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CORPORATE GOVERNANCE: A PERSPECTIVE

*Dan Busbee**

THE bankruptcy of Enron Corporation in November 2001 has raised serious questions about the efficacy of corporate governance. The actual causes of the largest bankruptcy in the history of the United States may not be known until all of the facts have been determined, but from appearances it seems that corporate governance failed completely. It is unsettling to realize that the basic principles of fiduciary obligation established over many years could be taken so lightly and discarded so easily.¹ Corporate governance is about adherence to the principles of fair play and the recognition of what it means to act responsibly, not only for the shareholders and employees but also for other corporate constituencies. It is not about taking advantage of positions of trust but of following a course of conduct that meets a standard higher than the minimum standard required when, considered in the light of experience and common sense, that higher course is the obvious course to take. In its broadest sense corporate governance touches practically every aspect of corporate existence, and is influenced by a variety of laws, rules, regulations, court decisions, policies, and practices. State corporate statutes are the keystone, since they provide the framework for derivative suits and other shareholder rights as well as management and board responsibilities.² Federal and state laws, such as the antitrust laws, securities laws, and environmental laws, give direction for management and the board of directors in specific areas of corporate operation and policy. The listing requirements and policies of the New York Stock Exchange and the National Association of Securities Dealers Quotation System (NASDAQ),

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1. For articles on corporate governance, see Michael D. Goldman & Eileen M. Filleben, *Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century*, 25 DEL. J. CORP. L. 683 (2000); Claire Moore Dickerson, *Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors*, 59 U. PITT. L. REV. 759 (1998); *Corporate Governance Symposium*, 1998 COLUM. BUS. L. REV. 27 (1998); Carol B. Swanson, *Corporate Governance: Sliding Seamlessly Into the Twenty-First Century*, 21 J. CORP. L. 417 (1996); Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985); Lawrence A. Cunningham, *Introduction to Warren Buffet Symposium Papers*, 19 CARDOZO L. REV. 719 (1997); E. C. Lashbrook, *The Divergence of Corporate Finance and Law in Corporate Governance*, 46 S.C. L. REV. 449 (1995).
 2. See Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholders' Rights to Vote, Sell and Sue*, 62 LAW & CONTEMP. PROB. 215 (1999).

as well as the Generally Accepted Accounting Principles of the accounting profession, also play a role as do decisions of federal and state courts and the policies of governmental agencies. The agency that has had the most influence on corporate governance is the Securities and Exchange Commission (SEC)³ which oversees the issuance of securities and regulation of the securities markets. Pronouncements by the SEC, formal or informal,⁴ are closely monitored by corporations whose shares are publicly-traded.

While the scope of corporate governance can be all-encompassing,⁵ its focus in recent years has centered on boards of directors and audit committees.⁶ That focus has resulted in a continuing examination of the relationships among management, the board of directors, and the shareholders with the creation of shareholder value within the framework of responsible corporate citizenship being a primary concern of management and the board.⁷ With respect to corporate citizenship, corporations are permitted to use corporate assets in reasonable amounts for social purposes,⁸ but business corporations are commercial enterprises and shareholder value must be given prominence.⁹ The well-known treatise, *The Modern Corporation and Private Property*,¹⁰ published in 1932, was influential not only in the enactment of the federal securities laws but also on shareholder rights.¹¹ As to what shareholders were entitled to expect, the authors stated that:

The corporate stockholder has certain well-defined interests in the operation of the company, in the distribution of income and in the public security markets. In general, it is to his interest, first that the company should be made to earn the maximum profit compatible

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3. See H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1 (2001).
 4. See, e.g., text of speech by Lynn E. Turner, SEC Chief Accountant, Audit Committees: A Call to Action (Oct. 5, 2000) (available at <http://www.sec.gov/rules/other/nspch414.htm>).
 5. See Melvin A. Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271 (1993).
 6. See SEC STAFF REPORT ON CORPORATE ACCOUNTABILITY, COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, U.S. SENATE 96TH CONGRESS, (Comm. Print 1980) [hereinafter SEC Staff Report]; Ira M. Millstein, *Introduction to the Report and Recommendations of the Blue Ribbon Committee*, 54 BUS. LAW. 1057 (1999); Lashbrook, *supra* note 2, at 455-62 (1999).
 7. See Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROB. 129 (1999); A. A. Sommer, Jr., *A Comment on Dunfee*, 62 LAW & CONTEMP. PROB. 159 (1999); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Paul H. Zalecki, *The Corporate Governance Roles of Inside and Outside Directors*, 24 U. TOL. L. REV. 831, 833 (1993).
 8. See, e.g., TEX. BUS. CORP. ACT ANN., art. 2.02(A)(14) (Vernon 2001); DEL. CODE ANN. tit. 8, § 122(9) (2001); see R. Frank Balotti & James J. Hanks, Jr., *A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965 (1999).
 9. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); see Lashbrook, *supra* note 2, at 455.
 10. ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Macmillan 1948) (1932).
 11. See Donald E. Swartz, *Federalism and Corporate Governance*, 45 OHIO ST. L. J. 545, fn. 6 (1984).

