monitoring duty by failing to uncover illegal actions by Caremark employees who had violated federal and state laws regulating health care providers, resulting in Caremark having to make some $250 million in

[29] *See id*.
[30] *See* 188 A.2d 125, 127 (1963).
[31] *See id.*
[32] *See id.* at 127, 129.
[33] *See id*. at 130.
[34] *See id.*
[35] *See id.*
[36] *See id*.
[37] *See* 698 A.2d 595.

reimbursement payments.[38] Shareholders claimed that "directors allowed a situation to develop and continue which exposed the corporation to enormous legal liability and that in doing so they violated a duty to be active monitors of corporate performance."[39]

In reviewing the settlement, the Chancery Court took the opportunity to revisit directors' oversight duties, and reassess the applicability of *Graham*. The court focused on several modern trends that had developed after *Graham*. The court discussed various federal laws that incentivized corporations to establish information systems aimed at detecting violations of the law.[40] The court also considered the significant legal and economic impact such violations had on corporations, often resulting in the payment of millions of dollars in damages.[41] In addition, the court recognized that the Delaware Supreme Court recently had made clear the seriousness with which the law viewed the role of the corporate board through several opinions. In those opinions, the Delaware Supreme Court not only had chastised boards for failing to perform their duties to be sufficiently informed regarding corporate affairs, but also had demonstrated a willingness to hold them liable for breaching their duties.[42] In light of these and other modern trends, the Chancery Court concluded that *Graham* could no longer be interpreted to mean that boards could comply with their oversight responsibility by being passive, or otherwise only acting upon suspicion of wrong doing. Instead, the Chancery Court stated that a "broader interpretation" of *Graham* was necessary.[43]

The *Caremark* court argued that boards could satisfy their fiduciary duty to monitor corporate affairs only if they had established an information system designed to provide directors and senior officers with accurate and timely information about those affairs.[44] This duty is often referred to as the *Caremark* duty. Under *Caremark*, directors breached their oversight duty when plaintiffs can show "either (1) that the directors knew or (2) should have known that violations of law were occurring, and in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of."[45] The *Caremark* court did warn that liability would result only from a "sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists."[46] In this respect, *Caremark* proclaimed that directors' oversight duty encompassed an active duty to establish information systems aimed at monitoring corporate conduct, but suggested that the test for liability would be demanding.

Caremark altered the landscape with respect to oversight. The decision spurred the development of internal control systems and more robust compliance efforts.[47] *Caremark* also increased expectations regarding directors' role in overseeing corporate compliance with laws

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[38] *See id*. at 960, 967.
[39] *See id*. at 967.
[40] *See id*. at 969-970.
[41] *See id.*
[42] *See id.*
[43] *See id*. at 969.
[44] *See id*. at 969-970.
[45] *See id*. at 971.
[46] *See id*. at 971.
[47] *See* Rebecca Walker, *The Importance of Board Oversight of a Company's Compliance Program: Implications of* Stone v. Ritter, 1703 PLI/Corp 403, 405 (2008) (noting Caremark's substantial impact on compliance programs)

and business performance.[48] Nevertheless, because it was a decision by the Delaware Chancery Court (and it purported to reassess, if not overturn, a decision by the Delaware Supreme Court), there was some uncertainty regarding the scope and applicability of *Caremark*. Ten years later, the Delaware Supreme Court finally took the opportunity to clear up this uncertainty.

In the 2006 case of *Stone v. Ritter*,[49] the Delaware Supreme Court essentially affirmed *Caremark*, making clear that directors have an affirmative obligation to monitor the employees and agents who act on the corporation's behalf. In *Stone*, shareholders brought a derivative suit alleging that directors had breached their oversight duties by failing to install an appropriate information and reporting system for anti-money laundering violations by company employees.[50] Because of such violations, the corporation had to pay $50 million in fines and penalties.[51] No fines and penalties were imposed on directors, and the plaintiffs acknowledged that directors had no knowledge of the employees' activities, nor were directors aware of any "red flags."[52] Nonetheless, the plaintiffs claimed that directors should be held liable for their failure to monitor.

In assessing the plaintiffs' claims, the Delaware Supreme Court formally approved the *Caremark* standard, agreeing that directors had a monitoring responsibility that required them to establish a reporting system aimed at keeping them informed about the corporation's compliance with the law and its business performance.[53] The Court also agreed that directors could incur liability even when they were unaware of misconduct, if it could be shown that directors had failed to put into place policies and procedures aimed at providing them with information about company activities. The *Stone* court held that in order to demonstrate that directors had breached their oversight duty, it must be established that "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[54] To be sure, as Part II will illuminate, the Court set a high hurdle for establishing oversight liability. However, the Courts' pronouncement left no doubt that corporate directors have an affirmative responsibility to pay attention, and to the extent their lack of attention makes it easier for misconduct to occur, or avoid being detected, directors may be held responsible for breaching this responsibility.

C. Oversight, Corporate Misconduct, and the Financial Crisis

The most recent financial crisis triggered renewed attention on the board's oversight duty.[55] Many commentators agree that one primary cause of the financial crisis was that banks

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[48] *See* Walker, *supra* note __ at 405 (noting that *Caremark* created a much keener awareness of the importance of board oversight).
[49] *See* 911 A. 2d 362.
[50] *See id*.
[51] *See id*. at 365. AmSouth and AmSouth Bank paid $40 million in fines and $10 million in civil penalties to resolve government and regulatory investigations.
[52] *See id*. at 364, 365.
[53] *See id*. at 368-369.
[54] *See id.* at 370 (emphasis in original).
[55] *See* David A. Katz, *Risk Management and the Board of Directors—An Update for 2012*, 1931 PLI/COP 147, 149 (2012) (noting that worldwide financial instability have caused issues to be "front and center"); Bainbridge, *supra* note __ at 968; Miller, *supra* note __ at 1154; Petrin, *supra* note __ at 436; Miller, *supra* note __ at 50.

and other entities engaged in excessively risky transactions.[56] Such commentators also agree that boards' lax oversight may have enabled corporations to engage in such risky transactions.[57] Indeed, while management bears responsibility for risk management, boards have responsibility for instituting appropriate risk management procedures, and ensuring that those procedures are being properly executed.[58] In order to effectively carry out this responsibility, boards must have sufficient appreciation of the various risks facing corporations, and must establish and actively oversee programs aimed at ensuring that those risks are being properly managed.[59] When corporations engage in overly risky activities, it raises the possibility that boards have failed in this endeavor. Hence, many shareholders and other commentators have suggested that corporations took on too much risk *because* the board failed to remain informed about the company's risk exposure, and failed to take steps aimed at preventing excessive risk-taking.[60] To be sure, the financial crisis had many causes, and there were some risks that may have been unavoidable.[61] Nevertheless, there is agreement that more effective board oversight of risks at the very least may have mitigated the crisis, and prevented some of the more significant losses both to the corporation and the boarder society.[62] As a result, the financial crisis spotlighted issues surrounding board oversight, particularly oversight of risks.

