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Leveraging Information Forcing in Good Faith

Hillary A. Sale
Georgetown University Law Center, has75@georgetown.edu

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Introduction

A question central to corporate governance is one that has remained unanswered both over time and because of time. That question is: what are the positive attributes of directors' fiduciary duties? There is, of course, a simple answer to this question: there are two fiduciary duties, care and loyalty (with candor omnipresent), and they are defined by the common law. Yet, as litigation reveals, the actual contours of these duties are more opaque than one might think or even than fiduciaries might wish. This is particularly true of the good-faith and oversight branch of the duty of loyalty, which is the focus of this chapter. Interestingly, the reason for this ambiguity is also a question of time, albeit a procedural one.

The duty of good faith and oversight has been the subject of considerable litigation in recent years, and the cases reveal significant information asymmetries between directors and management that can result in tremendous harm. The outcomes in these cases, however, are subject to the business judgment rule and the concomitant strict pleading requirements, which result in very high rates of dismissals both at the motion to dismiss and summary judgment stages. Indeed, these decisions occur at a moment in time, providing a snapshot or a window into the questions surrounding loyalty and oversight. Trials are largely non-existent, and, unless a matter makes it to summary judgment, fulsome discovery and fact-finding are also limited. As a result, the motion-to-dismiss and summary-judgment opinions largely control the understanding of the oversight duty.

The reasons why the oversight duty is receiving so much attention now is arguably a question of the evolution over time in the understanding of the role of shareholders, officers, and directors in the governance of corporations. As discussed below, shareholders have evolved from owner operators to absentee owners, with limited opportunities to intervene in the governance of the organizations they own. Where once they made day-to-day decisions, today, they cast votes on major transactions and board members (which are not always binding), sell their shares and move on, or sue the operators for fiduciary breaches.

Initial changes in the law to address the information gaps between those who operate the companies and those who own the companies (the absentee shareholders), were largely federal and premised on disclosure regulation. This regulatory space is discussed further below, and is the home of the information-forcing-substance theory. The basic premise is that federal securities regulation requires substantial and substantive disclosures about the corporation, its financials, and its operations and choices. In order to make the disclosures and ensure their accuracy, officers and directors must confer and make choices about what and when to disclose. If it works well, conversations and iteration occur, improving the quality and quantity of information disclosed, and if it does not, enforcement and litigation over fraud occurs.

Disclosure regulation has grown substantially since the 1933 Securities Act and the 1934 Securities Exchange Act and provides today's shareholders with information about the corporation's strategy, risk, financials, and more. In that sense, the federal regulatory system is providing a complement to the state-created common law of fiduciary duties. When a company makes disclosures that turn out to be false, the falsity might prompt further inquiry and litigation as to whether the directors were appropriately mediating the space between the shareholders and the officers. In today's world, that space is largely one of oversight.

This chapter argues that the information-forcing-substance theory has a significant role to play both in how courts decide these matters and in how active and engaged directors can add value in the boardroom. As explored below, by deploying the theory in corporate-law matters, the courts can reveal the information gaps between officers and directors and create pressure for better processes and discourse, which in turn can impact both the way in which fiduciaries interact with each other and on behalf of shareholders, as well as the substantive choices they make. This chapter uses case studies involving Boeing and McDonald's to reveal how judges can use information forcing to develop more robust disclosure discourse in the good faith and oversight context and increase the creative friction vital to effective corporate governance.

Time and Fiduciary Evolutions

Like so much in the law, in the space of corporate fiduciary duties, the substance is largely delineated by the process or, here, by the procedural posture and timing of the litigation. We can attribute this to several factors. Derivative litigation, which must be brought either in the state in which the company is incorporated or the one in which it is headquartered, focuses on the internal affairs of the company, which is controlled by the law of the state of incorporation. More Fortune 500 companies are incorporated in Delaware than anywhere else, and the Delaware judiciary is well-known for its corporate expertise, speed, and efficiency. Moreover, in Delaware, these cases are all decided by judges in a court of equity—thus the risk of a random jury outcome is non-existent. The result is that more cases are filed there, and the judges play a powerful role in the development of the evolution and understanding of fiduciary duties.

Derivative litigation involves the shareholders standing in the shoes of the corporation and arguing that the claim is one the corporate fiduciaries should have brought. In essence, the shareholders are making the claims they believe the directors should have brought on behalf of the corporation. In examining a case, the trial court deploys the business judgment rule and the demand-futility analysis. When combined with strict pleading standards, this approach leads to a high rate of dismissals at either the motion to dismiss or, when a case survives, the summary judgment stage.

In order to survive a motion to dismiss, the shareholder plaintiffs are expected to ask the board to address the issue before going to court (make a demand) or plead with particularity that the board of directors should not be allowed to address the concerns because they are either incapable of doing so or demonstrably unwilling to do so. The latter is referred to as "demand futility" because making a demand on the board to address the concern would be futile. To weigh demand futility, the court applies the business judgment rule, which operates as a rebuttable presumption that the fiduciary decisions or choices in question were reasonable and made in good faith by disinterested and independent decision makers. Demand futility, as decided through the lens of the business judgment rule, is a powerful procedural mechanism that both operates to provide corporate decision makers with considerable deference and has substantive outputs.

Behind the deference to corporate fiduciaries are a series of policy choices about what corporations are and how they should operate. The history of the evolution of the corporate entity in the United States is beyond the scope of this chapter, but some background is useful to understanding the fiduciary questions at issue. Early on, in order to achieve the privileged corporate status, owners had to ask for permission from the state legislature. Permission was granted entity-by-entity, so to speak. Over time, as the status became increasingly available at the will of the incorporator, the number of small, individual-owner controlled enterprises decreased, and the control of corporations shifted from the owners (shareholders) to the operators (managers). This separation of ownership and control, in turn, prompted concerns about the impact of corporate decision making both on the entities themselves and society more broadly. The theory is that when a business entity operates as a sole proprietorship, with a single owner managing and controlling the decisions, that person is incentivized to make good business decisions. But as the space between the owners and managers increases, the opportunities for shirking and opportunism grow.

In addition, in the United States, corporations enjoy the privilege of limited liability for the owners; thus, shareholders do not risk their personal assets, homes, or swimming pools when they invest. Their liability is limited to their investment in the entity. In exchange for this privilege, the shareholder/owners become absentee owners and cede their rights to engage in the day-to-day management of the organization to the managers/agents. This role delineation facilitates both free transferability of ownership from shareholder to shareholder and capital raising, because creditors do not need information on the financial stability or means of every shareholder in order to determine whether and when to invest.

Nevertheless, over time, it has also contributed to the growing gap between the shareholders and the decision makers and, thus, decreased the incentives of the owners to monitor fiduciary choices, creating space for managerial shirking. Shareholder powers have also decreased, leaving them to vote in limited doses on major transactions, sell their shares and move on, or sue. (Thompson 1999). Limited liability has also contributed to increased company size and that, in turn, increases the gaps between directors and daily operations, places emphasis on the role of officers, and puts pressure on oversight and its importance in the constellation of fiduciary duties that mediates that space.

Corporate fiduciaries enjoy privileges with respect to liability for their decision making. Allegations of breaches are subject to the demand futility standard, and breaches of the duty of care are allowed the privilege of exculpation (at least for directors) for derivative litigation, which both eliminates damages for those breaches and makes them fully dismissable early in time. Here, the theory is that enterprise growth and profits are correlated with risk taking. In order to encourage risk for profit and growth, the ability to sue corporate fiduciaries and rehash their decisions is significantly limited. The point is to discourage the twenty-twenty hindsight that might apply anytime a business decision turns out badly and to reinforce the role delineation between shareholders and their fiduciaries. Thus, the moment in time when the procedural mechanisms first apply is early on, at the motion to dismiss. Deploying mechanisms at a point early in time results in cases being resolved procedurally and long before trial, which in turn ensures that fiduciaries are sued less often and less successfully for the risks inherent in making profits and encouraging corporate growth.

