

# ON CORPORATE CODIFICATION: A HISTORICAL PEEK AT THE MODEL BUSINESS CORPORATION ACT AND THE AMERICAN LAW INSTITUTE PRINCIPLES THROUGH THE DELAWARE LENS

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## I

### THE HISTORICAL VIEW OF AMERICAN CORPORATE LAW

In the broadest sense, the evolution of corporate law and governance might be seen in the following light: First, the King of England granted charters. Later, state legislatures began granting charters, based on the entity's proposed business purpose and the societal or communal need for the entity's specific contribution to the state's economy, such as building roads or bridges. Next, around the turn of the twentieth century, this micromanagement by the state legislatures gave way to the enactment of general corporation laws—enabling statutes. The enabling statutes provide fundamental parameters for corporate governance, yet allow for substantial flexibility to fit a corporation's corporate governance structure with its particular needs.

Then, around the end of the 19th Century and the beginning of the 20th Century, states began to enact general corporation statutes and state courts, notably Delaware, began the adjudication of corporate principles. Corporate law has since been articulated in both statutes and case law. General corporation statutes still are primarily enabling acts with room for private ordering and case-by-case adjudication. Some statutes are comparable to a definitive code. Others are skeletal enabling acts, leaving the bulk of corporate law to case-by-case judicial development. This latter model is exemplified by the Delaware model embodied in the Delaware General Corporation Law (DGCL) and the Delaware case law. The Model Business Corporation Act (MBCA) is both, but it is more of a definitive code than the DGCL. Yet, the MBCA, as enacted in individual states, still leaves room for the judiciary to fill in some interstices. Each form of law carries with it various costs and benefits that make it more or less attractive in a given context. Choosing a law's optimal

form depends on careful consideration of these costs and benefits in a given context.

## II

### THE DELAWARE CASE-LAW MODEL

The “flesh and blood” of Delaware corporate law is judge-made. It is the common-law formulation of principles of fiduciary duties, articulated on a case-by-case basis. No Delaware statute sets forth the duty of care, the duty of loyalty, the business judgment rule, or when director liability may attach. Yet, the judicial gloss on fiduciary duties is embodied in about a century of Delaware case law, norms, expectations, and aspirational standards that influence the structure, relationships, control mechanisms, and objectives of corporations.

Because Delaware fiduciary-duty law is judge-made, it has been characterized as “far from clear and predictable,” therefore demonstrating a “degree of indeterminacy.”<sup>1</sup> But importantly, any indeterminacy found in the fiduciary law does not outweigh the benefits produced by judicial lawmaking. “Delaware lawmaking offers Delaware corporations a variety of benefits, including flexibility, responsiveness, insulation from undue political influence, and transparency.”<sup>2</sup> Most scholars I know would say that Delaware should not move to a mandatory or codified system. A rational corporation law or corporate-governance regime, such as Delaware’s, depends on a rich body of case law and the expertise, prompt service, and independence of, and trust in, the judiciary. As noted below, my thesis is that some statutory language, even in the MBCA, can lead to more confusion or potential mischief than would be the case if the development of key doctrines is left to case law. This is particularly true, in my opinion, when it comes to articulating fiduciary duties of directors.

Life in the boardroom is not black and white; directors and officers make decisions in shades of gray all the time. No viable corporate-governance regime can be founded on a “one size fits all” notion. Fiduciary law is based on equitable principles. Thus, it is both inherently and usefully non-prescriptive, because it allows business practices and expectations of director conduct to evolve, and enables courts to review compliance with those evolving practices and expectations in each unique factual setting.

Delaware’s corporate law—in its judge-made mode—also provides business advantages to both stockholders and managers because of its balance and flexibility. Indeed, Delaware’s emphasis on responsible corporate-governance practices as an aspirational standard of conduct is intended to promote good decisionmaking by directors, thereby obviating the specter of judicial second-

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1. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1063 (2000). *But see* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997) (arguing that “despite the fact-specific, narrative quality of Delaware opinions, over time they yield reasonably determinate guidelines”).

2. Fisch, *supra* note 1, at 1064.

guessing. Good governance practices permit the time-honored business judgment rule regime to operate with integrity by checking self-interest and sloth, while permitting valuable and prudent risk-taking.

