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CHIEF JUSTICE MYRON T. STEELE

Sarbanes-Oxley: The Delaware Perspective

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Today I would like to address the Delaware perspective on corporate governance after the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").[1] It may differ widely from what others have written on the subject, but it is, I want to emphasize, very narrowly based on the Delaware perspective. A conference that addresses corporate governance issues must consider all of the states' views, but my perspective will be limited to Delaware's view.

Any rational view of a Delawarean about Sarbanes-Oxley begins with a comment made about two thousand years ago by Cicero: "Summum ius, summa iniuria [More law, less justice]."[2] While I am here sans toga and do not purport to be the orator that we understand Cicero was, I want to make sure that as we examine the Delaware perspective, we understand that I do not have the time to address the benefits, costs, advantages, and disadvantages of Sarbanes-Oxley itself. What I want to focus on is the states' continuing role in corporate governance and the difference between the methodology employed by the federal government and the states when scrutinizing internal corporate governance.

States employ a methodology that views corporate governance through the prism of fiduciary duty. It is contextual. It is case-by-case. It is incremental. It is not an attempt to micromanage or to set prescriptive rules that dictate uniformly to the widely differing social cultures among corporations or within the business sector in which a particular corporation may operate. The states' methodology by no means suggests that there is a one-size-fits-all solution to the social normative problems that elected officials see at any given point in time. Its principal purpose and ultimate objective is to create a body of doctrine that generates trust between shareholders who invest in an enterprise and those who manage that investment for the benefit both of the enterprise and of the shareholders. We can disagree on which methodology is better, but the states' perspective is the more flexible. Delaware has found what we think is the magic bullet in that respect.

Delaware provides a flexible enabling statute that allows those forming a corporation to select from a menu of options the internal structure for the operation of that corporation that will best maximize wealth for the investor.[3] The statutory framework is designed to assure that the board manages the corporation and, at the same time, demonstrates that the board's authority brings with it significant responsibility and accountability. The case law and the development of best practices provide clear doctrinal principles that permit the board to both carry out its managerial role and satisfy the proper exercise of authority in a wealth-maximizing scenario, yet make those individuals with that authority accountable if and when they depart from their proper role. If operating as per-

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in various sections of 11, 15, 18, 28 and 29 U.S.C.).

2. MARCUS TULLIUS CICERO, DE OFFICIIS ¶ 33 (Walter Miller trans., Harvard Univ. Press, Loeb ed. 1913).

3. *See* DEL. CODE ANN. tit. 8, § 141 (2007).

fectly as they can, given humankind, they will draw the best and the brightest to board service because they will give boards an opportunity to be intuitively innovative, enable them to take reasonable risks after making thoughtful decisions, and maximize wealth-enhancing opportunities while minimizing risk to shareholders.

We believe the Delaware system works. As long ago as 1977, Judge Ralph K. Winter Jr. made the following observation when comparing the federal internal corporate governance options to the states' options:

> An expanded federal role in corporate governance would almost surely be counterproductive. At the federal level, there is no mechanism by which optimal legal rules governing the shareholder-corporation relation can be determined.
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> . . . .
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> . . . [O]nce federal legislation is enacted, it will be very difficult to correct, no matter how wrong it may be. Not only will the bureaucrats involved view the legislation as a cornerstone of the Republic, but even the most demonstrably foolish rule will lead to calls for more rather than less regulation . . . . As it presently stands, the case for federal intervention . . . lacks both a theoretical and empirical basis.[4]

Worse, it finds its sole political sustenance in a movement that has little sympathy for shareholders as investors or for the survival of the private sector in general.

Judge Winter made this observation during the years of the debate over federal chartering. That debate, mercifully, has dissipated virtually into nonexistence. I suggest that since Judge Winter is a New Yorker, perhaps the Biblical phrase is apt: "A prophet is not without honor, save in his own country."[5] Moving from thirty years ago to the present, I recently read some comments by Jonathan Macey, the deputy dean of Yale Law School, in the *Wall Street Journal*. One cannot characterize Dean Macey as a model of the modern major general in the Federalist army, but, nonetheless, his comments were as follows:

> Professional bureaucrats at the Securities and Exchange Commission and their allies in the corporate and securities bar had another theory. America, they said, was dominant thanks to its superior government regulations and protections for investors. According to this hypothesis, if a company didn't want to go public in the U.S. it must have something to hide.
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> On this view, the additional regulatory freight brought into play by the 2002 Sarbanes-Oxley Act should have been a godsend. By restoring the confidence in U.S. corporate governance that had been shaken by the Enron-era corporate scandals, America would assure its

4. Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 290–92 (1977).