As with most things, along with some good comes some bad. Here, the good of the enterprise growth and profits that comes with preventing litigation based on hindsight results in a very high rate of dismissals, many occurring at the motion to dismiss stage where full discovery has yet to occur. Thus, both the timing and procedural posture of the opinions prevent depositions of officers and directors, full discovery of the facts surrounding the decisions, and, of course, trials. Indeed, there have been very few trials with fact-based outcomes in the context of good faith, let alone oversight. (In re Walt Disney Co. Derivative Litigation).

As a result, the "definition" of the duty of good faith and oversight has evolved from the case law involving motion to dismiss opinions (which tell us how *not to plead* an oversight violation) and summary judgment opinions (which tell us what *might be* an oversight violation). Indeed, a case that survives summary judgment rarely tries—mainly because a breach is non-exculpable, non-indemnifiable, and usually non-insurable, creating a significant incentive for officers and directors to settle a case that survives summary judgment. The settlement of cases, however, confines our understanding of the duty of good faith to either what worked at the pleading stage or what did or did not survive summary judgment but does not reveal what might be an *actual* fiduciary breach, which we would learn only after trial.

The implications of this procedural, moment in time development of the law for the space in which fiduciaries operate are significant. As noted above, the original role of sole proprietors or small firms with owner-managers has, with the advent of limited liability and increased entity size, given way to a different structure: one in which the owners/shareholders have no managerial rights and depend on fiduciaries to take the reins. Director fiduciaries, however, generally speaking, do three things: strategy, risk, and people, all from a distance and from a nose-in-fingers-out vantage point, ceding the daily management of these increasingly large operations to officers. The result is an information asymmetry between directors and officers, and the oversight duty now occupies that space. As a result, oversight is arguably the most important and complex role that directors have; yet, the procedural nature of the litigation means that directors have little direct guidance on what the oversight role entails.

This guidance gap increases the importance of the role that the judges play in crafting the opinions, whether in the form of a win for the plaintiffs or the defendants. To fill the space created by the moment in time nature of these opinions, the courts should focus on and develop both the incentives being created in the opinions and how those incentives might impact the agency costs inherent in the corporate form. This chapter contends that one key way to do so is to focus on the information asymmetry between officers and directors and craft incentives to increase information sharing and decrease the asymmetry. The information-forcing-substance theory, which undergirds the federal securities regulatory regime, already occupies some of this space and is an excellent tool for judges to deploy in the oversight cases.

The Information-Forcing-Substance Theory Examined

The information-forcing-substance theory is key to corporate governance and occurs both through state law and, for publicly traded companies, federal securities regulation. The federal securities regulatory system is disclosure or information based, with litigation and enforcement as a backstop. The federal disclosure approach is designed to address information asymmetries between issuers and shareholders—and, arguably, between officers and directors. The basic premise of the system is that issuer sales of securities to the public are akin to insider trading even though publicly disclosed. (Sale 2000). Simply put, the issuer has all the information about the company, and the potential shareholders do not—hence the term information asymmetry. The concern is that without the disclosure requirements, issuers will dupe investors into buying worthless securities.

Notably, the requirements do not prevent the sale of risky or even worthless securities. They require disclosures to allow investors to make decisions about whether and when to invest. Put differently, when the SEC approves securities offering documents, its role is not to evaluate the merits of an offering; it simply reviews disclosures for completeness. That said, the premise of the information-forcing-substance theory is that the required disclosures are generated by officers (with the help of accountants, investment bankers, and other gatekeepers). As officers share the disclosures with the gatekeepers and the directors, discourse occurs, which reduces the asymmetry between them. In theory, that discourse will produce a deeper understanding of the companies' risks and potential for growth as well as better decision making and, thereby, additional disclosures. In this manner, the required disclosures and information produce substance in the form of additional disclosures and, of course, in the discussions themselves that increase understanding about the corporation.

The Securities Exchange Commission also promulgates regulatory requirements to which documents must conform, with certification requirements that the information is true and accurate. Both directors and officers must sign the registration statement or the document used for offering securities to the public. In theory, the act of signing the document creates at least two things: greater awareness of the substance contained therein (and the opportunity for director-officer discourse and information sharing and forcing) and the potential for liability (which presumably enhances discourse and disclosure in a virtuous cycle). And that, in turn, albeit indirectly, decreases the potential for the sale of worthless securities.

The initial securities regulatory requirements were offering focused and subject to strict liability. Today, the requirements also apply to aftermarket trading, proxy solicitations, which are required after securities are issued, and ongoing disclosures, including quarterly, annual, and occasional reports. In all cases, federal regulation emphasizes disclosure as the "type" of regulation, but the impact on substance is well-understood.

Both the disclosures in the original offering/registration statement and the reports filed by companies already public are supplemented with private and public enforcement. The signature requirements push the information-forcing substance theory into action by increasing the pressure on directors to ask questions and question answers from management. Key officers must also sign the documents, thus creating an opportunity for reflection and discourse as well as liability. In short, the goal is that the disclosure requirements, supplemented with potential liability, including strict liability in some instances, will increase discourse, accuracy, transparency, and market efficiency. (Sale 2019). Indeed, the defense for strict liability claims is one of due diligence, which requires a reasonable belief that the information contained in the documents was accurate. That in turn, requires the question asking and pressure testing that is the hallmark of good faith.

Importantly, with some exceptions, the requirements are very robust but do not specify particular duties or even whether companies must have certain assets, profits, or returns. Instead, the regulations require disclosure of the choices that issuers have made, including on compliance. If the issuer cannot provide a required disclosure, it must leave the information blank. The information-forcing-substance theory, however, creates an incentive to avoid leaving information blank, pushing issuers to consider the reasons for the required disclosure and to weigh the consequences of having no information to share. That process, in turn, creates pressure on fiduciaries to develop the policy or process necessary to provide the information. This is where discourse and directors play a role. A strong and empowered board of directors probes into disclosures and their completeness and, along with other gatekeepers, will ensure that the company is putting the systems in place necessary to successfully manage the investors' money. When the process breaks down, litigation and federal enforcement serve as the backstop.

A recent example of regulations that operate to force information and require directors to engage in the information-forcing substance process are the SEC's new rules on cybersecurity incident reporting. These regulations require public companies to report on cyber management, strategy, governance, and risks. Perhaps not surprisingly, all issuers must file timely reports on cyber incidents. The regulations, however, are broader than incident reporting. They require disclosures about processes for cyber oversight and management as well. For the issuer that did not have such a process in place prior to this regulatory structure, the choice is now clear: develop the processes or disclose to the public that one does not exist.

It is hard to imagine an issuer that would choose to have no process around cyber (and indeed doing so would likely violate the state law fiduciary duty of good faith) and therefore no disclosure. That is the essence of information-forcing-substance in action: the required disclosure forces the action of developing and explaining the action, here cyber risk approaches and strategies. Developing that information is also a matter of the directors' oversight duty. By the time they disclose the risks and strategies, they have presumably done sufficient work to reasonably believe that the disclosures are complete and accurate. This means that the company has both a cyber strategy and a risk plan, which, in turn, prevents liability in both the securities and the state-law fiduciary realms. (Sale 2019). In this sense, then, federal disclosure law creates demand for information, which produces discourse and substance, and thereby, occupies space in the corporate governance sphere.

