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ABSTRACT

The officer is at the center of modern corporate governance. Wielding immense power and influence, officers' conduct and decision-making can determine the success or failure of their companies and impact the economy more broadly. Fiduciary duties under state law serve as a vital check on officer power. This article is the third piece in a study of the role of fiduciary duties in regulating officer behavior. It examines an underlying premise in prior scholarship – that officers are rarely being held accountable for their conduct in the traditional fiduciary duty litigation context of state court. This article reviews opinions of the Delaware state courts between 2004 and 2014 to gain insight into officers' fiduciary accountability in this context. The results of this research suggest a modest occurrence of officer accountability in state court, consistent with prior scholars' views. The court opinions also support other beliefs surrounding officer misconduct and the enforcement process for officers' fiduciary duties. This article concludes with a discussion of long-term considerations for future research regarding the role of litigation in shaping officer accountability and fiduciary duty doctrine.

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INTRODUCTION

"The separation of control from ownership [in the corporate form] demands a system of accountability."[1] This statement is arguably truer now than ever before as today's corporate icons like Warren Buffett, Mark Zuckerberg, and Marissa Mayer wield tremendous power and influence in running corporate America. Indeed, decisions made by these individuals can result in the success or collapse of their companies—and in some cases may even impact the broader

1. Donald E. Schwartz, *In Praise of Derivative Suits: A Commentary on the Paper of Professors Fischel and Bradley*, 71 CORNELL L. REV. 322, 324 (1986).

economy. This power is not unfettered, however. At a minimum, it is subject to oversight by the board of directors and, perhaps more importantly, cabined within the limits of corporate fiduciary duties under state law.[2] This article is the third piece in a three-part study of the role and effectiveness of fiduciary duties in regulating officer behavior.[3] The first article explored the substantive content of an officer's fiduciary duties[4] while the second article analyzed the legal schemes in place to enforce those duties.[5] Building upon this prior research, this article engages in an analysis of officers' accountability in the traditional fiduciary duty litigation context of state court.

A hallmark of the corporate form is the separation of ownership and management rights.[6] Directors and, most often through directorial delegation, officers are given primary responsibility and decision-making powers regarding the business and affairs of the corporate enterprise,[7] while stockholders, as the owners of and residual claimants to the assets of the entity, have few management

2. *See infra* note 22.

3. *See* Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 BUS. LAW. 27, 31 (2010) [hereinafter *Restoring the Balance*] (discussing the standards of fiduciary conduct for officers and proposing the duty of obedience to apply to these individuals); Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duti*es, 48 U.C. DAVIS L. REV. 271, 280 (2014) [hereinafter *The (Un)Enforcement*] (analyzing the enforcement scheme surrounding officer fiduciary duties). For purposes of this article, the term "corporate officer" or "officer" refers to non-director officers or persons who serve as both a director and an officer in the corporation but are acting in their officer capacity. Within this group, this article focuses primarily on senior/executive officers.

4. *See* Shaner, *Restoring the Balance*, *supra* note 3.

5. *See* Shaner, *The (Un)Enforcement*, *supra* note 3.

6. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6–7 (Transaction Publishers 1991) (1932); CORP. GOVERNANCE COMM., AM. BAR ASS'N, REPORT OF THE TASK FORCE OF THE ABA SECTION OF BUSINESS LAW CORPORATE GOVERNANCE COMMITTEE ON DELINEATION OF GOVERNANCE ROLES AND RESPONSIBILITIES, 65 BUS. LAW. 107, 111 (2009) [hereinafter ABA REPORT] ("The corporate form is defined by the way it distributes decision rights and responsibilities among shareholders, the board, and management.").

7. *See* DEL. CODE ANN. tit. 8, § 141(a) (2006) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."); MODEL BUS. CORP. ACT § 8.01(b) (2006) ("All corporate powers shall be exercised by or under the authority of the board . . . and the business and affairs of the corporation shall be managed by or under the direction . . . of its board of directors . . . ."); *see also* Kaplan *ex rel* Chase Manhattan Corp. v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 729 (Del. 1988) (stating that it is a "basic principal of [Delaware law] that the business and affairs of a corporation shall be managed by the board of directors"); Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 188 (2004) ("[T]he corporate form of centralized management involves dividing management between professional full-time executives who manage the firm day-to-day and directors who oversee the board and set policy.").

rights.[8] Separating ownership from control in this manner has many benefits, most prominently centralized decision-making; the efficient, effective utilization of director and officer expertise; and limited liability for stockholders.[9] This form is not without drawbacks, however. When a corporation's managers do not share in the ownership of the entity in the same manner as the stockholders, their economic incentives may not align, leaving stockholders exposed to potentially significant agency costs from self-interested or careless actions of the managers.[10] Whether such actions are outright illegal, just unreasonably risky, self-serving, or some combination of them all, they can result in considerable harm to stockholders—not to mention the general public.[11]

While both directors and officers may engage in opportunistic behavior at the expense of stockholders, a strong argument can be made that actions of officers pose the greatest risks to the corporation and its stakeholders. This is particularly true for public corporations (which is the primary focus of this article) where officers have taken on an outsized role within the enterprise.[12] In the typical public

8. *See* BERLE & MEANS, *supra* note 6, at 6–7; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 559 (2003) ("Shareholders essentially have no power to initiate corporate action and, moreover, are entitled to approve or disapprove only a limited set of board actions.").

9. *See* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1051 (2010). Professors Marcel Kahan and Edward Rock describe the centralized management of the corporate form as "[o]ne of [its] great virtues" and accordingly, "[m]uch of corporate law can be interpreted as establishing and protecting that centralized management because of the benefits that it provides to the participants in the firm." *Id. See also* Bainbridge, *supra* note 8, at 555–56 (vesting power in a centralized decision-maker "lower[s] costs associated with uncertainty, opportunism, and complexity"); Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1365–69 (2014) (describing the benefits of strong management and chief executive officer).

10. *See* BERLE & MEANS, *supra* note 6, at 7 (stating that the "separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge"). This is the classic agency problem. *Id.* at 7. *See also* William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1397 (2007) ("According to classic agency theory, problems of opportunism and adverse selection among managers generate 'agency costs' that impair corporate performance."); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

11. *See* ABA REPORT, *supra* note 6, at 111 (stating that historically a major concern with the corporate form is that it provides management with the opportunity to "act in a self-interested manner" at the expense of stockholders); Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859, 860 (2013) ("Corporate behavior in the [financial] crisis yielded enormous negative externalities for the greater society.").

12. This article's primary focus is officer accountability in the public corporation context.

corporation, senior executive officers such as the chief executive officer (CEO), not the board of directors, have primary day-to-day management authority.[13] In connection with this expansive authority, and likely as a result thereof, officers often command immense discretion and deference.[14] Under classic agency theory, however, if left unchecked, officers will exercise their power in their own self-interest as opposed to in the best interests of the corporation and its stockholders.[15] In fact, many of the major corporate scandals over the past twenty years were rooted in self-interested officer conduct, exposing the dangers of an officer-dominated model of corporate governance.[16] Further, recent attempts to regulate officer conduct at the federal level illustrate the recognition of officers' prominent roles in both corporate and broader economic welfare and the importance of reducing the agency costs that flow from their power.[17]

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13. *See* 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.10[B] (3d ed. 2008) (stating that it is normally the officers to whom the primary management functions are delegated); Robert B. Thompson & Hillary A. Sale, *Securities Fraud As Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 864 (2003) ("In reality, officers exercise the most important corporate powers . . . ."); *see also* ABA REPORT, *supra* note 6, at 128 (stating that "[t]hroughout much of the last century, the professional managers hired to run public companies have wielded significant power in relation to both the board of directors and shareholders").

14. *See* ABA REPORT, *supra* note 6, at 128 (noting that as executive officers took on greater management responsibility they were afforded greater latitude); Lin, *supra* note 9, at 1364–65 (describing the organizational and legal deference); *see also* Jens Dammann, *How Embattled Are U.S. CEOs?*, 88 TEX. L. REV. SEE ALSO 201, 201 (2010) ("What both sides agree upon, though, is that U.S. managers *are* in fact quite powerful, especially by international standards."). *But see* Kahan & Rock, *supra* note 9, at 989 (asserting that CEOs of publicly held corporations are losing power).

15. BERLE & MEANS, *supra* note 6, at 7; Lin, *supra* note 9, at 1370–88 (discussing the perils of strong management, in particular the CEO, including capture, deference, overconfidence and aggrandizement); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 684 (2005) (stating that "there is no reason to assume that managers are necessarily motivated to maximize shareholder value").

16. *See* James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, LAW & CONTEMP. PROBS., Autumn 1997, at 1, 11 ("[T]here is hardly any behavior within the corporate setting that cannot be linked to advancing a manager's self interest."); Shaner, *The (Un)Enforcement*, *supra* note 3, at 289–94 (describing officers' roles in Enron, WorldCom, option backdating, and the financial crisis); Thompson & Sale, *supra* note 13, at 861.

17. *See* ABA REPORT, *supra* note 6, at 145–46 ("Renewed concern that our society is deeply dependent on the continued health and viability of corporations for economic growth has heightened the scrutiny of current corporate governance practices."); William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 967–68, 999 (2003); Thompson & Sale, *supra* note 13, at 905–06; Charles K. Whitehead, *Why Not a CEO Term Limit?*, 91 B.U. L. REV. 1263, 1270–71 (2011).

Oversight and accountability can reduce officer agency costs.[18] As a general matter, accountability is vital to encourage legal compliance and deter misbehavior.[19] In the corporate setting, increased management accountability is viewed as an important component in improving corporate governance and protecting stockholder interests.[20] Accordingly, a central problem in corporate law is how to deploy accountability measures that allow a centralized management body the freedom to exercise its authority while protecting stockholders from the agency costs associated with that freedom.[21]

One key tool for holding officers accountable is the imposition of fiduciary duties; indeed, it is a principal constraint on officer power under state corporate law.[22] While officers may be given wide

18. *See* Schwartz, *supra* note 1, at 324 ("The separation of control from ownership demands a system of accountability."); Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 144–49 (2009) (stating that the efficiency of the corporate form's centralized decision-making must be balanced with monitoring and accountability).

19. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1142 (2012) (noting that "our system of regulation is only as good as the enforcement mechanisms underlying it"); Richard C. Hollinger & John P. Clark, *Deterrence in the Workplace: Perceived Certainty, Perceived Severity, and Employee Theft*, 62 SOC. FORCES 398, 399 (1983) (stating that "the consensus of empirical research is that perceived certainty of punishment is the most effective in shaping behavior"); Andrew Quinn & Barry R. Schlenker, *Can Accountability Produce Independence? Goals as Determinants of the Impact of Accountability on Conformity*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 472, 480 (2002) (finding that accountability can counteract unethical conduct and human behavior tendencies that undermine self-governance systems).

20. *See* Kahan & Rock, *supra* note 9, at 1051 (noting that centralizing management in the hands of paid managers "creates agency costs for the shareholder-manager, the prevention of which forms such an important part of corporate law"); Ribstein, *supra* note 7, at 199 ("The main question regarding corporate governance . . . is whether powerful corporate managers are adequately accountable to shareholders' interests.").

21. *See* Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 567–68 (2008) ("At the heart of corporate governance law lies the tension between the competing values of authority and accountability."); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 86–87 (2004) [hereinafter *Business Judgment Rule*] (asserting that the business judgment rule "identifies the tension between authority and accountability as the central problem of corporate law"); *see also* Chandler & Strine, *supra* note 17, at 993 ("One of the central problems of corporate law has always been how to create a system whereby diffuse stockholders feel comfortable entrusting their capital to centralized management."); ABA REPORT, *supra* note 6, at 110 ("Maintaining an appropriate balance between responsibilities for corporate oversight and decision-making is critical to the corporation's capacity to serve as engine of economic growth, job creation, and innovation.").

22. *See In re* Goldman Sachs Grp., Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *1 (Del. Ch. Oct. 12, 2011) ("Within the boundary of fiduciary duty, however, [officers and directors] are free to pursue corporate opportunities in any way that, in the exercise of their business judgment on

latitude in managing the business and affairs of the corporation, their authority must be exercised within the bounds of their fiduciary duties. This fiduciary constraint can be, and at least in the director context frequently is, enforced by stockholders suing for breaches of those duties.[23] Stockholder litigation has been described as essential to a successful system of corporate governance and management accountability—giving meaning to the abstract concepts of fiduciary duties, supporting the disciplinary effect of those duties, and encouraging desirable conduct.[24]

While fiduciary constraints are central to the system of checks and balances in corporate law, several scholars have posited that their effect, especially through judicial enforcement in state courts, is limited. Citing to the role reversal in corporate management, procedural hurdles in derivative litigation, and narrowing standards of oversight liability, prior scholarship concludes that better options for holding officers accountable exist outside of state court fiduciary litigation.[25] Professors Thompson and Sale, for example, conclude

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behalf of the corporation, they see fit."); Thompson & Sale, *supra* note 13, at 865 (stating that "[t]he most important state law constraint is fiduciary duty"). This article assumes that fiduciary duties provide a sufficient constraint on officer conduct. For a discussion of whether this is a fair assumption, see Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993 (2006).

Moreover, scholars have cited many other constraints, legal and non-legal, on officer conduct. *See* Shaner, *The (Un)Enforcement*, *supra* note 3, at 278 n.17 (describing the different constraints on officer behavior); *see also* David M. Phillips, *Principles of Corporate Governance: A Critique of Part IV*, 52 GEO. WASH. L. REV. 653, 672 (1984) ("Extra-legal incentives, most notably those proffered by the existence and operation of certain markets, including the securities, executive employment, and products markets, already regulate managerial behavior."). This article does not take a position on the relative effectiveness of the different mechanisms that constrain officer conduct.

23. *See* Thompson & Sale, *supra* note 13, at 861 (observing that "state fiduciary duty litigation continues as a mechanism frequently utilized to monitor managers").

24. *See* Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 436–37 (2008) ("Derivative litigation performs the task of translating the abstract concepts of fiduciary obligation, good faith, and fairness into the specific limits on the insiders' ability to favor themselves."); Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1733 (1994) ("Shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers."); Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 214 (2010) (stating that "the shareholder derivative suit [is] an important tool to encourage and enforce complying behavior"); Schwartz, *supra* note 1, at 327.

25. *See, e.g.*, Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 408–09 (2005) ("[S]cholars agree that the procedural rules related to derivative suits severely limit the ability of shareholders to bring legal actions to impose liability on directors for violating their fiduciary duty."); Nees, *supra* note 24, at 215

that stockholder securities fraud litigation has several practical advantages over state stockholder litigation, which has contributed to the greater use of the former in holding officers accountable.[26] Similarly, Professors Johnson and Ricca contend that officer fiduciary accountability is not occurring in the traditional state litigation context but rather in alternative venues like bankruptcy court.[27] Finally, scholars have construed studies on CEO turnover rates as suggesting that boards of directors are reasserting themselves through intra-corporate sanctioning, as opposed to judicial sanctioning, of officers.[28]

This article explores an underlying premise of this prior scholarship: that officers are not frequently or effectively being held accountable for compliance with their fiduciary duties in the context of traditional state court litigation. Specifically, this article takes a first step in studying the status of state court accountability by looking at those instances where the Delaware courts are commenting on the issue of an officer's fiduciary duties.[29] To do so, this article reviews Delaware state court and bankruptcy court opinions from 2004 to 2014 that include or discuss breach of fiduciary duty claims against corporate officers.[30] This research has

(addressing the narrow duty of oversight); Shaner, *The (Un)Enforcement*, *supra* note 3, at 303–19 (discussing how the dynamic in corporate management and development of corporate doctrine has led to the (un)enforcement of officer fiduciary duties).

26. *See* Thompson & Sale, *supra* note 13, at 861.

27. Lyman Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75, 95–97 (2011) (positing that "the non-criminal sanctioning of officers may be taking place in federal bankruptcy courts with respect to fiduciary duties").