Standards should be somewhat flexible in the face of unusual facts or a rapidly changing environment because standards should not rigidly limit the range of factors that a court may consider in reaching its judgment. This flexibility also reduces the risk of legal error because the court is not required to apply a standardized solution to each unique factual problem. But flexibility comes at a cost; it is sometimes difficult to predict how the standard will apply to a given case, and parties may be exposed to some legal uncertainty if the law is overly indeterminate to the point of instability.

In contrast, bright-line rules may provide some certainty, and are well suited to regulate repeated and relatively homogeneous activities. Rules may enhance certainty by focusing attention on a set of key factors, but they are necessarily inflexible, and may effectively ignore other important factors. A rich body of consistently developed case law, however, could yield even more certainty than a detailed code.

It is my thesis that this cost-benefit analysis explains the structure of the Delaware law as applied to corporate transactions—that is, the manner in which the courts have applied the duty of care and the duty of loyalty (including, recently, the doctrine of good faith).<sup>3</sup> Law in this context often takes the form of coherent and stable principles driving fact-intensive decisions because the law must handle a wide variety of conduct. As a result, it is impracticable to devise a bright-line, one-size-fits-all regulatory scheme that could (1) adequately cover the vast corporate landscape; (2) prevent circumvention by unscrupulous actors; and (3) keep pace with changes in corporate governance, takeover strategies and defenses, and financial devices.

There was a time in the 1970s when some academics argued for federalized minimum standards for director conduct. That effort failed. In the twenty-first century, Congress has moved in the direction of some federalization of *corporate-governance* structures by the enactment of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010. Yet, even with those federal intrusions, state-based *corporate law*, including the business judgment rule, is mostly unharmed.<sup>4</sup>

A word of caution is that the judge-made law must not be of a freewheeling or ad hoc quality. It must involve a disciplined and stable *stare decisis* analysis based on precedent and a coherent economic rationale.<sup>5</sup> The private-ordering

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3. See e.g., *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006); *Stone ex rel AmSouth Bancorp. v. Ritter*, 911 A.2d 362 (Del. 2006).

4. See E. Norman Veasey, *The Challenges for Directors in Piloting Through State and Federal Standards in the Maelstrom of Risk Management*, 34 SEATTLE U. L. REV. 1, 16 (2010).

5. See, e.g., *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (refusing to overrule the seminal, “poison pill” case of *Moran v. Household Int’l Inc.*, 500 A.2d 1346 (Del. 1985), and stating, “The need for stability and continuity in the law and respect for court precedent are the principles on

aspect of it must provide, *ex ante*, the stockholders' contractual protections deemed important, as distinct from *ex post* judicial rewriting of the contractual framework.

### III

#### THE MODEL BUSINESS CORPORATION ACT

The MBCA, in my view, is a good blend of the codified state-law model and the indeterminate judge-centered model. Although it may be more of the former than the latter model, that may be good news or it may be bad news, depending on the perception or agenda of the reader.

I found it useful during my twelve-year term in writing opinions for the Delaware Supreme Court to consider some provisions of the MBCA when those provisions had no statutory analog in the DGCL.<sup>6</sup> One such area is the useful process of dividing the analysis of director conduct into standards of conduct and standards of liability. Although this division is a good framework for analysis, the “devil is in the details” when it comes to setting forth fiduciary duties in statutory form.

As Professor Mel Eisenberg has cogently written,<sup>7</sup> and as the MBCA reflects,<sup>8</sup> standards of conduct are distinct from standards of review (also referred to as standards of liability). On the one hand, standards of conduct include some conduct that is required of directors and some aspirations for what is expected of directors in carrying out best practices.<sup>9</sup> Standards of review, on the other hand, govern whether directors will be held liable (or a transaction set aside) as a result of their particular action or inaction. Failure to adhere to the standard of conduct reflected in the aspirational goal of best practices may not result in liability, as the Delaware Supreme Court has made clear.<sup>10</sup>

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which the doctrine of *stare decisis* is founded.”); *Williams v. Geier*, 671 A.2d 1368, 1385 n.36 (Del. 1996) (“Directors and investors must be able to rely on the stability and absence of judicial interference with the State’s statutory prescriptions . . .”); *see also* E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. LAW 681, 694 (1998) (“As I see it, the courts have at least seven key obligations. They are: (i) be clear; (ii) be prompt; (iii) be balanced; (iv) have a coherent rationale; (v) render decisions that are stable in the overall continuum; (vi) be intellectually honest; and (vii) properly limit the function of the court.”).