Similarly, the corporate governance crisis associated with Enron and Worldcom raised concerns about the adequacy of boards' adherence to their oversight duty. Evidence related to that crisis suggested that directors did not have sufficient knowledge of their company's accounting practices, or of the information contained in their company's financial statements and other public disclosure documents.[63] Thus, those governance crises created growing concern that directors' failure to monitor corporate transactions, and their failure to employ safeguards against accounting shenanigans and other misdeeds, contributed significantly to governance failures.[64] Former Delaware Supreme Court Chief Justice Norman Veasey argued, that "the main corporate governance failure in this period was the lassitude and indifference of some boards of directors who were not pro-active in their oversight and strategic roles."[65]

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[56] *See* Miller, *supra* note __ at 1153; Miller, *supra* note __ at 50; Petrin, *supra* note __ at 436-37; Bainbridge, *supra* note __ at 970; Bebchuk and Spamann, *supra* note __ at 247.

[57] *See* Bainbridge, *supra* note __ at 972; Petrin, *supra* note __ at 436-37; Miller, *supra* note __ at 1154.

[58] *See* Bainbridge, *supra* note __ at 969-970 (explaining the process of risk management); Katz, *supra* note __ at 149-150.

[59] *See* Bainbridge, *supra* note __ at 969-970. As Bainbridge notes, corporations face many different types of risk, and must make decision related to identifying, preparing for, preventing, and responding to risks.

[60] *See* Bainbridge, *supra* note __ at 968; Michelle Harner, *Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis*, 5 J. Bus. & Tech. L. 45, 48-52 (2010); Eric Pan, *A Board's Duty to Monitor*, 54 N.Y. L. Sch. L. Rev. 717, 718 (2010). Bainbridge has noted that risk management failures too many forms from boards that failed to institute any risk management system to those that failed to have a complete understanding of their company's risk profile. *See* Bainbridge, *supra* note __ at 972 (discussing surveys in which more than half of those surveyed blamed lax oversight of risks as a major contributing factor to the financial crisis).

[61] *See* Steven Davidoff and David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 Administrative L. Rev. 463 (2009).

[62] *See* Miller, *supra* note __ at 50; Miller, *supra* note __ at 1154.

[63] *See* Fairfax, *supra* note __ at 12-13.

[64] *See id*; E. Norman Veasey, *Policy and Legal Overview of Best Corporate Governance Principles*, 56 SMU L. Rev. 2135, 2138 (2003).

[65] *See id*. at 2136.

These crises have shoved oversight into the spotlight, and sparked a desire to ensure that directors take their oversight responsibility more seriously.[66] Many consider that shoring up directors' oversight role is critical to preventing corporate governance failures because if boards can put in place effective information systems, they can serve as an important check on officer and employee misbehavior. In their view, relying on oversight seems like an ideal way to control corporate risk-taking, minimize corporate misconduct and fraud, and improve corporate governance generally.[67]

II. Oversight in the Courts: Immature, Incoherent, and Irrelevant?

While enhancing board oversight duties may be an admirable goal, the current state of the oversight doctrine, as well as courts' current conception of the doctrine, may severely hamper achievement of that goal. As an initial matter, it is possible that the relative newness of the doctrine may make it difficult to use it as a guide until more time has passed. The relative incoherency of the doctrine also may pose challenges for its ability to provide meaningful guidance to directors seeking to determine how best to comply with the oversight duty. Finally, courts may have fashioned a liability standard that fails to appropriately encourage directors to comply with their oversight duties, potentially rendering fiduciary duty law irrelevant for purposes of shoring up directors' oversight obligations. As this Part will discuss, these defects in the development and articulation of the oversight doctrine do not bode well for efforts at enhancing board oversight.

A. Immaturity as a Stumbling Block

The oversight doctrine is in its infancy, which means it is still evolving, making it more challenging to pinpoint the precise contours of directors' oversight responsibilities. It has been less than twenty years since the Delaware Chancery Court first pinpointed the elements associated with an oversight duty, and less than ten years since the Delaware Supreme Court announced its acceptance of *Caremark* as the appropriate framework for assessing oversight. Even in that time, courts' assessment regarding oversight responsibility and liability has evolved. As Part IIB will reveal, the doctrine has gone from being apparently firmly established in the duty of care, to being classified as both a duty of loyalty and a duty of good faith.[68] The fact that the court has evolved in its treatment of the oversight doctrine may stem, at least in part, from the fact that it takes some time for courts to establish the precise contours of new doctrines. While this is certainly understandable, it also means that new doctrines may be in flux, making it more challenging for directors to draw lessons from such doctrines.

Indeed, courts have raised questions about the range of activities for which directors can incur oversight liability. For example, in *In re Citigroup Inc. Shareholder Derivative Litigation*, the Delaware Supreme Court appeared to indicate that oversight liability could not be extended to board inattentiveness related to business risks.[69] As a result, some commentators have

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[66] *See* Anne Tucker Nees, *Who's The Boss? Unmasking Oversight Liabililty Within the Corporate Power Puzzle*, 35 Del. J. Corp. L. 199, 204 (2010); Pan, *supra* note __ at 718.
[67] *See* Miller, *supra* note __ at 1154.
[68] *See infra* note __ and accompanying text.
[69] See In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 123 (Del. Ch. 2009).

interpreted *Citigroup* to exclude oversight claims based upon directors' failure to monitor business risks.[70] Others disagree, insisting that while the court created a high burden for such claims, it nevertheless left open the possibility for them.[71] This disagreement, which may stem in part from the fact that the doctrine is continuing to evolve, underscores the uncertainty regarding the scope of the oversight doctrine, which may undermine the ability to confidently use it as a guide for director behavior. Indeed, if directors cannot incur oversight liability for business risks, it may undermine their willingness to increase their monitoring efforts with respect to such risks.[72]

The newness of the doctrine also means that optimal best practices related to the doctrine may not have emerged, particularly with respect to risk management. To be sure, several key groups have generated best practices for directors' oversight of business risks.[73] However, these best practices are still evolving, and thus a clear consensus regarding them has not yet emerged.[74] Importantly, there exist many different models for measuring and assessing risks, all of which have limitations.[75] Then too, the optimal risk management model varies depending on the type of entity and its risk appetite.[76] Moreover, while some directors have an understanding of the risks facing their companies, many others have acknowledged that they do not have a clear appreciation of their companies' risk profile and practices.[77] Of course, directors are seeking to gain a better awareness of corporate risks, and to do a better job of managing those risks. They also are seeking out guidance that would enable them to better engage in risk management. However, because the oversight doctrine is young and continues to evolve, along with best practices in this area, it may take some time before we can expect that doctrine to provide effective guidance for directors seeking to more effectively engage in risk oversight.

B. The Coherency Conundrum

Unfortunately, as the oversight doctrine has evolved, problems with coherency have emerged, which problems could undermine its effectiveness. These problems stem in large part from the Court's decision to change gears regarding how best to classify the *Caremark* duty of oversight.

The *Caremark* court clearly analyzed the oversight duty under the duty of care. The *Caremark* complaint charged directors with a breach of their duty of care, characterizing directors' breach of their duty of attention as a breach of the duty of care in the ongoing operations of the corporation's business.[78] The *Caremark* court accepted this characterization,

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[70] *See* Pan, *supra* note __ at 738.
[71] *See* Miller, *supra* note __ at 96; Bainbridge, *supra* note __ at 979.
[72] *See* Pan, *supra* note __ at 226-228.
[73] *See* Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management—Integrated Framework* (2004); Gregory Monahan, *Enterprise Risk Management: A Methodology for Achieving Strategic Objectives* 12, 122 (2008) (discussing Basel II and risk management).
[74] *See* Bainbridge, *supra* note __ at 970; Betty Simkins & Steven Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 Loy. U. Chi. L. J. 571, 592 (2008).
[75] *See* Miller, *supra* note __ at 60; Bainbridge, *supra* note __ at 970.
[76] *See* Bainbridge, *supra* note __ at 970.
[77] *See id*. at 972.
[78] *See Caremark*, 698 A.2d at 967.

referring to directors' failure to monitor as a breach of their duty of care.[79] The court also specifically distinguished claims related to the oversight duty from claims involving "director self-dealing, or the more difficult loyalty-type problems . . ."[80] Thus, there is no question that the *Caremark* court considered the duty of oversight to be a care-based one, and not one implicating a loyalty breach.