28. *See, e.g.*, *id.* at 87 ("We expect that most officer misconduct coming to the attention of the board will be resolved [internally]."); Ken Favaro et al., *CEO Succession 2010: The Four Types of CEOs*, STRATEGY+BUS., Summer 2011, at 11, http://www.strategyand.pwc.com/media/file/Strategyand-CEO-Succession-2010-Four-Types.pdf (finding that boards of operationally involved corporations "tend to be more informed and engaged in monitoring strategy"); Kahan & Rock, *supra* note 9, at 1030–32 (citing CEO turnover as an indicator of greater substantive board independence and that CEOs are losing their power); Chuck Lucier et al., *The Era of the Inclusive Leader*, STRATEGY+BUS., Summer 2007, at 12, http://www.boozallen.com/media/file/Era_of_the_Inclusive_Leader_.pdf (concluding that boards are "more deeply engaged and owners actively involved in governance and strategy"); *see also* Paul Graf, *A Realistic Approach to Officer Liability*, 66 BUS. LAW. 315, 333 (2011). *But see* Dammann, *supra* note 14, at 204 (pointing to executive compensation and golden parachutes, as opposed to decreasing CEO power, to explain shorter CEO tenure).

29. It should be noted that a more in-depth empirical analysis of litigation rates and allegations in complaints would be necessary to draw stronger conclusions than what this article is able to do.

30. This article primarily focuses on Delaware law because Delaware case law and statutes are

two goals. The first is to add to our understanding of efforts to hold officers accountable via state law litigation for their breaches of fiduciary duty. The second is to tease out the interpretations and implications of the results of this research on the law applicable to corporate officers' fiduciary duties. The purpose of this article is not to provide an explanation for any disparity between officer accountability in state court versus other venues. Rather, the intention is to provide insight into the officer fiduciary duty accountability landscape (as reflected in the Delaware courts' opinions) as well touch on the related issues of officer conduct and enforcement. Viewed in that light, this research can be useful in adding to the discussion of issues such as how one thinks about the role of officers, the current system of checks and balances on officer conduct, and the broad goal of increased officer accountability.

Providing a backdrop for this research project, Part I of this article presents an overview of the role of officers in the modern corporation and the need for fiduciary accountability to balance their considerable power and authority.[31] Part II provides the results of the collection and analysis of Delaware state and bankruptcy court decisions from 2004 to 2014 that discuss officer fiduciary duty claims.[32] The results reveal a relatively modest number of traditional fiduciary duty claims against officers, consistent with prior scholars'

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generally considered to be the leading source for corporate law. *See, e.g.*, William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 71 (2000) (stating that the DGCL "is certainly the nation's and indeed the world's leading organization law for large scale business enterprise"); Chandler & Strine, *supra* note 17, at 959 (using Delaware law for their analysis as it is "generally representative of state corporate laws"); Ribstein, *supra* note 7, at 230 (noting the "continued dominance of Delaware corporation law"). Delaware's corporate law prominence is due, in part, to the high incorporation rates in that state. *See infra* notes 69–74 and accompanying text.

In addition to state law stockholder litigation, bankruptcy trustees may file claims against a bankrupt corporation's officers for breach of fiduciary duty. *See infra* Part II.C. In fact, Delaware's bankruptcy courts began tackling the issue of officer fiduciary duties even before the Delaware Supreme Court's decision in *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009). *See, e.g.*, *In re* Bridgeport Holdings, Inc., 388 B.R. 548, 573 (Bankr. D. Del. 2008). Table 2, *infra*, provides a complete picture of officer accountability data on publicly-available opinions involving or referencing officer breach of fiduciary duty claims in the bankruptcy context in the United States Bankruptcy Court for the District of Delaware for the same 2004 to 2014 time period.

31. *See infra* Part I.

32. *See infra* Part II.

beliefs.[33] Part II also provides breakdowns of the research by (i) the types of cases filed, (ii) the context in which fiduciary breaches were alleged, and (iii) the enforcement scheme surrounding the claims advanced.[34] Based on these categorizations, this section of the article includes discussions of how the results also appear to provide support for scholars' other beliefs surrounding fiduciary accountability for officers.[35]

Part III then explores possible interpretations and implications of the research.[36] Specifically, the article collects and synthesizes the courts' statements regarding officer fiduciary duties—which tend to be scant, fragmented, or both—into a clearer statement of the law surrounding officer fiduciary duty doctrine.[37] The opinions also reveal a pattern of superficial use of sweeping language for precedential purposes and reliance on established legal principles both by the plaintiffs bringing these claims and the courts in analyzing them.[38] Judicial reluctance to address the contours of officer fiduciary claims, in combination with the reliance on established principles, has contributed to the apparent stalling in the development of officer fiduciary doctrine.[39] Finally, Part IV provides a brief agenda for future research regarding officers' accountability for their fiduciary duties, including some initial thoughts on the role of litigation in shaping officer accountability and fiduciary duties.[40] This article concludes that any discussion of improving corporate governance through accountability should include a purposeful focus on the interplay of officer accountability with the development of fiduciary duty doctrine.

33. *See infra* Part II.B.
34. *See infra* Part II.
35. *See infra* Part II.D.–II.E.
36. *See infra* Part III.
37. *See infra* Part III.A.
38. *See infra* Part III.
39. *See id.*
40. *See infra* Part IV.

I. CORPORATE OFFICERS AND THE NEED FOR ACCOUNTABILITY

The officer occupies an important space in corporate management and leadership. Although the board of directors is statutorily charged with managing the business and affairs of the corporation, it can delegate much of its authority to officers.[41] Today—especially in large public corporations—most, if not all, of the management responsibility is delegated to the corporation's officers.[42] This has led to an officer-dominated model of corporate governance, with officers exerting immense power and influence over the corporation.[43] Indeed, the rise of the CEO nicely illustrates the power, impact, and stature of these individuals.[44] Excessive levels of CEO compensation and, until recently, the role of the CEO as the chairman of the board, reflect the significant control this one officer has over corporate

41. *See* DEL. CODE ANN. tit. 8, § 141 (2006).

42. *See* BALOTTI & FINKELSTEIN, *supra* note 13, at § 4.10[C] (stating that "normally it is the officers to whom the primary functions of management are delegated"); Ribstein, *supra* note 7, at 188 ("[T]he corporate form of centralized management involves dividing management between professional full-time executives who manage the firm day-to-day and directors who oversee the board and set policy."); Thompson & Sale, *supra* note 13, at 905–06 ("As our business enterprises have become larger and more complex, increased power has passed to chief executive officers and the line hierarchy that flows from that person.").

43. *See* Amitai Aviram, *Officers' Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. ILL. L. REV. 763, 777–79 (2013) (describing the different ways in which officers can dominate the board); Johnson & Ricca, *supra* note 27, at 82 ("Of the three main actors in corporate governance (shareholders, directors, and officers), the officers clearly continue to reign supreme."); Lin, *supra* note 9, at 1353 ("Chief executives run the world."); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 1, 6 (2009) (describing corporate officers as the "true corporate decisions makers" and the "powerbrokers of the corporation").

It is arguable whether federal corporate reform requiring independent directors to serve on the boards of public corporations has lessened the power of the executive officer. Following adoption of Sarbanes-Oxley and the stock exchange reforms, at least two members of the Delaware judiciary thought there would not be a significant impact on officer power:

> Given the unmistakable message that independent directors are preferred, it will become increasingly unlikely that even the three managers most critical to governing a firm on a day-to-day basis will be on the board. But it is doubtful that this overall decline in board service by top managers will correspond with any genuine reduction in the importance of key executives to the management of public companies.

Chandler & Strine, *supra* note 17, at 1002. *But see* Kahan & Rock, *supra* note 9, at 989 (asserting that CEOs are losing power in part because of federal reforms).

44. *See* Lin *supra* note 9, at 1364 (stating "CEOs can govern firms like corporate emperors and empresses, holding primacy over shareholders, directors, and managers").

decision-making.[45] As a corporate scholar recently remarked, "two of the most intriguing and influential figures in law and society [are] the President of the United States and the CEO of a large corporation."[46]

The separation of corporate ownership from corporate control exposes stockholders to a variety of agency costs.[47] Similar to ordinary agents, officers pose a risk that in managing the business they will act in their own self-interest at the expense of the corporation and its stockholders.[48] The escalation of officers' power and role in the corporate enterprise has led to a corresponding increase in these agency costs.[49] Exercising their considerable expertise, authority and deference, executive officers can, and many times do, use their position for their own personal benefit.[50] Recognizing that this is the reality of the modern corporation, the Delaware Court of Chancery commented, "It is, of course, true that most examples of malfeasance by corporate fiduciaries involve officers who exploit their superior knowledge, power, and influence to extract value from the corporation at the expense of its stockholders."[51]

Given the breadth of officers' power and control, the corporate system of checks and balances on officer conduct is of great

45. *See* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1617 (2005) (discussing the CEO-chairman of the board problem); Ribstein, *supra* note 7, at 199–200 (stating excessive executive compensation supports an officer-dominated model of corporate decision-making); *see also* Paredes, *supra* note 15, at 673 (noting the "extensive corporate control concentrated in [CEOs'] hands and the fact that they are rarely seriously challenged").

46. Lin, *supra* note 9, at 1354.

47. *See* BERLE & MEANS, *supra* note 6, at 6–7.

48. *See* sources cited *supra* note 15.

49. *See* Brian Cheffins, *Corporate Governance Since the Managerial Capitalism Era*, at 1 (July 2015) (forthcoming Business History Review), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=261480&download=yes ("[F]or at least three-quarters of a century managerial 'agency costs' generated by inattentive or self-serving executives have constituted the core governance risk in the U.S."); Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 EMORY L.J. 163, 189 (1997) ("Because they possess greater and more specialized expertise than ordinary workers, they can divert more wealth to themselves without the principal's being able to prevent (or even necessarily detect) such losses."); Whitehead, *supra* note 17, at 1265 (discussing the increase in agency costs as CEOs use their "control over the board" to their benefit).

50. *See supra* notes 16–17.

51. *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1003 (Del. Ch. 2005); *see also* ABA REPORT, *supra* note 6, at 111; Whitehead, *supra* note 17, at 1265–66.

significance. Under state law, fiduciary duties serve as a primary check on officer behavior.[52] Boards of directors, stockholders, and creditors all have, albeit to differing degrees, the power to directly enforce officers' fiduciary obligations. Principal among the enforcement mechanisms available to these corporate actors is the ability to file direct or derivative lawsuits alleging breaches of fiduciary duty. Accountability through litigation is thus a crucial component of the system of checks and balances on management power.[53] Indeed, stockholder litigation (both class actions and derivative suits) is described as the primary means for stockholders to protect their interests against the opportunistic behavior of directors and officers.[54] This is because litigation serves both a compensatory function and a deterrence function in combatting misconduct.[55]

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52. *See supra* note 22 and accompanying text. The fiduciary obligations of officers, as distinguished from directors, is a topic in corporate law that has received relatively little individual attention. BALOTTI & FINKELSTEIN, *supra* note 13, at § 4.10[C] ("Few authorities deal with the nature of the obligation owed by officers to the corporation and its stockholders."); Johnson & Millon, *supra* note 45, at 1601 ("Hardly a week goes by without yet another Delaware decision addressing the subject of *director* duties. Yet, surprisingly, no Delaware decision has ever clearly articulated the subject of *officer* duties and judicial standards for reviewing their discharge."); Shaner, *Restoring the Balance*, *supra* note 3, at 29 ("[T]he exact nature and scope of an officer's fiduciary obligations were left virtually untouched by the Delaware courts and legislature for almost seventy years, despite Delaware's otherwise vast and well-developed body of corporate law."); A. Gilchrist Sparks III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 215 (1992) ("The precise nature of the duties and liabilities of corporate officers who are not directors is a topic that has received little attention from courts and commentators."). This has led to disagreement and uncertainty as to the exact contours of those duties. *See* Shaner, *The (Un)Enforcement*, *supra* note 3, at 297–99. Nonetheless, what is uniformly recognized is that officers do owe some form of fiduciary obligations. *See* 3 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 837.50 (rev. vol. 2002) ("[C]orporate directors and officers occupy a fiduciary capacity . . . ."); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 669 (2007) ("What apparently is not controversial, however, is that officers owe fiduciary duties of some sort . . . .").

53. *See, e.g.*, Kraakman et al., *supra* note 24, at 1733 ("Shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers."); Schwartz, *supra* note 1, at 324 (describing derivative litigation as the "heart of the accountability devices").

54. *See* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 55 (2014) ("Shareholder litigation has historically played an important role in policing the behavior of corporate managers."); Kraakman et al., *supra* note 24, at 1733. Moreover, a study of derivative lawsuits in both the public and private company contexts concluded that derivative litigation serves an important function that "goes well beyond the outcome of the cases themselves." Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1749 (2004).

55. *See* Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 78 (2008) ("Scholars have long recognized that shareholder litigation is

Until recently, the reach of the Delaware courts' jurisdiction to hold corporate management legally accountable for their fiduciary duties was essentially limited to directors.[56] This changed in 2003 when the Delaware legislature amended its personal jurisdiction statute, extending jurisdiction over certain non-resident corporate officers.[57] Following this amendment, one notable Delaware jurist predicted a marked increase in litigation involving officers.[58] Over the past ten years, however, there have been only a handful of noteworthy decisions from the Delaware courts that address officers' fiduciary obligations. The most prominent officer decision was *Gantler v. Stephens* in 2009, where the Delaware Supreme Court held that "officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors."[59] Indeed, *Gantler* itself illustrates the lack of officer case law, in that it was not until 2008 (four years after the personal jurisdiction statute became effective) that the issue of officer fiduciary duties was squarely brought before the Delaware Court of Chancery.[60] Since *Gantler*, however, there have been very few decisions from Delaware courts expanding on the fiduciary

intended to deter future instances of corporate misconduct and punish the individuals involved in corporate scandals."); George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 268 (2014) ("Even better, the threat of private legal action could prevent bad behavior in the first place."). *But see* Erickson, *supra*, at 79 ("In the end, more litigation is not necessarily better when it comes to combating corporate misconduct.").

56. *Cf.* DEL. CODE ANN. tit. 10, § 3114(b) (2006). Prior to 2004, the Delaware courts lacked personal jurisdiction over non-resident officers of Delaware corporations. *Id.*

57. *Id.* The amendment to the statute became effective January 1, 2004. *Id.* (providing for personal jurisdiction over officers of Delaware corporations with respect to all civil actions or proceedings where such officer "is a necessary or proper party, or in any action or proceeding against such officer for violation of a duty in such capacity, whether or not the person continues to serve as such officer at the time suit is commenced"); *see generally* Shaffer v. Heitner, 433 U.S. 186 (1977).

58. *See* Jack B. Jacobs, *The Delaware Supreme Court: Looking to the Future*, M & A LAW., June 2004, at 1, 5.

59. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009). As the Delaware Supreme Court explained:

> That issue—whether or not officers owe fiduciary duties identical to those of directors—has been characterized as a matter of first impression for this Court. In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold.

Id.

60. Gantler v. Stephens, No. 2392-VCP, 2008 WL 401124 (Del. Ch. Feb. 14, 2008).

duties of officers.[61] The apparent lack of legal accountability raises questions with respect to the role fiduciary duty litigation is playing in shaping officer conduct.[62]

II. FIDUCIARY DUTY ACCOUNTABILITY

Standards of conduct (for example, fiduciary duties) coupled with the imposition of sanctions for violations of those standards (in other words, accountability) serve as an important component in combatting self-interested and careless officer behavior.[63] Accountability can be broadly categorized as formal or informal in nature. Examples of formal accountability include litigation and other forms of legal liability like fines, cease and desist orders, and internal disciplinary actions (for example, firing and demotion). Informal methods of accountability can include market constraints and other market effects, social norms, and shaming.[64]

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61. In those few decisions that do discuss officers' duties, most simply cite to the *Gantler* court's holding without further development of officer fiduciary doctrine. *See, e.g.*, Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *11−12 (Del. Ch. July 12, 2010); Beard Research, Inc. v. Kates, 8 A.3d 573, 601 (Del. Ch. 2010).