6. *See* E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1417 (2005).

7. Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437–38 (1993).

8. MODEL BUS. CORP. ACT §§ 8.30–8.31 (2008).

9. *See* Eisenberg, *supra* note 7, at 438 (“A standard of conduct states how an actor should conduct a given activity or play a given role.”). I have found the *Corporate Director’s Guidebook* to be a very helpful framework for directors to consider in the quest for best practices. *See generally* COMM. ON CORPORATE LAWS, ABA SECTION OF BUS. LAW, CORPORATE DIRECTOR’S GUIDEBOOK (5th ed. 2007). The *Guidebook* is produced by the Committee on Corporate Laws of the American Bar Association’s Section of Business Law, of which I am privileged to be a past chair.

10. *See Brehm v. Eisner*, 746 A.2d 244, 255–56 (Del. 2000).

When considering standards of conduct, one begins with the duties and responsibilities of directors. Directors must direct the management of the corporation.<sup>11</sup> They also have a vital oversight role in monitoring management without micromanaging operations. They must carry out their responsibilities in accordance with principles of fiduciary duty. That is, directors are expected to act—indeed are presumed to act, unless the presumption is rebutted—on an informed basis, in good faith, and in the belief that the action taken was in the best interests of the corporation. The clutch question that I shall discuss later is whether that belief should be described as an *honest* belief or as a *reasonable* belief.<sup>12</sup>

One example of the potential for mischief when fiduciary principles are codified may be found by comparing the formulation of the duty of care found in the MBCA and the American Law Institute Principles of Corporate Governance (ALI Principles), and contrasting those codifications with Delaware case law. The MBCA today in sections 8.30 and 8.31 articulates the standard of conduct and the standard of liability of directors by using the objectively measured concept of *reasonableness*. That objective test, standing alone, could theoretically be a problem for a director because it could be seen as an invitation to a court to second-guess a director's judgment. The concept of reasonableness is also found in the ALI Principles, but it is ameliorated by other provisions. That reasonableness standard for directors was precisely the problem my colleague Bill Manning and I wrote about thirty years ago in connection with the predecessor of section 8.30 (old section 35) in the MBCA.<sup>13</sup>

Today's articulation, in section 8.30, like old section 35 of the MBCA, and section 4.01 of the ALI Principles, provides, in a statutory form, that a director shall act in good faith and “in a manner the director *reasonably* believes to be in the best interests of the corporation.”<sup>14</sup> Assuming the provision setting forth the standard of conduct is to some extent aspirational and not a menu for liability imposition, one should then look to other provisions for liability imposition.

But, importantly, section 8.31(a)(2) of the MBCA (“Standard of Liability for Directors”) provides for the potential liability of a director if

[T]he challenged conduct consisted or was the result of:

- (i) action not in good faith; or

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11. DEL. CODE ANN. tit. 8, § 141(a) (2010).

12. Compare *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (“honest belief”), with MODEL BUS. CORP. ACT §§ 8.30–8.31 (2008), and 1 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 (1994) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE] (“reasonably believes”).

13. E. Norman Veasey & William E. Manning, *Codified Standard-Safe Harbor or Uncharted Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law*, 35 BUS. LAW. 919, 932 (1980). But see S. Samuel Arshat & Joseph Hinsey IV, *Codified Standard—Same Harbor but Charted Channel: A Response*, 35 BUS. LAW. [lxxxvii], [lxxxviii] (1980) (arguing that the Veasey-Manning concerns about “reasonableness” are misplaced).

14. MODEL BUS. CORP. ACT § 8.30 (2008) (emphasis added); see also PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 12, § 4.01(a).

(ii) a decision

(A) which the director did not *reasonably* believe to be in the best interests of the corporation, or

(B) as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances.<sup>15</sup>

So, the potential problem in this codification of section 8.31(a)(2)(ii)(A) could arise if a court were to find that a director's belief in a particular judgment is not objectively reasonable. Would this create the potential mischief that the court could second-guess the director's business judgment? Probably not, but my point is that an effort to codify fiduciary duties may be risky.