5. *Matthew* 13:57.

> continued dominance of world capital markets well into the new millennium.
>
> Alas, things have not quite turned out that way. Whatever good might be said of Sarbanes-Oxley (and there isn't much good to be said for its intrusive, circulatory and duplicative grab-bag of rules), the statute has triggered a complete change in the way the world views the U.S. as a center for capital formation.
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> . . . .
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> . . . New York is competing along the vector of providing the "best," or at least the most, regulation. London lies in the middle, and Hong Kong does little in the way of actual enforcement. My guess is that the middle road will win.[6]

Whether, in the global debate, Dean Macey's comments are right or wrong, or even whether Judge Winter's thirty-year-old observation is right or wrong, the debate will inevitably continue.

Empirical evidence may suggest a number of things, but one thing is clear. During the forty-one-year period from 1960 through 2000, an average of 360 companies went public every year. If you exclude 1973 to 1979, the average was 423 initial pubic offerings ("IPOs") per year. Since 2002, the average has only been 142 IPOs per year. Some of this may be attributable to the dotcom bust, but much of this can only be attributable to Sarbanes-Oxley. The only comparable period, 1973 to 1979, averaged 47 IPOs per year. That was because of poor economic activity. But we have had six years of good markets. Delaware is now averaging 1 percent growth, after having averaged 8 percent growth in chartering corporations and business entities over the past ten years. (The state still captures 70 percent of all publicly traded U.S. IPOs.) If any state is going to see an impact on business chartering, it will be Delaware.

Something is driving this change and it merits examination into what is driving it, and why? Perhaps the Committee on Capital Markets Regulation, maybe the policy conference—all of those entities are better at determining what the models should be and what impact Sarbanes-Oxley has had than one lone keynote speaker. The macroeconomic issues are happily problems that are not going to be resolved by the Delaware courts.

Let me turn to my view of the Delaware perspective after Sarbanes-Oxley. I emphasize that this is my view, not the view of the Delaware Supreme Court, the Delaware Court of Chancery, or the view of the Delaware General Assembly. I credit Vice Chancellor Leo E. Strine Jr. with coming up with the metaphors for discussing the Delaware perspective. He likes to refer to it as the "federal lane" and the "state lane." From my perspective, the focus of the federal lane has always been, and should always be, market fraud and disclosure. On the other hand, monitoring the structure of internal corporate governance is the focus

6. Jonathan Macey, *What Sarbox Wrought*, WALL ST. J., Apr. 7, 2007, at A9.

of the state lane. There is debate over whether the federal government has always been in the state lane. My view, generally, is that the meaningful role for the federal government is market fraud and disclosure, and the role for the states is to manage the internal governance of its own chartered corporations. To paraphrase a renowned Texas politician who once captured it best: there is a reason that the line down the middle of the road is yellow.[7]

If you get the feeling that I have strong views on this, you are correct. I do. There is no point in mincing words about it. As far as I am concerned, what should be a solid line between the two lanes has now become a dotted line. The issues for thoughtful reflection are: should it continue to be a dotted line or should it be a solid line, and to what extent should there be movement across either? I think there are two fundamentally important reasons for examining this as two lanes with a dotted or solid line between them. First, those driving in the federal lane make a normative choice about what is going to lead to better corporate governance. Prescriptive rulemaking by statute, or by devolution to regulatory power, is largely politically driven, normative decision making applicable across the board to all of those subject to it regardless of circumstance. The driving rationale is messianic populism, almost religious at its core. On the other hand, those driving in the state lane seek incremental common law building of principle-based doctrine derived from analyses of factually based controversies. I think the second better balances authority and accountability in internal corporate governance. While the first approach may well be better for addressing market fraud and disclosure issues designed to maximize transparency in the broader market, the second approach better balances authority and accountability in internal corporate governance.