62. Shaner, *The (Un)Enforcement*, *supra* note 3, at 282; *cf.* Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 432 (2012) (noting that the plaintiffs' bar plays an important role in shaping the regulation and governance of corporations because they "largely determine which lawsuits are brought" and where those suits are brought).

63. It should be noted that in corporate law fiduciary duties set forth the standards of conduct that we expect of officers, while the standard of review is the test a court applies to determine whether an officer is liable for breach of fiduciary duty (e.g., the business judgment rule). *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437 (1993).

64. In the context of the board of directors, scholarship is divided over the impact of informal methods of accountability (or extra-legal sanctions) on influencing behavior. Some scholars assert that extra-legal forces or sanctions can adequately control management behavior. *See, e.g.*, Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1133–35 (2006); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 718 (1986) (reputational concerns); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265 (1999) (reputational concerns); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1263–64 (1982) (market regulation); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1937 (2003) (discussing the market for corporate control as a means of applying pressure on management); Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 116–17 (2006) (discussing the role of employment markets, product markets and social norms in regulating director conduct); Phillips, *supra* note 22, at 673; Ralph K. Winter, Jr., *State Law, Shareholder Protection, and*

Prior scholarship addressing officer conduct has largely focused on forms of formal, judicial accountability. This scholarship has almost uniformly concluded that officers are largely being held accountable in venues other than traditional state law fiduciary duty litigation. Securities fraud litigation and bankruptcy litigation have been proffered as two alternative litigation contexts in which officer accountability occurs.[65] Alternatively, some scholars posit that the majority of officer accountability takes place via internal corporate sanctioning.[66] Underlying the aforementioned conclusions is the belief that traditional fiduciary duty litigation is not being utilized to hold officers accountable. Scholars have posited that a lack of state court litigation is due to procedural hurdles in derivative litigation, the role reversal between the board and officers in corporate management, and the narrow standard for board oversight liability.[67] This section collects and analyzes state and bankruptcy court opinions to discern whether the case law supports scholars' views regarding officer misconduct and fiduciary duty litigation.

A. Case Selection

Delaware state court cases and bankruptcy court cases in the United States Bankruptcy Court, District of Delaware were selected as the universe from which opinions that include fiduciary duty

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the Theory of the Corporation, 6 J. LEGAL STUD. 251, 262–73 (1977) (pointing out the employment market and product market as constraining management actions). However, other scholars question whether extra-legal sanctions impact management behavior. *See, e.g.*, William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 195–96 (1992) (asserting that anti-takeover doctrine has weakened the threat of a takeover and the corresponding disciplinary effect of a market for corporate control); Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1420–27 (1985) (discussing why market constraints on management behavior are ineffective); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169–70 (1981); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1235 (2002) (noting that the events surrounding Enron's collapse "provides another set of reasons to question the strength of the efficient market hypothesis"); Jones, *supra*, at 118 (critiquing the enforcement role of markets for failing to provide ample accountability).

65. *See* Johnson & Ricca, *supra* note 27, 95–97 (discussing bankruptcy litigation); Thompson & Sale, *supra* note 13, at 861 (looking at securities fraud litigation).

66. *See supra* note 28 and accompanying text.

67. *See supra* note 25 and accompanying text.

claims against officers would be collected. Delaware is widely considered the leading jurisdiction for corporation law.[68] This is due in large part to the overwhelming number of corporations incorporated in that state. Sixty-five percent of Fortune 500 corporations are incorporated in Delaware as well as over half of all U.S. publicly traded corporations.[69] For each year of 2011-2013, the number of new corporations that incorporated in Delaware was: 31,472; 32,394; and 34,234, respectively.[70] Additionally, in 2013, Delaware corporations represented 83% of all new U.S. initial public offers.[71]

The state of incorporation has several important consequences. First among those is the internal affairs doctrine, which provides that the laws of a corporation's state of incorporation, which in the majority of cases is Delaware, determine the rights and duties of directors, officers, and stockholders.[72]And "few, if any, claims are more central to a corporation's internal affairs than those relating to alleged breaches of fiduciary duties by a corporation's directors and officers."[73] Second, Delaware courts generally have jurisdiction over the parties and claims involved in breach of fiduciary duty cases.[74] Third and finally, Delaware's judiciary is well-known for its expertise and efficiency in adjudicating business law disputes,

68. *See supra* note 30.

69. *See* JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS 2013 ANNUAL REPORT (2014), http://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf; *see also* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1563 (2002).

70. *See* BULLOCK, *supra* note 69, at 2.

71. *See* BULLOCK, *supra* note 69, at 2. In comparison, corporations that were initially incorporated in New York changed their state of incorporation (primarily to Delaware) before going public. *See* William J. Carney et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 145 (2012) (stating that "New York retains only 24.5% of reincorporated companies, versus an overall average for all states of 38.1%").

72. VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113–14 (Del. 2005) ("It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs.") (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89–93 (1987)). This applies equally in the bankruptcy context. *In re* Fedders N. Am., Inc., 405 B.R. 527, 538–39 (Bankr. D. Del. 2009) (applying the internal affairs doctrine in the bankruptcy context).

73. *In re* Fedders N. Am., Inc., 405 B.R. at 538–39 (citing *In re* Topps Co. S'holders Litig., 924 A.2d 951 (Del. Ch. 2007)).

74. *See* DEL. CODE ANN. tit. 10, § 3114(b) (2006) (providing for personal jurisdiction over officers); 28 U.S.C. § 1334(b) (providing for personal jurisdiction); *see also* 28 U.S.C. § 1334(e) (providing for subject matter jurisdiction).

capturing a large percentage of corporate lawsuits.[75] In light of the combination of all of these factors, breach of fiduciary duty claims against officers are more likely to be litigated in Delaware.[76]

This article also focuses on judicial opinions as opposed to the complaints filed. A plaintiff's complaint must have, at a minimum, some allegation(s) about an officer or individual's actions in his or her officer role in order for the court to hear claims related such actions. Most complaints, however, typically just have broad statements about the officers that are not always pursued in the litigation.[77] Opinions, on the other hand, reflect the issues, claims,

75. *See* Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 626 (2005) (describing the Delaware judiciary and stating that "their experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law"); *see also* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (discussing the judicial lawmaking in Delaware corporate law and the specialization of the Court of Chancery).

76. There are, however, studies that suggest that Delaware may be losing some of its share of cases to other jurisdictions. *See* John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012) [hereinafter *Losing Cases*]. A recent study found that Delaware attracted only 45.2% of all takeover litigation that could potentially go to Delaware—those cases in which the target corporation's state of incorporation or location of its headquarters was Delaware. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, at 5 (Ohio St. U. Moritz C. of Law, Public Law & Legal Theory, Working Paper Series No. 236, 2014), http://ssrn.com/abstract=2377001 [hereinafter *Takeover Litigation*]; *see also* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1350 (2012) [hereinafter *Balancing Act*] (discussing "Delaware's loss of litigation market share"); *Losing Cases*, *supra* at 605 (concluding "Delaware *courts* are losing market share in lawsuits, and Delaware *companies* are gaining lawsuits, often filed elsewhere"). This was reported as a slight decrease from 2012, in which 46.3% of that litigation took place in Delaware. Cain & Davidoff, *Takeover Litigation*, *supra*, at 5. Similarly, there has been a documented increase in lawsuits being filed in more than one jurisdiction (multi-forum litigation), meaning that Delaware is only one of several jurisdictions where fiduciary lawsuits are being filed. *See, e.g.*, *id*.; Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U.L. REV. 1753 (2012). Nonetheless, as compared to other jurisdictions, Delaware courts have been found to "out-draw" those competitors. Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465 (2015) [hereinafter *A Great Game*] (finding that Delaware captures higher percentages of takeover cases than other states including those regarded as corporate law centers (New York and Massachusetts) but appears to be losing out when directly competing for a case against California and New Jersey).

77. *See, e.g.*, Verified Stockholder Derivative Complaint at 19, Friedman v. Khosrowshahi, No. 9161, 2013 WL 6668572 (Del. Ch. Dec. 13, 2013) ("As officers and/or directors of the Company, each Defendant owed the Company and its shareholders the fiduciary obligation of loyalty."); Second Amended and Supplemental Class Action Complaint at 6, *In re* Answers Corp. S'holders Litig., No. 6170-VCN, 2011 WL 3859941 (Del. Ch. Aug. 26, 2011) ("Because of their positions as officers and/or directors of Answers.com, the Individual Defendants owed fiduciary duties of loyalty and due care to Plaintiffs and the other members of the Class including the duty to maximize the value Plaintiffs and the Class would receive for their shares.").

and arguments that the parties have developed more fully after briefing and/or oral argument. Thus, judicial opinions are more likely than complaints to reflect the extent to which plaintiffs' assert and develop claims pertaining to officer conduct.

The opinions of the court will not necessarily capture all of the state law officer-fiduciary duty accountability cases though. For instance, the issues related to officer conduct may not be raised on every motion to dismiss or motion for preliminary injunction, even though they are part of the larger case. Lawsuits may also settle before the court has the opportunity to address officer fiduciary duty claims. Nonetheless, a strong argument can be made that judicial opinions are a proper starting point because, overall, they provide a better picture of officer accountability than allegations in a complaint.[78]

The following summary provides a description of the collection process and criteria by which opinions were selected and classified. A search of Delaware cases was conducted using the Westlaw and Lexis databases, two of the largest sources of publicly available judicial opinions, and supplemented by Delaware Chancery Court websites. The timeframe for this search was January 1, 2004 (when Delaware's personal jurisdiction amendment became effective), through December 31, 2014. The initial search was over-inclusive to capture all potential discussions of claims against officers for breach of fiduciary duty.[79] Figure 1 provides the number of opinions from this initial search for (i) Delaware state courts (Superior Court, Court of Chancery, and Supreme Court), and (ii) the United States Bankruptcy Court, District of Delaware. In order to winnow the results down to the relevant set of cases, each opinion was read to determine if it contained a discussion, reference, or other indication that a claim against a corporate officer for breach of fiduciary duty

78. Of course, allegations of breaches of fiduciary duties against officers in complaints also provide important information regarding officer accountability. Taken together, analysis of court opinions and complaints would provide a more complete picture of officers' fiduciary accountability. Undertaking both areas of research would be too large a task for one paper, thus this article focuses just on the former. Data on complaints is left for future research.

79. The initial search results were intended to pick up any opinion that contained the following terms: "fiduciary dut!", "officer", and "breach".

(as distinct from directors or individuals acting in the director capacity) was made.[80] If an opinion met that criterion, it was then classified as either (i) a traditional fiduciary duty case (in other words, a case not arising in the bankruptcy context) or (ii) a bankruptcy case. Opinions were then further coded across the following attributes: (i) court, (ii) date, (iii) plaintiff type, (iv) type of officer(s), (v) whether the officer was also a director, (vi) whether the directors were also being sued, (vii) context of fiduciary breach,[81] (viii) type of claim (direct, derivative, or both), (ix) procedural posture, (x) court ruling, and (xi) whether there was any discussion of the officer's fiduciary obligations.

Figure 1.

Court:	Initial Search results:
Delaware state courts	736
United States Bankruptcy Court for District of Delaware	126

80. To the extent that there was more than one opinion related to a single case (which was defined as cases having the same civil action number, suits that were later consolidated into one case, and cases that were appealed to the Delaware Supreme Court), those opinions were treated together for purposes of the subsequent categorization so as to avoid duplication.

Cases involving (i) Section 220 books and records demands, (ii) officers' claims for advancement and indemnification of expenses, and (iii) certified questions of law to the Delaware Supreme Court from non-Delaware courts or the Securities and Exchange Commission (SEC) via Article IV, Section 11(8) of the Delaware Constitution, were ultimately excluded from the collected results. With respect to Section 220 actions, these cases were excluded for two reasons. First, books and records demands and suits based thereon typically are the first step in investigating possible causes of action. To the extent that this investigation leads to a sufficient basis for filing claims against officers for breach of fiduciary duty, those suits are later filed and are otherwise captured in the search results. *See, e.g.*, Sutherland v. Sutherland, No. 2399-VCN, 2010 WL 1838968, at *9 (Del. Ch. May 3, 2010); Feldman v. Cutaia, 951 A.2d 727, 732 (Del. 2008); Teachers' Ret. Sys. of La. v. Scrushy, No. Civ.A. 20529, 2004 WL 423122, at *2 (Del. Ch. Mar. 2, 2004). Second, the Section 220 action does not, by itself, trigger liability or other accountability with respect to a breaching officer. *See* DEL. CODE ANN. tit. 8, § 220 (2006) (granting stockholders access to books and records). Cases involving officer claims for advancement and/or indemnification of expenses were also excluded because the underlying claims against the officer were brought outside of the Delaware courts or, if brought in Delaware, it was confirmed that the underlying Delaware claims were already captured in the data set (and thus the advancement/indemnification suit would be duplicative). Finally, opinions of the Delaware Supreme Court that involved certified questions of law from non-Delaware courts or the SEC were excluded because the underlying litigation did not involve claims against officers brought in the Delaware courts.

81. The three contexts in which breaches occurred were (i) employer-employee disputes, (ii) mergers and acquisitions, and (iii) other fiduciary breaches (e.g., option backdating).

B. Traditional Fiduciary Duty Cases

When corporate officers breach their fiduciary duties, one would expect a primary path for holding them accountable would be through filing direct or derivative claims in the Delaware courts. The Delaware Court of Chancery explains:

> The Delaware General Corporation Law is, for the most part, enabling in nature. It provides corporate directors and officers with broad discretion to act as they find appropriate in the conduct of corporate affairs. It is therefore left to Delaware case law to set a boundary on that otherwise unconstrained realm of action. The restrictions imposed by Delaware case law set this boundary by requiring corporate officers and directors to act as faithful fiduciaries to the corporation and its stockholders. Should these corporate actors perform in such a way that they are violating their fiduciary obligations—their core duties of care or loyalty—their faithless acts properly become the subject of judicial action in vindication of the rights of the stockholders.[82]

Scholars have likewise noted that lawsuits for breach of fiduciary duty are the primary means by which stockholders hold corporate management accountable for their actions.[83] Below, Table 1 sets forth the opinions discussing officer allegations organized by year.

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82. *In re* Goldman Sachs Grp., Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *1 (Del. Ch. Oct. 12, 2011).

83. *See* Eugene V. Rostow, *To Whom and for What Ends is Corporate Management Responsible?*, *in* THE CORPORATION IN MODERN SOCIETY 46, 48 (Edward S. Mason ed., 1961) (describing derivative suits as "the most important procedure the law has yet developed to police the internal affairs of corporations"); Davis, *supra* note 24, at 437; Kraakman et al., *supra* note 24, at 1733 ("Shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers."); Nees, *supra* note 24, at 214 (asserting that stockholder derivative actions are an effective mechanisms for holding management liable); Schwartz, *supra* note 1, at 324 (describing derivative litigation as the "heart of the accountability devices").

Table 1. Delaware State Court Opinions with Officer Fiduciary Duty Claims

Year:	Number of opinions:
2004	11
2005	2
2006	9
2007	5
2008	10
2009	9
2010	9
2011	4
2012	7
2013	11
2014	9
Total:	86

Overall, there are very few opinions of the Delaware courts addressing breach of fiduciary duty claims against officers. This is in stark contrast to the numerous director fiduciary duty opinions issued by the Delaware courts each year. For example, in 2014, there were nine opinions of the Delaware courts that include discussions of officer fiduciary duty claims.[84] Opinions of the Delaware courts that include discussions of director fiduciary duty claims, however, exceeded that number within just the first four months of 2014.[85] Given that investigations into the corporate scandals of the past fifteen years have revealed many instances of officer misconduct—

84. *See supra* Table 1.