However, when the Delaware Supreme Court ultimately purported to approve *Caremark*, it re-characterized the oversight duty as a duty of loyalty.[81] The *Stone* court reasoned that *Caremark* required proof of bad faith conduct. The *Stone* court based this reasoning on language in *Caremark* indicating that a lack of good faith was a necessary condition to liability for an oversight breach.[82] The *Stone* court then insisted that bad faith required conduct "qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care . . ."[83] As a result, the *Stone* court held that because a showing of bad faith conduct "is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty."[84] Hence, the Court reframed the oversight duty as a duty of loyalty even as it purported to affirm *Caremark*. In so doing, as one observer notes, the *Stone* court "ripped the *Caremark* claim from its original home in the duty of care and reinvented it as a duty of loyalty."[85]

The fact that the *Stone* court purported to affirm *Caremark*, while drastically re-characterizing it, enabled the Court to avoid providing a clear explanation for that re-characterization. The avoidance has implication for future efforts at interpreting the oversight doctrine. One the one hand, commentators who have sought to interpret the Courts' re-characterization tend to agree on at least two primary rationales, both of which suggest a desire to enhance shareholders' ability to impose personal liability on directors. First, some argue that the re-characterization was driven by a desire to avoid the protection from liability provided by state exculpatory statutes, such section 102(b)(7) of the Delaware General Corporation Law.[86] Such statutes enable corporations to create charter provisions that limit or eliminate shareholders' ability to hold directors liable in money damages for breaching their fiduciary duty.[87] However, such statutes do not allow for such limitations with respect to breaches of the fiduciary duty of loyalty.[88] Thus, corporations that have opted into the protections afforded by exculpatory statutes can shield directors from care, but not loyalty breaches. As a consequence, shareholders previously were prevented from holding directors personally liable for breaching their duty of oversight under such charter provisions.[89] Placed in this context, the shift from

[79] *See id*. at 971.
[80] *See id*.
[81] *See Stone*, 911 A.2d at 431.
[82] *See id*. at 369.
[83] *See id*. at 369.
[84] *See id*. at 370.
[85] Bainbridge, *supra* note __ at 975.
[86] *See* Bainbridge, *supra* note __ at 597 (noting that Delaware's exculpation provision seemed to be driving the court's analysis" in *Stone*); Thompson, *supra* note __ at 551.
[87] *See id*.
[88] *See id*. Thus, while Delaware 102(b)(7) enables corporations to exculpate directors for monetary liability for breaching their fiduciary duty, liability cannot be eliminated for violations of the duty of loyalty. *See* Del. Code Ann. Tit. 8, § 102(b)(7) (2001).
[89] *See* Regina F. Burch, *"Unfit to Serve" Post-Enron*, 42 Val. U. L. Rev. 1081, 1094 (2008) (noting that limits under Delaware's 102(b)(7) exculpatory charter provisions applied to Caremark claims).

characterizing oversight as a care duty to one based in loyalty may be viewed as an effort to increase the potential for personal liability by avoiding the protections of exculpatory statutes. [90] This view seems particularly plausible given that the shift occurred in the midst of concerns that directors were not being held sufficiently accountable for their failure to effectively monitor corporate misconduct.[91]

Second, many hypothesized that the re-characterization was driven by the desire to side-step the protections of the business judgment rule, which also increases the potential for personal liability. In order to prove that directors have breached their duty of care, shareholders must overcome the presumption of the business judgment rule, which presumes that directors actions are in good faith and consistent with the corporation's best interests.[92] Overcoming this presumption is extremely difficult. Thus, empirical evidence reveals that care breaches resulting in personal liability are very rare, due in large part to the protections afforded by the business judgment rule.[93] However, while care breaches are analyzed by reference to the business judgment rule, loyalty breaches are not. By classifying oversight breaches as loyalty breaches, such breaches lose the protection of the business judgment rule, and thus appear to be more susceptible to personal liability.

However, both of these hypothesis seem inconsistent with the courts' rhetoric, creating confusion regarding how best to interpret the oversight doctrine. Indeed, the court's rhetoric both in *Caremark* and *Stone* strongly indicates the desire to limit the extent to which directors can be held personally liable for oversight breaches. In *Caremark*, the court called a claim for oversight liability "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[94] The *Stone* court reiterated this point, confirming the desire to severely curtail personal liability in this area.[95] In this respect, the rhetoric appears to diverge from potential explanations of the courts' re-categorization, creating lack of clarity for the oversight doctrine.

The shift also seems inconsistent with the traditional understanding of the loyalty and care doctrines, potentially creating confusion and incoherency with respect to those doctrines. Oversight claims seems more suited to a care-based analysis. Indeed, the care-based duty to remain informed seems more closely aligned with the oversight duty because that duty relates to the obligation to establish systems aimed at keeping directors informed. By comparison, the oversight duty bears no real resemblance to traditional loyalty claims. Loyalty cases typically

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[90] *See* Bainbridge, *supra* note __ at 975. Professor Bainbridge does note, however, that the high standards established by the *Stone* court effectively replicated directors' insulation from monetary damages. *See id*. at 976.

[91] *See* Claire Hill and Brett McDonnell, *Disney, Good Faith and Structural Bias*, 32 J. Corp. L. 833, 847-848 (2007); Renee M. Jones, *The Role of Good Faith in Delaware: How Open-Ended Standards Help Delaware Preserve its Edge*, 55 N.Y. L. Sch. Rev. 499, 510 (2010/2011).

[92] See CORPORATE DIRECTORS GUIDEBOOK, *supra* note __ at 551; *Aronson*, 473 A.2d at 812; Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360-61 (Del. 1993).

[93] *See* Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 Tex. L. Rev. 591, 591 (1983); Henry Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 Del. J. Corp. L. 971, 982 (1994); Joseph Bishop, *Sitting Ducks and Decoy Ducks, New Trends in the Indemnification of Corporate Directors and Officers*, 77 Yale L.J. 1078, 1099 (1968). *See also* Black, et. al, *Outside Director Liability*, 58 Stan. L. Rev. 1055 (2006). Of course, indemnification as well as D&O insurance also account for the rarity of personal liability associated with duty of care claims.

[94] *See Caremark*, 698 A.2d at 967.

[95] *See Stone*, 911 A.2d at 372.

involve a director having some conflict or otherwise receiving some financial benefit that is later stripped from him or her. Yet *Stone* extends loyalty into a realm where directors receive no benefit, and otherwise have no particular conflict of interests. Given loyalty's historical framework, classifying oversight as a duty of loyalty violation is "quite odd."[96] The oddness decreases the ability to consistently analyze an oversight claim.