In 1980, Bill Manning and I wrote,

The second duty which inheres in the formulation of section 35 MBCA is the duty to be reasonable when forming a good faith belief on the best interests of the corporation. In testing compliance with this duty the court will be called on to evaluate the quality of a director's judgment. The risks and benefits inhering in various corporate transactions differ. . . . Because facts differ from case to case there are no objective standards for judicial review of the decisions of directors. Despite the absence of such guidance, section 35 MBCA would require courts to determine the "reasonableness" of judgment in each case. Such determinations would be made with the benefit of "20/20" hindsight.

In Delaware and elsewhere, the traditional response to the absence of workable standards for reviewing good faith decisions of directors is the "business judgment rule []" . . . .

The "good faith" requirement exposes to close judicial scrutiny decisions made for an improper purpose, or for no "rational business purpose."<sup>16</sup>

#### IV

#### THE AMERICAN LAW INSTITUTE "PRINCIPLES OF CORPORATE GOVERNANCE"

The corresponding provisions of the ALI Principles developed in the 1980s are partly similar to the MBCA and partly different from it. Section 4.01(a) of the ALI Principles, which outlines the "Duty of Care of Directors and Officers" and the "Business Judgment Rule," provides the following:

A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she *reasonably* believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.<sup>17</sup>

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15. MODEL BUS. CORP. ACT § 8.31(a) (2008) (emphasis added).

16. Veasey & Manning, *supra* note 13, at 932–33 (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

17. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 12, § 4.01(a) (emphasis added).

In undertaking to codify the business judgment rule,<sup>18</sup> the ALI Principles provide the following in section 4.01(c):

A director or officer who makes a business judgment in good faith fulfills the duty under this Section if the director or officer:

- (1) is not interested [§ 1.23] in the subject of the business judgment;
- (2) is informed with respect to the subject of the business judgment to the extent the director or officer *reasonably* believes to be appropriate under the circumstances; and
- (3) *rationally* believes that the business judgment is in the best interests of the corporation.<sup>19</sup>

I am inclined to think that the ALI Principles, in effect, suggest that a “reasonable belief” (that is, an objective test) is the aspirational standard of conduct and only a “rational belief” is necessary to avoid liability (“reasonable” and “rational” are different). That is different from section 8.31(a)(2)(ii)(A) of the MBCA, which gives the director a clear, safe harbor from liability only for a *reasonable* belief in the best interests of the corporation.<sup>20</sup>

Although I and others have been somewhat critical of the ALI Principles in other contexts,<sup>21</sup> in my view, the term “rationally believes,” as used in the ALI Principles is more consonant with Delaware law than the term “reasonably believes.” The Delaware Supreme Court recently reinforced the Delaware case-law doctrine that “the board’s decision will be upheld unless it cannot be ‘attributed to any rational business purpose.’”<sup>22</sup> As explained in a comment to the ALI Principles on the “duty of care standards as applied to business judgments”:

It is recognized that the word “rational,” which is widely used by courts, has a close etymological tie to the word “reasonable” and that, at times, the words have been used almost interchangeably. But a sharp distinction is being drawn between the words here. The phrase “rationally believes” is intended to permit a significantly wider range of discretion than the term “reasonable,” and to give a director or officer a safe harbor from liability for business judgments that might arguably fall outside the term “reasonable” but are not so removed from the realm of reason when made that liability should be incurred. Stated another way, the judgment of a director or officer will pass muster under § 4.01(c)(3) if the director or officer believes it to be in the best interests of the corporation and that belief is rational.

. . . A director or officer who has made a decision with a belief that lacks rationality will also have failed to meet the higher standard set forth in the first paragraph of § 4.01(a), namely, the obligation to make a decision in a “manner that he or she reasonably believes to be in the best interests of the corporation.” Thus, the director’s

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18. The Official Comments to MBCA provisions 8.30 and 8.31 expressly disclaim that the MBCA has undertaken to codify the business judgment rule. MODEL BUS. CORP. ACT §§ 8.30 cmt., 8.31 cmt. (2008).

19. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 12, § 4.01(c) (emphasis added).