85. *See, e.g.*, Blaustein v. Lord Blatimore Capital Corp., 84 A.3d 954 (Del. 2014); Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014); Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014); *In re* Orchard Enter., Inc. Stockholder Litig., 88 A.3d 1 (Del. Ch. 2014); OTK Assocs., LLC v. Friedman, 85 A.3d 696 (Del. Ch. 2014); *In re* Rural Metro Corp., 88 A.3d 54 (Del. Ch. 2014); Houseman v. Sagerman, No. 8897-VCG, 2014 WL 1600724 (Del. Ch. Apr. 16, 2014); Frank v. Elgamal, No. 6120-VCN, 2014 WL 957550 (Del. Ch. Mar. 10, 2014); *In re* Gardner Denver, Inc. S'holder Litig., No. 8505-VCN, 2014 WL 715705 (Del. Ch. Feb. 21, 2014); *In re* Answers Corp. S'holder Litig., No. 6170-VCN, 2014 WL 463163 (Del. Ch. Feb. 3, 2014); *see also* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 167 (2004) (observing that the majority of fiduciary litigation in Delaware involves challenges to director actions in the deal context).

much of which is or appears to be a violation of their fiduciary duties—the number of opinions speaking to officer fiduciary breaches seem disproportionately small. Further, there does not appear (at least facially) to be an upward trend in opinions following the amendment of the personal jurisdiction statute or the *Gantler* decision.[86]

C. Bankruptcy Cases

Traditional fiduciary duty claims are usually filed in the Delaware state courts. However, breaches of fiduciary duty by corporate officers also may be adjudicated in bankruptcy courts. In this context, the bankruptcy trustee, in addition to the corporation, stockholders or creditors, may file the breach of fiduciary duty claims.[87] Adjudicating corporate governance disputes in the bankruptcy setting is not uncommon. For example, the Delaware bankruptcy courts tackled the issue of officer fiduciary obligations before the Delaware Supreme Court did in *Gantler*.[88] In *In re World Health Alts., Inc.*, for instance, the United States Bankruptcy Court, District of Delaware addressed the issue of oversight liability for officers.[89] Similarly, in *In re Bridgeport Holdings, Inc*., the court addressed fiduciary duty claims against officers of the corporation.[90] Table 2 sets forth the opinions of the United States Bankruptcy Court, District of Delaware for the same 2004–2014 timeframe.

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86. *See supra* note 60–61 and accompanying text. Of course, in focusing on opinions as opposed to complaints, it will not be surprising if there are few opinions for the first few years of this time frame as generally there is a lag between claims being initially filed and reaching a stage where the court is asked to issue a ruling or opinion in the matter. This means that many of the cases from 2004 and even 2005 are based upon complaints filed before the personal jurisdiction statute regarding officers became effective.

87. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 353 (1985). In fact, the U.S. Supreme Court has indicated that "investigat[ing] the conduct of prior management to uncover and assert causes of action again the debtor's officers and directors" is a required part of the bankruptcy trustee's duties. *Id. See also* Meer v. Aharoni, No. 5141-CC, 2010 WL 2573767, at *6 (Del. Ch. June 28, 2010).

88. Gantler v. Stephens, 965 A.2d 695, 709 (Del. 2009); *In re* World Health Alts., Inc., 385 B.R. 576, 591 (Bankr. D. Del. 2008).

89. *In re* World Health Alts., Inc., 385 B.R. at 591.

90. *In re* Bridgeport Holdings, Inc., 388 B.R. 548, 572–73 (Bankr. D. Del. 2008).

Table 2. U.S. Bankruptcy Court, District of Delaware Opinions with Officer Fiduciary Duty Claims

Year:	Number of opinions:
2004	0
2005	4
2006	1
2007	0
2008	4
2009	3
2010	0
2011	2
2012	2
2013	0
2014	3
Total:	19

Early officer fiduciary duty decisions like *In re World Health* and *In re Bridgeport Holdings* led one set of scholars to posit that "the non-criminal sanctioning of officers may be taking place in federal bankruptcy courts [as opposed to the state courts] with respect to fiduciary duties."[91] Comparing the results in Tables 1 and 2, however, do not seem to support this conclusion. Rather, the number of Delaware state court opinions each year that discuss officer fiduciary duty claims are (with one exception) either equal to or greater than the number of bankruptcy court opinions.

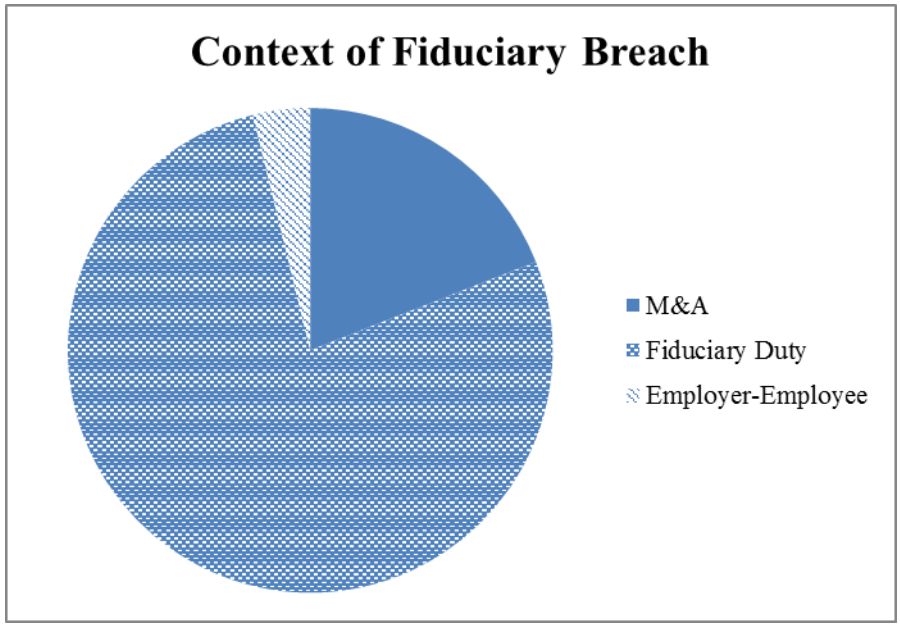
D. Types of Officer Misconduct

In addition to indicating the number of instances in which claims related to an officer's fiduciary obligations are litigated, the opinions also provide insight into the different contexts in which officer breaches were alleged to have occurred. For each opinion, the alleged breach(es) of fiduciary duty was categorized as occurring in one of three settings: (i) mergers and acquisitions (M&A), (ii) general

91. Johnson & Ricca, *supra* note 27, at 95–97.

fiduciary duty breaches (for example, stock option backdating), or (iii) employer-employee disputes. The breakdown of the opinions by context is set forth in Figure 2.

Figure 2.[92]



Twenty opinions (approximately 19% of the total number of opinions) address alleged breaches in the M&A context. The most prominent example of an officer breach in the M&A context is the *Gantler* decision, where certain officers violated their fiduciary duties by sabotaging their company's sales process.[93] Other claims against officers in this context include breaches related to self-interested negotiations and side payments,[94] inadequate sales price,[95]

92. One of the cases dealt with claims that could be categorized as M&A and fiduciary duty. To avoid duplication, it was classified as an M&A case because the primary claims in the case revolved around that transaction.

93. *Gantler*, 965 A.2d at 704–05, 708–09.

94. *See, e.g.*, Crescent/Mach I P'ship, L.P. v. Turner, No. Civ.A.17455-NC, 2005 WL 3618279, at *1 (Del. Ch. Dec. 23, 2005).

95. *See, e.g.*, Se. Pa. Transp. Auth. v. Volgenau, No. 6354-VCN, 2013 WL 4009193, at *22 (Del.

and disclosure violations.[96] In the employer-employee context, there are only four opinions, or approximately 4% of the total number of opinions. These cases involve typical disputes that occur in employment situations involving senior level employees. Generally, these cases raise fiduciary duty claims as well as improper use of confidential information, stealing corporate opportunities, and violations of non-compete agreements.[97] Finally, all other breaches of fiduciary duty make up the largest percentage with 81 opinions, or approximately 77% of the total number of opinions. Almost all of these opinions deal with claims that an officer violated his or her duty of loyalty.[98] This would suggest that it is the self-interested officer, as opposed to the careless officer, that plaintiffs are worried about, feel is worth pursuing legal claims against, or both.[99] Further, the small number of care allegations may be a reflection of the impact the business judgment rule, exculpation, indemnification, and insurance are having. Although not all of these protections are applicable to officers, the impact of these protections on director liability may have had a spillover effect that minimizes plaintiffs' use of the duty of care in litigation against officers.[100]

Ch. Aug. 5, 2013); Hokanson v. Petty, No. 3438-VCS, 2008 WL 5169633, at *1 (Del. Ch. Dec. 10, 2008).

96. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 653 (Del. Ch. 2014).

97. *See, e.g.*, Beard Research, Inc. v. Kates, 8 A.3d 573, 580 (Del. Ch. 2010) (alleging that an executive vice president misappropriated trade secrets and usurped business opportunities of the corporation).

98. *See, e.g.*, Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *33 (Del. Ch. July 12, 2010) (finding a breach of the duty of loyalty for participation in and/or overlooking financial irregularities to benefit CEO with improper expense reimbursement).

99. *See also* McGinty, *supra* note 49, at 163 ("Classically, the duty of loyalty is thought to afford shareholders their strongest protection and is often described as the heart of corporate law."); Schwartz, *supra* note 1, at 326 ("[M]anagement's greatest liability exposure is for breaches of the duty of loyalty. Such cases are far more appealing to lawyers who bring suits on contingent fee bases. They are easier to prove, and their facts typically glean more sympathy from judges and juries. The legal rules relax the burden of proof for plaintiffs in cases involving the duty of loyalty. Without actually having made a head count, I am satisfied that over ninety percent of the litigation involving breaches of duty by directors and officers involves cases claiming a breach of the duty of loyalty.").

100. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2006) (providing that it only applies to directors of the corporation); Gantler v. Stephens, 965 A.2d 695, 709 n.37 (Del. 2009) (stating that § 102(b)(7) does not protect officers); Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 865 (2005) (contending that the business judgment rule does apply to officers); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 440 (2005) (asserting that the business judgment rule does

E. Enforcement

Accountability for fiduciary obligations is only possible if those obligations are enforced. Scholars have asserted the limited use of state court litigation to hold officers accountable for their fiduciary breaches is a reflection of an enforcement process that disincentivizes the use of this specific tool. Specifically, boards of directors lack the incentive and informational means to monitor and enforce officers' duties.[101] Additionally, stockholders are significantly deterred from bringing legal claims against officers due to the procedural rules governing derivative litigation that have made it an expensive, onerous process with little chance of success.[102] Accordingly, this section analyzes the opinions based on (i) who is enforcing officers' fiduciary duties through judicial means and (ii) whether the claims are direct or derivative in nature. As discussed more fully below, the opinions appear to support scholars' assertions surrounding the role of fiduciary duty litigation as an enforcement mechanism.

First, there are four corporate actors that have the ability to sue officers for breaching their fiduciary duties: the board of directors, stockholders, creditors, and bankruptcy trustee. Table 3 provides a summary of the opinions organized by which of these actors instituted the litigation.

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not apply to officers).

101. *See* Shaner, *The (Un)Enforcement*, *supra* note 3, at 303–11 (discussing the problems with the board enforcing officers' duties).

102. *See id.* at 311–18 (discussing the enforcement scheme surrounding officer fiduciary duties and positing that litigation burdens and corporate doctrine contribute to a lack of officer accountability); *cf.* John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 326 (1981) (discussing "three distinct barriers" to the effectiveness of derivative actions); Fairfax, *supra* note 25, at 408–09 (describing procedural hurdles to shareholder actions); Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 286 (1986) (listing rules that limit the shareholders' ability to bring derivative suits); Rodrigues, *supra* note 43, at 34–35 (describing the difficulties faced in bringing a derivative suit); Ann M. Scarlett, *A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation*, 57 U. KAN. L. REV. 39, 40 (2008) (explaining that "[s]hareholder derivative litigation . . . rarely succeeds in holding directors liable for their decisions"); Schwartz, *supra* note 1, at 339–40 (discussing the board's ability to terminate a suit, usually through a special litigation committee).

Table 3. Corporate Actor Instituting Litigation **

Board of directors:	14*
Stockholders:	72
Creditor:	6
Bankruptcy trustee:	12***

*In one of these cases, a special litigation committee of the board took over the litigation from the stockholder-plaintiffs.

**One of these cases involves a warrant holder as the plaintiff. Because of the unusual nature of such a plaintiff (in this case an equity holder who was not also a stockholder), that case was excluded only for this specific table.

***In one of these cases the trustee of the litigation trust brought claims on behalf of the creditors.

Not surprisingly, stockholders make up the vast majority of plaintiffs in litigation challenging the conduct of officers on fiduciary duty grounds. Exercising their right to sue is the only direct means by which stockholders can hold officers accountable for their actions.[103] This result is also consistent with prior commentary on the role of stockholder litigation as a primary enforcement mechanism for management's fiduciary duties.[104] Further, stockholders brought almost all of the suits involving M&A activity (the exception being two cases in which the bankruptcy trustee brought the claims). This specific result is to be expected. By statute, boards of directors must approve all mergers and major acquisitions or sales.[105] As a result, in the event that a board wanted to hold an officer accountable for self-interested negotiations of a merger, filing litigation against that individual would expose the board to allegations of breach of the

103. *See* Schwartz, *supra* note 1, at 342–43 (describing the enforcement mechanisms available to stockholders); *see generally* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 157 (6th ed. 2010) (describing the rights of stockholders and including the right to vote, sell, or sue).

104. Kraakman et al., *supra* note 24, at 1733 ("Shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers."); Schwartz, *supra* note 1, at 323 ("Liability rules, enforced by shareholder litigation, are theoretically sound and profoundly affect the conduct of corporate managers, at least some aspects of their duties."); Shaner, *The (Un)Enforcement*, *supra* note 3, at 311–19 (discussing stockholders' role as an enforcer); Thompson & Sale, *supra* note 13, at 861.

105. DEL. CODE ANN. tit. 8, §§ 251, 252, 271 (2006).

duty of oversight, care, and loyalty for failing to monitor the officers' actions and for approving the self-interested deal. Moreover, almost all large transactions involving public corporations generate litigation, which usually includes allegations made against the board of directors.[106] When a board is busy addressing allegations made against it, it can be difficult to sue an officer.

Similarly unsurprising is the small number of cases brought by creditors. This is a reflection of the limited circumstances in which a creditor has the right to bring a derivative suit for directors' or officers' breach of fiduciary duty. As the Delaware Supreme Court made clear in *Gheewalla*, fiduciary duties run to the corporation and not creditors except when a corporation is in the zone of insolvency.[107] Thus, only in those limited instances when a corporation is in the zone of insolvency may a creditor assert derivative claims against corporate management.

Less than 14% of the officer claims were instituted by the board of directors on behalf of the corporation.[108] There are several possible explanations for such a small number. First, the board has a few different methods available to it for sanctioning officers. In addition to filing a breach of fiduciary duty lawsuit, boards can hold an officer accountable through termination, demotion, compensation claw-backs, social pressures, and contractual remedies.[109] Thus, the above findings may be a reflection of boards' preferences to handle officer accountability through non-judicial means. Somewhat related, the low number of board-instituted suits may constitute only those instances of officer conduct that are so egregious that the board feels litigation is the only option, when the board has the greatest incentive to pursue expensive litigation, or both. This reasoning may then explain why the board brought all of the breach of fiduciary duty claims in the employer-employee context—in those situations where

106. *See* Cain & Davidoff, *Takeover Litigation*, *supra* note 76, at 3.

107. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99–103 (Del. 2007); Shaner, *The (Un)Enforcement*, *supra* note 3, 320–22 (discussing creditors' role as an enforcer of officer fiduciary duties).

108. Table 3, *supra*.

109. Johnson & Ricca, *supra* note 27, at 87.

the board has strong incentives to seek judicial resolution of the corporation's rights vis-à-vis one of its employees. Moreover, in employer-employee disputes, judicial relief like enforcement of a non-compete clause or an injunction prohibiting use of confidential information is frequently the most desirable as well as most practical solution.