Those driving in the state lane rely on more flexible enabling legislation interpreted largely by a state's common law. This is a desirable alternative for the markets, business generally, and those who take guidance from both the statutory and common law—there is a high measure of consistency and predictability arising incrementally over time from contextually written decisions. The need to promote consistency, clarity, and predictability suggests dividing the line between the lanes and deciding once and for all whether there is going to be an uncertain dotted line between the lanes or a solid line with limited bases for crossing. If there is going to be a dotted line and both sides are going to cross from time to time willy-nilly—as currently appears to be the case—we should at least avoid the potential for a collision because it does little to further consistency, clarity, and predictability. Nothing is more important to the markets and to decision makers than avoiding uncertainty.

It is particularly important to board members who are making difficult decisions about the extent to which risk can be taken to maximize wealth, and the

7. *See generally* Jim Hightower, There's Nothing in the Middle of the Road but Yellow Stripes and Dead Armadillos (1997).

extent to which they are going to be held accountable to shareholders when they fail to obey the rules of the road developed by those controlling the traffic in each lane. I expect that each of you will have your own view about the prescriptive rulemaking option or the enabling statutory framework enhanced by the flexibility of common law contextual interpretation. I am not trying to convert anyone to my way of thinking; rather, what I am suggesting is that we need to keep our eye on the differences and promote each within the arena in which it works best to maximize shareholder wealth. By "we," I mean those who are involved in the regulatory process, those who pass legislation, and those who are involved in the common law practice. Each of those involved should keep their respective eyes on the road within their respective lanes.

I am going to suggest examples of why I think the lane-crossing works both ways, and then I am going to offer solutions as to how it might work better. I will first examine Sarbanes-Oxley. There are three ways, if you would allow me to continue that tired analogy, in which Sarbanes-Oxley clearly crosses from the federal lane into the state lane.

First, Section 301 takes a rather circular route in mandating that the Securities and Exchange Commission ("SEC") require stock exchange rules and listing agreements to conform to certain standards.[8] The section attempts to define independence by describing nineteen ways in which a director is not independent. By contrast, the states define independence through fiduciary duty principles. Delaware's independence rule, for example, is not limited to directors' financial self-dealing. Delaware's view of independence, as I hope the cases articulate clearly enough, is much broader than that.

The duty of loyalty, and the concept of independence that is encompassed by it, are based on two principles. First, it is based on whether or not a director is acting in her own financial interest as opposed to that of the corporation or the shareholders. Second, it is linked to whether a director can make an objective decision given personal entanglements. The scrutinizing eye of Delaware law will examine whether a director is under the control of a majority stockholder, whether a director has ties to those who have a substantial influence over the board, and whether a director's personal ties to those who are conflicted prevent her from rendering an objective judgment and, therefore, make it difficult to conclude that she can be independent.

Whether one is an independent director cannot be analyzed carefully based on a predetermined laundry list of disqualifiers. In Delaware, the only way one can determine a director's independence is to address the director's ability to render an objective judgment based upon the context in which the decision was or would be made—a fact-specific, case-by-case analysis. What may constitute independence (i.e., the ability to exercise a business judgment objectively) in one

8. 15 U.S.C. § 78j–1 (Supp. IV 2004).

situation may not in another. We retain the flexibility to decide whether board members can or have exercised objective judgment, both in requests for instant injunctive relief to prevent something that should not happen from happening or, after the fact, for rescission or for money damages. Those circumstances logically demand a more flexible, contextually applicable definition of independence.

The federal model of prescriptive definitions of what does not constitute an independent director does not send the right message. A laundry list of disqualifiers does not send a fact-driven, contextually determined message to directors that will help them understand their role. Norms for corporate governance are best developed on a case-by-case basis, allowing those who are subject to liability for failing to live up to those norms to learn how to act from fact-specific situations with clear doctrine applied to resolve disputes arising from those facts. Which method produces the most clarity, predictability, and consistency for those who must decide what or what not to do? I leave that for you to decide.

