Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers

GABRIEL RAUTERBERG & ERIC TALLEY†

ABSTRACT: For centuries, the duty of loyalty has been the hallowed centerpiece of fiduciary obligation, widely considered one of the few "mandatory" rules of corporate law. That view, however, is no longer true. Beginning in 2000, Delaware dramatically departed from tradition by granting incorporated entities a statutory right to waive a crucial part of the duty of loyalty: the corporate opportunities doctrine. Other states have since followed Delaware's lead, similarly permitting firms to execute "corporate opportunity waivers." Surprisingly, more than fifteen years into this reform experiment, no empirical study has attempted to measure either the corporate response to these reforms, or to evaluate the implications of that response.

This Article presents the first broad empirical investigation of the area. Contrary to conventional wisdom, we find that *hundreds of public corporations have adopted waivers* – often with capacious scope and reach. We thus establish a central empirical fact that is an important baseline for further discussion: public corporations have an enormous appetite for contracting out of the duty of loyalty when freed to do so. Our analysis further sheds light on the high-stakes normative debate around the relationship between fiduciary principles and freedom of contract. What types of corporations choose to contract around default rules? When they do so, do such measures tend to bolster or thwart shareholder welfare? We develop an efficient contracting approach to explain *why* corporations – and their shareholders – might favor tailoring the duty of loyalty, and provide empirical evidence that Delaware's experiment has generally been a success.

†AUTHORS. Assistant Professor of Law, University of Michigan Law School (rauterb@umich.edu); and Isidor & Seville Sulzbacher Professor of Law, Columbia Law School (etalley@law.columbia.edu), respectively. For helpful research assistance, we are grateful to Ashley Youn-Jae Lee, Michael Linneman, Zachary Nagler, William Nguyen, and Akili Kareem Wallace. All errors are ours.

Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers

Contents

INTRODUCTION

For nearly two centuries, a cornerstone of Anglo-American corporate law has been the fiduciary duty of loyalty, the most demanding and litigated fiduciary obligation imposed on corporate managers. The duty—which regulates financial conflicts of interest and requires managers to subordinate their own interests to the corporation's—represents a key policy lever to address the most pernicious of intra-firm agency costs. Practitioners, academics, and jurists alike have characterized loyalty as the most important fiduciary obligation,[1] crediting it with facilitating efficient corporate stewardship and catalyzing investment and entrepreneurship. Indeed, a well-known literature in law and finance has documented the beneficial role that credible conflict-of-interest management plays in promoting company value, vibrant capital markets, and firm longevity.[2] The duty of loyalty is also characterized as inveterate and unyielding: While much of corporate law consists of "default rules" that parties may freely alter, the duty of loyalty is widely perceived as "immutable"—immune to private efforts to dilute, tailor, or eliminate it.[3]

That perception is no longer true. Beginning in 2000, Delaware dramatically departed from longstanding tradition, amending its statutes to enable corporations to waive a critical component of loyalty – the corporate opportunity doctrine – which forbids corporate fiduciaries from appropriating new business prospects for themselves without first offering them to the company.[4] From that moment forward, Delaware corporations and managers were free to contract out of a significant portion of the duty of loyalty. In the ensuing years, several other states have followed Delaware's lead, granting their own incorporated entities the statutory authority to execute corporate opportunity waivers (COWs).[5] The Corporate Laws Committee of the ABA has also recently

[1] *See, e.g.*, Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 3 (1993) (describing the duty of loyalty as the "most important fiduciary duty of corporate officers and directors"); 1 REG. OF INVEST.

[2] *See, e.g.*, Rafael La Porta, et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107, 113 (2003).

[3] Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution,* 96 NW. U.L. REV. 489, 496 n.16 (2002) (providing "the duty of loyalty of corporate directors" as an example of mandatory corporate governance regulation); Jill E. Fisch, *Picking a Winner,* 20 J. CORP. L. 451, 458 (1995); Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis,* 84 NW. U. L. REV. 542, 551-53 (1990) (citing self-dealing rules as one example of mandatory law); Melvin Aron Eisenberg, *The Structure of Corporation Law,* 89 COLUM. L. REV. 1461, 1486 (1989) (arguing that self-dealing rules are "largely mandatory, at least for publicly held corporations"); Randall S. Thomas, *What Is Corporate Law's Place in Promoting Societal Welfare?: An Essay in Honor of Professor William Klein*, 2 BERKELEY BUS. L.J. 135, 139 (2005) (stating self-dealing rules are mandatory for public corporations); Marcel Kahan, *The Qualified Case Against Mandatory Terms in Bonds,* 89 NW. U. L. REV. 565, 607 n.164 (1995) (claiming that the rules on self-dealing by managers are mandatory).