A final explanation for the low percentage of board-instituted actions may be the effects of a role reversal in corporate management that scholars have observed where officers occupy a superior role to directors and thus the board defers to officer interests.[110] This would also explain why only marginally more opinions came from the board-instituted suits context rather than the bankruptcy context; the bankruptcy trustee would not be subject to the same structural bias, behavioral bias, or pressures in favor of management.

Second, looking at the types of claims that are being filed and the procedural history for those claims provides additional insight into those instances in which litigation was used as an enforcement device for officer duties. Approximately 33.7% of the opinions in Delaware state courts involve direct claims, 51.2% involve derivative claims, and 15.1% raise both derivative and direct claims.[111] With respect to the derivative claims, the sample includes 27 opinions in which the court addresses, at least in part, defendants' Chancery Court Rule 23.1 motion to dismiss based on a failure to make a demand on the board.[112] Twelve of those opinions granted the motion to dismiss the

110. *See* ALFRED F. CONRAD, CORPORATIONS IN PERSPECTIVE 349–50 (1976) ("[Directors] do not supervise and control the executives; rather, they are supervised and controlled by the executives."); JAY W. LORSCH & ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 20 (1989); *see also* Arthur J. Goldberg, *Debate on Outside Directors*, N.Y. TIMES, Oct. 29, 1972, at F1 (stating that the board has been "relegated to an advisory and legitimizing function"): Tom C.W. Lin, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 363–73 (2011) (describing organizational and legal deference given to iconic executives); Paredes, *supra* note 15, at 721–22 (describing how CEOs have additional "de facto power" as a result of subordinate officers, gatekeepers, boards and stockholders defer to them).

111. Data on file with the author.

112. Delaware Chancery Court Rule 23.1 requires that a derivative complaint allege with particularity the reasons why demand would have been futile. DEL. CH. CT. R. 23.1; *see also* Aronson v. Lewis, 473 A.2d 805, 814–15 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000). For further descriptions of the review of derivative claims under a Rule 23.1 motion to dismiss, see *Brehm*, 746 A.2d at 249; Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993); Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988), *overruled on other grounds by Brehm*, 746 A.2d at 253; *Aronson*, 473 A.2d

fiduciary duty claims against the officer on Rule 23.1 grounds, nine opinions denied the motion, and six opinions dismissed the claims on grounds other than Rule 23.1.[113]

The high rate of dismissal of officer claims in the derivative context is expected given the demand excusal requirements under Chancery Court Rule 23.1 and case law interpreting that rule. As set forth by the Delaware Supreme Court in *Rales v. Blasband*, in order to show demand futility, a plaintiff must present the court with "particularized factual allegations . . . creat[ing] a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[114] As detailed in prior work, satisfying this burden is especially difficult when one is challenging officer conduct and not director conduct.[115]

Two examples that illustrate the challenge stockholders face in bringing derivative fiduciary duty claims against officers are *Desimone v. Barrows* and *In re Sanchez Energy Derivative Litigation*.[116] In *Desimone*, a stockholder challenged allegedly improper option grants made to the officers of the corporation.[117] As the court explained, in order for the stockholder's claim to survive the motion to dismiss for failure to make a demand on the board, "the relevant inquiry is whether the Sycamore board, as constituted at the time Desimone brought suit, could exercise an independent and disinterested business judgment in responding to a demand regarding

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at 814–16.

113. There was also one opinion where the court was addressing a motion to compel before the motion to dismiss. In that case the motion to compel was granted.

114. *Rales*, 634 A.2d at 934; *see also* DEL. CH. CT. R. 23.1. In satisfying this burden, a plaintiff must show more than just deferential board behavior, but an inability to exercise independent judgment by a majority of the board. *See Aronson*, 473 A.2d at 816 (stating that "[t]he shorthand shibboleth of 'dominated and controlled directors' is insufficient" to excuse demand); BALOTTI & FINKELSTEIN, *supra* note 13, at § 13.14[B] ("[A]n unsupported allegation of domination and control of directors by one interested in the transaction is insufficient to demonstrate demand futility.").

115. *See* Shaner, *The (Un)Enforcement*, *supra* note 3, at 314 n.187, 315 (describing the difficulty of surviving Rule 23.1 motions to dismiss).

116. Desimone v. Barrows, 924 A.2d 908, 914 (Del. Ch. 2007); *In re* Sanchez Energy Derivative Litig., No. 9132-VCG, 2014 WL 6673895, at *13 (Del. Ch. Nov. 25, 2014); *see also* Highland Legacy Ltd. v. Singer, No. Civ.A.1566-N, 2006 WL 741939, at *8 (Del. Ch. Mar. 17, 2006).

117. *Desimone*, 924 A.2d at 913.

Desimone's claims."[118] Because none of the board members received the challenged option grants, and Desimone was unable to show that members of the board knowingly approved improperly back-dated or spring-loaded options, the court granted the motion to dismiss.[119] Similarly, in *In re Sanchez*, the court dismissed the fiduciary claims against the officer-defendant because the stockholder was unable to show that the board was sufficiently interested and/or not independent from the officer and his actions such that the board would be unable to consider a demand to file suit against the officer.[120] Thus, the outcomes of derivative claims are consistent with scholars' assertions that derivative litigation's significant procedural hurdles impede enforcement of officer fiduciary duties.[121]

III. INTERPRETATIONS AND IMPLICATIONS

A. The State of Officer Fiduciary Duty Doctrine

Until 2009, there was considerable speculation about the exact fiduciary obligations of corporate officers. The Delaware Supreme Court in *Gantler v. Stephens* remedied some of the uncertainty in this area of law by holding that "officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and . . . the fiduciary duties of officers are the same as those of directors."[122] The remainder of the court's opinion discussing the specific allegations before it, however, focused only on the officers' breach of their duty of loyalty.[123] This still leaves many open issues surrounding officer fiduciary obligations.[124] Since *Gantler*, the Delaware courts' jurisprudence on the role and responsibilities of officers has been

118. *Id.* at 914.
119. *Id.* at 951.
120. *In re Sanchez*, 2014 WL 6673895, at *6, *9.
121. *See, e.g.*, Shaner, *The (Un)Enforcement*, *supra* note 3, at 314 n.187, 315.
122. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009).
123. *See generally id.*
124. *See* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1108 (2009) (discussing the outstanding issues following *Gantler* and stating that "[c]learly the area of officer duties remains murkier than that of director duties"); J. Travis Laster & Steven M. Haas, *Delaware Supreme Court Establishes Clear Rules in* Gantler *Decision*, INSIGHTS: CORP. & SEC. L. ADVISOR, Mar. 2009, at 8.

scant and fragmented, with seemingly little expansion in this concededly important area of corporate governance.[125] Accordingly, this part of the article attempts to collect and synthesize the courts' scattered declarations on the law surrounding officer duties in an effort to gain a clearer picture of the current state of officer fiduciary duty doctrine.

On its face, the language in *Gantler* suggests that officer fiduciary duties import all of the existing law surrounding director fiduciary duties.[126] Under Delaware law, directors owe fiduciary duties of care and loyalty.[127] An officer's duty of care appears to mirror that of directors: "[g]enerally, like directors, [the officer-defendants] were expected to . . . use the amount of care that a reasonably prudent person would use in similar circumstances (i.e., to fulfill their duty of care)."[128] Similarly, the descriptions of an officer's duty of loyalty (which includes good faith) are taken from director fiduciary case

125. *See* D. QUINN MILLS, WHEEL, DEAL, AND STEAL: DECEPTIVE ACCOUNTING, DECEITFUL CEOS, AND INEFFECTIVE REFORMS 183 (2003) (stating that "the core problem faced by investors today, as revealed by corporate scandals, is that investors must be better protected from [officers]"); Johnson & Ricca, *supra* note 27, at 82 ("Of the three main actors in corporate governance (shareholders, directors, and officers), the officers clearly continue to reign supreme."); *cf. In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1003 (Del. Ch. 2005) ("It is, of course, true that most examples of malfeasance by corporate fiduciaries involve officers who exploit their superior knowledge, power, and influence to extract value from the corporation at the expense of its stockholders."). The court's restraint and superficial use of precedent in discussing officer issues is discussed more fully in Part III.B.

126. *See generally Gantler*, 965 A.2d 695.

127. *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 749–51 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

Relatedly, the issue of to whom do officers owe their fiduciary obligations is important. Language in the case law suggests that officers owe duties to the corporation and its stockholders, thereby giving stockholders the ability to sue directly and derivatively to enforce those duties. *See In re* Comverge, Inc., No. 7368-VCP, 2014 WL 6686570, at *8 n.19 (Del. Ch. Nov. 25, 2014) ("Under settled Delaware law, however, '"[f]iduciary duties are owed by the directors *and officers to the corporation and its stockholders*." In other words, a corporation does not owe fiduciary duties to its stockholders.'") (internal citations omitted) (emphasis added); *In re* Nine Sys. Corp. S'holder Litig., No. 3940-VCN, 2014 WL 4383127, at *57 (Del. Ch. Sept. 4, 2014) ("Under Delaware law, a corporation does not owe fiduciary duties to its stockholders; the board of directors and the *officers* do.") (emphasis added); *cf.* Trenwick Am. Litig. Trust v. Ernst & Young, LLP, 906 A.2d 168, 203 n.96 (Del. Ch. 2006) (stating that officers owe fiduciary duties to creditors).

128. Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010). Importantly, the standard of liability for the duty of care for officers is an open issue. *Compare* Johnson & Millon, *supra* note 45, at 1633 (asserting ordinary negligence is the standard), *with* Hamermesh & Sparks, *supra* note 100, at 868 (asserting gross negligence is the standard); *see also Hampshire Grp.*, 2010 WL 2739995, at *11 (declining from ruling on the proper standard of care liability but noting that the parties agreed to apply gross negligence).

law: "[a]n officer['s] . . . duty of loyalty requires [him or her] scrupulously to place the interests of the corporation and shareholders that they serve before their own."[129]

The respective roles of directors and officers in the corporation are not, however, identical. A close look at the courts' discussion surrounding officer duties seems to take this into account and fashion fiduciary obligations in a substantially similar, but not identical, manner.[130] A more specific tailoring of fiduciary duties is apparent in discussions pertaining to the other duties that are components of care and loyalty, such as disclosure and oversight.[131] With respect to the duty of disclosure, an officer is often akin to an agent, as opposed to a director.[132] Accordingly, an officer's duty changes with respect to the circumstances—perhaps a broader range of times than directors—

129. TVI Corp. v. Gallagher, No. 7798-VCP, 2013 WL 5809271, at *25 (Del. Ch. Oct. 28, 2013) (citing to director duty of loyalty cases). The settings in which an officer's duty of loyalty has been most often examined include misuse of corporate assets (including corporate opportunities), compensation, and self-dealing in transaction negotiations. *See, e.g.*, Official Comm. of Unsecured Creditors of Integrated Health Svcs., Inc. v. Elkins, No. Civ.A 20228-NC, 2004 WL 1949290, at *16–17 (Del. Ch. Aug. 24, 2014) (compensation); QC Commc'ns Inc. v. Quartarone, No. 8218-VCG, 2014 WL 3974525, at *11–12 (Del. Ch. Aug. 15, 2014) (misuse of corporate assets); Dweck v. Nasser, No. 1353-VCL, 2012 WL 161590, at *12–13 (Del. Ch. Jan. 18, 2012) (corporate opportunity); La. Mun. Police Emps. Ret. Sys. v. Fertitta, No. 4339-VCL, 2009 WL 2263406, at *7 (Del. Ch. July 28, 2009) (negotiation of financing).

130. *See Hampshire Grp.*, 2010 WL 2739995, at *11; Frank v. Elgamal, No. 6120-VCN, 2014 WL 957550, at *20 (Del. Ch. Mar. 10, 2014) ("Under Delaware law, the individuals who owe fiduciary duties to a corporation and its stockholders are the corporation's directors and, *to a similar extent*, officers.") (emphasis added).

131. MCG Capital Corp. v. Maginn, No. 4521-CC, 2010 WL 1782271, at *12 n.68 (Del. Ch. May 5, 2010) (discussing duty to disclose to the board).

Further examples of the recognition of the unique role of officers and a conforming adjustment of fiduciary duties include officer actions in conducting a stockholders' meeting and the receipt and exercise of stock options. *See, e.g.*, Portnoy v. Cryo-Cell Int'l, Inc., 940 A.2d 43, 73–76 (Del. Ch. 2008) (conduct at a meeting); Weiss v. Swanson, 948 A.2d 433, 448 (Del. Ch. 2008) (discussing stock options); Ryan v. Gifford, 935 A.2d 258, 269–70 (Del. Ch. 2007) (discussing the different scenarios in which receipt of stock options could violate officers' fiduciary duties or not).

132. There are, however, times when an officer should be treated like a director for disclosure requirements. *See* Joan MacLeod Heminway, *Martha's (and Steve's) Good Faith: An Officer's Duty of Loyalty at the Intersection of Good Faith and Candor*, 11 TRANSACTIONS: TENN. J. BUS. L. 111 (2009) (discussing a corporate officer's disclosures of personal facts under state corporate law); Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749 (2007) (discussing disclosure requirements for executive officers under federal securities law).

and to whom—the board more so than stockholders—the obligation is triggered.[133]

Another example is the courts' discussions of the duty of oversight. As applied to officers, language in the relevant opinions indicate a duty to monitor the individuals and business of the corporation under their control similar to that of directors.[134] On the other hand, courts have recognized the difficulty associated with enforcing a duty against an officer, who is also a director, that requires oversight and reporting on the officer's own actions.[135] In light of the differences between officers' and directors' roles and the corresponding impact they have on the contours of fiduciary obligations, further delineation of officer duties—as opposed to reliance on directorial fiduciary doctrine to fill in the gaps of officers' fiduciary duties—is still needed.

While *Gantler* may have addressed the standard of conduct for officers, it did not address the standard of review.[136] In analyzing compliance with fiduciary obligations, Delaware law makes a distinction between the standard of conduct and the standard of review. The former pertains to the content of fiduciary duties discussed above, while the latter involves the standard of review a court will apply in determining whether a director or officer is liable for breaching a fiduciary duty.[137] When evaluating director action,

133. *See Hampshire Grp.*, 2010 WL 2739995, at *13 (discussing the "contextual obligations" of officers and the responsibility to disclose to superior officers or principals); *see also MCG Capital Corp.*, 2010 WL 1782271, at *12 n.68.

134. *See, e.g.*, Am. Int'l Grp., Inc. v. Greenberg, 965 A.2d 763, 788–99 (Del. Ch. 2009).

135. *See* Canadian Commercial Workers Indus. Pension Plan v. Alden, No. Civ.A.1184, 2006 WL 456786, at *7 (Del. Ch. Feb. 22, 2006).

136. *See* Chen v. Howard-Anderson, 87 A.3d 648, 666 n.2 (Del. Ch. 2014).

137. *See* Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 171–72 (Del. Ch. 2014) ("When determining whether directors have breached their fiduciary duties, Delaware corporate law distinguishes between the standard of conduct and the standard of review. 'The standard of conduct describes what directors are expected to do and is defined by the content of the duties of loyalty and care. The standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct.'") (internal citations omitted); Eisenberg, *supra* note 63, at 437; *see also* William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 451–52 (2002); William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1295–99 (2001); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key*

scholars have classified judicial review as occurring under one of six standards: the business judgment rule, entire fairness, *Revlon*'s enhanced scrutiny, *Unocal*'s intermediate scrutiny, *Blasius*, or *Schnell*.[138] To what extent these standards of review developed for evaluating director action should similarly apply to officers is still largely an open issue.[139]

There is, however, language in the courts' opinions signaling an answer with respect to certain standards of review. First, there is broad language in decisions from the Court of Chancery that can be read to suggest that directors and officers alike are entitled to business judgment rule deference.[140] Second, language in the Court of Chancery's opinions in the M&A context intimate that officers, at least those officers charged with negotiating a transaction, owe *Revlon* duties like directors to seek the highest value possible for stockholders.[141] In both of these instances, the court's language

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Developments, 153 U. PA. L. REV. 1399, 1416–25 (2005) (distinguishing between the standards of fiduciary conduct and standards of review).