with a reasonable degree of risk; second, that as large a proportion of these profits should be distributed as the best interests of the business permit, and that nothing should happen to impair his right to receive his equitable share of those profits which are distributed; and finally, that his stock should remain freely marketable at a fair price.¹²

The corporate governance-related statutes, rules, regulations, and court decisions often contain provisions or guidelines placing restraints on corporate action, but the relationship between shareholders and the board of directors is characterized by the latitude allowed to the board through application of the business judgment rule.¹³ The business judgment rule, as applied under Delaware corporate law, was expressed by the Delaware Supreme Court in a 1985 decision when the court wrote:

Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in 8 *Del. C.* § 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors . . . In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders . . . The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors . . . The rule itself “is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” . . . Thus, the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one.¹⁴

A review of significant developments in corporate regulation and corporate governance in the United States from the latter part of the nineteenth century to the present may be useful in gaining a perspective in the aftermath of Enron. It should be recognized that the term corporate governance has had widespread usage only during the recent past, which requires that developments involving corporate regulation also be included in the review.

One of the more unworthy periods in American business history occurred during the years following the end of the Civil War. Business activity was increasing and new technologies and energy sources were being introduced to improve efficiencies in production. A cross-country rail system was under construction and communications were changing radically through the telephone and telegraph.¹⁵ But it was during these years that monopolistic and discriminatory practices became widespread

12. BERLE & MEANS, *supra* note 11, at 121.

13. See R. Frank Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 *BUS. LAW.* 133 (1993).

14. *Smith v. Van Gorkom*, 488 A2d 858, 872 (Del. 1985).

15. See JULIAN O. VON KALINOWSKI, *ANTITRUST LAWS & TRADE REGULATION* (2d 2000); DANIEL J. GIFFORD & LEO J. RASKIND, *FEDERAL ANTITRUST LAW CASES AND MATERIALS* (1998).

through the concentration of commercial enterprises in business trusts, pools, and other types of collusive arrangements.¹⁶ The activities of these enterprises, particularly the trusts, were vilified by the Congress of the United States and the general public for price-fixing and other flagrant business practices.¹⁷ After two years of debate in Congress, the Sherman Act was signed into law in 1890 to proscribe monopolistic activities and agreements in restraint of trade.¹⁸ There were no concerted efforts at enforcement of the Sherman Act, however, until the administration of President Theodore Roosevelt which began in 1901. The Clayton Act¹⁹ was enacted in 1914 to improve the Sherman Act, and the Robinson-Patman Act²⁰ was added in 1936 to deal with unfair pricing.

The Securities Act of 1933 (Securities Act)²¹ and the Securities Exchange Act of 1934 (Exchange Act)²² were reactions by the administration of President Franklin Roosevelt and Congress to wild speculation and fraudulent activity in the securities markets in the 1920s.²³ These statutes and subsequent amendments, along with the rules, regulations, investigations, and enforcement actions of the SEC, have had a profound effect on corporate activity in the securities markets.

According to commentators, a culture of inattention to responsibilities was pervasive among boards of directors prior to the late 1960s and early 1970s.²⁴ Change began during those periods, particularly during the 1970s, as the oversight duties of boards of directors and the behavior of management in conducting business operations increasingly were the subjects of legislative action, court decisions, and SEC investigations.²⁵ In 1968, the ruling of the Federal District Court for the Southern District of New York on motions to dismiss in *Escott v. Barchris Construction Corp.*,²⁶ a case brought under the Securities Act of 1933 for registration statement liability, attracted widespread attention. Although not a corporate governance case in the strict sense, it was among the first publicized cases to highlight the liability of directors for a misleading registration statement. Barchris Construction Corp. was engaged in the construction of bowling alleys and for a few years enjoyed substantial success. However, as the popularity of bowling declined in the early

16. See 1 Earl W. Kinter, *Sherman Act of 1890*, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3, (Earl W. Kinter ed., 1978); 2 JOSEPH J. NORTON, REGULATION OF BUSINESS ENTERPRISES IN THE U.S.A. (1985).

17. *Id.*; see *supra* note 16.

18. 15 U.S.C. § 1, et seq.