[4] Del. Code Ann. tit. 8, § 122(17).

[5] K.S.A. 17-6102(17); Md. Code Ann., Corps. & Ass'ns § 2-103(15); Mo. Ann. Stat. § 351.38(16); Nev. Rev. Stat. Ann. § 78.070(8); NJ Stat. Ann. 14A:3-1(q); Okla. Stat. Ann. tit. 18, § 1016(17); Tex. Bus. Orgs. Code Ann. § 2.101(21); Wash. Rev. Code Ann. § 23B.02.020(5)(k). *See also infra* Subsection I.B.4.

proposed amending the Model Business Corporation Act to permit advance waivers of corporate opportunities.[6]

The reform movement sparked by Delaware represents a significant departure from both long-settled understanding and common law tradition—one that concerns a foundational tenet of company law. It is thus surprising that no significant study to date has empirically assessed firms' response to these reforms (save for anecdotal accounts suggesting that there has been little response).[7] This Article endeavors to fill this void, presenting a broad empirical assessment of how public companies responded to the statutory reforms and developing a broader conceptual and theoretical account to predict and explain that response.[8] To our knowledge, we are the first to offer either type of assessment.

Based on an extensive data set drawn from U.S. public companies' filings with the Securities and Exchange Commission ("SEC"), we isolated over 10,000 unique disclosures that were likely to be corporate opportunity waivers. We manually coded a large subset of this group along a variety of dimensions pertaining to the scope, reach, and location of the waivers. In contrast to the conventional wisdom, we find that hundreds of public corporations *in our sample* – and by extrapolation, thousands of public corporations *writ large* – have executed waivers,[9] whose terms apply broadly both across both managerial ranks and categorical domains.[10] We thus establish a central empirical fact that is an important baseline for further discussion: *Public companies have an enormous appetite for tailoring the duty of loyalty when freed to do so*.

Alongside these empirical trends, our analysis also takes on several fundamental questions raised by widespread adoption of waivers of corporate opportunities: *Why* would a corporation ever choose to restrict the reach of the duty of loyalty? *What form* will the optimal allocation of corporate opportunities plausibly take in different companies? *Under what conditions* would such waivers be valuable to shareholders, notwithstanding that such waivers constrain the fiduciary duties owed *to* shareholders? Delaware's sixteen-year statutory experiment also provides a unique opportunity to revisit some of the foundational quandaries in corporate law with a fresh perspective. For one, there is a vigorous, decades-old debate that asks whether *any of corporate law's rules should be mandatory*, or whether parties should be free to contract out of every governance requirement as they already can from most.[11] That debate concerns whether enlarging the contracting space for fiduciary duties results in greater efficiencies, or

---

[6] ABA Corporate Laws Committee, Proposed Amendments (2014), https://apps.americanbar.org/dch/-committee.cfm?com=CL270000; *see also* Proposed Amendments to Sections 2.02 and 8.70 (and Related Changes to Sections 1.43, 8.31 and 8.60) Permitting Advance Action to Limit or Eliminate Duties Regarding Business Opportunity, 69 BUS. LAW. 717 (2014).

[7] *See, e.g.*, Christopher E. Austin & David I. Gottlieb, *Renouncing Corporate Opportunities in Spin-offs, Carve-out IPOs and Private Equity Investments*, https://vcexperts.com/buzz_articles/320 ("Since the enactment of Section 122(17), it appears that only a small number of corporations have gone public with or adopted corporate opportunity provisions in their charters.").

[8] *See infra* Section II.A.

[9] As discussed in the empirical section, many but not all of our data set's corporations are public. *See infra* Part III.

[10] *See infra* Part II.