138. *See* Mary Siegel, *The Illusion of Enhanced Review of Board Action*, 15 U. PA. J. BUS. L. 599, 600 (2013); *see also* Emerald Partners v. Berlin, 787 A.2d 85, 89 (Del. 2001); *Chen*, 87 A.3d at 666–67; Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 663 (Del. Ch. 1988).

139. *See* Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010) ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors."). For an example of the debate over the appropriate standard of review for officer conduct, compare Hamermesh & Sparks, *supra* note 100, at 865, and Sparks & Hamermesh, *supra* note 52, at 215, with Johnson, *supra* note 100, at 439. Relatedly, where directorial and officer fiduciary standards of conduct and standards of review diverge, the courts and legal counsel will need to be sensitive to differentiating actions taken in an individual's officer capacity versus director capacity. *See, e.g.*, *In re* Delphi Fin. Grp. S'holder Litig., No. 7144-VCG, 2012 WL 729232, at *3 (Del. Ch. Mar. 6, 2012) (differentiating between defendants' officer and director roles).

140. *See, e.g.*, *In re* Goldman Sachs Grp., Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *1 (Del. Ch. Oct. 12, 2011) (stating that so long as directors and officers "act within the boundaries of their fiduciary duties, judges are ill-suited . . . to secondguess [sic] the business decisions" of them); *id.* at *23 ("The Delaware General Corporation law affords directors and officers broad discretion to exercise their business judgment in the fulfillment of their obligations to the corporation."). *But cf. In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 46 n.38 (Del. 2006) (barring the argument that officers were not protected by the business judgment rule on procedural grounds without ruling on the merits of the argument).

141. *See, e.g.*, *In re Delphi*, 2012 WL 739232, at *3; *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439, 443 (Del. Ch. 2012). Even when not explicitly citing to *Revlon* in evaluating an officer's conduct, the court uses *Revlon*-like language, referencing a duty to seek the best price available for stockholders. *See, e.g.*, *In* re El Paso Corp. S'holder Litig., 41 A.3d at 444 (stating that it was both the CEO's and the

provides a tentative basis to assert that officer conduct is subject to the same standard of review as director conduct. Finally, the court has found that where a director or an officer has engaged in self-interested decision-making, the decisions in both instances will be subject to entire fairness review.[142] In contrast to the first two standards of review, the court's language regarding entire fairness indicates with more certainty that it applies equally to officers and directors.

Despite the underdeveloped judicial standards of conduct and standards of review for officer fiduciary duties, the courts have more directly addressed other related matters. One such example is the application of exculpation to officer conduct. As both Section 102(b)(7) of the Delaware General Corporation Law and the Delaware courts make clear, despite owing similar fiduciary duties, officers of Delaware corporations do not enjoy the protection of an exculpatory provision in a corporation's charter.[143] Where complexity can arise, however, is in trying to untangle to what extent exculpatory provisions protect officer-directors.[144] Another area of relative clarity is jurisdiction over officers for their fiduciary duty breaches. Section 3114(b) of the Delaware Code provides for personal jurisdiction over certain non-resident officers for their conduct as officers of a Delaware corporation.[145] In applying the statute to officers, the courts have made clear that prior case law interpreting the director consent statute, Section 3114(a), applies

board's duty "to squeeze the last drop of the lemon out for [the] stockholders").

142. *See Hampshire Grp.*, 2010 WL 2739995, at *12; Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 745–46 (Del. Ch. 2007).

143. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2006) (authorizing "a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director"); Gantler v. Stephens, 965 A.2d 695, 709 n.37 (Del. 2009) ("Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers."); *Chen*, 87 A.3d at 666; McPadden v. Sidhu, 964 A.2d 1262, 1273 (Del. Ch. 2008) ("Dubreville, though he, as an officer, owes the same duties to the Company as the Director Defendants, does not benefit from the same protections as the Director Defendants because the section 102(b)(7) provision operates to exculpate only directors, not officers.").

144. *See In re* Celera Corp. S'holder Litig., No. 6304-VCP, 2012 WL 1020471, at *27 n.191 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012); Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 799 n.82 (Del. Ch. 2004) ("The question of to what extent § 102(b)(7) would protect these officer-directors is a complex one.").

145. DEL. CODE ANN. tit. 10, § 3114 (2006).

equally to the officer consent statute.[146] This means that Section 3114(b) has a limited scope in granting Delaware courts jurisdiction over officers. First, the claims brought against an officer must be related to actions in his or her officer capacity and must involve alleged violations of the Delaware General Corporation Law, charter, bylaws, breaches of fiduciary duty, or any combination of the aforementioned.[147] Second, the alleged wrongful conduct on which the cause of action is based must have occurred after the adoption of Section 3114(b).[148]

B. Restraint and Established Legal Principles

The Delaware Supreme Court's *Gantler* decision laid the groundwork for future development of officer fiduciary doctrine. As discussed above, post-*Gantler* decisions have sparingly added to its initial principles. Indeed, Delaware courts have acknowledged that there are still several "important and interesting questions" with respect to officer fiduciary duties and the appropriate standards of liability.[149] Contributing to the slow development of the law is restraint by the courts in delving into issues surrounding officer conduct and, relatedly, the superficial use of precedent. Almost all post-*Gantler* decisions that address officer fiduciary duties in any meaningful way cite to the same language in the opinion for support.[150] While citing to *Gantler* is warranted because it is the

146. Ryan v. Gifford, 935 A.2d 258, 266 (Del. Ch. 2007) ("The enactment of section 3114(b) carried with it the interpretive 'baggage' of section 3114(a), which I am bound to follow.").

147. *See* Corp. Prop. Assocs. 14 Inc. v. CHR Holding Corp., No. 3231-VCS, 2008 WL 963048, at *10 (Del. Ch. Apr. 10, 2008).

148. *See Ryan*, 935 A.2d at 266; *see also* Teachers' Ret. Sys. of La. v. Scrushy, No. Civ.A. 20529, 2004 WL 423122, at *10 (Del. Ch. Mar. 2, 2004) (stating that the court cannot exercise personal jurisdiction over acts by former officers that pre-date the statute).

149. Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010).

150. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 686–87 (Del. Ch. 2014); Higher Educ. Mgmt. Grp., Inc. v. Matthews, No. 9110-VCP, 2014 WL 5573325, at *13 (Del. Ch. Nov. 3, 2014); QC Commc'ns Inc. v. Quartarone, No. 8218-VCG, 2014 WL 3974525, at *11 (Del. Ch. Aug. 15, 2014); *In re* Wayport, Inc. Litig., 76 A.3d 296, 322 (Del. Ch. 2013); *In re* Celera Corp. S'holder Litig., No. 6304-VCP, 2012 WL 1020471, at *27–28 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012); Dweck v. Nasser, No. 1353-VCL, 2012 WL 161590, at *12 (Del. Ch. Jan. 18, 2012); Beard Research, Inc. v. Kates, 8 A.3d 573, 601 n.181 (Del. Ch. 2010); *Hampshire Grp.*, 2010 WL 2739995, at *11 n.75.

Delaware Supreme Court's first definitive statement on the topic, many times the court simply cites back to that decision without any further discussion of the legal principles surrounding it.[151] This is, in many ways, similar to the historical development of fiduciary duties of officers in Delaware. Before *Gantler*, the Delaware courts referenced officer duties only in passing, citing broad statements from *Guth v. Loft* as precedential support for the idea that officers owe fiduciary duties without any further explication.[152] Such a pattern in the courts' jurisprudence, however, leads to a stagnation in this area of the law.

Further contributing to an apparent stalling in the development of officer fiduciary doctrine is the Delaware courts' exercise of judicial restraint. This is not to criticize the courts. A court should limit itself to the issues appropriately brought before it and refrain from engaging in speculation or discussions of matters outside that scope.[153] Judicial restraint in officer fiduciary doctrine is thus a result of the parties failing to raise officer fiduciary issues. Again, the Delaware courts recognize this problem in officer litigation, making statements in their opinions that can be characterized as invitations to the parties to bring these important matters before the court so that they may be adequately addressed.[154]

Plaintiffs and their legal arguments largely explain the superficial use of precedent and restraint in officer fiduciary case law. The lack

151. *See, e.g.*, *Hampshire Grp., Ltd.*, 2010 WL 2739995, at *11.

152. *See* Shaner, *Restoring the Balance*, *supra* note 3, at 31–33 ("This is typical of the chancery court's treatment of the issue pre-*Gantler*; references to similar language appear in a number of chancery court opinions, most of which simply cite the sweeping language from *Guth* as precedential support without any further explication.").

153. *See In re* Tyson Foods, Inc. Consol. S'holder Litig., No. Civ.A. 1106-CC, 2007 WL 2351071, at *1 (Del. Ch. Aug. 15, 2007) ("Judicial restraint suggests that a court should limit itself to the case or controversy placed before it and, to the extent practicable, not engage in speculation about phantasmal parties or issues that might one day appear.").

154. *See, e.g.*, *Chen*, 87 A.3d at 666 n.2 ("A lively debate exists regarding the degree to which decisions by officers should be examined using the same standards of review developed for directors. Given how the parties have chosen to proceed, this decision need not weigh in on these issues and intimates no view upon them.") (internal citations omitted); *Hampshire Grp., Ltd.*, 2010 WL 2739995, at *11 ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors. The parties in this case have not delved into any of those issues, and I see no justifiable reason for me to do so myself.").

of certainty and predictability in this area of the law leads many plaintiffs to avoid officer fiduciary issues in favor of claims founded on better-developed statutory or decisional law.[155] Officer suits involving these established causes of action and, as discussed in Part C below, plaintiffs' preference to sue directors over officers whenever possible, demonstrate plaintiffs' dependency on established legal principles. As to the former, based on the cases reviewed for this article, a majority of legal actions against corporate officers that plaintiffs' pursued beyond the motion to dismiss stage involve a few, distinct, types of claims: usurpation of corporate opportunities, state law insider trading, compensation, and improper use of corporate assets.[156] All of these claims are based on legal principles that were well established in the case law even before the *Gantler* decision. The seminal corporate opportunity case, *Guth v. Loft* for example, was decided in 1939.[157] Over the years, the contours of the corporate opportunity doctrine and its application to officers have been developed and tested by the courts. Likewise, insider trading claims based on state law were established in Delaware in 1949 in *Brophy v. Cities Service Co.*, and have also been further developed over the years.[158] In both of these areas, the legal principles governing an individual's conduct and liability are well developed, and therefore, provide plaintiffs and their counsel with the benefit of more predictability in the litigation.

In sum, to the extent that plaintiffs are seeking to hold officers accountable for their conduct, they are pursuing more established avenues of legal liability.[159] The result of this litigation strategy by

155. *Cf.* Cheffins et al., *supra* note 62, at 432 ("Plaintiffs' lawyers largely determine which lawsuits are brought and where.").

156. The research yielded ten opinions that were issued post-trial and twelve opinions that were addressing motions for summary judgment. Of those twenty-two opinions, approximately three-quarters of them involved at least one claim against an officer that fell into one of these categories.

157. Guth v. Loft, Inc., 5 A.2d 503, 508 (Del. 1939); *see also* Gen. Video Corp. v. Kertesz, No. 1922-VCL., 2008 WL 5247120, at *18 (Del. Ch. Dec. 17, 2008) ("The best known statement of the corporate opportunity doctrine is taken from the venerable cause of *Guth v. Loft, Inc*.").

158. Brophy v. Cities Serv. Co., 70 A.2d 5, 7 (Del. Ch. 1949); *see In re* Oracle Corp., 867 A.2d 904, 925 (Del. Ch. 2004) ("This type of claim is a state version of a federal insider trading claim and has its origins in Delaware law in the venerable case of *Brophy* . . . ."); *id.* at 929–34 (setting forth the elements of a *Brophy* claim).

159. Alternatively, or additionally, these may also be characterized as instances where there is more at

plaintiffs is that there is no need (or opportunity) for the courts to provide guidance with respect to officer fiduciary duties. This creates, of course, a "chicken and egg" problem. Fiduciary duties are a creature of common law. Thus, the court only may develop and clarify fiduciary duties if plaintiffs bring those issues before the court. If, however, plaintiffs are refraining from raising officer fiduciary issues because of the absence of guidance from the court, there will be no occasion for the court to provide such guidance.

C. Preference for Director Accountability[160]

Another interpretation of the limited number of cases alleging officer breaches of fiduciary duty is that they evidence a preference for holding directors accountable for their misconduct while excluding similarly misbehaving officers. In contrast to directors, who are subject to numerous fiduciary suits each year, officers are rarely the defendants in such litigation. In M&A litigation, for example, there appears to be a strong director preference.[161] According to a recent study in 2013, 97.5% of M&A transactions that targeted U.S. public corporations where the value of the transaction was more than $100 million and the offer price was at least $5 per share were subject to a stockholder lawsuit.[162] In virtually all of these

stake for the party injured by the officer conduct and thus the plaintiff(s) are more willing to pursue their claims. *See* Quinn Curtis & Minor Myers, *Do the Merits Matter? Evidence from Options Backdating Litigation*, 164 U. PA. L. REV (forthcoming) (finding that plaintiffs' attorneys selected corporations with more egregious patterns to pursue legal claims) (manuscript on file with author).

160. In a forthcoming paper, I analyze more extensively the apparent "director preference" in stockholder litigation. *See* Megan Wischmeier Shaner, *Legal Agency Costs: Our Preference to Sue Directors* (manuscript on file with author).

161. *See* Thompson & Thomas, *supra* note 54, at 1761 (finding M&A litigation to be the dominant form of stockholder litigation). Using the findings in the M&A litigation context as illustrative of what may be going on in fiduciary duty litigation generally is apt as scholars have found that M&A litigation is the dominant form of corporate litigation and that it almost always includes fiduciary duty issues. *Id. See also* ROBERT M. DAINES & OLGA KOUMRIAN, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS (2012), http://securities.stanford.edu/research-reports/1996-2012/Cornerstone-Research-Shareholder-MandA-Litigation-03-2012.pdf; Cain & Soloman, *A Great Game*, *supra* note 76, at 468 ("This litigation almost always raises fiduciary duty issues and other important corporate law issues.").

162. Cain & Davidoff, *Takeover Litigation*, *supra* note 76, at 2.

lawsuits, directors were named as defendants and breach of fiduciary duty claims were included.[163]

Many times, however, officers also play a central role in M&A transactions. It is well-established that CEOs and other senior executive officers are not only heavily involved in negotiating these transactions, but also often negotiate in a self-interested manner to extract individual benefits.[164] Despite these facts, few M&A suits include allegations related to self-interested officer conduct, focusing instead only on the actions of the board of directors. More precisely, as shown in Figure 2, only 20 of the opinions referencing any claim for breach of fiduciary duty brought against an officer occur in the M&A context.[165] Moreover, in cases involving an officer who is also a director of a corporation, the focus of the allegations in the suit focused primarily on the individual's conduct in his or her director, but not officer, role.[166]

There are several possible explanations for the apparent preference to sue directors to the exclusion of the officers. The first is that plaintiffs' attorneys are simply overlooking officers and their role in the corporation.[167] One notable example of this appearing to happen is the *Disney* litigation, where the plaintiffs did not attempt to argue for a stricter standard against the defendants for actions taken in their

163. *See id.* at 3 ("In plain English, if a target announces a takeover it should assume that it and its directors will be sued.").

164. *See, e.g.*, Jay C. Hartzell et al., *What's in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 51–56 (2004) (finding target management exchange lower premiums for generous compensations packages); Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals"*, 20 J.L. ECON. & ORG. 60, 94 (2004) (finding target management exchanges lower premiums for employment in the surviving entity); *see also* Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TRANSACTIONS: TENN. J. BUS. L. 65, 71–72 (2011) (describing CEO overconfidence in M&A activity and also stating that "[o]verconfidence leads to diminished risk perception"); Lin, *supra* note 9, at 1386 (describing studies that suggest that high-statured individuals like executive officers are more inclined to engage in unethical and risky behavior).