20. See MODEL BUS. CORP. ACT § 8.31(a)(2)(ii)(A) (2008).

21. See Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 514 (1989).

22. *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

or officer's duty of care will not have been met. This follows from the fact that the "rationally believes" test provides a significantly wider range of discretion than the "reasonably believes" test.<sup>23</sup>

It is interesting that the official comment to section 8.31 of the MBCA refers to the "rational belief" language of the ALI Principles as follows, but it is unclear (at least to me) what the comment is saying about the ALI Principles' formulation of "rational" belief:

While, in substance, the operative elements of the standard of judicial review commonly referred to as the business judgment rule have been widely recognized, courts have used a number of different word formulations to articulate the concept. The formulation adopted in § 4.01(c) of The American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* (1994) provides that a director who makes a business judgment *in good faith* (an obvious prerequisite) fulfills the duty of care standard if the director:

- (1) is not interested [*as defined*] in the subject of the business judgment;
- (2) is informed with respect to the subject of the business judgment to the extent the director . . . reasonably believes to be appropriate under the circumstances; and
- (3) rationally believes that the business judgment is in the best interests of the corporation. . . .

Referring to clause (3) above, the phrase "rationally believes" is stated in the Principles to be a term having "both an objective and subjective content. A director . . . must actually believe that the business judgment is in the best interests of the corporation and that belief must be rational." Others see that aspect to be primarily geared to the process employed by a director in making the decision as opposed to the substantive content of the board decision made. See *Aronson v. Lewis*, *supra*, at 812 ("The business judgment rule 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. . . . Absent an abuse of discretion, that judgment will be respected by the courts.") In practical application, an irrational belief would in all likelihood constitute an abuse of discretion. Compare *In re Caremark International Inc. Derivative Litigation* (September 25, 1996) (1996 Del. Ch. LEXIS 125 at p. 27: "whether a judge or jury considering the matter after the fact . . . believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational," provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests . . . the business judgment rule is process oriented and informed by a deep respect for all good faith board decisions.")

. . . .

Section 8.31 does not codify the business judgment rule as a whole. The section recognizes the common law doctrine and provides guidance as to its application in dealing with director liability claims. Because the elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts, it would not be desirable to freeze the concept in a statute.<sup>24</sup>

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23. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 12, § 4.01 cmt. d (citations omitted).

24. See MODEL BUS. CORP. ACT § 8.31 cmt. to § 8.31(a), Note on the Business Judgment Rule (2008) (emphasis added) (citations omitted). It is interesting to note here the citation to the 1996 *Caremark* case that suggested in dictum that directors in modern times should see that the corporations have a compliance system and should monitor that system. This is what Bill Manning and I suggested in



Note that this official comment says that the rational-belief language may be “primarily geared to the process employed by a director as opposed to the substantive content of the board decision made.”<sup>25</sup> But does the comment intend to say that the “reasonable belief” language of section 8.31 is the same as “rationally” believes?

We were concerned in that 1980 article about what a court might do if it dabbled in the concept of the reasonableness of director conduct. In *Cramer v. General Telephone & Electronics Corp.*, the Third Circuit Court of Appeals, in deciding correctly that a dismissal of a derivative suit will be upheld when no proper demand is made on the board to commence the action, stated the following dictum that concerned us:

[W]e do not think that the business judgment of the directors should be totally insulated from judicial review. In order for the directors’ judgment to merit judicial deference, that judgment must have been made in good faith and independently of any influence of those persons suspected of wrongdoing. *In addition, where the shareholder contends that the directors’ judgment is so unwise or unreasonable as to fall outside the permissible bounds of the directors’ sound discretion, a court should, we think, be able to conduct its own analysis of the reasonableness of that business judgment.*<sup>26</sup>

It is plainly not the law of Delaware that a court should “conduct its own analysis of the reasonableness of [a] business judgment,” as the *Cramer* dictum says. Moreover, I would hope now that courts in MBCA states adopting section 8.31 would not do so either.<sup>27</sup>

Perhaps our concerns of 1980 about the reasonableness test in a “plain vanilla”<sup>28</sup> business judgment rule case were overblown. So, is the concern about the codified terms such as “reasonable” belief simply “no harm, no foul,” as borne out by history?

The case law in this area is well laid out in Stephen Radin’s excellent 2009 sixth edition of his four-volume treatise, *The Business Judgment Rule*.<sup>29</sup> In the sections that are applicable here, the author merely quotes the *Cramer* dictum. But he also discusses the numerous Delaware cases articulating the “egregious” and “irrational” “lack of good faith” outer limits of the board’s discretion in making a business decision, juxtaposed with the “waste” doctrine.<sup>30</sup> In short,

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1980 following a 1978 suggestion to that effect by the Business Roundtable. Veasey & Manning, *supra* note 13, at 929–30.