19. 15 U.S.C. § 18, et seq.

20. 15 U.S.C. § 13, et seq.

21. 15 U.S.C. § 77a, et seq.

22. 15 U.S.C. § 78a, et seq.

23. See LEGISLATIVE HISTORIES OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (1973).

24. See Millstein, *supra* note 7, fn. 11 (citations omitted).

25. See Brown, *supra* note 4, at 51-63, for an account of significant SEC investigations during the 1970s.

26. *Escott v. Barchris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

1960s, the demand for new bowling alley construction also declined and the fortunes of the company suffered. During that period of decline the company sold debentures to the public under a registration statement filed with the SEC. Seventeen months later, the company filed for bankruptcy and the debentures became worthless. A lawsuit was then brought by the investors against the company, the directors, the underwriters, and the auditors alleging that the registration statement contained false and misleading information about the company and omitted information necessary to inform an investor of its true condition. In the findings of fact as determined by the court in the hearing on the motions to dismiss, which, under the court's ruling were binding in any further proceedings, the court found that the directors were not fully informed about company operations and had not fulfilled the due diligence standard of investigation required to avoid liability under Section 11 of the Securities Act of 1933.²⁷

The publicity surrounding the *Barchris* case was a forerunner of the publicity attendant to the bankruptcy of the Penn Central Transportation Company²⁸ in 1970 which at that time was one of the largest corporations in the United States. The relationship between the financial collapse of Penn Central and the federal securities laws was at the center of an investigation by the SEC that also looked closely at the actions of the board of directors.²⁹ Although the SEC only has power over directors who are in violation of the securities laws,³⁰ SEC investigations that touch on issues such as breach of fiduciary duty provide encouragement to private litigants and are believed to have a deterrent effect.

The Pennsylvania Railroad Company and the New York Central Railroad Company merged in 1967 with the name of the surviving company being changed to The Penn Central Company. In 1970, after only three years of operation, Penn Central filed for bankruptcy.³¹ The SEC decided to investigate the causes of the financial collapse of Penn Central to determine the relationship between the company's demise and the federal securities laws. The investigation resulted in a Report, issued in 1972 (Penn Central Report),³² that found the outside directors had failed in the performance of their duties as directors. According to the Director of the Enforcement Division of the SEC, the Penn Central investigation resulted in a turning point in SEC policy. He wrote the following in a law review article:

. . . I always like to think that one of the turning points in agency policy occurred when the Commission investigated the Penn Central Corporation . . . As we looked into Penn Central we decided not

27. See 15 U.S.C. § 77a, et seq.

28. *In re Penn Central Transportation Company*, 385 F. Supp. 612 (E. D. Penn. 1974).

29. See SEC Staff Study of the Financial Collapse of the Penn Central Company, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,931.

30. See 15 U.S.C. §§ 77a, 78a, et seq.

31. *Penn Central*, 385 F. Supp. at 612.

32. Staff Report, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 78,931.

only to investigate the financial debacle, but also to look at the various components to determine what role management had played. We particularly focused on the directors in that case, and in the staff report we issued, the staff found that the directors were generally accustomed to playing an inactive role in company affairs, permitted management to operate without any effective review or control, and remained uninformed throughout the period of important developments and activities.³³

In 1976, the Special Prosecutor in the Watergate Hearings testified before the Senate Committee on Banking, Housing and Urban Affairs on his investigation into the Nixon Administration's role in illegal political campaign activities. He stated that there was also evidence of illegal corporate payments.³⁴ During the investigation, the testimony of corporate officers in the investigation of the existence of corporate "slush funds" that were not reflected in the company's financial records attracted the attention of the SEC because they were required under the securities laws to be in their financial statements.³⁵ Further hearings produced evidence of payments by a large number of corporations to foreign government officials, politicians, and political parties to influence the awarding of contracts and for other purposes.³⁶ As a result of the hearings, Congress enacted the Foreign Corrupt Practices Act (FCPA)³⁷ in 1977 to put an end to these practices. The FCPA amended the Securities Exchange Act of 1934 by requiring that public companies keep books in reasonable detail to reflect transactions and dispositions of assets and by maintaining internal controls so there would be accountability for assets and transactions.³⁸ The FCPA is an example of corporate governance by legislative fiat, although brought on by unconscionable corporate behavior.³⁹ In the aftermath of Enron, a similar approach can be expected.

During the late 1970s the SEC began to examine its rules relating to shareholder communications, shareholder participation in the corporate

33. See Stanley Sporkin, *SEC Enforcement and the Corporate Boardroom*, 61 N.C. L. REV. 455, at 455 (1983).

34. See *Foreign and Corporate Bribes: Hearings on S. 3133, Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th. Congress, 2d. Sess. 3 (1976).