The court's analysis also raises questions about the reach of the business judgment rule in the context of oversight claims. As a general matter, it was understood that the business judgment rule had no applicability in at least two settings: (1) an unconsidered failure to act by directors because directors cannot be said to exercise judgment when they have not acted, and (2) in the context of duty of loyalty breaches because directors cannot be presumed to act in good faith or otherwise in the corporation's best interests when they are confronted with transactions in which they may receive some personal benefit or have some conflict.[97] At first glance, the oversight breach seems to implicate both of these settings, and hence the business judgment rule appears to have no applicability to such a beach. However, courts have left this issue in some flux. Indeed, because the oversight breach does not involve issues regarding self-interest, those breaches leave open the possibility that the business judgment rule can be applied even though the breach is characterized as one involving loyalty. Moreover, courts have reasoned that once a board establishes an information and reporting system, the level and detail of the system is the subject of business judgment.[98] Such reasoning indicates that the business judgment rule remains relevant when analyzing breaches of oversight, even when there appears to be a failure to take action. At least one court has confirmed this possibility, insisting that directors continue to be afforded the protection of the business judgment rule when assessing whether they have breached their oversight responsibilities.[99] Other commentators similarly have suggested that directors remain protected by the business judgment rule when courts evaluate the appropriateness of their oversight.[100] The potential confusion surrounding whether the business judgment rule has a role to play in oversight breaches only underscores the incoherent state of the doctrine, undermining its predictability.

Adding to the overall confusion, the *Stone* court characterized the oversight duty as a duty of good faith. In so doing, the court appeared to be closing a loop-hole in the fiduciary duty doctrine. While the concept of good faith is not new, as a matter of fiduciary duty law it was relatively unexplored, and often subsumed under either the duty of loyalty, or the duty of care. In the 2006 case of *In re Walt Disney Co. Deriv. Litigation*, the Delaware Supreme Court suggested that directors had a seemingly independent duty of good faith, but left open the question regarding whether that duty was entirely distinct from the traditional duties of loyalty and care.[101] The *Stone* court addressed this question in three ways. First, the *Stone* court argued that the oversight duty represented a breached of the duty of good faith.[102] As indicated in the earlier discussion, the *Stone* court reasoned that this conclusion was compelled by *Caremark's* heavy reliance on concepts of good faith. Second, the *Stone* court insisted that good faith did not

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[96] *See* Stephen Bainbridge, et. al, *The Convergence of Good Faith and Oversight*, 55 UCLA L. Rev. 559, 585 (2008); *see id*. at 597 (referring to the court's reinterpretation of oversight as a loyalty duty as "simply shoddy.")
[97] *See supra* note __; Bainbridge, *supra* note __ at 975.
[98] *See Caremark*, 698 A.2d at 970.
[99] *See* Desimone v. Barrows, 924 A.2d 908, 935 (Del. Ch. 2007).
[100] *See* Katz, *supra* note __ at 151.
[101] *See* 906 A.2d 27 (Del. 2006).
[102] *See Stone*, 911 A.2d at 369.

represent a separate duty.[103] Third, the *Stone* court reasoned that the duty of good faith should be viewed as a subset of the duty of loyalty, and that one of the ways in which good faith could be breached is through an oversight failure.[104] In other words, a breach of the duty of oversight represents a breach of the duty of good faith, which in turn represents a breach of the duty of loyalty.

This rather convoluted analysis of oversight raised more questions than it answered. What other types of ways could directors breach the duty of good faith? What other categories of loyalty breaches existed? If good faith and loyalty are the same, how should one view Delaware's exculpatory provision which specifically pinpoints both doctrines? Indeed, the *Disney* court had suggested that good faith and loyalty were distinct *because* Delaware's exculpatory statute contained a carve-out for both kinds of conduct.[105] As a result, conflating the two seems potentially problematic. Also, as indicated in the earlier discussion, since both good faith and loyalty breaches cannot be limited under a corporation's exculpatory provision, should oversight breaches be more susceptible to claims for personal liability? It is not clear how these questions should be answered.

The fact that the oversight doctrine has been left in a somewhat confusing state undermines its strength, jeopardizing the ability to use it as a guide for assessing corporate behavior and liability for that behavior. As one commentator notes, the Court's reinterpretation of *Caremark* failed "to set forth clearly the new rules of the game."[106] In so doing, the Court generated confusion about the precise standards that apply to directors' conduct, the manner in which directors meet those standards, and the extent to which those standards can and should result in liability.[107] Such confusion undermines efforts at making the doctrine more robust.

C. Trending Towards Exoneration and Irrelevance

Even if directors can determine the nature of the conduct that renders them liable, many have raised concerns about the possibility that the oversight doctrine may fail to encourage directors to comply with their oversight duty in any meaningful manner.

At the outset, courts have repeatedly emphasized the high hurdle shareholders must cross in order to prove an oversight breach. Indeed, courts have been clear that only a "very extreme set of facts" would lead to a finding of oversight liability.[108] Moreover, as noted earlier, the *Caremark* court referred to an oversight claim as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[109] The *Stone* court repeated this reference, suggesting that the burden for proving a breach of oversight may be almost insurmountable.[110] Indeed, given that duty of care breaches almost never result in personal liability, referring to an oversight claim as the "most" difficult theory suggest that it will be virtually impossible for oversight breaches to result in personal liability for directors.

[103] *See id*. at 369-70.
[104] *See id*. at 370.
[105] *See Disney*, 906 A.2d at 27.
[106] *See* Bainbridge, *supra* note __ at 598.
[107] *See* Nees, *supra* note __ at 205-06.
[108] *See* In re Lear Corp. Shareholder Litigation, 967 A.2d 640, 654-55 (Del. Ch. 2008).
[109] In re Caremark Int'l Inc. Derivative Litig., 698 A,2d 959, 967 (Del. Ch. 1996).
[110] *See Stone*, 911 A.2d at 436.

The *Stone* court then added to this burden by requiring proof of scienter for oversight liability. When *Stone* recast the oversight claim as a good faith duty, it also insisted that such a duty required scienter—a showing that directors knew or should have known that they were disregarding their duties. [111] As one court put it, "director liability for failure to monitor required a finding that the directors acted with the state of mind traditionally used to define the mindset of a disloyal director—bad faith—because their indolence was so persistent that it not be ascribed to anything other than a knowing decision not to even try to make sure the corporation's officers had developed and were implementing a prudent approach to ensuring law compliance."[112] At the pleading stage, this scienter element means that shareholders must plead particularized facts showing that directors consciously disregarded an obligation to be reasonably informed, or consciously disregarded the duty to monitor and oversee the business. This poses difficultly because shareholders must prove a culpable state of mind based on inaction. "Short of requiring intent to inflict actual harm, one can hardly imagine a more demanding liability standard."[113] Indeed, as one commentator explained it, "unless the director's failure to act was the product of deliberation (which takes the matter outside of the duty to monitor), no records, witnesses, or other readily available pieces of evidence will be available to inform a court whether the board's failure to act was an act of carelessness or disloyalty."[114] As a result, courts must be willing to draw inferences from a board's inaction. However, the inferences courts appear willing to draw all flow in a direction that seems to avoid holding directors liable for their monitoring efforts. Hence, courts seem willing to infer good faith, or at least a lack of bad faith, so long as directors have made any effort at implementing a monitoring system.[115]

The result is that, as applied, the scienter-based standard appears to practically guarantee that directors will escape liability for oversight claims. Under *Caremark* and *Stone*, there are essentially three ways in which shareholders can establish that boards have breached their oversight duty: (1) an unconsidered failure to establish a system, (2) a failure to monitor the established system, and (3) the failure to respond to red flags.

