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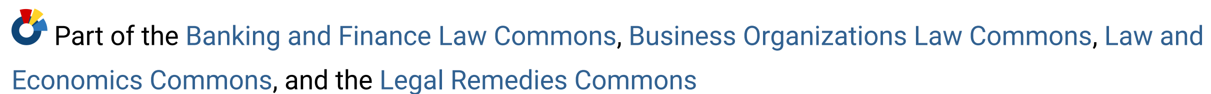

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THE HONORABLE CAROLYN BERGER

Good Faith After *Disney*: Justice Berger's Closing Discussion

ABOUT THE AUTHOR: The Honorable Carolyn Berger was appointed to the Supreme Court of Delaware on July 22, 1994. Justice Berger was a Vice Chancellor for the Delaware Court of Chancery from 1984 to 1994. Justice Berger received her B.A. at the University of Rochester in 1969. She received a Masters in Elementary Education in 1971 from Boston University School of Education and her J.D. from Boston University School of Law in 1976. Justice Berger gave the following remarks at the symposium titled *The Delaware Fiduciary Duty of Good Faith after* Disney*: Meaningful or Mickey Mouse?,* which was held at New York Law School on November 13, 2009. Her remarks were followed by a question-and-answer dialogue with symposium participants.

The following comments were made by Justice Berger during the final panel discussion of the *Good Faith After* Disney Symposium. Many of the Justice's comments were made in response to Professor Lawrence Lederman's presentation on the reasons for the Delaware Supreme Court's decisions in *Lyondell Chemical Co. v. Ryan* and *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, which is the subject of his article that is published in this symposium issue.

I have to begin with the standard disclaimer. I'm sitting on a court. I expect to be going to work next week. So whatever I'm saying here today is my best view of things. But it is not a reflection of how things might be decided in the court and it is certainly not a reflection of what anybody else on my court or the Delaware Court of Chancery might think is the answer.

Starting from a slightly different perspective, today you've heard a lot about Delaware corporate law and the good or bad about our decisions. It would, perhaps, be helpful to look at it from our side of the fence. We have the business judgment rule that says, "Hands off," and we are judges. Stockholders bring lawsuits and allege all kinds of horrible damages and mistreatment and we're supposed to say, "Too bad, the business judgment rule applies." (At least for now we're leaving aside the conflicted transactions.) So, as judges, we have a tension from the very get-go. Our job is to right wrongs, and yet, in the corporate arena, our job is to hold back in most cases. At least in my view, the Delaware courts have injected the intermediate standard of review in *Unocal*[1] to respond to particular points in time where there was a view, whether it was because of fear of federal preemption or because of what was going on in the market and a concern that there might be abuses.

For what it's worth, there had been a bunch of decisions, including a decision just about a year before *Unocal*, that questioned if a defensive step taken by a board is protected by the business judgment rule. Answer: absolutely. Then *Unocal* comes around and the court says, "Not so fast. You still get the business judgment rule, but first we're going to look at it." I guess that is still the business judgment rule, if you want to call it that.

These three cases all happened within a year. Then there was, of course, *Van Gorkom*.[2] You've heard a lot about *Van Gorkom*. I wasn't on the court at that point in time, and it's not clear to me whether Justice Drew Moore[3] was upset with anybody. It was a 3-2 decision. But clearly, if you read the dissent, you're reading a whole different case than when you read the majority opinion. My point is simply that a set of facts comes to the court and the court decides, as it did in *Van Gorkom*, that the board has gone too far here and we're going to excoriate them for not paying attention,

1. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

2. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

3. The Honorable Andrew G.T. Moore II is a retired Justice of the Supreme Court of the State of Delaware. Justice Moore authored numerous opinions on Delaware corporate law, including *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.* and *Unocal Corp. v. Mesa Petroleum*. Justice Moore voted with the majority in the 3-2 *Van Gorkom* decision.

not getting an adequate report, not getting a market check, and not getting an investment banker to give [them] a price. You read that and say, "It sounds right to me. That surely must be gross negligence." Then you read the *Van Gorkom* dissent and realize that the directors were all CEOs of other major companies. One person was the dean of the business school at the University of Chicago. They had been on the board for years and years and years and knew that company inside out. [Jerome] Van Gorkom and [Jay] Pritzker may have wanted to do their deal, but at least from the standpoint of the judiciary and the case law, we have a lot of respect for directors. You can have a very strong CEO, but you can also have strong directors who might, in their own business judgment, decide to agree with the CEO.