Federal securities regulation also operates to ensure that disclosures are not misleading by omission. Disclosures must be fulsome, and it is the fiduciaries who make these disclosures (and who are subject to potential liability) that determine disclosure content. Information forcing also plays a role in substance in this context. Those considering the content of the disclosures for which they may be liable may choose to increase their monitoring and oversight role with respect to, here, cyber processes. When that occurs, the securities disclosure regulation produces action and conduct on the part of the fiduciaries and transcends federal regulation to become an information-forcing tool in the state-law, fiduciary-duty zone. (Sale and Langevoort 2016).

In an area of risk and oversight, like cyber, for example, the information asymmetry can make the agency gap between management and the board particularly acute. Securities disclosure requirements can help to decrease that information asymmetry. That said, well intentioned officers may believe that they are managing risk and have strong systems in place or even that they have course corrected for risks and that, therefore, no discussion is necessary. Cognitive biases may contribute to the challenge. Those gaps, however, are precisely the spaces in which directors are expected to operate. Their role is to ask questions and question answers to manage cognitive biases, ensure management is doing its job, and engage in oversight and risk management. In essence, their role is to pressure test and information force in order to monitor the gaps created by the changes in the corporate structure. This space is the zone of the state-law fiduciary duty of good faith and oversight.

Good Faith and Oversight

The contours of good faith are some of the least clear in corporate law. Directors have two fiduciary duties: care and loyalty (and candor, which is present in all). Good faith is a branch of the duty of loyalty that has become more fulsome in the years since the Delaware Supreme Court issued the *Smith v. Van Gorkom* opinion. That case involved the sale of a company, and the court found that the directors had not engaged in the sale process as they should have, including, never actually assessing managements' decisions around pricing for the company relative to its value.

The focus was on a breach of the duty of care, which requires gross negligence, with the court finding that the directors had breached their duty. The initial result was personal liability for the directors, albeit paid by the insurer and the buyer. The opinion then received backlash from the legal establishment because liability findings, particularly for care, were and are very rare. Shortly thereafter, the Delaware legislature promulgated a statute containing an exculpation clause for director breaches of the duty of care. The statute, however, specifically carved out "acts or omissions not in good faith." Since that time, good faith has become a branch of the duty of loyalty, which prior to that time, was the home only of conflicts of interest.

Over time, there have been many cases involving good faith claims. This is not surprising because other than major transactions, like mergers or asset sales, the role of directors is largely one of oversight, which goes hand in hand with good faith. Indeed, the nose-in-fingers-out role of directors requires them to mind the agency gap by engaging, pressure testing, and ensuring that the CEO and other members of the leadership team are running the company in both a legal and appropriately ethical manner. They do so in part by ensuring that risk appetite is calibrated and that tone and culture are set at the top. In this sense, directors, with the fiduciary duty operating to mediate the space, are in the role of policing the agency costs between the owners/shareholders and the officers running the company. Simply put, the duty exists to ensure directors do their job and mediate the agency costs inherent in the corporate structure. (DeMott 2018).

Of course, directors face an information asymmetry with their officer counterparts. By design, they will never know as much as the day-to-day managers because they are not meant to spend as much time at or on the entity as the officers. They are, however, expected to monitor the space between the shareholders and the managers. Disclosure discourse can occupy this space and help to manage this asymmetry. Thus, when directors engage in pressure testing, they are actually playing an information-forcing role designed to challenge the thought processes of the corporate leadership team and to help that team iterate on strategic choices, compliance matters, and more. The directors ask questions and question answers and leave management to run the company, and officers do the same with the managers below them.

When the process works well, we have good corporate governance (and good compliance) through the creative friction that discourse creates. When the process fails, we have derivative litigation about whether and when the directors (and more recently, officers) adhered to their fiduciary duties. The majority of these matters are subject to timing: they end at the motion to dismiss stage, where very explicit pleading is required, or sometimes at the summary judgment stage. At both moments in time, the litigation is filtered through demand futility and the business judgment rule. Further, cases that survive both a motion to dismiss and summary judgment tend to settle rather than try—presumably because the risk of a finding of wrongdoing is significant: personal liability. The result is that we know much more about how not to plead (and in some cases how to plead) or what might be (and in some cases what might not be) a fiduciary breach than we do about the positive content of the duties. In this sense then, the procedural moment in time (motion to dismiss or summary judgment) when a decision occurs impacts the understanding of the content and nature of director fiduciary duties. In short, time and substance are interdependent.

The duty of good faith has also evolved over time and actually takes several forms—all of which are, in some sense, about monitoring. Although there are many examples, the duty usually divides into a few clear types of situations. The first type are those involving the failure to act or to make a decision, including to engage in monitoring and oversight or implement systems for oversight. We will see this type of situation in the *Boeing* case study below. Failures to act are never protected by the business judgment rule, which is operative only when a decision/business judgment is present.

The failure to act is different from a decision to act or engage in oversight that did not turn out favorably. Recall that the business judgment rule, in combination with strict pleading, was designed to prevent hindsight bias and second-guessing of fiduciaries. Thus, matters involving allegations of insufficient action rarely succeed. Finally, there are situations in which there was action and then red flags making it clear that more action was likely necessary. With the business judgment rule and the strict pleading in derivative cases, these cases are both tricky for plaintiffs and often where the action is. This is the type of fact pattern presented in the *McDonald's* case study. In all of these situations, the information-forcing-substance theory has an important role to play.

Good Faith (or Bad Faith) in Action

Boeing. Two case studies, *Boeing* and *McDonald's*, are helpful in understanding how the court develops the duty of good faith and in defining the information-forcing role that courts can play. This section explores the litigation that took place after the two Boeing airplane crashes: one in Indonesia (October, 2018, resulting in all 189 people on board dying) and one in Ethiopia (March, 2019, resulting in all 157 people on board dying). After the second crash, various governments, including eventually the United States, grounded all planes. The crashes were horrifying. They also prompted many types of litigation. Here, the derivative litigation, which focuses on harm to shareholders as opposed to the crash victims and their families, is what is at issue.

Fiduciary oversight is at the root of this sort of claim. The types of questions posed are: Did the directors (and officers) put safety and reporting systems in place to make sure they knew of issues with planes? Did they pay attention to red flags? According to the Delaware Chancery Court, the answer was no. Boeing's officers were profits, not safety, first in focus, and the board was complicit. The officers did not share safety information with the board, and the board did not monitor safety or hold management accountable for it. Instead, the board monitored profits.

The opinion documents a decade's worth of plane-related problems, fines, FAA citations, engineering issues, and more. Notably, planes are what Boeing does, and plane safety should have mattered. Nevertheless, the board did not have a committee for which airplane safety was the priority. Further, the Audit Committee, which was the only group on the board charged with risk monitoring, did not address or manage airplane safety. Indeed, even after the 2018 crash, the audit discussion was not focused on safety. According to the Chancery opinion, management did not report to the board on safety information before the crash (nor did the board ask for such reports). Although Boeing had an internal group for safety reviews, that group had no connection to the board. Similarly, the board did not review whistleblower complaints about safety or anything else. In good faith terms, Boeing sells airplanes which no one would buy if it were known that the planes were not safe; thus, airplane safety was both "mission critical" and missing from board discussions and deliberations.