25. MODEL BUS. CORP. ACT § 8.31 cmt. to § 8.31(a), Note on the Business Judgment Rule (2008).

26. *Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 275 (3d Cir. 1978) (emphasis added); see Veasey & Manning, *supra* note 13, at 935–36.

27. It is interesting that, as of 2009, only six states (that is, Idaho, Iowa, Maine, Mississippi, South Dakota, and West Virginia) have adopted “section 8.31’s comprehensive provisions on standards of liability.” 2 MODEL BUS. CORP. ACT ANN. § 8.31, statutory comparison at 8-246 (Supp. 2009).

28. By “plain vanilla” business judgment rule case, I mean to distinguish regular board decisions from enhanced scrutiny cases such as a takeover case (*e.g.*, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)), or sale of control case (*e.g.*, *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994)), in which cases, reasonableness in context is a proper factor.

29. STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE* 370–78, 387–98 (6th ed. 2009).

30. *Id.*

Radin's comprehensive analysis of the case law strongly implies that courts will certainly not test the objective reasonableness of a director's belief in the best interests of the corporation. It is fair to infer from Radin's analysis that Chancellor William Allen's dictum in the *RJR Nabisco* case is close to the best summary of the Delaware view:

[S]uch limited substantive review as the [business judgment] rule contemplates (i.e., is the judgment under review "egregious" or "irrational" as "so beyond reason," etc.) really is a way of inferring bad faith. . . . To recognize in courts a residual power to review the substance of business decisions for "fairness" or "reasonableness" or "rationality where those decisions are made by truly disinterested directors in good faith and with appropriate care is to make . . . courts super-directors."<sup>31</sup>

The Delaware Supreme Court has made clear, *again*,<sup>32</sup> that it will not impose a "reasonableness" test on the conduct of a director or her honest belief in the best interests of the corporation in applying the business judgment rule. Rather, the court adheres to the doctrine that conduct that can be attributed to a "rational business purpose" would normally be protected.<sup>33</sup>

## V

### CONCLUSION

To be sure, I was worried thirty years ago that the "reasonably believes" language would import an objective test that might cause some courts to be tempted to second-guess a director's honest belief and to hold that a business judgment was not objectively "reasonable." Keep in mind that the Third Circuit's *Cramer* dictum was only two years old in 1980. It is now thirty-two years old, and I don't think it has caused harm when viewed in the context of all the other cases noted here.<sup>34</sup> So, now I do not think my concerns of 1980 have been borne out by the bulk of the adjudicative experience of the past thirty years.

So, what is the bottom line, as we reflect on the sixtieth anniversary of the MBCA and the continuing goal of the Committee on Corporate Laws to burnish and protect the intellectual integrity of the MBCA? I have been honored to be a member and former chair of the Committee. I think the MBCA is an outstanding and responsible articulation of corporate law, and it has provided a good template for states to adopt. I must say the MBCA, though sometimes prolix, usually "gets it right" in almost every context, and its extensive codification—when considered with its formative comments and

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31. *See id.* at 373 (quoting *RJR Nabisco, Inc. S'holders Litig.*, No. 10389, 1989 Del. Ch. LEXIS 9 (Del. Ch. Jan. 31, 1989)).

32. *See, e.g.*, *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 49 (Del. 1997) ("Courts give a deference to directors' decisions reached by a proper process, and do not apply an objective reasonableness test in such a case to examine the wisdom and the decision itself.").

33. *In re The Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 29 (Del. 2006); *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000).

34. Moreover, there appear to have been no subsequent cases that have adopted or referred to the 1978 *Cramer* dictum.

reporter's notes—has not produced worrisome, unintended consequences of which I am aware.

Yet, on balance, I tend to prefer the indeterminacy of the Delaware law, its reliance on the century-old body of case law, and the expertise of the judges of the Delaware Court of Chancery and the justices of the Delaware Supreme Court. I note only that there may be potential confusion or mischief in other legal regimes when statutory drafters are attempting some codifications, such as those pertaining to fiduciary principles.