So *Van Gorkom* says that there was gross negligence. Then you get the statutory response. *Unocal* imposes the intermediate standard of review for defensive action. At the same time, or roughly the same time, *Revlon*[4] says that the business judgment rule applies. But if the company is going to be sold, then your duty is to obtain the highest price.

Now, fast forward to early in this century and *Disney*[5] comes along at a time when there's beginning to be real concern about excessive compensation. Again, just as with *Unocal*, there are cases going back fifty years saying that we don't touch compensation—it's not for the courts to say how much anybody should get paid. Well, in *Disney*, the chancellor says that the plaintiffs did not have a case, and dismissed the first complaint. But it comes up to the Delaware Supreme Court and the court says that $130 million is a lot of money to terminate somebody after he's been there for just over a year, or fourteen months, that it really would like to take a look at this. So it goes back on remand and Chancellor [William] Chandler is no fool. The plaintiffs filed an amended complaint and we had a seven-week trial in Georgetown, Delaware, population 5000. Then, in a one-hundred-plus page opinion, the court finds no liability. The Delaware Supreme Court later affirms.

At least one could argue that what was going on in *Disney* was in the nature of preaching, maybe even that an intermediate step between zero liability and finding liability is that you get a seven-week trial, all of your directors are turned upside down, and you pay attorneys' fees. You really don't want your company to go through that, do you? So, at the end of the day, there was no damage award. But I think the *Disney* trial certainly sent a message in terms of what directors should or shouldn't do with respect to compensation.

That brings me to *Lyondell*.[6] First, understand that the way we do things is, number one, I didn't ask to write the opinion. Number two, any time our court issues any opinion, it is not simply the opinion of the author. I think that frequently people

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4. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

5. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

6. Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).

get the impression that Justice Jack Jacobs[7] said something, when it's the *court* that said it. Also, I hear you when you talk about not wanting to use the term "utterly." I'm not the least bit concerned about our Court of Chancery being able to exercise its equitable powers if the right case comes along. "Utterly" is not going to stop it.

To the extent that people have suggested that there is a dialogue that goes on, like an intramural sport, between the Supreme Court and the Chancery Court, I think that's probably true. I don't think that's the point of our decisions by any means. But I do think that when we get a case in which the trial court has said, "Here's what happened and we've got to go to trial on this because this may be bad faith," then it becomes, arguably, important that the language of our decision makes it clear where that line ought to be. And the court doesn't just say, "Well, we're going to go have a trial and decide whether these people have failed to exercise good faith when they have done a lot of things that are part of the expectation. Granted, they didn't do a market check. They didn't have an auction. It may be that you're right and that there was a better deal that could have been obtained." Although, if I hear you correctly, what Professor Lederman is suggesting is that they couldn't have gotten a better deal.

PROF. LAWRENCE LEDERMAN:[8] That's correct.

HON. BERGER: If they couldn't have gotten a better deal, then I'm hard pressed to see why you would be concerned about *Revlon* as applied to these facts. They got the best deal they could.

PROF. LEDERMAN: Well, no, all I'm saying is that no one else had access to the information. No one else could bid on the deal. I don't think they could have gotten a better deal. I think it was a pretty good price. But I'm saying that, from the outside, there was no way that anyone would challenge the transaction. So you can't say that it was the best price, because no one came in.

HON. BERGER: Right. I wouldn't say it was the best price either, but *Revlon* doesn't say you have to get the best price. You have to make whatever efforts you can to *attempt* to get the best price.

PROF. LEDERMAN: Yes. The problem there was that there was no transparency because the directors held all the information about what the values were and it wasn't out in the marketplace until much, much later. They didn't really test it against any other possibility. Because there's no way to know what the price is.

HON. BERGER: Right.

PROF. LEDERMAN: We've always been surprised by what people are prepared to pay.

HON. BERGER: Right. I have a few other comments and then I'll be happy to respond to any questions. To the extent that there was a discussion earlier today about a duty of obedience, my considered view is that it isn't going to happen in Delaware. What I mean is not that the concept is not going to be a real part of our corporate law. I think it already is. But we've already been burned, if you will, with

7. The Honorable Jack B. Jacobs was appointed to the Delaware Supreme Court in 2003. Justice Jacobs had served as Vice Chancellor of the Delaware Court of Chancery since October 1985.