The opinion also reveals that officers and managers at Boeing lied to the FAA, concealed issues with the 737Max, prioritized profits and economies of scale, and pushed the plane to market without ensuring its safety. Indeed, there is even some indication that the company understood that the target customers for the 737Max were in emerging countries, where low cost airlines were expanding rapidly and where pilot training was not as "consistently high" as in the United States. The board also appears to have been both profit focused and completely unaware of the false statements and safety issues. As a result, profits "skyrocketed," (and so did executive pay) with sales largely in emerging markets and an order backlog in the hundreds of billions. Yet, at the same time, employees were raising safety concerns and issues—none of which made it to the board.

And then came the first crash with Lion Air. Initially, management's response to this crash was nothing and then very slow notice to the board. Indeed, when the CEO, Dennis Muilenberg, finally shared information with the directors, he repeatedly and falsely told them that the plane was safe and the issues were due to pilot error. Notably, the board did not formally meet to discuss the crash until over a month after it occurred, and according to the court, when it did so, the minutes reflected a discussion about profitability and efficiency and nothing meaningful about safety. This gap is important because had the board met with managers engaged in safety on a full time basis, it might have learned information that would have allowed it to push back on Muilenberg and other officers and thereby discover the misrepresentations.

As the months rolled by, the board continued to sit back. By deciding to forgo an internal investigation and failing to ask questions and question answers, the board allowed the profits-before-safety approach to continue without scrutiny. The result was a second crash, more deaths, and multiple countries grounding the planes, with a lengthy delay in management reporting its own fraud to the FAA, all leading to settlements in the billions. Throughout this time, the focus of Boeing leadership was on keeping the planes in the air. In fact, even when multiple countries and the FAA finally grounded the 737Max, the board appears to have failed to consider making that decision itself. Documents instead revealed a focus on image, production targets, and business performance.

Thus, it was not until over a month after the second crash that the board had a full safety briefing and discussion, which came at the urging of two directors and notably not at the initiative of management. Although the board finally established a committee charged with safety three weeks after the second crash, few, and often only one, board member(s) attended the committee's fact-finding sessions. Other board members, including the lead director, instead focused on image and even lied to the public about oversight and engagement. This pattern continued until the board, facing immense public pressure, voted to terminate Muilenburg and allow both him and the General Counsel, Michael Luttig, to "retire." As a result, both were allowed to retain tens of millions in equity awards—decisions the plaintiffs in the derivative litigation also challenged.

The complaint survived, in part, a motion to dismiss and the associated demand futility and other procedural hurdles, and it did so under the theory that the board never made a good faith effort to put a safety monitoring system in place—at least before the second deadly crash. In essence, the board failed to act: the company lacked a system for safety monitoring at the board level, and there was no reporting system for employee and whistleblower concerns to reach the board. According to the court, it was incomprehensible that for a mission critical factor like airplane safety, the officers and the board failed to engage, to adopt formal processes, or to set expectations about how it should be handled.

This is the space of the information-forcing-substance theory. Good information-forcing processes, here on safety, would have pushed information to the board and allowed for disclosure discourse. In turn, this could have resulted in changes in the design of the planes, training for the pilots, or some other safety-related decision altogether. Any of those changes would have been a form of "substance" in response to the discourse and information forcing. In short, the board's failure to engage in oversight, or, here, to expect or demand safety information, meant that the board did not receive the information. It also meant that the company did not prioritize or set in place processes to ensure safety was being weighed along with profits. (In re Boeing Co. Derivative Litigation).

McDonald's. A second Delaware case study provides an in-depth review of the officer side of information forcing. The first move made by the Chancery Court in the McDonald's litigation was to clarify that officers in fact owe the same fiduciary duty of oversight as directors, albeit with some potential limits based on the scope of their remits. This move is key because for the information-forcing-substance theory to work, both directors and officers must engage in the process and discourse. The acts at issue involved sexual harassment—throughout the company-owned and franchise restaurants as well as at the top, both by the CEO, Stephen Easterbrook, and by the Chief People Officer, David Fairhurst, who was the defendant in this matter.

According to Vice Chancellor Laster, Easterbrook and Fairhurst were both long-term McDonald's employees and were promoted to C-Suite roles in the same 2015 time frame. They apparently supported and engaged in alcohol consumption and parties at work, in the course of which they flirted with and made female employees uncomfortable. They also engaged in assault and relationships with employees. Moreover, according to the Chancery opinion, after Fairhurst assumed his role, human resources began ignoring complaints and set a tone at the top that created a fear of retaliation for reporting sexual harassment.

At the same time, the number of sexual-harassment complaints from restaurant workers began to grow. For example, in 2016, workers filed complaints with the Equal Employment Opportunity Commission, and a fast-food worker advocacy group organized a walkout across the United States. Complaints documenting individual issues and systemic ones continued to grow, and in 2018, there were complaints asserting that human resources was ignoring the conduct. Workers also organized a 2018 strike, and Senator Tammy Duckworth sent an inquiry to Easterbrook. The strike and letter were followed by reports to the board that Fairhurst had pulled a female employee into his lap at a party, an allegation which the company compliance department found to be inconsistent with company business conduct standards. In fact, under company policy, Fairhurst's acts were defined as sexual assault.

The board's audit committee met to discuss the situation. The CEO, Easterbrook, informed committee members that there was an additional Fairhurst incident, two years prior, which had not been reported or discussed. Despite the fact that there were two separate reported instances of harassment and assault involving Fairhurst, who was the Chief People Officer, a member of the C-Suite, and the officer in charge of McDonald's policies in this area, Easterbrook recommended that the company's zero-tolerance policy be ignored. Instead, Easterbrook recommended that Fairhurst forfeit some pay and sign a release and a "last chance" agreement. The audit committee agreed, and Fairhurst signed and continued in the role.

After the Fairhurst situation, and in early 2019, the board and company management began to focus more on the sexual-harassment issues. They also received another letter from members of the United States Senate. The board then met with management and received reports on the company's approach to creating a safe workplace. According to the court, the board's work on these issues continued throughout 2019 until, in October, the board learned that CEO Easterbrook was also in violation of company policies for a prohibited relationship with an employee. On November 1, the board terminated Easterbrook without cause and received an update from the General Counsel about Fairhurst. The board then terminated Fairhurst with cause. From the sequence of events, the Chancery Court inferred that Fairhurst had again violated the company policy on sexual harassment and, presumably, the terms of his last-chance agreement.

Multiple class actions about systemic failures to address sexual harassment across the company followed, along with derivative claims against both the board and Fairhurst. In analyzing the claims against Fairhurst, the Chancery Court described the first realm of oversight as being one involving an "Information-Systems Theory." The premise for this type of claim is that fiduciaries must create internal information and reporting systems that are calibrated to get information to senior leaders and the board so that the board can fulfill its supervisory and monitoring obligations, which connect to compliance, risk, and oversight. This type of system is, for example, the one that the court found missing in the *Boeing* matter.

The obligation to share information, however, is not limited to initial monitoring systems. It also extends to red flag situations involving bad faith, and the Chancery Court concluded that the latter is what the *McDonald's* plaintiffs pleaded successfully. Although the Chancery Court separated red flags claims from information-forcing claims, both in fact are connected. For example, Vice Chancellor Laster found that Fairhurst failed to report upward about sexual harassment issues of which he was aware and, in so doing, appeared to have breached his fiduciary duties. That finding is itself a standard invoking the information-forcing-substance theory even if not so described.