Second, Section 307 regulates attorneys.[9] This subject matter has traditionally been reserved to the states. A recent U.S. attorney general found that out when she tried to remove U.S. attorneys from the regulatory process of the individual states and make them sort of "super-lawyers" subject only to federal supervision.[10] What is implied when Sarbanes-Oxley requires lawyers to report when the organization for which they work violates federal and state law and condones breaches of fiduciary duty? Will federal bureaucrats and federal courts, without a common law, now decide what constitutes a breach of fiduciary duty in a given state? Even in Delaware, where there are one hundred years of precedent waxing on what constitutes fiduciary duty and breach of fiduciary duty, will thirteen hundred federal judges reviewing SEC attorneys now supplant that law? What fact situation creates a breach of fiduciary duty for the purpose of imposing discipline on the attorney who may have interpreted the facts *not* to have constituted a breach under his state law, but where the SEC believes it did? No one quarrels with the fact that anyone who appears before an administrative body at any level of government subjects themselves to that body's control over how they conduct themselves while appearing before that body. But this intersection of the two lanes is a potential disaster if the bureaucrats within the SEC propose to either create a federal common law of fiduciary duty or impose their own view of state law and decide for purposes of attorney discipline when a breach of fiduciary duty has occurred.

Third, Section 402 prohibits corporate loans to executive officers and directors.[11] This is the kind of topic that the states have defined in their statutory law

9. *Id.* § 7245.

10. *See generally* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 212–14 (2000); Thomas H. Moore, Note, *Can Prosecutors Lie?*, 17 GEO. J. LEGAL ETHICS 961, 967 (2004).

11. 15 U.S.C. § 78m(k).

and the state courts have interpreted consistently over time. Though there may be states that do not permit it, Delaware law clearly permits corporate loans to officers. One commentator, in my view, got it right when he said that a federal statute barring boards from advancing money to officers and employees is as sensible as banning cell phones on the premise that no one should posses a cell phone because there is a potential that the cell phone might be used to organize and facilitate criminal activity.[12] An across the board prescriptive ban of corporate loans under all circumstances amounts to the same thing. What if you just recruited a high-ranking executive to join your company? Presumably, you did so after a sound business judgment that his employment will enhance the company's performance. But you cannot lend that executive money to move from California to New York? You have to create some kind of perverse mechanism, a "sort of a loan," to make sure that the executive can afford to make the move and accept your offer of employment? Does political populism alone justify the need to step from the federal lane into the state lane and cause a head-on collision?

A couple of cases raise the question of the extent to which the states are moving or have moved into the federal lane. Though it hurts me from time to time, I try to be entirely objective regarding federalism in corporate governance. Let's look at it from this other perspective.

There are cases in which Delaware courts have said that we have a common law duty of disclosure.[13] It is usually captured in the phrase "duty of candor" as a subset either of duty of care or duty of loyalty. Delaware courts like to define and capture concepts within subsets because it makes it easier to analyze the issue. While we do have a duty of candor, a former vice chancellor made the point that there was no duty of disclosure unless there was a request for shareholder action.[14] The Delaware Supreme Court reversed that decision and held in *Malone v. Brincat* that the duty of disclosure is much broader than that.[15] The court held that whenever you disseminate information to shareholders, regardless of the purpose for the dissemination, you have to be accurate in what you disseminate, and you have to be fulsome in the way in which you have disseminated it so the shareholders receive accurate information even when you might not be under any legal obligation to disseminate the information to them at all.[16] That sounds very much like the disclosure lane that I have previously defined as federal, so there is overlap there. Is that overlap necessary? Is it productive if the overall goal is to promote certainty? The federal government has every disclosure option covered for publicly traded companies. Was there a need to create a basis for

12. Eric Simonson, *Turning Tables: The Grade So Far on Sarbanes-Oxley*, DEL. L. WKLY., Aug. 3, 2005.

13. *See, e.g.,* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

14. Malone v. Brincat, No. 15510, 1997 Del. Ch. LEXIS 158, at *2 (Del. Ch. Oct. 30, 1997).

15. 722 A.2d 5 (Del. 1998).

16. *Id.* at 9.

private action in state law for enforcement of "disclosure violations" where no shareholder vote was required under state law?