8. Lawrence Lederman is a Distinguished Adjunct Professor of Law at New York Law School, and a retired partner and chairman of the Global Corporate Practice at Milbank, Tweed, Hadley & McCloy LLP.

language. I don't think anybody on our court or the Court of Chancery wants to come up with new language. We have the duty of care, the duty of loyalty, enhanced scrutiny, and the business judgment rule. I don't think we're looking to make up new terminology. So a duty of obedience would, in my view, not be likely to catch on.

The other comment that I thought is worth making is that we have, in addition to the whole tension issue—that, on the one hand, we're supposed to decide cases and reach the merits and, on the other hand, we're supposed to let directors do their thing because of the business judgment rule—another part to the equation that people tend to overlook. And that is the whole litigation process. We talk about what's happening in the board room, but we have stockholder suits—whether they can get by the failure to make demand, whether they're class actions, whether they get dismissed, whether they go to summary judgment or whether they go to trial, whether the suit is all about reaching a settlement, and then the amount of the attorneys' fees. There are other aspects to what comes before us that don't change the corporate law really. For example, before section 220[9] books and records actions, the plaintiffs were getting dismissed left and right because they weren't adequately alleging the wrongs that they were complaining about. The Delaware Supreme Court said, "Use the tools at hand, and file a section 220 books and records action first. Get all the information so that you can file your nice lawsuit and it will actually allege some wrongdoing."

I'm just using that as an example. But what's going on there is that, on the one hand, if our courts are not open to stockholders because we're just there for management, then we're not doing our job and we're not good for anybody. That may be nice for the companies, but the stockholders are not going to stand for it and the repercussions would be severe. So we're constantly trying to maintain a proper balance. Frankly, with section 220, the court said, "Go file your section 220 actions," but then the Court of Chancery was not giving plaintiffs records when they filed their 220 actions and they'd wind up not being able to bring their suits in any event. There are other just plain litigation issues that have to do with who gets to sue, what you have to say, and how much you have to have before you get dismissed or you have summary judgment entered against you. *Lyondell* is one decision. There's room in the actual process of litigating to buffer what may be viewed as a too-strong response without doing harm to the underlying principles of corporate governance, which is what we're trying very hard to adhere to.

PROF. FAITH STEVELMAN:[10] We'll start with questions from the panel and then we'll take some questions from the audience.

PROF. ROBERT B. THOMPSON:[11] I just wanted to make one comment. What worries me about "utterly" is when it's combined with Christopher Bruner's point about

9. Del. Code Ann. tit. 8, § 220 (2001). Section 220 actions give stockholders in a particular corporation the right to inspect the books and records of that corporation. *See id.*

10. Faith Stevelman is a Professor of Law at New York Law School and the Director of New York Law School's Center on Business Law & Policy.

11. Robert B. Thompson is the Peter P. Weidenbruch, Jr. Professor of Business Law at the Georgetown University Law Center.

"try." Now, "try" is a word that I use with my children because my mother used it with me. If you just try, you're a good kid. It's not the word we use with our students, all of you out there. I mean, is trying enough? You've got to do more than try.

So I worry that I think we've written off good faith in this iteration. Now, things go up and down, but in this standard we have said, "The words we've used, the chancellors are very good about reading the Delaware Supreme Court. They know the message. The message is that it's going to be hard to get a lawsuit." What we have as a result is an imperial CEO in *Trans Union*.[12] The Delaware Supreme Court holds them liable. The legislature reverses it. We have an imperial CEO in *Disney*. After the supreme court rules, the Chancellor says you're liable and then the second time around he says there is no liability. We have an imperial CEO in *Lyondell*; no liability. I think the current status is that good faith is not very helpful to us in addressing imperial CEOs.

PROF. LEDERMAN: To put it very simply, I think that good faith is a shield for the directors. It's not a sword for the plaintiffs. That's what it comes to. I think that's where we are with respect to good faith. I'm not surprised by that. I think that, basically, is what the conceptual basis of good faith is. That's what happened. If the court allowed good faith to free float and didn't tuck it into the self-dealing area and so forth, we may have had something. But I think right now it's basically a shield and you're not going to have a new area of liabilities.

At one point Vice Chancellor Leo Strine[13] suggested that if directors take on a role as being a director when they know that it's going to be impossible to spend the time to be able to do the job, then maybe that's not in good faith. It was in one of his articles in 2002.[14] Of course, that is not on the table and will never be on the table.