The *McDonald's* opinion is also notable for its approach to the role of officers, as opposed to directors. Fairhurst was an officer and not a director (to be distinguished from Easterbrook, who was both CEO and a director). Prior to the *McDonald's* opinion, Delaware courts had not squarely held that officers were subject to the oversight duty. Indeed, the *Boeing* opinion side-stepped this issue based on the facts. In the *McDonald's* case, Vice Chancellor Laster, however, addressed it directly, finding that officers have the same fiduciary duties as directors and that the way the duty might play out for officers would likely be different and tied to their roles. Directors have a duty to ensure systems are in place for the entire organization; officers have a duty for their portion of the organization. Nevertheless, both directors and officers have a duty to address red flags. For officers, the red-flag aspect of the duty can even apply outside of their remit (i.e. an officer presumably should not ignore a red flag in a part of the organization for which they are not directly responsible). The duty varies with the nature of the red flags, including how sustained, systematic, or striking the flags might be.

Applying that standard to Fairhurst, the court found that the plaintiffs' allegations were sufficient to support a claim. Fairhurst was, after all, the leader of the very department charged with creating a safe, non-hostile work environment. According to the allegations, he was aware, over time, of employee complaints, and he, himself, engaged in sexual harassment—twice before fall of 2019 and, by inference, again that fall, resulting in his termination for cause. Sexual harassment is illegal and, therefore, a violation of applicable positive law—a key form of bad faith conduct. Further, good faith requires that fiduciaries act to further the best interests of the corporation, and, according to Vice Chancellor Laster, when a fiduciary engages in the conduct alleged here, they have crossed the good-faith line.

This case, as strong as it seemed when first decided, died a procedural death at a different moment in time. Approximately three months after issuing the opinion ruling that officers owe a fiduciary duty of oversight and that Fairhurst appeared to have violated his duty, the court issued an order dismissing the allegations against Fairhurst on different grounds—failure to meet the demand futility standard. The court issued that order after rejecting the plaintiffs' claims against the McDonald's board for failure to meet the pleading standards for director liability. Recall that in bringing derivative claims, the plaintiffs are standing in the shoes of the corporation, arguing that the board did not and should not be allowed to resolve those issues.

As part of its ruling on the director defendants, the court found that the McDonald's board, unlike the Boeing board, had in fact engaged in monitoring and oversight and had not ignored red flags. The court also found, with respect to the board's decisions on Easterbrook and Fairhurst, that the plaintiffs had not pleaded with the requisite particularity that the directors were interested or lacking in independence when they made those decisions. Then, after dismissing the case against the director defendants, the court dismissed the allegations against Fairhurst under the demand futility standard, noting that the same rationale applied. In short, the court was not willing to let the plaintiffs step into the shoes of the directors for the purposes of the allegations against Fairhurst because even assuming that Fairhurst had breached his fiduciary duty, the board had addressed it. The result is an initial opinion against Fairhurst with strong statements about officer duties and potential officer liability but no actual liability, or even the opportunity to see what that liability or proof of that liability might look like. (In re McDonald's Corporation Stockholder Derivative Litigation, 289 A.3d 343; In re McDonald's Corporation Stockholder Derivative Litigation, 291 A.3d 652).

Good Faith and the Information Forcing Substance Theory

As these two case studies reveal, corporate law and the judges who create it have important roles to play—not just in developing fiduciary duties, but also in ensuring the mechanisms are in place to create good disclosure discourse between management and the board. (Sale 2019). The goal of information forcing is to use disclosure requirements and mechanisms to press for the development of information that enlightens and produces substantive choices and behaviors, or here, good governance, including compliance, oversight, and risk management systems. To impact governance in that manner, we need fulsome, truthful, and accurate disclosures from officers (and other managers) to directors that produce conversation and discourse. As directors engage in pressure testing, question asking, and dialogue about choices and opportunities, creative friction through effective challenge and iteration occurs. Thus, disclosures both produce the information necessary for engaging in the fiduciary process and also helps to ensure that directors will, in fact, engage in substantive fiduciary choices.

Both the *Boeing* and *McDonald's* case studies reveal oversight gaps and the potential for using information-forcing-substance theory to address them. Consider the *Boeing* opinion and the way in which Vice Chancellor Zurn outlined what the board knew, asked, and focused on—and what it did not. The opinion mentions 57 times that the board did not know about safety issues, did not ask about safety issues, and was not informed about safety issues. According to the court, the facts indicate that board members were aware that they should have known more about safety, that they should have asked management for information and developed a different process for ensuring information reached the board, and that they did not do so. Without the information, the board was in no position to engage with management on 737Max issues, let alone any other safety or engineering issues in the company. The lack of information prevented the creative friction that should occur in the boardroom.

This finding by the court is its own form of information forcing. The dynamic in boardrooms is and needs to be friendly. Directors regularly face challenging or crisis situations and need to be able to work well together to resolve them. Indeed, boards generally operate by consensus, and that is a good thing. They need to be on the team and vested in senior leadership in order to do their jobs. Nevertheless, there are moments in time when individual directors might need to push for more information or a different process. Doing so might even be an obligation. In a congenial and consensus-based group, however, effective challenge can be difficult. The *Boeing* opinion thus provides a reset message for directors about the obligation to do so—regardless of the discomfort or even pushback that might occur. In doing so, the opinion sends a message about peer pressure and groupthink—and about the importance of creative friction.

Consider the court's use of emails between two Boeing directors who also served together on the Medtronic board. These two directors eventually demanded that board conversations about safety occur. They did so after discussing the fact that another board on which they both served, Medtronic, always had safety updates and room for discussion. At Medtronic, safety was literally the first agenda item. These emails, the court noted, revealed that the directors' shared experience at Medtronic indicated they had experienced and understood a better approach to safety monitoring, including how to set up processes for ensuring effective board engagement. Yet, despite that experience and knowledge, the directors participated in meeting after meeting at Boeing, waiting until after the second 737Max crash to push for change, including with respect to how the board engaged with Muilenberg.

Taking note of these emails and using them to show that the directors knew better, so to speak, is arguably its own form of information forcing—here between and among directors. Vice Chancellor Zurn makes it clear that these directors' questions after the second crash, as well as the push to reform board meetings and the safety process, should have occurred much earlier at Boeing, long before the 737Max crashes. Further, even without the Medtronic directors' experience, given Boeing's business, it is inexplicable that the directors were not engaged on safety issues and processes before the crashes. Thus, as the Vice Chancellor leans in on her analysis, she empowers the directors, giving them cover to engage on and challenge existing board practices and the CEO—and, importantly, the existing boardroom dynamic. In short, the directors who knew better were obligated to say so—even if doing so created conflict and was uncomfortable. Here, the court deploys a form of the stand-together-fall-together approach we have seen before from the Delaware courts. Although the court did not label it as information forcing, nor did earlier courts, the finding has the potential to do exactly that: develop information, discourse, and substance, and create separation between directors when necessary. (Smith v. Van Gorkom).

Importantly, the court does not stop with the directors. Vice Chancellor Zurn also points out that the CEO, the General Counsel, and other members of management had access to safety information but did not share it with the board. Instead, the officers focused their reports on profits and efficiency, presumably at the request of the CEO and with the, at least, tacit support of the board. Yet, the General Counsel, who in most companies plays a significant role in risk management and compliance was, according to the court, not fulfilling his role. The opinion also indicates that other members of the management team seemingly made misrepresentations to the board and contributed to the absence of safety discussions. Indeed, the company actually had two key managers in the safety space, a Vice President of Safety, Security and Compliance, and a Vice President of Boeing Commercial Airplanes (BCA) Engineering, but the board had never insisted that either actually present at a board meeting. The board eventually did so, but only after the second deadly crash.

Here again is a reset message to the board—good corporate governance requires oversight. Oversight is about asking questions and questioning answers. It is not about rote presentations without engagement or about jumping through hoops. It is about pressure testing. Pressure testing might produce conflict, but conflict is at the root of creative friction and that, in turn, produces innovation and change, here, presumably on safety monitoring. Had the questions been asked, the board might have learned that the company management had reason to know that the 737Max was unsafe and that the push to market was leading to shortcuts in training for pilots, insufficient software adjustments, and more. Information might have led to discourse and discourse to substance, including saving lives.