35. See Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235 (1982).

36. See Legislative History of the Foreign Corrupt Practices Act, House of Representatives Report to accompany H.R. 3815 (Sept. 28, 1977); Report of the Senate Committee on Banking, Housing and Urban Development to accompany S-305 (Mar. 28, 1977), Senate Report No. 95-114; SEC Report on Questionable and Illegal Corporate Payments and Practices (1976), referred to as the "May 12 Report," Sec. and Exch. Comm, 94th Congress, 2nd. Session.

37. Pub. L. No. 100-418, § 5001-5423, 102 Stat. 1107, 1415-69 (1988) (amending 15 U.S.C. Par. 78a-78dd).

38. *Id.*

39. See John C. Coffee, Jr., *Toward a Theoretical View of Corporate Misconduct and Effective Legal Response*, 63 VA. L. REV. 1099 (1977); Kenneth J. Bialkin, *Foreign Corrupt Practices Act of 1977 and the Regulation of Questionable Payments*, 34 BUS. LAW. 623 (1979); Mary Jane Dundas & Barbara C. George, *Historical Analysis of the Accounting Standards of the Foreign Corrupt Practices Act*, 10 MEMPHIS ST. L. REV. 499 (1980).

electoral process, and corporate governance generally. A task force was formally established in 1979, and in September 1980 a Staff Report on Corporate Accountability (1980 Report)⁴⁰ was sent to the Committee on Banking, Housing and Urban Affairs of the U.S. Senate in support of changes in the securities laws advocated by the SEC. In a Forward to the 1980 Report, Senator Williams, Chairman of the Committee, wrote that: “. . . a new consensus is emerging with respect to the vital monitoring role to be played by the board of directors in the corporate accountability process and the most desirable and appropriate composition and structure of a board designed to play such an enhanced oversight role.”⁴¹ With respect to corporate governance, the 1980 Report stated that a board of directors having a majority of independent directors was essential to corporate accountability and that each board should have effectively functioning audit, compensation, and nominating committees independent of management.⁴² The 1980 Report also made recommendations with respect to the functions of audit committees.⁴³

During 1978, the year following formation of the SEC task force on corporate accountability that resulted in the 1980 Report, the American Law Institute (ALI) initiated a project on corporate governance (ALI Project).⁴⁴ The ALI was organized in 1923 by a group of lawyers, law professors, and judges, including the Chief Justice of the Supreme Court of the United States.⁴⁵ The charter of the ALI stated that it would “encourage and carry on scholarly and scientific legal work.”⁴⁶ The principle projects of the ALI have been restatements of basic legal subjects, including the law of contracts, torts, agency, conflict of laws, and many others.⁴⁷ The chief reporter for the ALI Project wrote that the project was not initiated because of the events that had occurred during the 1970s, but that the idea for a project on corporate governance had originated in 1923. However, after preliminary drafts of a Restatement of the Law of Business Associations, it was determined that the subject matter was not suitable for restatement form.⁴⁸ The ALI Project was a renewal of the original effort in 1923.⁴⁹

The ALI Project resulted in the publication in 1992 of the Principles of

40. SEC Staff Report, *supra* note 7.

41. *Id.* at 2.

42. For a study on the relationship between corporate performance and the makeup of the board of directors, see Sanjai Bhagat Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999).

43. See SEC Staff Report, *supra* note 7.

44. See Eisenberg, *supra* note 6, at 1271; Richard B. Smith, *An Underview of the Principles of Corporate Governance*, 48 BUS. LAW. 1297 (1993); Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461(1992).

45. See American Law Institute, *About the American Law Institute*, at <http://www.ali.org/ali/thisali.htm>.5.

46. *Id.*

47. *Id.*

48. See Eisenberg, *supra* note 6, at 1271.

49. See *id.*

Corporate Governance (Principles).⁵⁰ The ALI limited its considerations to the basic ground rules applicable to the fiduciary responsibilities of directors and officers and did not include corporate finance, internal meetings of shareholders, and other such matters.⁵¹ The Principles generated controversy among those who participated in the ALI Project and in the commentary that followed publication.⁵² In part, that criticism revolved around the process that was followed during the project,⁵³ but other criticism dealt with provisions contained in the Principles.⁵⁴ The Section of Business Law of the American Bar Association (Section) neither endorsed nor opposed the Principles for the reason that the Section did not believe that the Principles were harmonized sufficiently with the Model Business Corporation Act.⁵⁵ The controversy surrounding the ALI Project may have resulted from a systemic problem inherent in attempting to codify the concept of corporate governance, which draws from a number of legal and non-legal sources that can change with changing business practices and economic conditions.