Let's examine two cases recently decided by the chancellor,[17] and then consider *In re Netsmart Technologies*, which was decided by Vice Chancellor Strine.[18] Disclosure is implicated in all three of the cases.[19] Of the two cases decided by the chancellor, one is the backdated options case[20] and the other is what is called the "spring-loaded" options case.[21] In both of those cases, the chancellor found fault with board actions approving the plans at issue in two respects. First, the way in which each board approved the plans conflicted with the express requirements of a shareholder approved plan.[22] This, in my opinion, seems to be a breach of loyalty contract issue. You either do or do not obey the contract that you have made with the shareholder. Second, the boards approved the plans with material information that was not available to their shareholders, and the boards did not disclose that they were violating the plans, and that they had information they did not disclose to the shareholders.[23] These cases raise the question of whether state court judges should address disclosure issues even where a breach of fiduciary duty is alleged. Should we be going that far or should we leave those issues solely to those regulating traffic in the federal lane?

We cannot avoid crossing into the federal lane when a case comes to us in the Court of Chancery, as it often does, on a complaint requesting injunctive relief. There is great efficiency, I think, in having the option of injunctive relief for two reasons. The first is from the shareholders' point of view. Injunctive relief blocks any action by the directors that may constitute a breach of fiduciary duty and, therefore, prevents a wrong that can be costly to the shareholders before it matures to a final action, and the undoing of which is often referred to as the functional equivalent of "unscrambling an egg." Second, it is generally beneficial to the markets because it says to the people who are making those decisions that there is instant accountability. You do not want to be known as the board that

17. Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007); *In re* Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563 (Del. Ch. 2007).

18. 924 A.2d 171 (Del. Ch. 2007).

19. *Netsmart Techs.*, 924 A.2d at 176; *Ryan*, 918 A.2d at 350; *Tyson Foods*, 919 A.2d at 575.

20. *Ryan*, 918 A.2d 341.

21. *Tyson Foods*, 919 A.2d 563.

22. *Ryan*, 918 A.2d at 357–58; *Tyson Foods*, 919 A.2d at 588–89.

23. *Ryan*, 918 A.2d at 358; *Tyson Foods*, 919 A.2d at 588–89. I would like to emphasize that the *Tyson* decision came in the context of denying a motion to dismiss for failure to state a legally cognizable claim. Therefore, we did not really know what the facts ultimately would be. In general, knowing a little bit more about the facts on a particular case might be helpful before assessing the cases on the basis of your normative view. I have always found it difficult to have the facts interfere with the outcome that I like to see on a particular case, but as a judge, I have found over the years that it is necessary to make findings of fact, after assessing credibility, and to decide the factual underpinning of a dispute before applying the law and determining whether the result is right or not.

makes the wrong decision, potentially costing the company millions, only to find out that your process was so bad or your price was so inadequate that you failed as a decision maker to craft a deal that can close. There is instant accountability, even the potential of personal liability in some cases. More importantly, there is the shaming aspect in the business community that would reduce the possibility of that situation happening again. Apart from the injunctive relief situations, it may be difficult to justify the state courts' involvement in resolving disclosure issues in publicly traded corporations, but it is there—an example of Delaware courts crossing into the federal lane.

Netsmart, the final case that I will talk about, recently decided by Vice Chancellor Strine, involved a private equity takeover.[24] Vice Chancellor Strine made what some might think to be an unremarkable observation that since shareholders are being asked to vote on the deal, it might be helpful for them to know the methodology that the investment banker used to determine the price that it advised the board was fair—advice the board accepted.[25] Also, the shareholders were voting primarily on two issues: First, whether or not the board had done its duty in shopping to strategic buyers as well as to private equity buyers and, second, whether the price was right.[26] Would the methodology used to formulate the bases for the conclusion that the price was fair be the kind of information that shareholders ought to have before they vote? In the minds of some, this is moving the paradigm to more information and disclosure, getting shareholders information that directors believed reliable in recommending a deal to shareholders on the assumptions that the shareholders need it to cast an informed vote and that they are going to read and understand the investment bankers' methodology. Vice Chancellor Strine held up the deal's closing until there was supplementary disclosure to assure that the shareholders had optimal information for the purpose of exercising their vote.[27] Question: Is this another example of the state court crossing into the federal lane? Should the state courts be moving in that direction, and will we be subject to criticism for doing so?