By citing to this gap, the court is engaging in a form of information forcing. Safety in an airline company is mission critical. "Mission critical" areas are not the only ones requiring board attention or even the only ones that can present red flags. Nevertheless, the board's role is to be engaged in the oversight of the company and place emphasis on the parts that are core to the strategy and business model, even if it is not sufficient oversight in every circumstance. People at Boeing below the top officer level knew about serious safety issues, and those people had an obligation to tell their superiors, but they never had the chance to meet with the board directly nor was their perspective or information shared with the board via the officers. Vice Chancellor Zurn's opinion makes clear, however, that the board probably should have heard from those people directly and might have the obligation to ask for that to happen—even if the CEO and others did not offer it. Had the board engaged in oversight, the information the managers provided might well have pointed to more underlying safety issues and the questions necessary to probe and recalibrate and, ultimately, ensure better safety for the 737Max. Of course, that choice might have slowed down the push to market. It might also have prevented the deaths of 243 people.

The *McDonald's* opinion takes a different tack and breaks considerable new ground in doing so. It is the first chancery opinion to find that the oversight branch of the duty of loyalty applies not only to directors but also to officers, who, unlike their director counterparts, are legally agents of the entity. The opinion focuses on Fairhurst, whose role as Chief People Officer included oversight and management of the company's policies on sexual harassment. Specifically, his remit included the problems and bad acts, including his own, at the center of the plaintiffs' allegations, and that is a focus of the court. Indeed, throughout the time frame of the complaint, Fairhurst was reporting to the board on the company's strategy on these issues, and, it appears, that he was also committing harassment and covering for Easterbrook, his friend, the CEO. The court notes that officers are supposed to push information to the board, and, of course, be honest in their dealings. The opinion is clear that this is not just an agency-law based duty of candor but a corporate fiduciary duty.

Indeed, this information-forcing approach by Vice Chancellor Laster is vital to the fiduciary duty of oversight. Officers and their direct reports engage daily, but in most public companies, absent a crisis, directors engage about 10 times per year. Thus, the information and power asymmetries are inherent in the structure. To address this gap, directors must rely on officers to engage in oversight and in information sharing—even when doing so might reveal challenges in the corporation. Inserting the fiduciary duty in this space arguably sends a message: even if the officers should try to address problems and challenges on their own first, they should also inform the board and engage with it at least at the systemic level. To the extent that it is human nature to avoid exposing flaws and mistakes, the oversight duty for officers intervenes as a form of information forcing, helping to balance the nose-in-fingers-out role of directors and the accompanying information and power asymmetries.

Timing plays a role here as well. The allegations died at the motion-to-dismiss stage, when the court dismissed the oversight claims against the director defendants based on the plaintiffs' failure to plead demand futility. When the director-focused claims disappeared, so did the claims against Fairhurst and the potential for a trial. Without that trial, or even the additional discovery that would have accompanied a summary-judgment motion, it is not possible to know whether evidence existed to allow Fairhurst to escape liability. Though, to be sure, his own acts of sexual harassment would seemingly prevent that outcome. Nor do we know the facts surrounding the interactions between Fairhurst and Easterbrook and the connections between those and the board.

Thus, the moment in time nature of the opinions stunts the growth of the positive law. For example, trials in oversight cases are rare, but the outcome in the *Disney* case, a very different type of good faith claim, resulted in a finding of only a breach of care, which was exculpated, and not of loyalty/good faith, which would not have been exculpable, indemnifiable, or insurable. Yet, even in dismissing the claim, the fulsome post-trial opinion with its factual findings provided considerable guidance to boards on the nature and extent of their duties and the engagement necessary to fulfill them. Indeed, the trial and post-trial opinion accomplished something most of the other opinions, which occur at the motion-to-dismiss stage, cannot: it develops facts and makes findings about the duties after witness testimony and full discovery. Put differently, the timing of the *Disney* opinion allows for information not available in the *McDonald's* and *Boeing* matters.

Both the *McDonald's* and *Boeing* case studies present dramatic fact patterns, and both still provide only a roadmap to the pleading of harm and oversight breaches. Indeed, the *McDonald's* case study might leave the reader wondering if the board was sufficiently engaged over time. The *McDonald's* fact pattern details sexual harassment allegations starting in 2016 but focuses on board engagement later, in 2018, when more allegations surfaced and members of Congress pressed for answers. The lack of a trial, or even summary judgment here, means that discovery of more information about this timing gap is not available. The same applies with respect to Easterbrook and the allegations that the board let him off the hook, initially terminating him without cause and paying him considerable compensation at his departure. Nevertheless, he was engaged in an inappropriate relationship, and given that he was CEO, it is reasonable to assume that he knew any such relationship was off limits. After all, the company had a strict policy about such relationships, and he had been involved with an independent contractor when promoted and agreed to terminate that relationship at the insistence of the board.

The court had an answer to both of these points, but because the answer occurs in motion-to-dismiss time, it might feel unsatisfying to those rightfully troubled by the misconduct and harassment at McDonald's. For example, the plaintiffs argued that the directors breached their oversight duties, in part, because they were aware of multiple allegations of sexual harassment and EEOC complaints against the company, as well as worker strikes related to the harassment. These allegations all sit squarely in the red-flag zone and require both pleading of the red flags along with facts to show that the directors failed to respond. It is on the latter aspect that the court found the plaintiffs failed to make their demand-futility case. Instead, the court listed multiple board actions and discussions focused on improving the safety of

McDonald's employees, including those at franchises. Those director actions, in contrast to the ones in the *Boeing* case study, resulted in a dismissal of the first set of oversight allegations.

The second group of allegations against the board are, arguably, both common and difficult ones on which to succeed. This is the space where *Boeing* and *McDonald's* intersect—and many other complaints and motions to dismiss as well. For that reason, it is also an area of oversight about which we know very little. In the *McDonald'*s case, the plaintiffs argued that the board's decision to promote Easterbrook knowing he was in a relationship with an independent contractor, which violated company policy, and with the condition that he terminate it, was a breach of their fiduciary duties. The court rejected both this argument and the one connected to Easterbrook's 2019 termination without cause, which was also based on an employee relationship barred by company policy.

McDonald's had sexual harassment issues and a Chief People Officer who the board was aware had engaged in two situations involving what appears to have also been sexual harassment. Yet, at the same time, the board decided to terminate Easterbrook for an inappropriate relationship, without cause, and with tens of millions of dollars in compensation. This outcome is at best unsatisfying. Nevertheless, it is not uncommon for boards to choose to terminate officers without cause, and there are business reasons, including avoiding the costs and uncertainties of litigation, for doing so. This is where demand futility, the business judgment rule, and pleading requirements gain traction. According to the court, the directors appeared to have evaluated their options and made a business decision about Easterbrook's termination. Yet, it is also in the complaint that Fairhurst knew Easterbrook was violating company policy, and Easterbrook defended Fairhurst's sexual harassment to the board advocating against termination. What we do not know, but could infer, is that Easterbrook defended Fairhurst out of self interest—to keep Fairhurst from exposing Easterbrook. Further, by terminating Easterbrook without cause, even though he, too, violated company policies, and by allowing him to keep his compensation, the board arguably created the impression that it did not care about the tone at the top.