PROF. STEVELMAN: I've got one question that I can't resist. *Gantler v. Stephens* held that officers have the same fiduciary duties as directors.[15] I also know that case law in this area is much less developed, of course. I'm puzzled, consistent with our discussion of imperial CEOs in *Smith v. Van Gorkom*, *Disney*, and *Lyondell*. I can also think of the *Columbia/HCA*[16] case where there was the massive Medicare and Medicaid fraud.

Why are CEOs not getting sued for a breach of due care or breach of good faith in the way that they've conducted themselves, and relatedly, why [not] CFOs [today] in the wake of the financial crisis? I assumed that the primary responsibility of the chief financial officer is to understand what the capital structure is, have a really good feel for the leverage the company has undertaken and the ability of the company

12. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

13. The Honorable Leo E. Strine, Jr. became a Vice Chancellor of the Delaware Court of Chancery in November 1998.

14. *See* Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 Bus. Law. 1371 (2002).

15. 965 A.2d 695 (Del. 2009).

16. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002). The Medicare and Medicaid fraud case was settled, with no official decision rendered.

to meet its obligations. Also, Randall Thomas at Vanderbilt sat with me and said that he looked at some very solid studies that said that if you tweaked the assumptions in the models, you could see that things could go awry very easily. So I'm surprised. I'm kind of confused about why we don't see the plaintiffs going after CEOs and CFOs, given that section 102(b)(7)[17] does not exculpate them, even with respect to due care, and why good faith might really mean something in these cases.

PROF. LEDERMAN: Actually, in *Lyondell*, Vice Chancellor John Noble[18] looks at the question of whether [Alden] Smith acted in such a way as to create liability, and he says two things, which are very important. Number one, the plaintiffs didn't raise it, so I'm not going to get into it. And the other is that there was a totally independent board and they knew what was going on sufficiently enough to act in such a way. They approved the process.

PROF. STEVELMAN: It doesn't answer my question. I think what you said is consistent with the question when I ask why aren't the plaintiffs naming the officers? This is a real question. Do you have anything to say about it? Does it surprise you? Is there an answer that I'm just missing?

HON. BERGER: I don't know. I have no idea why they're not doing it, other than that's not part of the game plan that everybody is accustomed to, which is kind of a lame answer, but that's the only way I can explain it.

PROF. THOMPSON: I think architecturally these are all deals. Boards do deals because the statute says *boards* do deals. Section 251 says that there has to be a plan of merger.[19] It has to be approved by the *board*, approved by the shareholders. It doesn't mention the CEO.

PROF. STEVELMAN: That makes sense with respect to *Smith v. Van Gorkom*. It doesn't make sense of the law abiding these cases. I mean the facts in the *Columbia/HCA* case with [Thomas] Frist being the founder, the CEO, and the chairman of the board and so deeply involved in the health care business, they're kind of distinct. But otherwise, yes, I agree with you.

PROF. ALAN PALMITER:[20] I have a question that relates to, I think, what everybody has said, a synthesis question. But before I get to it, Ken Lewis does not believe that CEOs are immune.[21] Bob's point is that we're looking at a subset, a small subset, of the plaintiff's set of claims, that the action is happening in securities fraud class actions and with the SEC and with the Justice Department.

PROF. THOMPSON: They do get named personally for those.

PROF. PALMITER: Here's my synthesis question. Isn't there soft law going on here? Hasn't it been going on the whole day? The soft law is that we now have a way

17. Del. Code Ann. tit. 8, § 102(b)(7) (2001).

18. The Honorable John W. Noble has been a Vice Chancellor of the Delaware Court of Chancery since November 2000.

19. Del. Code Ann. tit. 8, § 251 (2001).

20. Alan Palmiter is a Professor of Law at Wake Forest University School of Law.

21. Kenneth D. Lewis is the former Chief Executive Officer, President, and Chairman of Bank of America Corporation.

of getting past the motion to dismiss and forcing directors to explain themselves, which is Ken's point. They're forced to explain themselves dramatically, in the *Disney* case, publicly, but, in other contexts, in depositions, preps, and all the rest. My guess is that a lot of directors would say, "I've paid a pound of flesh. I didn't pay out of my pocket. But this and the sleepless nights this caused were as painful and sent as much of a message as would a personal liability judgment." So my question is, is there soft law happening?

PROF. LEDERMAN: No, Alan, but what *Lyondell* does is cut it off at the pass in the same way. It made sure that there would be no trial. [Vice Chancellor] Noble wanted a trial and he wanted to muck around and find out what the facts were. There, the court cuts it off and says there will be no trial. So, yes, it looks like in the good faith cases that you can get to trial. But I have a feeling that you're not going to be able to get to trial.