[11] *See infra* notes 57 and 105 and accompanying text.

instead in unchecked opportunism. There is also a significant set of issues involving whether corporations *actually make use of the freedom* frequently given them by corporate law to replace default rules, and whether, when they do so, it serves shareholders well.[12]

We argue that there are, in fact, several plausible economic rationales for a corporation to embrace a COW for the sake of shareholder value. Indeed, in the years leading up to Delaware's initial reform, a growing chorus of critics argued that the exacting requirements of the duty of loyalty had begun to impede corporations' ability to raise capital, build efficient investor bases, and secure optimal management arrangements.[13] This claim was based in part on the recognition that many then-emerging sources of capital, such as private equity, venture capital, or spin-off transactions may subject their financial sponsors to fiduciary duties in profound conflict with either their larger business plans or with fiduciary obligations they owe to other business entities.[14] Absent the contractual ability to clarify ownership rights regarding new business opportunities, it is difficult to see how such capital structures could stably persist.

Consider, for example, one of the issuers in our database: Prosper Marketplace, Inc., the first and still one of the largest peer-to-peer lenders. The waiver that Prosper adopted in its charter[15] covered any member of Prosper's board who was not also an employee. The four outside directors in place at the time of the company's public filing (and a majority of the board) worked for financial firms – three of them in venture capital – and at that point served as directors for at least *fourteen* other companies, including another online commercial market. As a risky entrepreneurial start-up, Prosper was an ideal candidate for the venture capital financing model. Yet it is difficult to see how those outside directors could avoid intractable fiduciary conflicts without first securing waivers defining the boundaries of their loyalty obligations across different companies.[16]

That said, simply because there are plausible conditions where COWs *could* enhance shareholder welfare, it does not mean that the firms *actually adopting waivers* satisfy those conditions. Our empirical analysis allows us to get some traction on this set of questions as well. We find that COW adopters are, on average, reasonably established firms with moderate-to-high asset values. They typically generate sizeable revenues, and they tend to deliver *larger* overall market returns to their capital investors by comparison to other public companies. Delaware corporations are over-represented, as are firms in industries where diversified, active investments across multiple portfolio companies are the norm (such as venture capital and oil and gas). As a descriptive matter, then, it does not appear that companies that execute waivers are systematically the unscrupulous bottom feeders of the corporate ecosystem. To the contrary, they appear—by and large—to be healthy, growing, and profitable business organizations.

---

[12] *See infra* notes 104-104 and accompanying text.
[13] *See infra* Subsection I.B.2.
[14] *See infra* notes 57-58 and accompanying text. That said, prior to the reform, the Delaware Chancery Court took a particularly dim view of the enforceability of such contractual clarifications. Siegman v. Tri-Star Pictures, Inc., 1989 WL 48746, *reprinted in* 15 Del. J. Corp. L. 218 (1990).
[15] That Charter was attached to Prosper's 2007 S-1 filing (available on the Edgar interface at https://www.sec.gov/Archives/edgar/data/1416265/000110465907078072/0001104659-07-078072.txt)
[16] For those who followed the well-known litigation in *In re Trados Inc.*, 73 A.3d 17, 40-41 (Del Ch. 2013), Prosper suggests a number of possibly instructive analogies.

In addition to these descriptive statistics, we further assess whether the adoption of a waiver tends to add or dilute value on the margin, by analyzing market reactions to issuers' first public disclosure of a COW. Our event study analysis reveals that market reactions are generally favorable, resulting in an average positive abnormal stock return of between 1.0 and 1.5 percent in the days immediately surrounding the announcement date. This return is particularly pronounced for Delaware corporations, and those with asset values just below $1 billion. The positive market response does *not* seem sensitive to whether the waiver also covers officers and/or dominant shareholders, nor does it appear to vary depending on whether the COW was adopted in a proposed charter amendment, a board-promulgated resolution, or something else. All told, we view these findings as suggestive that public companies not only have embraced their new-found liberty to tailor the fiduciary duty of loyalty, but that they have done so in ways consistent with shareholder value maximization. Our findings are also pertinent for considering current debates about shareholder activism, the appropriate role of "constituency" directors, and whether the delineation of such roles should be subject to immutable rules or left up to the issuers themselves.[17]