This is the nature of moment in time decision making—both for fiduciaries and the courts. Recall that the board relied on outside counsel to investigate the Easterbrook relationship in the fall of 2019, and both Easterbrook and the employee were interviewed. Based on the allegations, the board was not aware of other relationships and had relied on experts (outside counsel) to investigate before reaching a decision. Viewed in that light, the board was actually engaging in information forcing and using it to make the substantive decision —to terminate Easterbrook without cause. The challenge for the plaintiffs, for the court, and for fiduciaries who want to understand the actual substance of the fiduciary duties is that, as the court invokes, reasonable minds might disagree as to the best course of action on Easterbrook in the fall of 2019. In those circumstances, according to the court, the board is entitled to make the choices, unsavory as they might appear in hindsight.

Hindsight, of course, plays a significant role here because, as it turned out, Easterbrook lied to the board in the course of his fall 2019 termination discussions. Indeed, in the summer of 2020, additional Easterbrook relationships with employees that violated company policy, and all of which involved sexually explicit photographs and videos, came to light. It appears that the board did not know about these relationships prior to terminating him. Recall that in round one, the board hired experts, i.e. outside counsel, to investigate. The opinion indicates that they interviewed Easterbrook and the employee and did not learn of any other relationships. Indeed, Easterbrook denied that other relationships had taken place. Thus, even if Easterbrook lied, absent cause for suspicion, the board was entitled to rely on the experts it engaged to manage the situation.

In round two, however, when the new allegations surfaced, the board discovered additional relationships and payments of company funds to the employees as well as the use of corporate aircraft for travel with them. This investigation led to the company suing Easterbrook to take back the compensation paid in 2019. This is arguably the litigation the board hoped to avoid initially. After all, litigation costs money and takes time, dragging the board and corporate resources into a fight at the same time as, here, the board was focused on a new CEO and a new Chief People Officer, a 2020 pandemic, and more. Further, Easterbrook's response to the company's action against him asserted that the board knew or should have known about his multiple relationships and chose to ignore them—even though he affirmatively lied in round one, thereby breaching his duties of loyalty and candor. Easterbrook's allegations about the board are mirrored in the Delaware plaintiffs' claims.

Of course, the shareholders will never know the truth of these allegations or any others. The litigation between Easterbrook and the company settled, with Easterbrook returning a significant portion of the compensation granted in the fall of 2019, but without retracting his allegations against the board or admitting or denying the allegations about his relationships. Indeed, the lack of a retraction is part of what the plaintiffs relied on in the derivative complaint, and what the court dismissed for insufficient pleadings against the director defendants. The court dismissed the derivative claims against Easterbrook because the company's earlier settlement agreement with him released those claims, and because there was no indication that the board was not qualified to make the decisions about his termination or the release of the claims against him. Those dismissals, in turn, prevent the plaintiffs, and all those following the litigation from knowing whether the allegations are accurate. At this point, what we know is that due to an enforcement action from the Securities Exchange Commission, Easterbrook is barred from serving as an officer or director for five years. And, importantly, we also know that when the information surfaced, the board took additional action to reset the agreement with Easterbrook, which is the board's job in the corporate structure—and not the plaintiff/shareholder's job.

The timing of the *Boeing* opinion creates similar gaps in our understanding of oversight duties. Recall that the *Boeing* case study reveals a potential oversight breach based on the board's failure to insist on the implementation of a safety monitoring and reporting system. But, the plaintiffs also argued that the board's decision to terminate Muilenberg and allow him to keep tens of millions in compensation amounted to a breach of fiduciary duty. The court found against the plaintiffs on this count—applying the demand-futility rubric, and leaving open, again, the question of whether and when a board's discretion to terminate officers without cause and allow them to keep considerable compensation can violate the good-faith duty. As a result, even when an officer violates company policy on inappropriate relationships, including those involving the misuse of company funds and assets (Easterbrook) or, in the case of Muilenberg, knew of significant safety issues and, thus, arguably had a role in the deaths of so many, it appears that payout decisions are allowed. It stands to reason that there are situations in which that choice is sufficiently problematic and not in good faith. Nevertheless, the moment in time nature of the opinions in *McDonald's* and *Boeing*, results in a lack of guidance—for directors or for potential plaintiffs desiring to hold their fiduciaries accountable.

The information gaps described above—from termination and payout questions to questions about when and how to push back on officers and establish systems inside the corporation—are the result of interstitial decisions made at moments in time. Many academics have written about how procedure impacts substance, creating gaps, and these two case studies are no different. Indeed, pleading standards in business-related litigation have increased in stringency over the years, indicating that these gaps are intended. They result from decisions at moments in time that invoke procedural mechanisms. But the impact of gaps within the corporation in combination with the gaps created by judicial opinions decided at moments in time is a larger gap in the understanding of the fiduciary duties.

This is the challenge for the shareholders to whom the fiduciaries are accountable. There is an explicit tradeoff involved. The shareholders, who in *Boeing* and *McDonald's* sued derivatively, did so because they believed fiduciary breaches occurred—and the courts, at least initially, agreed that appeared to be the case. Yet, because those shareholders gave up their rights to manage or make decisions in the corporation in exchange for limited liability, free transferability of their shares, and more, they were limited to bringing their claims derivatively—essentially asking permission to step into the shoes of the corporation to claim that the directors should have taken different action or made different choices. The business judgment rule, here in the form of demand futility, along with strict pleading standards, reinforces the role delineation and works to prevent the insertion of twenty-twenty hindsight into business decision making, which, in turn allows for risk taking, profits, and the wheels of commerce to turn. The challenge, of course, is to ensure that oversight actually occurs and fills the gaps created by the corporate form's evolution over time.

Courts and the Information-Forcing-Substance Theory

In the fiduciary context *Boeing* and *McDonald's* (and other such cases) do not and cannot resolve all of the gaps and thus remain troubling. The harms were significant and occurred over multiple years. Both companies had general counsels and outside lawyers advising them. Yet, presumably, for example, at Boeing, none of those people told the board it needed to monitor safety. And at McDonald's, where the party atmosphere and inappropriate behavior was occuring in the C-Suite, the general counsel and, presumably other officers, knew about it and failed to tell the board. This is the space where judges have a role to play in developing more deeply the information-forcing-substance theory as a tool for combatting both agency costs and the challenges of time and timing involved in litigation over those costs.

Information-forcing-substance theory can be a powerful judicial tool for decreasing information and power asymmetries inherent in the corporate form. Monitoring systems are important for the safety of people flying on airplanes and for vulnerable employees. They are also important for decreasing information asymmetries between directors and officers and for recalibrating the power of directors. In that sense, information forcing can be a wedge for directors in situations in which effective challenge is their role, but dynamics, like those at Boeing and with Muilenberg, are heavily weighted against it. Leaning into information forcing and pointing out where the directors failed to engage in it, as the *Boeing* court did, can provide a powerful reset and combat the arguably natural tendency of officers to protect their turf.

Judges have an important role to play here, using their own good faith fiduciary role to engage in information forcing and press on substance, clarifying the nature of the duty and, thereby, driving fiduciary behavior and combatting agency costs in the corporation. (Sale 2011). Judges in derivative matters are monitors. Like the plaintiffs who bring the claims and the directors, the role of the judges is more than that of an umpire, evaluating pleading standards and moving on to the next matter. They are the line between good faith and bad, between corporate fiduciaries and, in some cases, serious harm and death. We know from the case law that matters involving personal injury, as opposed to solely financial injury, tend to receive more rigorous scrutiny. Yet, the space for information forcing exists in all of these situations as well as in the settlements, which, unlike many other types of litigation, require judicial approval.