PROF. PALMITER: Maybe depositions are good enough.

PROF. STEVELMAN: Can we appeal to a higher authority?

HON. BERGER: Well, I think it's unlikely that you get past a motion to dismiss on a good faith case.

PROF. LEDERMAN: That's what it's about.

HON. BERGER: The case will come along with the kind of facts where you will get past the motion to dismiss. But, by and large, I think *Lyondell* wasn't aimed at this. But with respect to the idea that you could backdoor gross negligence by saying it's *really* gross negligence and that makes it a breach of the duty of good faith (or good faith as a part of loyalty), the court is saying, "No, you've got to have more than just very negligent conduct."

Arguably, in *Lyondell*, the only way that the trial court was able to say we can get past the motion to dismiss and go to trial is by saying that *Revlon* has specific things you must do and that you didn't do the things that *Revlon* says you must do. Therefore, there is arguably a knowing disregard of your responsibilities, an utter failure to act, and so forth under the existing standards for good faith. The Delaware Supreme Court said, "No, if *Revlon* were what the trial court said *Revlon* was, then maybe the trial court would have been affirmed." But *Revlon* doesn't say you must do these four things, these three things, or any specific thing. Because of that, you can't hang a good faith claim on the fact that you knowingly disregarded your responsibility as a director.

PROF. WILLIAM W. BRATTON:[22] Alan, let me rephrase your question. Since it's a liability regime, I don't know if soft law is the term. But here's my interpretation of your question. What is the function of a liability regime that almost never finds anybody liable? I think you're right. You can talk in terms of calling people to account on a motion to dismiss when you deny it and then forcing them to explain, and I think that's a very good justification. I also think, despite *Lyondell*, that Delaware

22. William W. Bratton is a Professor of Law at the University of Pennsylvania Law School and a Research Associate with the European Corporate Governance Institute.

chancellors are very good at denying motions to dismiss when there's some explaining that needs to be done.

HON. BERGER: I would agree with that. Bear in mind, when a motion to dismiss is denied, it doesn't come to the Delaware Supreme Court. Then, by the time they get their additional discovery and the trial court has looked at it and is satisfied that summary judgment is appropriate, it's still coming up in the posture of a defense verdict. But what's been accomplished in the meantime is that there has been some discovery and some calling to account, if you will.

PROF. PALMITER: Sleepless nights was my term.

HON. BERGER: There you go.

PROF. JOHN HUMBACH:[23] I think about the duty of loyalty, the duty of care, good faith, and these are all fine texts. But it seems to me that the real distinction is between disgorgement remedies and indemnity remedies. Disgorgement remedies are usually associated with the duty of loyalty, historically at least. They make a person who overreached or was crooked give back what he got. That's not going to scare off honest people. Indemnity remedies, on the other hand, scare off honest directors. The real distinction here is between those two remedies.

It seems to me that what the legislature did after *Van Gorkom* was to say to the corporations that you can take indemnity remedies off the table so that you don't scare off the good directors, the honest directors. But we're still going to leave the disgorgement remedies on the table. They passed this statute, which is very interesting to read, but it has words that had meanings when the statute was passed and have different meanings today. Lots of stuff has been poured into them in the last ten years, particularly the phrase "good faith," which used to mean honesty in fact. Now it means all kinds of stuff. Not violating laws, not failing to perform a known duty, etc. And now "loyalty" has "good faith" poured into it. So the legislative choice has really been changed because new meanings have been given to the words.

The question I have is whether there is a principled reason for imposing indemnity remedies on directors when we know that scares them off and we sort of don't want to do it, but in some cases we want to do it. Wouldn't that principled reason control, for example, the meaning we give to good faith, or any of these words?

HON. BERGER: My only comment on that is that I think to the extent that anybody got into "trouble," it was when *Van Gorkom* was decided the way it was. If we could have left gross negligence as the standard and liability for gross negligence, then I don't [think] there are too many directors who would be worried that they don't know the difference between doing their job and being grossly negligent.

The *Van Gorkom* court could have said that the conduct is not gross negligence, that this is not good and here are the things you should be doing, and here's our little sermon for the next one; but there was no gross negligence here. Then we would still have some review. Instead, the court said you're liable. The legislature said, "Oh no, you're not going to do that." Now we're stuck with a situation where, unless we're going to really distort things, we just can't call gross negligence lack of good faith.