With one notable exception, the first type of breach is largely irrelevant as applied to most modern corporations. This is because the vast majority of public corporations, by virtue of federal law and other practices, have a monitoring or internal control system in place with the purported goal of bringing material information to the attention of directors.[116] Hence, most oversight suits are not based on claims involving the failure to institute an information system.

Instead, shareholders suits typically contend that the system directors installed is inadequate, or otherwise that directors have failed to properly monitor the system.[117] However, because proving scienter or bad faith is so difficult, almost any monitoring effort, however, minimal or formulaic, appears to prevent a showing of bad faith. Thus, courts have indicated that a showing of bad faith will not result from demonstrating that directors monitoring efforts

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[111] *See* Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 240 (2009); *Stone*, 911 A.2d at 370.
[112] *See* Desimone v. Barrows, 924 A.2d 908, 935 (2007).
[113] See Petrin, *supra* note __ at 456.
[114] *See* Pan, *supra* note __ at 210.
[115] *See Desimone,* 924 A.2d at 940 (noting that the plaintiff needed to demonstrate facts suggesting that directors knew about the inadequacy of internal controls, but chose to ignore them); *Wood*, 953 A.2d at 143 (suggesting that plaintiffs needed to demonstrate that directors knew or participated in wrongdoing); Pan, *supra* note __ at 734-35.
[116] *See* Walker, *supra* note __.
[117] *See* Pan, *supra* note __ at 733-38 (describing oversight cases after *Stone*).

were inadequate, flawed, or represented a sharp departure from best practices.[118] Instead, only when directors "completely" or "utterly" fail to take any actions aimed at monitoring corporate conduct would they be liable for breaching their duty of good faith.[119] In other words, courts appear to measure breaches of oversight based on "how far above nothing" directors' actions fall.[120] The result is that it is rare for shareholders to successfully plead an oversight claim, and almost unheard of for shareholders to successfully hold directors liable for breaching their oversight duty.[121] In this regard, the cases after *Stone* highlight the ease with which directors can comply with their duty as well as the seemingly insurmountable burden shareholders bear when seeking to hold directors liable for breaching that duty.

In fact, to date the only post-*Stone* case in which directors were found liable for breaching their oversight duty is the exception that proves the rule, demonstrating that only when directors completely abandon their monitoring duties will they be liable for breach. In that case, the directors made absolutely no attempt to establish a reporting and information system, and had not even considered such a system.[122] Moreover, directors entirely deferred to others in matters relating to corporate business.[123] The court found directors liable for breaching their oversight duty because they "did nothing to make themselves aware of blatant misconduct or to stop it."[124] This case seems to underscore the notion that only when directors effectively abdicate their monitoring responsibilities will they be found liable for breaching them.

Importantly, this burden does not get any easier when shareholders seek to demonstrate oversight liability by virtue of a failure to respond to red flags. As an initial matter, there is considerable disagreement regarding what even constitutes a red flag.[125] More importantly, courts have argued that liability can only be found when red flags are either "waived in one's face or displayed so that they are visible to the careful observer."[126]

Collectively, these cases underscore the difficulty of holding directors liable for breaching their oversight duty. To be sure, a review of cases that hold directors liable for breaching their duty of care reveal that such liability is extremely rare.[127] Based on courts' current assessment of oversight, liability in that area will be rarer still, with virtually no cases imposes liability on directors for their inattention.

Of course, there may be good reasons for courts' reluctance to hold directors liable for breaching their oversight duty. First, courts historically have been reluctant to second-guess directors' business decisions by holding them liable when those decisions result in losses.[128]

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[118] *See* Robert Thompson, *The Short, But Interesting Life of Good Faith as an Independent Liability Rule*, 55 N.Y.L. Sch. L. Rev. 543, 550-551 (2010/2011).
[119] *See Lyondell*, 970 A.2d at 243-244.
[120] *See* Thompson, *supra* note __ at 550.
[121] *See* Pan, *supra* note __ at 216.
[122] *See* ATR-KTM ENG Financial Corporation v. Araneta, 2006 WL 3783520 (Del. Ch. Dec.21, 2006), aff'd 930 A.2d 928 (Del. 2007).
[123] *See* Araneta, 2006 WL 3783520, at *20.
[124] *See id*.
[125] *See* Sale, *supra* note __.
[126] *See Wood*, 953 A.2d at 143.
[127] *See supra* note __.
[128] *See* Bainbridge, *supra* note __ (discussing rationale for business judgment rule, and courts reluctance to second-guess directors). As one court notes, Delaware Courts give "great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and 'will not substitute [its] views for those of the board if the latter's decision can be 'attributed to any rational business purpose.'" Paramount

Courts are mindful that directors have been entrusted with making business decisions, some of which may, upon hindsight, appear foolish, unwise, or extremely risky.[129] If courts hold directors liable for such decisions, they may inappropriately replace their judgment with those of directors who have greater business experience. They also may inappropriately undermine directors' willingness to make risky decisions, many of which may prove beneficial to the corporation.[130] Thus, courts historically have adopted a standard that enables directors to made decisions in good faith, and seeks to avoid second-guessing those decisions. Such a standard appears to certainly apply when courts must determine whether directors exercised appropriate judgment about the best monitoring system to establish. Second, one can imagine that if courts are reluctant to hold directors liable for flawed or shoddy actions, they would be even more reluctant to hold them liable for inaction. Third, holding directors liable for oversight runs the risk of making directors guarantors for large corporate losses. Courts have repeatedly emphasized that no monitoring system is foolproof, and hence that we cannot and should not expect that a system will eradicate corporate wrongdoing.[131] Unfortunately, it is all too tempting to conclude that if a company suffers loss as a result of a business risk or illegal activity within the corporation, directors should have done more, and thus should be liable for breaching their oversight duty. Courts must set a standard that protects against this temptation, or courts run the risk that every instance of wrongdoing will result in oversight liability for directors.

Regardless of the legitimacy of these rationales, the high hurdle that must be cleared in order to hold directors liable for breaching their oversight responsibilities may mean that fiduciary duty law will not be able to play a significant role in ensuring directors' vigilant adherence to their oversight responsibilities. The relatively low threshold for satisfying the oversight duty may fail to encourage directors to monitor in a more robust fashion. Instead, such a threshold poses a danger that companies will structure their oversight policies around the minimum requirements needed to satisfy the court's liability standard.[132] Even more troubling, some have worried that courts' oversight standard may actively undermine directors more robust compliance with their oversight responsibilities. One commentator has noted that courts' refusal to hold directors liable for oversight failures has encouraged boards to be uninformed.[133] Because the scienter-based standard suggest that directors may only be found liable for conduct when there is evidence of their specific disregard of their duties, the current conception may incentivize directors to avoid asking questions or otherwise gathering information about potential problematic actions so as to avoid the paper trail or record of their actions that cold lead to a finding of liability.[134] In her consideration of the impact of *Caremark* on board behavior, Professor Arlen concludes that *Caremark* has not induced active oversight by directors, nor does

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Communications, Inc. v. QVC Network, 637 A.2d 34, 45 n. 17 (Del. 1994) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).
[129] *See supra* note __. *See* Gagliardi v. TriFoods International, 863 A.2d 1049, 1052 (Del. Ch. 1996).
[130] *See* Bainbridge, supra note __; *Supplying the Adverb: the Future of Corporate Risk Taking and the Business Judgment Rule*, 6 Berk. Bus. L. J. 216, 218 (2009).
[131] *See Stone*, 911 A.2d at 373.
[132] *See* Katz, *supra* note __ at 152 (warning that companies should not create risk management policies around the minimum requirements needed to satisfy the business judgment rule).
[133] *See* Pan, *supra* note __ at 210 (noting that the Delaware court's current conception of oversight "rewards ignorance and passivity by directors, imposing little obligation on them to take an active interest in the corporation's business.")
[134] *See* Pan, *supra* note __ at 210.

it provide any substantial deterrence.[135] Consistent with this conclusion, by potentially undermining the extent to which directors feel compelled to comply with their oversight responsibilities, Delaware courts may have rendered the oversight doctrine largely irrelevant.