Recall that the power of the information-forcing-substance theory is not solely in the information to be gleaned. The goal of information forcing is substantive action and change through information, discourse, iteration, and creative friction. Judges, like directors, who engage in information forcing can produce substance by creating incentives for fiduciary behavior. Applying the theory to the *McDonald's* case study, for example, seemingly creates pressure on all officers (not just Easterbrook and Fairhurst) to be more mindful of their remits and more forthcoming with the board. Thus, as noted previously, it seems likely that other officers in the party suite knew about the behavior at issue. Post *McDonald's*, it is now clear that they not only can be liable for a fiduciary oversight violation within their own remit but also for the failure to address red flags that come to their attention outside their remit. Here, the court has provided an information-forcing-substance wedge by pushing officer fiduciaries to speak out and up, fulfilling both their oversight and candor duties.

But, the court also does more. It makes it clear to the board that it should expect and demand more from officers in terms of disclosure and discourse. This is, presumably, what Vice Chancellor Laster meant when he used the term information forcing in the opinion. Directors should engage with officers and talk with them about the company. They should create opportunities and channels for communication and convey an openness to discussion and discourse. These sorts of conversations can occur in informal settings, like board dinners, and in formal settings, like presentations at board meetings. The key is to build opportunity for the connection between disclosure, discourse, creative friction, and substantive decision making to occur and, in turn, to allow for decisions about whether, when, and what action to take.

When officers are flat out dishonest, as appears to have been the case with Easterbrook and Fairhurst, for example, information forcing might fall short. It might also succeed—that is the power of pressure testing through question asking and questioning answers. It is also the power of regular engagement with all officers and with some of the leaders outside of the C-Suite. Indeed, the board's "people" role includes succession planning. To do that effectively, the board needs to see, know, and hear from those people and not just officers. Thus, doing so enables the board to fulfill the people aspect of its remit and increases the odds that information forcing, disclosure, and discourse will occur.

Next, consider the *Boeing* case study, which provides a window into information-forcing substance theory both in the court's discussion of the board's failures as well in the settlement it approved. As noted previously, the Boeing board did not engage on safety at all—and its failure to do so resulted in the court denying the motion to dismiss, producing, later, a settlement agreement. The *Boeing* claim, one based on a failure to engage in monitoring or set up information systems, as Vice Chancellor Laster termed it in the *McDonald's* matter, is fairly uncommon (to be contrasted with claims about insufficient monitoring/compliance systems). Nevertheless, it succeeded. Fiduciaries are charged with setting up systems, pressure testing them, and responding to red flags. To do so, they need information. At Boeing, that information was available from the people from whom the board never received a report and with whom it never met—even though all board members should have known better and at least two board members admittedly did. Although there are no guarantees that the information would have stopped production of the planes, it seems likely that it would have produced discussions at the board level about whether and when to address the issues and whether the push to market should have been paused. The allegations are parsed with care and detail, revealing a good-faith judge at work.

The settlement opinion in the *Boeing* matter also reveals information forcing and the power of the judge's role. In derivative matters, like class actions, settlement is not possible without judicial review and approval of the terms. In theory, this review counteracts the agency concerns inherent in a board wanting to settle claims that a court has found might present liability, including liability that is not exculpable, insurable, or indemnifiable. Indeed, the *Boeing* settlement has a financial component that is one of the largest ever paid. It also has governance and substantive components, with the latter being more rare but arguably necessary and key to information forcing. Both the governance and substantive changes at Boeing are information oriented and by design, shift power from the management side of the company to the board. The settlement provisions are designed to decrease information asymmetries. They also take power from the company to make its own determinations and "private" governance choices, and they shift that power into a space subject to public and judicial scrutiny.

Consider the five types of substantive organizational changes in the settlement. First, the settlement calls for the appointment of an internal ombudsperson whose role is to serve as a "safe" place for employees to raise safety issues—or to create a space for information, which, in turn, if accurate, should produce investigation and, potentially, substantive change. The company could have created this role on its own and long before the crashes and litigation prompting it. Company leadership, however, was profits and not product safety focused. As a result, the litigation and settlement forced it to create the role when it failed to take action on its own. Importantly, the ombudsperson is specifically charged with considering any issues related to transparency or interference at the company—an information-forcing provision.

The settlement also delineates specific qualifications for board members, again taking away degrees of freedom from the board to set its own qualifications. Thus, the second settlement provision required that the board add a director with experience related to airline/product/engineering safety oversight. This provision is designed to decrease information asymmetries and shift the balance of power from management to the board, by ensuring that at least one board member has sufficient knowledge and experience to ensure the directors know what information they might need and to provide effective challenge when management shares information. The third settlement requirement is that at least three board members have aviation/aerospace or engineering and/or product safety oversight experience. Again, this is an attempt to ensure that the board has fewer people with political or other backgrounds and more with relevant experience. Doing so, at least in theory, will add to the information-forcing power of the board, decrease asymmetries, and produce better substance.

The last two settlement requirements are also designed to force information and shift power. For example, the fourth requirement shifts power from management to the board by separating the CEO role from that of board chair, potentially increasing effective challenge at the board level and giving the directors additional opportunities to set their own course when engaging with officers and other managers. And, finally, the fifth requirement prescribes that the officers at Boeing, who are charged with safety and compliance, regularly engage with and report to the board—again increasing access to information at the board level.

In short, this settlement is information forcing in action. It decreases management's ability to call the shots by shifting power from management to the board. It ensures certain skill sets for the board, increasing the knowledge base of board members and, thereby, the ability of board members to engage in their information-forcing-substance role. The settlement provisions also do more: they make clear that governance choices are not a right, they are a privilege. Fiduciaries who fail to understand that distinction lose privileges and end up subject to public scrutiny and information demands. Thus, loss of "private" privileges serves as a backstop, or a consequence, that is actually similar to the statutory and regulatory changes that took place at the federal level in, for example, The Sarbanes-Oxley Act. And, of course, Easterbrook lost his privilege to be an officer/director for a period of years as a result of his lies and the SEC's action against him.

Conclusion

As explored in this chapter, the information-forcing-substance theory has a powerful role to play in the fiduciary space—in combating agency costs, the challenges of time and timing involved in litigation over those costs, and information and power asymmetries. To put the theory into action, we need active, engaged, fiduciary judges who deploy the theory to produce substance, even if indirectly, in procedural opinions. Indeed, the moment in time nature of this type of litigation, along with stringent pleading standards, arguably increases the need for judges to use this tool and engage in information forcing to develop the space around the demand-futility rubric. Further, as the chapter reveals, the best information-forcing tools will be those that connect information to substantive action by focusing on the situations where pressure testing fails, where information was missing, and, as a result, question asking and discourse did not occur. Information forcing in those spaces acts as a wedge between officers and directors, decreasing asymmetries.

In short, the corporate form has evolved and companies and agency costs have grown, increasing both information asymmetries and the pressure on the judges and their role in these matters. In a world in which cases end short of trials and factual findings, and yet still define the contours of fiduciary duties, what the judges say and how they say it matters. The best opinions tell a story, explicate on best practices, and send a message about choices that appear off base but lack sufficient specificity in the pleading. They also do more. They create incentives for officers to share better information sooner and, thus, help to realign the asymmetry between directors and officers. They probe at gaps, press on the roles of officers, engage on communication channels, encourage information-forcing-substance practices, and reset the power dynamics that prevent effective challenge and creative friction. That in turn, can help decrease agency costs and information asymmetries and improve the directors' understanding of their oversight role as well as their ability to do their jobs and fulfill their fiduciary roles.

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*Agnes Williams Sesquicentennial Professor of Law and Professor of Management, Georgetown University.

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