There are two possible answers. First, Delaware is in the process of passing the second leg of a constitutional amendment that would allow the SEC to certify questions of Delaware law to the Delaware Supreme Court.[28] The amendment is prompted by two things. It is prompted first by the potential conflicts that I perceive in Sarbanes-Oxley, where the federal government might unilaterally move to define fiduciary duty and what constitutes a breach contrary to long established and accepted precedent for normative reasons. Since Delaware's com-

24. *Netsmart Techs.*, 924 A.2d at 175.

25. *Id.* at 203–04.

26. *Id.* at 193.

27. *Id.* at 210.

28. This provision has since become law. *See* DEL. CONST. art. IV, § 11.

mon law disclosure law could potentially conflict with federal disclosure law, it gives the SEC the option, based on an existing or stipulated factual record, to ask our view should they want it. It does not mean they have to or even that they will (although the signals that I received from their general counsel or their deputy general counsel show that they welcome the option, whether they exercise it or not). It is also stimulated by a letter the SEC sent to counsel not too long ago, saying that it was not necessary for a Delaware lawyer to opine on whether or not a shareholder initiative on the ballot was consistent with Delaware law—any lawyer could offer his opinion on that issue. If the SEC is going to take the opinion of lawyers from other jurisdictions (lawyers who are not admitted to practice in Delaware) on what constitutes Delaware law no matter how well-educated or how brilliant that lawyer may be, or how familiar that lawyer may be with Delaware law, I suppose they do so at their own risk.

The second answer, as many have noted, is that development of the concept of good faith is still in play. The two latest cases concerning good faith have not closed the door to incremental embellishment. The only thing that Delaware courts have done is to abolish the triad concept because there never has been an explanation or an analytical basis for creating a triad of freestanding, independent fiduciary duties of equal significance.[29] All we have said is that it makes sense, given our body of case law, to continue to approach these issues with the understanding that the two fundamental bedrocks of fiduciary duty are loyalty and care. We will continue to flesh those out, while signaling that when boards carry out those duties they must do so in good faith. One caveat: At least one article focuses on conscious disregard in defining good faith.[30] Delaware courts, however, have avoided the negligence continuum in defining good faith by sensing that sliding down the slippery slope of trying to define what the difference is between gross negligence and reckless conduct is a no-win enterprise.

Some ridiculed us for leaving the issue of whether good faith is an independent fiduciary duty for another day in *Disney*.[31] At least one blogger referred to it as the "infamous footnote 112."[32] Why? Because he wanted the answer now and for all time. It is hard to explain to people who have the freedom to espouse what the law ought to be at their leisure between the classroom and symposia that we make law case-by-case, in fact-specific contexts. We must be careful not to expand a case beyond the facts by raising issues that are not presented by the circumstances in that particular case. We will leave it to academics to expand on

29. The triad concept is that there are three fiduciary duties of equal standing—loyalty, care, and good faith—and not simply the traditional two (loyalty and care).

30. *See* Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211 (2006).

31. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006).

32. Disney Around the Blogs, http://www.theconglomerate.org/2006/06/disney_around_t.html (June 9, 2006).

what we ought to do. We read law review articles and we listen to academics. Their thought processes and analyses are important to all of us. It is not as if we ignore the academic world and are simply locked into the Delaware Code and our own past case law. We are attentive to what the academy says. But the door is mercifully closed on the triad. You are not going to hear that phrase any longer. We will work our way through what that means in both oversight cases—such as those pioneered by our own former chancellor, William T. Allen—and decisional cases. Depending on how the fact situations present themselves, good faith may be expanded or restricted.

Finally, let me assure you that we do not make decisions based on reactions to Sarbanes-Oxley or any other federal intrusion into the state law arena. We may expand fiduciary duty law where we may be better equipped given our methodology to answer questions posed by actual cases—but we will be circumspect. We will continue to carry out our judicial duties in good faith.