During the period in which the ALI Project was under consideration, state and federal courts decided a number of cases involving unsolicited tender offers.⁵⁶ These offers raise a basic corporate governance issue. The shareholders of the target corporation are offered a premium over the market value for their shares, and the issue is whether the shareholders are entitled to make the decision to sell their shares and receive that premium. In many instances, target corporations are able to defeat the offer through corporate defensive tactics thereby making the premium unavailable to shareholders.⁵⁷ As Delaware is a favored state for incorporation, many of the leading cases were decided in Delaware courts applying Delaware corporate law.⁵⁸

A debate developed during the early 1980s around the role of directors in unsolicited tender offers. It was argued by those advocating director neutrality that successful resistance by the company would deprive the

50. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE (1994).

51. See Roswell B. Perkins, *Thanks, Myth and Reality*, 48 BUS. LAW. 1313 (1993).

52. See Alex Etson & Michael L. Shakman, *ALI Principles of Corporate Governance: A Tainted Process and a Flawed Project*, 49 BUS. LAW. 1761 (1994).

53. *Id.*

54. See Zalecki, *supra* note 8, at 835.

55. See E. Norman Veasey, *The American Law Institute's Corporate Governance Project, The Emergence of Corporate Governance as a New Legal Discipline*, 48 BUS. LAW. 1267 (1993); Elliott Goldstein, *The Relationship Between the Model Business Corporation Act and the Principles of Corporate Governance: Analysis and Recommendations*, 52 GEO. WASH. L. REV. 501 (1984).

56. See *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707 (5th Cir. 1984); *Treco, Inc. v. Land of Lincoln Savings & Loan*, 749 F.2d 374 (7th Cir. 1984); *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981); *Johnson v. Trueblood*, 629 F.2d 302 (3d Cir. 1980), *cert denied* 450 U.S. 999 (1981); *Revlon, Inc. Pantry Pride, Inc.*, 612 F.Supp. 804 (D. Del. 1985); *Martin Marrieta Corp. v. Bendix Corp.* 549 F. Supp. 623 (D. Md. 1982); *Uncoal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

57. See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).

58. See *Unocal*, 493 A.2d 946; *Revlon*, 621 F.Supp. 804.

shareholders of the opportunity to receive the premium offered for their shares in the tender offer.⁵⁹ The other view was that directors should take an active role to defeat offers in which the price offered was thought to be inadequate or not in the best interests of the corporation.⁶⁰ In 1985, the Supreme Court of Delaware held that a board of directors could resist an unsolicited tender offer under a modified version of the business judgment rule in which the burden of proof shifts to the board, provided that: (i) there were reasonable grounds for believing the offer represented a threat to corporate policy and effectiveness, and (ii) the resistance offered was reasonable in relation to the threat posed.⁶¹ In *Paramount Communications, Inc. v. Time, Inc.*, the Delaware Supreme Court addressed the issue in terms of corporate governance with the following statement:

Paramount argues that, assuming its tender offer posed a threat, Time's response was unreasonable in precluding Time's shareholders from accepting the tender offer or receiving a control premium in the immediately foreseeable future. Once again, the contention stems, we believe, from a fundamental misunderstanding of where the power of corporate governance lies.

Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives . . . The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders . . . Directors are not obligated to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.⁶²

In 1996, the decision of the Delaware Chancery Court in a case involving illegal corporate payments to doctors by a patient and managed care provider reverberated through corporate boardrooms because of its corporate governance implications. *In re Caremark International, Inc. Derivative Litigation*⁶³ considered the question of director responsibility for the corporation's violation of a federal law prohibiting payments to induce referral of Medicare/Medicaid patients. In August 1994, a federal grand jury indicted Caremark, two of its officers, and an employee of another corporation for having made payments of more than \$1.1 million to a Minneapolis doctor to induce sales of a growth hormone distributed

59. See Franklin H. Esterbrook & Daniel R. Fischel, *Takeover Bids, Defensive Tactics and Shareholders' Welfare*, 36 BUS. LAW. 1733 (1981); Franklin H. Esterbrook & Daniel R. Fischel, *The Proper Role of the Target's Management*, 94 HARV. L. REV. 1161 (1981); Franklin H. Esterbrook & Gregg A. Jarrell, *Do Target's Gain From Defeating Tender Offers?*, 59 N.Y.U. L. REV. 277 (1984).

60. See Leo Herzel et al., *Why Corporate Directors Have the Right to Resist Tender Offers*, 3 CORP. L. REV. 107 (1980); Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities - An Update*, 40 BUS. LAW. 1403 (1985).