To be sure, many have argued that fiduciary duty law can have an impact on corporate behavior even when courts do not hold directors liable for breaching their duty. Indeed, the Delaware Supreme Court has insisted that there is a distinction between standards of liability and standards of conduct, suggesting that even when a directors' conduct is insufficient to warrant liability, it nevertheless may fall short of what is deemed best practices and thus be considered problematic.[136] Consistent with this reasoning, commentators insist that Delaware law serves an important signaling function, signaling directors, officers and their advisors regarding the most appropriate standards of conduct.[137] Commentators insist that this function operates irrespective of legal liability, and may be the primary function of Delaware law. As a result, the fact that Delaware law fails to impose liability for oversight breaches does not undermine its ability to shape director conduct. Instead, Delaware law continues to inform behavior by setting a standard of conduct clearly higher than the liability standard.

On the one hand, it is clear that court cases have had an impact on the increased recognition of directors' oversight duty, as well as the increased recognition that directors need to establish information and reporting systems in order to comply with that duty. The court's language in *Caremark* spurred the development of corporate internal control systems. *Caremark* and its progeny also likely sparked the development of best practices in this area. Thus, it would be a mistake to suggest that court pronouncements do not have an impact on the corporate environment in general, and director behavior in particular.

However, it also would be a mistake to suggest that the high hurdle for liability in this area does impact the manner in which directors' compliance efforts develop, and does not have the potential for undermining the strength of those efforts. Indeed, the issue regarding oversight is not whether directors must establish an information and reporting system—courts have been clear with respect to such an obligation, and courts have been clear that directors' failure to establish any such system could lead to liability. Instead, the issue is how effective must those systems be? It is this issue that courts' refusal to impose liability may impact in a negative fashion.

Indeed, because courts have made clear that they will impose liability only in those situations where directors fail to establish a system, or otherwise fail to take *any* action, there is reason to be skeptical regarding the ability of courts to take on a signaling role that motivates behavior beyond the minimum requirements associated with that liability. First, even if court signaling or sermonizing is enough on its own to shape director conduct, the high standard courts have established for proving oversight liability means that many cases are dismissed at the pleading stage.[138] Such dismissals undermine the extent to which courts have the opportunity to

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[135] *See* Thompson, *supra* note __ at 556.
[136] *See* Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) (noting that "aspirational ideals of good corporate governance practices for boards . . . do not define standards of liability")
[137] *See* Claire Hill and Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 Va. L. & Bus. Rev. 333, 354 (2009); David Skeel, *Shaming in Corporate Law*, U. Pa. L. Rev. 1811, 1829 (2001); Melvin Eisenberg, *Corporate Law and Social Norms*, 99 Colum. L. Rev. 1253, 1270 (1999); Edward Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009, 1016 (1997).
[138] *See* Pan, *supra* note __ at 216.

engage in appropriate signaling. Second, the high burden for demonstrating oversight liability may dissuade shareholders from bringing meritorious claims, thus denying courts the opportunity to sermonize about them.[139] Third, it is not clear that court "sermonizing" or signaling can encourage appropriate behavior without some possibility of liability not only because the lack may send a mixed message, but also because most commentators agree that extralegal measures must be combined with legal liability to be truly effective. Indeed, how should directors interpret the courts signal when courts repeatedly insist that their conduct is not worthy of punishment, but yet is somehow still blameworthy? Then too, studies suggest that extralegal measures may be insufficient on their own to impact corporate behavior.[140] Instead, some form of personal liability must supplement them in order to be truly effective.[141] Finally, one has to question whether courts are truly interested in a signaling role, particularly with respect to oversight. Putting aside that thus far courts have created a relatively convoluted roadmap from which directors are supposed to receive guidance related to oversight, courts also seems to have ducked, rather than confronted, important issues related to oversight liability.   This can be seen in recent cases in which courts have chosen to leave open the issue regarding whether business risks should be the subject of directors' oversight duty, rather than affirmatively settle it.[142] All of these issues raise doubt regarding the courts' signaling function, while increasing the possibility that courts' failure to impose liability for oversight breaches may undermine their ability to play a role in ensuring more effective compliance with the monitoring role.

III. The Workability of the Oversight Doctrine

Even if directors desired to better comply with the oversight doctrine, that task may prove difficult for several reasons. The size and complexity of the modern corporation may render oversight of that corporation extremely challenging.   The inherently broad scope of the oversight duty also may make it unmanageable. More importantly, boards may not have the capacity to effectively perform their oversight obligations, particularly when viewed in light of other demands on their time, and their independent status. This Part discusses these hurdles.

A. Challenges Associated with the Size of Modern Corporations

The sheer size of the modern corporation makes the oversight task difficult. Indeed, the court in *Graham* specifically pinpointed the practical limitations of holding directors responsible for overseeing large corporations. The company in *Graham* employed more than 31,000 people, had 24 plants, 145 sales offices, and 5000 dealers and distributors.[143] The court argued that the "very magnitude of the enterprise required [directors] to confine their control to the broad policy decisions."[144] The court also reasoned that the very extent of the corporation's operations made it impractical for directors' to be able to effectively monitor the actions of the corporation and all

[139] *See* Pan, *supra* note __ at 211 (noting concern that the bad faith standard may undermine plaintiffs desire to bring forward meritorious duty to monitor claims).
[140] *See* Fairfax, *supra* note __ (citing studies).
[141] *See id*.
[142] *See Citigroup*, 964 A.2d at 126; In Re The Goldman Sachs Group, Inc. Shareholder Litigation (Del. Ch. 2011).
[143] *See Graham*, 188 A.2d at 128.
[144] *See id.* at 130.

its various divisions.[145] This practical limitation prompted the court to severely restrict the ability to hold directors liable for an oversight failure. In this regard, *Graham* specifically recognized that the nature of a large enterprise undermined the extent to which we could expect directors to actively perform their monitoring responsibilities.

While modern courts have expanded the oversight doctrine, the size issue has severely constrained expectations regarding director oversight. To be sure, directors' oversight responsibility has been limited to ensuring that they establish an information system aimed at keeping directors abreast of corporate operations, and then monitor that system.[146] Hence, the oversight duty does not require that directors have intimate knowledge about all of the activities occurring within a corporation. In fact, the *Caremark* court indicated that it would simply be inconsistent with the scale and scope of modern organizations to expect directors to have detailed information about all aspects of a corporation's operations.[147] However, this observation begs the question—what should we expect from directors in light of the corporation's size? Courts seem to suggest that our expectations should be very low, at least with respect to liability for oversight. Thus, it appears that so long as directors have some system in place that (a) on paper appears aimed at informing directors, (b) delegates responsibility to officers, and (c) relies on those officers for periodic reports regarding material events, directors have met their oversight duty.[148] In this respect, courts appear to have allowed the size of modern corporations to significantly constraint their expectations regarding board oversight.