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23. John A. Humbach is a Professor of Law at Pace University School of Law.

PROF. STEVELMAN: A long time ago, Larry Lederman and I started thinking about controlling shareholders and minority shareholders and freeze-out transactions. After spending an exhaustive amount of time thinking about the whole thing, one of the questions that I was left with was based on one of the strange things that I saw. That is, there's very little law that actually governs, adjudicates, articulates, applies, and enunciates the duties of the directors at the controlled subsidiary. There's a lot of law on what entire fairness means for the controlling shareholder and what the controlling shareholder has to do to satisfy the obligation of fair dealing.

Peter Kostant raised this question in the context of *Sinclair Oil*[24] and [it] made me wonder if I have to rethink that setting as a kind of a quasi freeze-out. So I just wanted to throw out there, and think about, when push comes to shove, whether good faith is going to get thrown at the directors at the controlled subsidiary as an analog or a corollary, separate piece of a cause of action in an entire fairness suit. Any thoughts?

PROF. THOMPSON: I think not. I would cite, as my first defense, *Emerging Communications*,[25] which is a controlling shareholder situation in which there's an appraisal claim and a duty claim personally against the directors. Justice Jacobs, sitting as Vice Chancellor in that case, has no trouble in saying you didn't do right. There is an imperial CEO in that case, but it's a controlling shareholder CEO.

PROF. LEDERMAN: It was an example of self-dealing.

PROF. THOMPSON: And there was self-dealing. So when the directors are self-dealing, courts do just fine. This is not a conference about the easy stuff. This is about the harder cases that come outside of self-dealing.

PROF. STEVELMAN: I remember that those directors were found personally liable, but did they themselves enjoy a financial benefit from going ahead with that transaction?

PROF. LEDERMAN: Almost everybody was in one way or another being paid off by the controlling shareholder. But for me the most disturbing thing in that case was the fact that there were two sets of financials. There was a set of financials that they gave to the independent committee and there was a set of financials that they gave to the banks. What they gave to the banks they also gave to Cahill Gordon & Reindel LLP, the controller's lawyers. I have never understood how they could have allowed that to go on, where they had a set of financials which they knew the committee didn't have. Everybody acted on a set of financials which were, in fact, stale and were not the best set of financials that were given to the banks. That case was a very disturbing case and I understood why [Justice] Jacobs got very upset with it. The fact is that they were treating everybody badly. It was a very strange result, holding liable a director who was not even on the committee, claiming he should have known beyond peradventure of a doubt that it was an inadequate price. I mean, that was very hard. But anyway, that's where I come out on that.

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24. Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

25. *In re* Emerging Commc'ns, Inc. S'holders Litig., No. 16415, 2004 Del. Ch. LEXIS 70 (Del. Ch. May 3, 2004).

MR. JOSEPH DELLARMI:[26] I've noticed in the past few years, especially since *Oracle*,[27] we've had several cases where it is increasingly likely to not find a director disinterested in committee voting. But at the same time, we've had cases like *Disney* and now *Lyondell* and then looking back at *Van Gorkom* where we could, conceivably, under those rationales, see conflicts of interest, loyalty violations. But yet, we look back and we try to go for duty of care violations and duty of good faith violations. Why, with the increase of non-disinterestedness, haven't we seen a commensurate increase of loyalty claims?

PROF. STEVELMAN: That's a good question.

HON. BERGER: One possible answer, and it's really just a guess, is that the trial court, the court of chancery, basically makes a factual determination as to whether there is disinterest. Having made that determination, there's not a whole lot of room to get that reversed on appeal by and large. Now, obviously, if the trial court was dead wrong, that's fine, but we're not talking about situations where the law is unsettled and there's a good chance that the trial court will get it wrong. So when the cases are presented, frequently the lawsuit does say that everybody was interested and beholden and all of that and the trial court throws it out, or at least throws those allegations out as being unfounded. That's my only response.

PROF. STEVELMAN: Peter, do you have any final words?

PROF. PETER C. KOSTANT:[28] Thank you, panel. Thank you to all panelists. Thank you, students. Thank you, practitioners. And especially thank you, Justice Berger.

HON. BERGER: My pleasure.

26. Joseph Dellarmi received his J.D. from New York Law School in June of 2010.

27. *In re* Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003).

28. Peter C. Kostant is a Visiting Professor of Law at New York Law School.