61. *Unocal*, 493 A.2d 946.

62. 571 A.2d 1140, 1154 (Del. 1990).

63. 698 A.2d 959 (Del. Ch. 1996); see Brown, *supra* note 4, at 6-9.

by Caremark. The payments were made under the guise of consulting agreements and research grants for which the doctor performed no services. One month later the grand jury returned other indictments for payments to a doctor in Ohio.

Caremark subsequently settled with the U.S. Justice Department and various state agencies by paying \$29 million in criminal fines and \$3.5 million for violation of the Controlled Substance Act. It also paid \$129 million to settle shareholder class action suits and contributed \$2 million to AIDS research. A derivative suit was filed against the directors alleging breach of the duty of care for failing to monitor and adequately supervise the affairs of the corporation. In approving settlement of the suit, the judge determined that there was no support for the allegations that the directors had actual knowledge of the violations of law by Caremark or that they had failed to monitor and supervise the activities of the corporation.

The *Caremark* case attracted attention because of the potential for increased director liability. One commentator believes the *Caremark* decision does not represent a significant source of director liability, since a board of directors can easily devise compliance programs that will be protected by the business judgment rule.⁶⁴ However, the commentator also realizes the decision will cause corporate directors to “implement protections that go beyond what is required by law” to limit corporate liability.⁶⁵

As stated at the outset of this paper, corporate governance in the United States has focused in recent years on boards of directors and audit committees. In 1977, at the urging of the SEC, the New York Stock Exchange included a requirement in its listing application that the board of directors of a listed company have an audit committee.⁶⁶ That requirement was later adopted by NASDAQ.⁶⁷ The Blue Ribbon Committee issued a report “On Improving Effectiveness of Audit Committees” (“Blue Ribbon Report”) in 1998⁶⁸ which the New York Stock Exchange and NASDAQ sponsored with the encouragement of the SEC. The Blue Ribbon Report contained ten recommendations for enhancement of audit committee performance and five guiding principles for audit committee best practices.⁶⁹ The recommendations emphasized independence

64. Stephen F. Funk, *In Re Caremark International, Inc. Derivative Litigation: Director Behavior, Shareholder Protection, and Corporate Legal Compliance*, 22 DEL. J. CORP. L. 311, 323 (1997).

65. *See id.* at 321-23. *See also*, CAROL L. BASRI ET AL., CORPORATE COMPLIANCE: *Caremark* and the Globalization of Good Corporate Conduct, COURSE HANDBOOK SERIES (No. B-1057) (1998).

66. *In re New York Stock Exchange, Inc.* Exchange Act Release No. 13,346 (Mar. 9, 1977); NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL, available at <http://www.nyse.com/listed>.

67. Allen I. Young, *Internal Control Systems and the Independent Accountant*, 835 PLI/Corp. 503, 671 (1994).

68. *See* Millstein, *supra* note 7, at 1057-58.

69. *Id.* at 1063.

and financial literacy of audit committee members, as well as quality of financial information.⁷⁰

The recommendations were directed to the SEC, the New York Stock Exchange, NASDAQ, and the accounting standards under Generally Accepted Accounting Principles.⁷¹ The SEC adopted the recommendations addressed to it and made those recommendations effective for registered companies as of January 31, 2000.⁷² The New York Stock Exchange and NASDAQ adopted the recommendations by amending their listing requirements.⁷³

The duties and responsibilities of boards of directors have been the subject of numerous court decisions, treatises, and legal articles over the years.⁷⁴ In comparison, court decisions and legal literature concerning audit committees are a more recent development so such material is relatively sparse.⁷⁵ Audit committees now comprise a prominent role in corporate governance, and their responsibilities and the consequences of their failing to carry out those responsibilities have become increasingly important.

Few reported cases involve audit committees, and those that have been reported were brought in federal courts and deal only with motions to dismiss or motions for summary judgment.⁷⁶ The defendants in all of these cases included the corporation, senior corporate officers, members of the audit committee of the board of directors and other members of the board, the independent auditors, and in some cases financial advisors. The cases generally revolved around alleged misrepresentations of financial information actionable under Section 10 and other sections of the Exchange Act, as well as breach of fiduciary duty to shareholders under

70. *Id.*

71. *Id.*

72. See http://www.nyse.com/nyse_rule_making/order_approving_proposed_rule_change_amending_the_audit_committee_requirements_and_notice_of_filing_and_order_granting_accelerated_approval_of_amendments_no_1_and_no_2_thereof_exchange_act_release_no_34-42233 (Dec. 14, 1999).