While this response to the size issue may appear inappropriate, the size issue does raise real questions about whether and to what extent we can expect directors' oversight duty to improve corporate governance because the size issue appears to limit expectations regarding directors' ability to garner the information necessary to be active monitors of corporate conduct and misconduct. A similar observation can also be made about managers. Indeed, it is certainly the case that we expect the CEO and other managers to have the capacity to effectively manage the far-flung operations of most modern corporations, and thus to overcome the size issue. However, this does not negate the relative complexity of such management. Moreover, managers are familiar with the day-to-day operations of the corporation, and thus may be better equipped to grapple with the challenges associated with staying on top of the affairs of enterprises that are national, and often international, in scope. The same is not true of directors, and thus greater attention must be paid to how the size issue should impact directors' oversight, or we run the risks of either expecting too much, or believing we can expect very little.

B. Oversight as Beyond the Scope

It is also possible that the scope of the oversight duty is so broad that it may be unmanageable. The very fact that oversight imposes liability on directors for what they have failed to do makes it difficult to define its scope.[149] Even without a precise scope, we know that the responsibility covers many more actions than those covered by the duty of care or the duty of loyalty. As one scholar noted, "[t]he universe of all actions not taken is *always* far greater than

[145] *See id.* at 128.
[146] *See Caremark*, 911 A.2d at 971.
[147] *See Caremark*, 911 A.2d at 971.
[148] *See* Thompson, *supra* note __ ; *Stone*, 911 A.2d at 373.
[149] *See* Pan, *supra* note __ at 210-211.

the roster of actions taken."[150] Because the oversight duty covers this universe, it is potentially far-reaching, which directors could find unworkable.

Of course, there is some suggestion that the oversight duty only extends to legal compliance, which could narrow the scope of the duty. In *Citigroup*, the Delaware Supreme Court suggested that oversight only involved monitoring to ensure legal compliance, and that *Caremark* was not designed to hold directors liable for failing to properly evaluate and monitor business risk.[151] If this suggestion is accurate, then the duty may be more manageable, particularly because directors may be able to rely on counsel and well-established legal compliance departments to help them meet their responsibilities. Of course, even if the oversight responsibility was limited solely to legal compliance, there are a vast number of laws for which the corporations must comply, and thus the potential oversight of that compliance is very broad.

Then too, others have suggested, and even advocated for, an oversight duty that includes monitoring for business risks. In fact, there is good reason to believe that *Caremark* extends beyond monitoring for legal compliance. The *Caremark* court noted that the board had a responsibility to put into place a system aimed at providing information regarding events within the corporation "so that judgments could be made *both* with respect to corporation's compliance and its business performance."[152] Then too, although *Citigroup* appears to question the wisdom of extending oversight liability to cases involving oversight of business risks, it nevertheless concedes the possibility of an oversight claim related to business risk "under some set of facts."[153] Moreover, many contend that the oversight duty should extend to business risks. Professor Stephen Bainbridge notes that there is no doctrinal reason why *Caremark* claims cannot extend to suits implicating lax monitoring of business risk.[154] Indeed, as Professor Bainbridge notes, some best practices guides either link or conflate oversight of legal compliance with oversight of risks.[155]

On the one hand, there are many good reasons for insisting that directors' monitoring duty does and should extend beyond oversight of legal compliance. On the other hand, such an extension only increases the tasks for which directors are responsible for monitoring. Like the issue with respect to corporate size, however, we need to grapple with how directors can best accomplish this task given its tremendous breadth. One solution may be to narrow the duty to particular kinds of business risks over which directors already have some additional role, such as accounting matters or compensation. Regardless of the potential solution, it is possible that the oversight doctrine is unworkable without some effort at narrowing its scope.

C. The Capacity of a Director

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[150] *See* Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 Bus. Law. 1477, 1485 (1984).
[151] *See Citigroup*, 964 A.2d at 131. *See also* Pan, *supra* note __ at 212 (noting that the court had effectively "closed the door" on duty to monitor claims involving a board's failure to monitor business risk).
[152] *Caremark*, 698 A.2d at 969-70 (emphasis added). *See also* Pan, *supra* note __ at 213 (noting that *Caremark*'s provided for a rationale for an expansive monitoring duty covering "a broad range of legal and business harms to the corporation").
[153] *See Citigroup*, 964 A.2d at 126.
[154] *See* Bainbridge, *supra* note __ at 968.
[155] *See id.* at 980.

It also is not clear that directors have the capacity to effectively engage in oversight in light of their increasingly broader responsibilities. Boards have been tasked with increasingly greater responsibilities in recent years from overseeing compensation packages and structure, to more actively monitoring the director election process and engagement with shareholders.[156] These tasks, if performed effectively, require significant amounts of work and time commitment. Thus, empirical evidence confirms that directors have increased the amount of time they spend on board matters. Such evidence reveals that meetings are running longer, and boards are meeting more frequently.[157] This increased time commitment has implications for effective board oversight because boards may be spreading themselves too thin by seeking to accomplish an increasingly wider range of tasks.

Indeed, effective oversight demands that boards devote even more time to carrying out their responsibilities. Thus, best practices emphasize the need for directors to meet more often with key members of management to gain insights about material actions and operations.[158] Best governance practices also require boards to engage in more periodic review of corporate policies and procedures so that the oversight effort is an ongoing one.[159] This increased time commitment raises questions about whether directors realistically have the capacity to meet their new obligations.

This is especially true when one considers that the burden of carrying out these tasks often falls on a subset of the board. Indeed, many corporations delegate the oversight task to the audit committee. [160] However, many of board reforms focus on enhancing the work of the audit committee. For example, Sarbanes-Oxley required the audit committee to have more oversight of the corporation's financial statements and auditing process.[161] As a result, the work of the audit committee increased, which increase was reflected in an increase in the number of hoers directors spent serving on the audit committee.[162] Thus, in 2010, the audit committee met nearly twice as often as the next most active committee of the board.[163] The average size of an audit committee is three directors. This means that we are expecting that a small number of already over-burdened directors will be able to carry out an ever-broadening array of demanding tasks.

To be sure, the fact that these increased responsibilities require directors to devote more time to their fiduciary responsibilities does not negate the importance of those responsibilities, or otherwise suggest that those increases are not legitimate. However, it does raise serious questions about whether directors can effectively tackle their duties.

D. Independence as a Hurdle

The emphasis on independent directors also raises several important questions regarding directors' ability to effectively perform their oversight responsibilities. The vast majority of

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[156] *See* Fairfax, *supra* note __.
[157] *See* SpencerStuart, 2011 SPENCER STUART BOARD INDEX 26-27 (2011), available at http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI2011.small022212.pdf.
[158] *See* Katz, *supra* note __ at 152-155
[159] *See id* (discussing best practices with respect to risk management).
[160] *See* Walker, *supra* note __ at 413; *Disney*, 906 A.2d at 67.
[161] *See supra* note __.
[162] *See id*.
[163] *See* SpencerStuart, 2010 SPENCER STUART BOARD INDEX 27 (2010), available at http://content.spencerstuart.com/sswebsite/pdf/lib/ssbi2010.pdf.

public company directors are independent, which means that they do not have an employment relationship with the corporation on whose board they serve.[164] Recent studies reveal that most public corporations have only one or two inside directors on their board.[165] While the shift towards increased director independence occurred because of concerns that boards dominated by insiders would not be effective monitors,[166] the shift raises concerns about whether such boards can perform their oversight responsibilities.