165. *See* Figure 2.

166. *See, e.g.*, *In re* Novell, Inc. S'holder Litig., No. 6032-VCN, 2013 WL 322560, at *8 (Del. Ch. Jan. 3, 2013) (focusing on director actions even though one director, who was also the CEO, negotiated the deal in an alleged self-interested manner).

167. *See* Johnson & Millon, *supra* note 45, at 1612 (asserting that officers are forgotten fiduciaries in part because of (i) the lack of appreciation by plaintiffs' attorneys, boards of directors, and judges for the distinctive fiduciary obligations of these individuals, and (ii) lawyers do not fully appreciate the fiduciary duties of officers as agents of the corporation because law schools devote less time and attention to agency law principles).

officer (as opposed to director) capacity until they appealed the Chancery Court's decision to the Delaware Supreme Court.[168] Before that point in time, "[t]he parties essentially treat[ed] both officers and directors as comparable fiduciaries" and had not attempted to distinguish between the defendants (or their actions) as directors versus officers.[169]

Another possible reason for a director preference is that it is a strategic choice by plaintiffs' attorneys to focus their time and energy on holding directors responsible for their actions. Where there is both board and officer misconduct, it is arguably easier to succeed when suing the directors as opposed to the officers. First, the case law outlining the duties of directors is better established than the scant guidance on officer fiduciary obligations.[170] This means that lawyers must speculate as to the exact nature and scope of officer fiduciary duties, as well as how much liability might accompany a breach of those duties. Second, there is significantly more documentation surrounding board actions and decisions than officer conduct (for example, board resolutions, board consents, and board meeting minutes).[171] As a result, from an evidentiary standpoint, it may be easier to prove director breaches than officer breaches.[172]

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168. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 46 n.38 (Del. 2006) (rejecting the plaintiffs' officer argument on procedural grounds).

169. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 777 n.588 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

170. *See, e.g.*, BALOTTI & FINKELSTEIN, *supra* note 13, at § 4.10[C] ("Few authorities deal with the nature of the obligation owed by officers to the corporation and its stockholders."); Johnson & Millon, *supra* note 45, at 1601 ("Hardly a week goes by without yet another Delaware decision addressing the subject of director duties. Yet, surprisingly, no Delaware decision has ever clearly articulated the subject of officers duties and judicial standards for reviewing their discharge."); Sparks & Hamermesh, *supra* note 52, at 215 ("The precise nature of the duties and liabilities of corporate officers who are not directors is a topic that has received little attention from courts and commentators."); Shaner, *Restoring the Balance*, *supra* note 3, at 29 ("[T]he exact nature and scope of an officer's fiduciary obligations were left virtually untouched by the Delaware courts and legislature for almost seventy years, despite Delaware's otherwise vast and well-developed body of corporate law.").

171. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(f) (2006) (providing for director written consent); MODEL BUS. CORP. ACT. § 16.01 (2006) (providing for specific corporate records). Additionally, ultimate responsibility for the business and affairs resides with the board, making them a prime target in litigation. DEL. CODE ANN. tit. 8, § 141(a) (2006).

172. *See* DEL. CODE ANN. tit. 8, § 220 (2006) (providing stockholders with books and records inspection rights). Access to this documentation through books and records inspection rights also make proving director conduct easier than officer conduct. *See id.*

Third, the combination of more established director fiduciary case law and evidentiary advantages surrounding director decision-making, when taken in the context of derivative litigation and the procedural hurdles that accompany it, make it more likely that a stockholder-plaintiff will survive a Rule 23.1 motion to dismiss for failure to make a demand when challenging the actions of the board.[173] Finally, the type of relief a plaintiff is seeking can impact who is named as a defendant in fiduciary litigation. While damages can be sought against directors and officers alike, injunctive relief to stop corporate action will typically be sought only against the board of directors.

In light of these possible explanations, a director preference is understandable and perhaps even justified. Nevertheless, the actions of officers should not be ignored and left unchecked.

IV. LONG-TERM CONSIDERATIONS

At the root of this article and prior officer accountability scholarship is a more fundamental question that has yet to be squarely addressed—In what context(s) should officer accountability for fiduciary duties occur?[174] There are several different fora where formal officer accountability can occur. State courts, bankruptcy courts, intra-corporate proceedings, private federal securities actions, and SEC proceedings are some of the main ones.[175] In addition, while

173. *See* Shaner, *The (Un)Enforcement*, *supra* note 3, at 314 n.187 (describing the difficulties of showing demand excused under *Aronson* and *Rales* when the actions of officers and not directors are being challenged).

174. *See* Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627, 630 (2007) ("Dishonest executives are undoubtedly subject to serious sanction; the question is only how and by whom those executives are sanctioned.").

This question is more nuanced than just "in what context(s) should officer accountability for fiduciary duties occur," including considerations such as when accountability should occur in a specific context(s), and how such accountability should occur. Acknowledging these nuances, I pose the question more broadly as an invitation for future research and discussion into the issues surrounding officer fiduciary duty accountability.

175. *Id.* ("There are many potential sources of sanction: federal and state, civil and criminal, private and public, or legal and extra-legal."); ABA REPORT, *supra* note 6, at 125 ("[D]irectors and officers are exposed to broad potential liability as fiduciaries (and under other laws including, but not limited to, the federal securities laws and employment laws).").

beyond the scope of this article, there are many different types of informal or extra-legal sanctioning of officer conduct.[176] This section provides an overview of some of the considerations involved in answering this important question with respect to the formal venues for officer fiduciary duty accountability.

The answer to "in which context(s) should officer fiduciary duty accountability occur?" will vary depending on one's objective. For example, if you approach this question from a corporate efficiency perspective,[177] intra-corporate accountability may be the best venue to discipline officers. Corporate statutes say very little with respect to the power, authority, and duties of officers, leaving such task to the corporation's organizational documents and board of directors.[178] The board of directors thus has expansive legal authority to regulate officer conduct. Indeed, the board is the principal actor responsible for the hiring, firing, delegation, compensation, directing, and oversight of corporate officers.[179] Boards of directors can make use of intra-corporate sanctioning, in substitution for or as a supplement to stockholder requests for judicial relief for fiduciary duty breaches, as a means of holding officers accountable. Types of intra-corporate sanctions include termination, demotion, reprimand (public or private), compensation modification, or delayed promotion as a means of holding officers accountable.[180]

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176. *See* sources cited *supra* notes 22, 64. For example, the markets can serve in a disciplinary role for management conduct. *See e.g.*, Fischel, *supra* note 64, at 1263–64; Jones, *supra* note 64, at 116–17 (discussing the role of employment markets, product markets, and social norms in regulating director conduct).

177. For purposes of this discussion, efficiency is understood in terms of a minimal loss to externalities.

178. *See, e.g.*, DEL. CODE ANN. tit. 8, § 142(a) (2006) (stating a corporation "shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board"); MODEL BUS. CORP. ACT § 8.40 official cmt. (2006) (permitting "every corporation to designate the offices it wants"); *id*. at § 8.41 (providing that an officer shall perform the duties set forth in the bylaws or prescribed by the board).

179. *See* DEL. CODE ANN. tit. 8, §§ 141–42 (2006).

180. Johnson & Ricca, *supra* note 27, at 87 ("With boards of directors controlling most claims against officers, we think there will be relatively few lawsuits initiated by directors against officers. We expect that most officer misconduct coming to the attention of the board will be resolved as part of an intra-corporate sanction . . . ."); *see also* Graf, *supra* note 28, at 333; Johnson & Millon, *supra* note 45, at 1611; Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1207–08 (2004).

These methods of accountability are exactly the same methods used to police misconduct by

As evidenced by several prominent instances of officers being disciplined for actions that would amount to a breach of fiduciary duty, internal accountability seems to play a meaningful role in policing officer conduct. These examples include American Apparel's firing of CEO and founder Dov Charney following ongoing investigations into "alleged misconduct",[181] Hewlett-Packard's firing of CEO Mark Hurd for improper expenses (and related disclosure, accounting and other actions),[182] JP Morgan Chase's executive Ina Drew retiring for her role in the London Whale fiasco,[183] and Walgreen Co.'s termination of chief financial officer (CFO) Wade Miquelon following a billion-dollar forecasting error in the corporation's Medicare-related business.[184]

It is important to note that these types of internal sanctions can be tough for a corporate outsider to measure, which in part lends itself to their desirability over litigation.[185] Unless a corporation is publicly

more junior employees, who are also fired when they are detected doing wrong even though, as under general principles of agency law, they too have fiduciary duties to the company. Johnson & Millon, *supra* note 45, at 1606 n.27.

181. *See* David Carrig & Gary Strauss, *American Apparel Shares Rise after CEO's Ouster*, USA TODAY (June 19, 2014, 4:09 PM), http://www.usatoday.com/story/money/business/2014/06/19/american-apparel-ceo-dov-charney-ousted/10835849/.

182. *See* Henry Blodget, *Well, There's No Longer Any Mystery Why HP Fired Mark Hurd*, BUS. INSIDER (Dec. 30, 2011, 9:14 AM), http://www.businessinsider.com/mark-hurd-jodie-fisher-hp-2011-12; Robert A. Guth et. al., *Accuser Said Hurd Leaked an H-P Deal*, WALL ST. J (Nov. 6, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748703805704575594343622319312?KEYWORDS=mark+hurd++jodie+fisher&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748703805704575594343622319312.html%3FKEYWORDS%3Dmark%2Bhurd%2B%2Bjodie%2Bfisher.

183. *See* Jim Puzzanghera, *Senators to Question Former JPMorgan Exec Who Oversaw London Whale*, L.A. TIMES (Mar. 13, 2013), http://articles.latimes.com/2013/mar/13/business/la-fi-mo-jpmorgan-london-whale-ina-drew-20130313.

184. *See* Michael Siconolfi, *Walgreen Shakeup Followed Bad Projection*, WALL ST. J. (Aug. 19, 2014, 9:00 PM), http://online.wsj.com/articles/walgreen-shakeup-followed-bad-projection-1408494546.

185. One area of internal discipline that has attempted to be studied and measured is CEO firing rates. *See, e.g.*, Ken Favaro et al., *supra* note 28, at 2, 11 (finding that boards of operationally involved corporations "tend to be more informed and engaged in monitoring strategy"); KEN FAVARO ET AL., CEO SUCCESSION REPORT 9 (2011), http://www.strategyand.pwc.com/media/file/Strategyand_CEO-Succession-Study-2011_Extended-Study-Report.pdf; *see also* Paredes, *supra* note 15, at 695. These studies have found an increase in CEO turnover rates in the post-Enron era, suggesting that the board of directors is playing a more prominent role in holding officers accountable for their conduct. *See, e.g.*, ABA REPORT, *supra* note 6, at 131 ("In 1995, one in eight departing CEOs resigned under board pressure or were fired, while in 2006 almost one in three departing CEOs left involuntarily.") (citations omitted); Chuck Lucier et al., supra note 28, at 12 (concluding that boards are "more deeply engaged and owners actively involved in governance and strategy"); Kahan & Rock, *supra* note 9, at 1030–32

traded and internal disciplinary actions trigger reporting requirements under federal securities laws or stock exchange rules, there may be no legal obligation to make this information public.[186] As a result, internal investigations and disciplinary measures can be kept relatively private and mitigate any impact on the corporation's reputation and stock price.[187]

Another benefit of intra-corporate sanctioning is it can be more efficient than filing a lawsuit against a misbehaving officer. In contrast to formal litigation, discipline for officer malfeasance can be handed down in a relatively quick manner. For example, Walgreens forced out its CFO less than a month after his forecasting error was brought to the attention of the board.[188] Relatedly, internal sanctioning of officers avoids many of the costly aspects of litigation such as court costs, attorneys' fees, discovery, and other expenses associated with protracted litigation.[189] Finally, and perhaps most importantly, internal methods of accountability do not involve the

(citing CEO turnover as indicating greater substantive board independence and that CEOs are losing their power); Chuck Lucier & Jan Dyer, *The Hidden Good News About CEO Dismissals*, HARV. BUS. REV., July–Aug. 2007, at 1, http://hbr.org/2007/07/the-hidden-good-news-about-ceo-dismissals/ar/1 ("Worldwide, boards of large corporations are dismissing four times more CEOs today than in 1995 . . . ."). *But see* Dammann, *supra* note 14, at 204 (pointing to executive compensation and golden parachutes as other factors that may explain shorter CEO tenure).

186. Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, 67 Fed. Reg, 42914-01 (June 25, 2002) (to be codified at 17 C.F.R. pt. 228, 229, 240, 249) (requiring disclosure of certain material corporate events on a current basis, which includes the departure, appointment, and compensatory arrangements of certain officers).

187. *See* Whitehead, *supra* note 17, at 1287 ("Balanced against heightened regulation are the benefits of the traditional board-CEO relationship, which remains fundamentally private. There are—for both the company and society—important benefits to insulating the CEO from external oversight or universal standards.").

188. *See* Siconolfi, *supra* note 184.

189. *But see* Brian Breheny, *The Landscape of CEO Succession Issues*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 23, 2013), http://blogs.law.harvard.edu/corpgov/2013/07/23/the-landscape-of-ceo-succession-issues/ (stating that "[i]t is often difficult, time consuming and tremendously distracting for a company to even attempt to discharge a CEO for Cause: the standards for a showing of Cause are often stringent, and as a result there may be considerable litigation risk"). On the other hand, however, it has been found that CEOs forced to leave the corporation were just as likely as CEOs who voluntarily departed the corporation to receive excess severance payments, however, the fired CEOs tended to receive much more in excess severance payments than the voluntarily leaving CEOs. Eitan Goldman & Peggy Huang, *Contractual Versus Actual Severance Pay Following CEO Departure*, July 5, 2010, at 17, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568156. One reason posited for such high excess severance payments for fired CEOs is that it is an effort by the board to facilitate a smooth transition from a failed ex-CEO to a new CEO without the ex-CEO making the process long and contentious. *Id.* at 4.

complicated and disputable factual question of whether an officer actually breached a legal duty. Officers serve at the pleasure of the board. When officers do bad things, regardless of whether that conduct amounts to a legally cognizable breach of fiduciary duty, the board typically has the power and authority to fire them (or use other forms of discipline).[190] Thus, with more timely discipline of misconduct, fewer resources spent on adjudicating and sanctioning the breach, and maintenance of the historically private board-officer relationship, internal accountability may be a more efficient method of policing misconduct by corporate officers than traditional state court litigation.

Alternatively, if one views judicial sanctioning of officers for their breaches and recovery of their ill-gotten gains—and the commensurate deterrent value of such sanctioning—as the most important objective, officer accountability at the federal level may be ideal. Federalization of officer accountability has been discussed in the context of (i) stockholder federal securities fraud class actions and (ii) direct regulation and sanctioning of officer conduct by the SEC.

First, while state fiduciary duty litigation and federal securities fraud litigation operate in much the same way in policing corporate governance, scholars have concluded that the latter has several practical advantages over the former. In their comparison of state and federal litigation, Professors Thomson and Sale assert that "state fiduciary duty litigation, with its amorphous focus on directors' failure to monitor officers and other parts of the enterprise, is at a systematic disadvantage relative to federal law which, in a more focused way, seeks to explore what officers need to do to meet their corporate disclosure obligations."[191]

190. *See* DEL. CODE ANN. tit. 8, §§ 141–142 (2006). Furthermore, the cost to a senior executive of a public company of being fired may be tremendous: not only does he or she lose all the future benefits under his employment agreement (if the termination is for cause), but his or her personal brand may be severely damaged (even if the termination is not for cause), and so his or her future earnings capacity is likely substantially reduced.