73. See Thomas Gilroy, *Disclosures Regarding Audit Committees*, 1285 *PLI/Corp.* 275, 279 (2002).

74. See, e.g., Ira M. Millstein & Paul MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 *COLUM. L. REV.* 1283 (1998); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 *GEO. L. J.* 797 (2001); Ira M. Millstein, *The Professional Board*, 50 *BUS. LAW.* 1427 (Aug. 1995); Ira M. Millstein, *The Responsible Board*, 52 *BUS. LAW.* 407 (1997).

75. See John F. Olson, *How to Really Make Audit Committees More Effective*, 54 *BUS. LAW.* 1097 (1999); Kevin Iurato, Comment, *Warning! A Position On the Audit Committee Could Mean Greater Exposure to Liability: The Problems With Applying a Heightened Standard of Care to the Corporate Audit Committee*, 30 *STET. L. REV.* 977 (2000); Millstein, *supra* note 7, at 1057-58.

76. See *In re JWP, Inc. Sec. Litig.*, 928 F. Supp. 1239 (S.D.N.Y. 1996); *Tischler v. Baltimore Bancorp*, 801 F. Supp. 1493 (D.C. Md. 1992); *Greenfield v. Prof. Care Inc.*, 677 F. Supp. 110 (E.D.N.Y. 1987); *In re AM Int'l Inc. Sec. Litig.*, 606 F. Supp. 600 (S.D.N.Y. 1985); *Haltman v. Aura Sys. Inc.*, 844 F. Supp. 544 (C.D. Cal. 1993); *Bomarko, Inc. v. Hemodynamics, Inc.*, 848 F. Supp. 1335 (W.D. Mich. 1993).

state law. In several of the cases the allegations also included alleged violation of various sections of the Securities Act.

In re Reliance Securities Litigation,⁷⁷ the United States District Court for the District of Delaware issued separate rulings on (1) motions to dismiss and (2) motions for summary judgment. These two rulings dealt with allegations against members of the board of directors for failing to perform their duties in their capacities as directors and as members of either the audit committee or the financial oversight committee. The case involves the failure of a finance company that was primarily engaged in making sub-prime automobile loans.

In April 2000, the court denied the motions to dismiss filed by the outside directors,⁷⁸ who each belonged to the audit committee or the financial oversight committee. The complaint contained five counts:⁷⁹ Count I alleges that the defendants knowingly or recklessly made public statements containing material misrepresentations regarding the financial condition of the company in SEC filings and press releases in violation of Section 10(b) of the Exchange Act and Rule 10b-5; Count II alleges the making of such misrepresentations in a proxy statement in violation of Section 14a-9 of the Exchange Act; Count III alleges that the defendants are vicariously liable for violations of the securities laws by persons they controlled; Count IV alleges that the defendants breached their fiduciary duties under Delaware law by failing to disclose material facts in a proxy statement necessary for shareholders to make informed investment decisions; and Count V relates to breach of fiduciary duty for self-dealing in an ERISA matter.

The court first considered the motions to dismiss plaintiffs' claims under Rule 10b-5. To prevail on the merits after a trial, the court stated that the plaintiffs must show that: "(i) defendants made a misstatement or omission; (ii) of a material fact; (iii) with scienter; (iv) in connection with the purchase or sale of securities; (v) upon which plaintiffs relied; and (vi) that reliance proximately caused plaintiffs' losses."⁸⁰ The court then stated that the first, third, and sixth prongs of this analysis were at issue.

With respect to the first prong, a misstatement or omission, the members of the audit committee argued the plaintiffs only alleged they signed or helped prepare SEC filings possibly containing misstatements or omissions but that such activity does not amount to the actual making of a misstatement or omission.⁸¹ In response, the plaintiffs argued outside directors may be liable for signing or aiding in the preparation of false or misleading financial disclosure, particularly when the directors served on

77. *In re Reliance Sec. Litig.*, 91 F.Supp.2d 706 (D. Del. 2000) (motion to dismiss); *In re Reliance Sec. Litig.*, 135 F.Supp.2d 480 (D. Del. 2001) (motion for summary judgment).

78. *See In re Reliance Sec. Litig.*, 91 F.Supp.2d at 717-18.

79. *Id.* at 717.

80. *Id.* at 720.