First, the fact that directors are independent increases the likelihood that they may not be able to devote sufficient time to their duties. Independent directors by definition are part-time directors. Recent surveys reveal that the average director of a public corporation devotes about 192 hours per year (16 hours per month) to board and committee work, including travel.[167] This averages about four hours per week.[168] In 1982, when directors worked an average of three hours per week, [169] one commentator insisted that "No human being can stay on top of all this in a major company on a one-and-half-day-a-month basis."[170] While the number of hours directors devote to their board work has increased slightly, their responsibilities have risen dramatically, making this sentiment even more appropriate for today's director.

Second, directors' independence raises other critical timing consideration. Independent directors have outside responsibilities, including full-time jobs. Indeed, many corporations have active CEOs or COOs on their board. Although there has been a steady decline of such directors on public boards, twenty-four percent of companies have active CEOs or COOs on their board, while another nineteen percent of directors are corporate executives such as division presidents.[171] Then too, nearly one-third of audit committee chairs are either active CEOs or CFOs, while twenty percent of compensation chairs are active CEOs.[172] Moreover, only twenty percent of directors are retired; the remaining directors are active executives and professionals.[173] These statistics show that directors have significant employment obligations outside of the company on whose board they serve. Directors' active involvement in other matters may provide them with important expertise and experience, but it also raises concerns about their ability to devote sufficient attention to their board duties. Because directors have full-time jobs elsewhere, they may not have the time to develop a meaningful understanding of the challenges facing their corporations.[174] Then too, directors' part-time status not only limits the extent of their interaction with other directors and management, but also limits the time they

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[164] *See* Korn/Ferry Institute, *supra* note __ at 4 (noting that on average, only 2 out of 10 directors are full time employees).
[165] *See id*.
[166] *See* Sanjai Bhagat and Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. Corp. L. 231, 231 (2002), William B. Chandler III, *On the Instructiveness of Insiders, Independents and Institutional Investors*, 67 U. Cin. L. Rev. 1083, 1084 (1999); Ira M. Millstein, *The Evolution of the Certifying Board*, 48 Bus. Law. 1485 (1993).
[167] *See* KornFerry, *supra* note __ at 10.
[168] *See id.*
[169] *See* Manning, *supra* note __ at 1481.
[170] *See id.* at 1481.
[171] *See* SpencerStuart, *2011 Board Index*, *supra* note __ at 8.
[172] *See id*. at 30.
[173] *See id*. at 11.
[174] *See* Sharpe, *supra* note __ at 286.

can devote digesting information they receive from those interactions.[175] Hence, independent directors as monitors create issues for effective oversight.

Third, directors' independence could prove counter-productive to effective monitoring because of the information they are able to access as well as the manner in which they access such information. One of the most important keys to effective oversight is that directors receive unbiased information.[176] However, directors are at an informational disadvantage vis-à-vis insiders in the corporation.[177] Not only does directors' independent status mean that they inherently have less information than officers and employees, but also studies reveal that directors rarely have channels of information that are independent from the officers and employees that they must monitor.[178] This may make it difficult for directors to exercise independent judgment and engage in effective monitoring. Indeed, without multiple sources of information, directors are dependent on management to determine how to screen, evaluate, and condense voluminous amounts of information. Even if officers do not actively engage in misconduct, the information they produce will be skewed towards the management's perspective. Then too, if the information is tainted, boards may not be in the best position to discover such taints.

Moreover, it is possible that directors' independent status may cause them to inappropriately defer to management in a manner that undermines their ability to be effective in their oversight role. Indeed, studies indicate that when directors are less confident in their own understanding of corporate affairs, they unduly rely on managers who they perceive to have greater expertise.[179] The size and complexity of the modern corporation, coupled with the increased time involved with knowing and understanding all of the nuances associated with the corporation, could cause directors to defer to management. Directors' independence only heightens this deference because it may prompt directors to assume that managers are better positioned to understand and evaluate corporate affairs. In this regard, directors' independent status poses a danger that they will inappropriately defer to management, thereby undermining their ability to serve as effective monitors.

Finally, the emphasis on independent directors raises questions about directors' expertise, which could undermine directors' ability to be effective in their oversight role. Even when directors receive information, they must be able to understand that information, and ask knowledgeable questions if that information raises concerns about the company and its operations. [180] This requires a knowledge and understanding of corporate affairs that many directors may not have.[181] While directors may have knowledge about industry practices more generally, their independent status means that they will not have in-depth knowledge about the day to day affairs of the corporations that they are expected to monitor.[182] As a result, directors may not have the specific expertise necessary to properly evaluate corporate information. To be sure, directors can gain company-specific information through their work on the board, but this

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[175] *See id*. at 290.
[176] *See id.;* Melvin Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors and Accountants*, 63 Cal. L. Rev. 375, 404 (1975).
[177] *See id.*
[178] *See id*. at 289 (citing studies). *See also* Cox, *supra* note __ at 1082.
[179] *See* Fairfax, *supra* note __
[180] *See* Arlen, *supra* note __ at 344.
[181] *See* Sharpe, *supra* note __ at 290.
[182] *See id*.

may take years of service.[183] Then too, some studies suggest that the longer directors serve on boards, the more likely they are to defer to management.[184] From this perspective, lengthy service obviously takes time to establish, but may prove counter-productive once it is acquired. As a result, it may not be a cure for the lack of expertise associated with independent directors.

As this Part reveals, therefore, there are important hurdles associated with making directors' oversight role more robust. Without sufficient appreciation and consideration of these hurdles, we may be creating expectations about the oversight doctrine that directors will be equipped to fulfill.

V. Concluding Thoughts

The financial crisis caused director oversight to take center stage because that crisis raised concerns about whether directors were effectively performing their duty to actively monitor corporate affairs. The hope is that by enhancing directors' oversight responsibilities we will improve corporate governance, and reduce instances of corporate malfeasance. This article questions whether the oversight doctrine offers false hope, creating expectations that directors cannot possibly fulfill. At the very least, the article argues that we may need to seriously consider how directors can comply with their oversight responsibilities in a responsible, but realistic manner. For example, should we limit directors' oversight to discrete tasks or responsibilities? Should we consider allowing particular directors with perhaps greater expertise and less outside responsibilities to engage in oversight? Perhaps we should focus our attention on other agents and advisors in the corporation to assist with directors' oversight function.[185] Consideration of these and other questions may be necessary before the potential positive outcomes of an oversight doctrine can be realized. If that consideration does not occur, then it is possible that the oversight doctrine will be ineffective, and that our renewed focus on it will have been a waste of important time and resources.

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[183] *See id*.
[184] *See* Fairfax, *supra* note __.
[185] *See* Lyman Johnson, *Are Corporate Officers Advised About Fiduciary Duties?,* 64 Bus. Law. 1105 (2009) (discussing the role of officer liability).