191. Thompson & Sale, *supra* note 13, at 864.

Second, the SEC, in contrast to stockholders, is given broad reach, both in terms of the substantive law applicable to officers and its remedial tools, in holding officers accountable for their actions.[192] The SEC has a broad array of sanctions available to it, including restitution, fines, and forward-looking penalties (for example, injunctions, cease and desist orders, and barring wrongdoers from further service as an officer or director of a reporting company).[193] The SEC is also not subject to the same restrictions as private litigants in fraud actions or fiduciary duty actions in seeking to hold corporate officers accountable.[194] Further, in contrast to intra-corporate sanctions, both the SEC and private litigants in securities actions many times have greater incentives than the board of directors to pursue accountability for officer wrongdoing.[195]

Third, the personal liability (including the frequency and quantity of that liability) associated with penalties at the federal level results in private securities litigation and SEC sanctioning having the

192. *See* Langevoort, *supra* note 174, at 652 ("So far as substantive law is concerned, in fact, what is remarkable is the breadth of the SEC's ability to reach individual corporate executives."); *see also* Lisa M. Fairfax, *The Sarbanes-Oxley Act as Confirmation of Recent Trends in Director and Officer Fiduciary Obligations*, 76 ST. JOHN'S L. REV. 953, 962 (2002); Melissa Maleske, *8 Ways SOX Changed Corporate Governance*, INSIDE COUNSEL MAGAZINE, at 8 (Jan. 1, 2012), http://www.insidecounsel.com /2012/01/01/8-ways-sox-changed-corporate-governance?page=8 (stating that Sarbanes-Oxley empowered the SEC by extending the statute of limitations to pursue actions and increased penalties).

193. *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 817–20 (5th ed. 2006); Johnson & Ricca, *supra* note 27, at 95–97; Langevoort, *supra* note 174, at 660 (describing the remedies available to the SEC). From this perspective, internal accountability would also arguably surpass traditional fiduciary duty litigation as well.

194. *See* Langevoort, *supra* note 174, at 652 (stating that the SEC does not have to meet all of the same requirements as private litigants).

195. *See* MYLES L. MACE, DIRECTORS: MYTH AND REALITY 72–85, 190–94 (rev. ed. 1971) (supporting the belief that officers, and not directors, play the central role in corporate affairs); Robert W. Hamilton, *Corporate Governance in America 1950–2000: Major Changes But Uncertain Benefits*, 25 J. CORP. L. 349, 360–64 (2000); Johnson & Millon, *supra* note 45, at 1614–17; Myles L. Mace, *The President and the Board of Directors*, HARV. BUS. REV., Mar.–Apr. 1972, at 37–43; Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 332 (2007) ("CEOs of public companies have the unique privilege of picking their own nominal supervisors—the board of directors."); Shaner, *Restoring the Balance*, *supra* note 3, at 28 n.5, 44, 51 (discussing the imbalance in power in corporate management and stating that "[r]ecent corporate scandals illustrat[e] that it is the officers, and not the directors, that are at the center of managing the business and affairs of the corporation"); Shaner, *The (Un)Enforcement*, *supra* note 3, at 310–11 (discussing how the development of corporate doctrine as well as the dynamic in corporate management disincentivizes board oversight and discipline of officer conduct); JAMES B. STEWART, DISNEYWAR 531 (2005) (describing how the Disney board members were manipulated by CEO Michael Eisner).

potential for stronger compensatory and sanctioning components than intra-corporate sanctions or state fiduciary duty litigation.[196] For example, indemnification and director and officer (D&O) insurance coverage for SEC enforcement actions are generally unavailable or very limited. Many D&O insurance policies do not cover fines, penalties and restitution paid to the SEC.[197] Similarly, indemnification is not generally available for these types of sanctions.[198] This means that in contrast to private state litigation relief, where corporations ultimately bear the costs of a defendant's sanctions by virtue of indemnification or D&O insurance, officers must directly bear the cost of the SEC's sanctions, thereby increasing the deterrent value of such accountability. Such strong sanctioning can then also have a corresponding strong deterrent effect on future officer fiduciary misconduct. Accordingly, if the goal of officer accountability is sanctioning of and compensation for officer misconduct (along with the deterrent value associated with each of these), then accountability at the federal level may be superior to both traditional fiduciary duty litigation and intra-corporate actions.

Lastly, any discussion of the proper or ideal venue for officer accountability should include, and this author would contend that it should begin with, consideration of the issue from a doctrinal development perspective. Currently, there is very little guidance and there are many open issues regarding the fiduciary obligations of corporate officers. The applicability of the business judgment rule and the standard of liability for the duty of care are two such examples.[199] This is problematic on several levels. Lack of clarity in this area of the law leaves officers in the difficult position of having to speculate and guess as to what their fiduciary responsibilities require of them and what the courts' expectations will be when making decisions in suits against them for failing to comply with

196. *See* Eric Helland, *Reputational Penalties and the Merits of Class-Action Securities Litigation*, 49 J.L. & ECON. 365, 365 (2006); Langevoort, *supra* note 174, at 635–36.

197. *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 355–56 (2015).

198. *See id*. at 385 (describing the factors suggesting that corporations do not indemnify officers for SEC sanctions, including the SEC policy against allowing indemnification).

199. *See supra* notes 139–42 and accompanying text.

those responsibilities.[200] Additionally, from the perspectives of stockholders' and boards of directors', uncertainty as to officer duties makes it challenging to know when officers are and, perhaps more importantly, are not complying with their duties. This means that except in those cases of egregious malfeasance, enforcers of officer duties may be hesitant (or even deterred) from seeking judicial relief for officer misconduct because the applicable legal principles and potential outcome of their lawsuit is largely unclear. This effect finds support in (i) the current mix of legal actions against officers, which favors claims arising under well-established legal principles like the corporate opportunity doctrine, and (ii) court observations that the parties failed to raise fiduciary issues.[201]

Thus, if one's objective is the development of judicial doctrine regarding officer fiduciary duties, then accountability for officer fiduciary obligations would be preferable in the Delaware state court context and secondarily in the bankruptcy court context.[202] Adjudication of officer misconduct in these venues would lead to much-needed guidance about the contours of officer duties. Indeed, scholars have frequently noted the value and broader impact of the Delaware courts' "sermonizing" of the expectations of corporate management and best governance practices.[203] This kind of guidance

200. *See also* Johnson & Ricca, *supra* note 27, at 78 n.13, 89 (discussing the lack of legal advice provided to officers by their counsel with respect to fiduciary duties).

201. *See supra* Part III.B–C.

202. From this perspective then, the least desirable venue for officer accountability would be inside the corporation. Intra-corporate accountability results in little to no development of fiduciary duties or best practices.

203. *See, e.g.*, Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) ("Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as 'corporate law sermons.'"); Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 206 (2007) ("The Delaware judges, from their vantage point at the center of the corporate governance arena, offer their insights to the community of those who regularly think about best practices, and in doing so can help to bring certain questions to the forefront of the collective mind on these issues."); Veasey & Di Guglielmo, *supra* note 137, at 1404 ("Delaware judges have had a substantial role in shaping best practices in corporate governance."); *see generally* Chandler & Strine, *supra* note 17, at 977–78 ("Within the framework of fiduciary duty review, the Delaware courts have provided strong incentives for corporate boards to use procedures that are designed to protect public stockholders."); Frank v. Elgamal, No. 6120-VCN, 2014 WL 957550, at *20 n. 217 (Del. Ch. Mar. 10, 2014) ("Extensive literature has developed on the ways in which this Court has encouraged, implicitly

would also not be limited to just public corporations, as in the case with certain officer accountability at the federal level.[204]

Judicial guidance is further beneficial in the area of fiduciary duties because of the Delaware courts' ability to be flexible and quickly adapt to changing business conditions and expectations.[205] Two Delaware court judges explain:

> The Delaware approach has tended to create incentives for particular good governance practices, yet also recognizes that what generally works for most boards may not be the best method for some others. The fiduciary duty form of accountability is well-suited to this sort of flexibility because it is context-specific in application.[206]

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or explicitly, certain 'best practices' of corporate governance.").

In addition, developing fiduciary duties through litigation "performs the task of translating the abstract concepts of fiduciary obligation, good faith, and fairness into the specific limits on the insiders' ability to favor themselves." Davis, *supra* note 24, at 437.

204. *C.f.* O'KELLEY & THOMPSON, *supra* note 103, at 163 ("Delaware . . . is the preeminent American corporate law jurisdiction. More than half of the country's largest corporations are incorporated in that small, mid-Atlantic state.").

205. *See In re* Topps Co. S'holders Litig., 924 A.2d 951, 960 (Del. Ch. 2007) ("[I]n Delaware's system of corporate law, the adjudication of cases involving the fiduciary duties of directors in new business dynamics is one of the most important methods of regulating the internal affairs of corporations, as these cases articulate the equitable boundaries that cabin directors' exercise of their capacious statutory authority."); *see generally* Fisch, *supra* note 75, at 1061 (explaining how Delaware law largely relies on judicial corporate lawmaking and that the peculiar characteristics and specialization of Delaware's courts play an important role in developing flexible and workable principles).

206. Chandler & Strine, *supra* note 17, at 979; *see also* Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 626 (2005) ("One reason that Delaware fiduciary duty law is both coherent and adaptive in the classic common law tradition is that it is made by an informed group of judges who are repeat players on matters of corporate law. . . . For these chancery court judges their experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law.").

Moreover, the Delaware courts have expressed a clear view that oversight of corporate fiduciaries is of great importance to Delaware:

> This Court has long recognized Delaware's strong interest in promptly, uniformly, and authoritatively deciding corporate governance disputes of Delaware corporations arising, pursuant to the internal affairs doctrine, under Delaware law. Depending on the circumstances, this interest, particularly when there are breach of fiduciary duty claims, can be so compelling that it may 'outweigh the policy underlying the doctrine of comity' in the Court's determination of whether a stay of a Delaware action in favor of litigation elsewhere is appropriate.

In re Molycorp, Inc. S'holder Derivative Litig., No. 7282-VCN, 2014 WL 1891384, at *5 (Del. Ch.

Relatedly, in contrast to federal courts, state courts have arguably greater availability of resources to dedicate to adjudicating these types of corporate governance disputes.[207] Accordingly, in thinking about the broad goal of increased officer accountability, there should be a purposeful focus on the enforcement and accountability scheme for officers' fiduciary duties at the state level.

CONCLUSION

Under state law, fiduciary duties are a principal constraint on the vast power and authority officers wield in managing their corporations. Fiduciary duty litigation thus serves as an important mechanism to enforce those duties and counteract the agency costs inherent in the centralized management structure of the corporation.[208] Prior scholarship has assumed that with respect to officers, traditional fiduciary duty litigation in the state court context

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May 12, 2014) (internal citations omitted); *see also* Armstrong v. Pomerance, 423 A.2d 174, 177 (Del. 1980) ("Delaware [also has] a significant and substantial interest in actively overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations . . . ."); *accord* Ryan v. Gifford, 918 A.2d 341, 349 (Del. Ch. 2007) ("Delaware courts have a significant and substantial interest in overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations.") (internal quotation marks omitted); Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., No. 13950, 1996 WL 608492, at *5 (Del. Ch. Oct. 16, 1996) ("[C]laims that a director has breached his fiduciary duties to a Delaware corporation are of special concern to this Court."); *cf.* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 38–39 (1993) ("The most important transaction-specific asset in the chartering relation is an intangible asset, Delaware's reputation for responsiveness to corporate concerns," which stems from "a comprehensive body of case law, judicial expertise in corporation law, and administrative expertise in the rapid processing of corporate filings.").

207. *See* Chandler & Strine, *supra* note 17, at 984 n.85.

> In our experience, the effective adjudication of corporate law disputes requires a great deal of direct involvement by the trial judge. The factual records in such cases are often large and make for demanding reading. Moreover, many of these matters are time-sensitive and involve the application of complex legal doctrines to the evidence in a very short timeframe—a reality that limits the capacity of judges to delegate very much of the work to law clerks.
>
> As we understand it, the federal courts already face a stiff challenge in addressing their already formidable caseloads. . . . In view of that reality, it seems unlikely that the federal courts are well-positioned to absorb the burden of adjudicating corporate governance disputes now handled by state courts.

Id.

208. *See* Thomas & Thompson, *supra* note 76, at 1761 ("Shareholder representative litigation is different from other forms of representative litigation in large part because of its managerial agency-cost-reduction characteristics."); Thompson & Sale, *supra* note 13, at 903–04 (stating that stockholders suits serve as a check on management's abuse of their position).

is not being used to hold officers accountable for violations of their duties. As a result, the focus of officer accountability research has been in other areas such as federal securities actions, intra-corporate sanctioning, and bankruptcy proceedings.[209] This article investigates the underlying assumption in this scholarship by researching state court accountability for officers' fiduciary duty breaches.

In an effort to gain additional insight into traditional state court fiduciary duty litigation all publicly available Delaware state court and bankruptcy court opinions that address officer fiduciary duties from 2004 to 2014 were collected and considered. The results of this research provide an initial picture of the officer accountability landscape that is consistent with prior hypotheses. First, only a modest number of opinions that discuss or reference claims against officers for fiduciary duty breaches were found, supporting prior beliefs that these individuals are infrequently being held accountable for their breaches of fiduciary duty in state court. Second, as scholars have contended, stockholders play the lead role in using litigation to enforce officer fiduciary duties. Finally, the opinions collected are consistent with assertions that (i) fiduciary duty claims largely focus on duty of loyalty (as opposed to care) violations and (ii) the procedural hurdles in derivative litigation seem to impede the enforcement of officer fiduciary duties.

What further emerges from the opinions collected is that officer fiduciary duty doctrine is an area of corporate law that has been, and is continuing to be, developed at a very slow pace.[210] Superficial use of precedent, judicial restraint, and reliance on established legal principles are all contributing to a stalling in the development of the courts' jurisprudence. The irony of this situation is there is a strong demand for guidance as to officers' fiduciary obligations and best practices because of the leading role officers play in corporate governance, yet the ones who largely drive the development of fiduciary doctrine (i.e., plaintiffs) are failing to raise these issues

209. *See supra* notes 26–28 and accompanying text.
210. *See supra* note 149–152 and accompanying text.

before the courts.[211] Indeed, the Delaware courts themselves have acknowledged that there are important open issues relating to officers, extending invitations to plaintiffs to raise these matters so that the court may fully address them.[212] A synthesis of what the court has said about officer duties thus far indicates that, essentially, the standards of conduct for officer fiduciary duties are largely the same as directors.[213] In contrast, it is less clear that this will be the case with respect to the applicable standards of review for those duties. In the absence of judicial guidance, there are strong arguments for why the standards of review for officer actions should, in fact, be different from those of directors.[214]

Finally, the call for further clarity in officer fiduciary duty doctrine directly bears on the broader discussion of the current system of checks and balances on officer conduct, specifically the appropriate bases for officer liability for breaches of fiduciary duty and the context in which it should occur. While intra-corporate sanctioning, private federal securities actions, and SEC actions may be preferable from a corporate efficiency or a sanctioning or deterrent perspective, these fora do not noticeably aid in the development of the contours of officer fiduciary duties.[215] Rather, the importance of the role of state court fiduciary duty litigation in shaping those duties, best governance practices, and the expectations of corporate management has been widely recognized.[216] When these factors are taken into account, fiduciary accountability in the state court context is vital to an effective system of checks and balances on officer behavior and

211. *See* Cheffins et al., *supra* note 62, at 432 (noting how the plaintiffs' bar shapes corporate law); Johnson & Ricca, *supra* note 27, at 76 n.3; Thompson & Sale, *supra* note 13, at 864 ("In reality, officers exercise the most important corporate powers, but in legal theory they are clearly subordinate to the board and are barely mentioned in most corporations statutes.").

212. *See supra* note 149 & 154 and accompanying text.

213. *See supra* notes 126–129 and accompanying text.

214. *Compare* Johnson, *supra* note 100, at 440 (arguing that the business judgment rule does not apply), *with* Hamermesh & Sparks, *supra* note 100, at 865 (asserting that the business judgment rule should apply).

215. *See supra* Part IV (discussing the different venues officer accountability can occur in and the benefits and detriments of each).

216. *See supra* note 203 and accompanying text.

should be at the forefront of discussions to improve corporate governance.