81. *Id.*

committees responsible for the company's financial oversight.⁸² The plaintiffs alleged that the defendants prepared, approved, or reviewed financial statements containing material overstatements to the company's net income as a result of inadequate reserves.⁸³ In denying the motions to dismiss, the court said that, while no specific misstatement could be attributable to the defendants, the wrong complained of involved declining loan loss reserves as actual loan loss rates increased and that such matters were of the kind that the defendants may have had oversight responsibility. Therefore, plaintiffs should have the opportunity to conduct discovery to determine whether misrepresentations occurred.⁸⁴ With respect to the scienter requirement, the court found the plaintiffs may not ascribe knowledge of the company's financial problems to the defendants solely because of their committee positions.⁸⁵ However, under the facts as alleged, the defendants possibly knew the net income was overstated and the loan portfolio was deteriorating, sufficiently proving the recklessness and thus scienter.⁸⁶

The defendants filed motions for summary judgment⁸⁷ after their motions to dismiss were denied, arguing that they were outside directors and should not be liable for simply signing documents filed with the SEC. The defendants further argued that the plaintiffs must prove that they had day-to-day operational involvement. The court denied the motions for summary judgment, rejecting these arguments, and quoted from *Howard v. Everex Sys., Inc.*: "[k]ey corporate officers should not be allowed to make important false financial statements knowingly or recklessly, yet shield themselves from liability to investors simply by failing to be involved in the preparation of those statements."⁸⁸

The court then found the *Howard* rationale applies to the defendants, because the evidence indicates that they had ample opportunity to review the documents and that, although they might not be involved in preparation of the documents, their signing could constitute the making of misleading statements.⁸⁹ The court also found the evidence satisfied the scienter requirement for the purposes of the motions for summary judgment because the defendants may have acted recklessly by ignoring express warnings of the company's financial trouble.⁹⁰

The conclusions that can be drawn from the two rulings of the Delaware Federal District Court discussed above and the other reported rulings involving motions to dismiss and motions for summary judgment are that audit committee members: (i) must have fundamental financial liter-

82. *Id.*

83. *Id.* at 721.

84. *Id.*

85. *Id.* at 724.

86. *Id.* at 722.

87. *In re Reliance Sec. Litig.*, 135 F.Supp.2d 480 (D. Del. 2001).

88. *Id.* at 503 (quoting *Howard v. Everex Sys., Inc.*, 228 F.3d at 1062).

89. *Id.*

90. *Id.* at 508.

acy; (ii) must be diligent in their review of the company's financial statements and other financial information; (iii) must be prepared to require that such information be furnished as deemed necessary; (iv) must be alert for warning signs of impending financial difficulties; and (v) must be prepared to act in response to those warning signs. These conclusions form only a part of the responsibilities of audit committee members, but failing to pay heed will only increase their vulnerability.

In October 2000, the then Chief Accountant of the SEC, in a speech given in New York City, stated that quality financial information is crucial to the integrity of the capital markets and that audit committees are uniquely positioned to oversee corporate accounting and financial systems.⁹¹ The fact that quality financial information is essential to the integrity of the capital markets necessarily means that shareholder value, a primary goal of corporate governance, is directly related to the market price of a corporation's shares. That is not to say that market price is the only measure of shareholder value or that a well-functioning audit committee contributes most of what is needed for good corporate governance, but market price is a highly visible indicator. Shareholder value may not be reflected in the market price of shares for a variety of reasons. Plus virtually all areas within the corporate structure, in addition to the audit committee, are involved in corporate governance.

Corporate governance in the United States has developed over many years through laws, court decisions, regulations, policies, best practices, and the other influences described in this paper. As we have seen, repercussions from questionable corporate behavior, periods of economic distress, and corporate failures have been the principal catalysts for change in these influences. Those aspects of corporate governance lacking more specific definition are generally found in the fluid relationships among managers, directors, shareholders, and other corporate stakeholders, arising from the complexities of day-to-day business operations. These aspects must be dealt with on an ad hoc basis. As one corporate commentator remarked:

Effective corporate governance remains more an art than a science, and a mysterious art at that. We are certain that it can increase shareholder value, but can find little statistical evidence to prove it. Good governance procedures are vital for boards, yet it is impossible to define any 'best practice' governance template.⁹²

Although corporate governance may be an art as suggested by the above quotation, there is an essential ingredient without which it will fail. Delaware Supreme Court Chief Justice E. Norman Veasey referred to this ingredient in a 1996 speech on corporate governance given in Australia: "In the end, the issue is integrity. Corporate governance depends on

91. *Id.*

92. WILLIAM T. ALLEN, *THE MYSTERIOUS ART OF CORPORATE GOVERNANCE, THE CORPORATE BOARD* (2001).

the integrity of the directors and their counselors.”⁹³ This dependence on integrity may be the lesson learned from Enron. Notwithstanding the legal fences erected around corporate behavior, in the end, as Judge Veasey said, it is integrity that counts.

93. E. Norman Veasey, *The Defining Tensions in Corporate Governance in America*, 52 *BUS. LAW.* 393 (1997).