Three caveats to our analysis warrant attention before proceeding. First, we note that our study is limited to waiver disclosures contained in *public* SEC filings. This data source imposes some unavoidable constraints. Most notably, because privately held companies are far less likely to be SEC reporting entities, our data skews toward publicly traded firms. In addition, the statutory provisions permitting COWs tend to grant wide latitude to companies about how and where they promulgate a waiver, raising the possibility that a waiver could be buried in any number of public filings. While it is important to remain mindful of these limitations, we note that a significant fraction of our data set *does* include private companies, such as when a public corporation spins off a privately-held division that is itself covered by a waiver. Moreover, the protocol we designed for identifying *candidate* waivers from SEC filings was deliberately over-broad, designed to pull in some "false positive" disclosures from the entire universe of filings – a population we could later winnow with manual coding.[18]

Second, our empirical finding that COW adoptions are on average consistent with shareholder welfare maximization conjures up a truism of statistics: Average effects are just that—*averages*. It is not difficult to find several examples of outlier companies in our data set where a waiver is associated with *negative* abnormal returns around the date of announcement. Our subsequent research may well yield more fine-tuned insights about circumstances in which waivers can erode firm value. A necessary first step, though, in any such research is the primary data collection enterprise we develop and report on here.

Finally, most statutes enabling companies to execute COWs (including Delaware's) *also* subject that decision to a "back door" duty-of-loyalty analysis.[19] For example, if an interested director, officer, or dominant shareholder were to use her

[17] *See, e.g.*, J. Travis Laster and John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors,* 70 BUS. LAWYER 33, 49-50 (2015) (arguing that constituency directors should all be compelled to pursue long-term value for shareholders).
[18] *See infra* Part III.
[19] For a general discussion of this limitation (which appears in the statutory synopsis but not the statute itself), *see infra* Part I.B.2.

domination of the board to force through a self-serving COW, then the promulgation of the waiver could itself be invalidated as self-dealing. The issuers embracing waivers within our data set have done so against the backdrop of this liability exposure—one animated, ironically enough, by a lingering species of *immutability* of the duty of loyalty, which pertains even to acts purporting to limit that duty.

Our analysis proceeds as follows. Part I revisits the broad contours of fiduciary duties, providing a brief overview of the duty of loyalty and the corporate opportunities doctrine. We also trace the evolution of COWs, from pre-reform waiver efforts, to their skeptical reception by Delaware's courts, to the enactment of the Delaware reforms and related statutes, and finally to subsequent litigation addressing waivers. In Part II, we lay out a conceptual framework and model of efficient contracting over corporate opportunities, in order to capture the contexts in which a COW would be value enhancing, and what form it would plausibly take. Part III describes the empirical methodology behind our data set, offering a series of descriptive statistics about both the structure of COWs and the types of companies embracing them. We also report on a series of event studies documenting positive market reactions to companies' first disclosure of a COW. Part IV discusses the broader legal and policy implications of our analysis.

I. REVISITING THE DUTY OF LOYALTY

Before exploring our conceptual and empirical enterprise, it will be useful to first provide an overview in Section A of the broad contours of the duty of loyalty and corporate opportunities doctrine ("COD") in particular; and in Section B of the process by which Delaware and other states implemented statutory reforms empowering corporations to execute COWs.

A. Fiduciary Law and the Corporate Opportunities Doctrine

1. Fiduciary Duties and the Duty of Loyalty

Corporate fiduciaries – the officers who manage a company's daily operations, the directors who wield ultimate decision-making authority, and the dominant shareholders who possess swing voting power – exercise control over a vast amount of social resources on behalf of corporations' ultimate owners, their shareholders. Among the law's principal tools for ensuring that corporate fiduciaries serve the interests of all of a corporation's owners faithfully and competently are the fiduciary duties of *loyalty* and *care*.

The duty of care mandates that corporate fiduciaries exercise informed business judgment in their stewardship of the company, imposing liability if a fiduciary acts (or fails to act) without first being adequately informed.[20] As some courts have put it, "a corporate fiduciary, in the discharge of his responsibilities must use at least that degree of diligence that an 'ordinarily prudent' person under similar circumstances would use."[21]

[20] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).
[21] Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2d Cir. 1986).

While this duty could conceivably reach almost any major decision by corporate decision-makers, its scope is cabined by a wide-variety of judicial and private limitations.

Most famously, there is the defendant-friendly "business judgment rule" – a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[22] To gain the benefit of the presumption, directors must "inform[] themselves 'prior to making a business decision, of all material information reasonably available to them.'"[23] Alongside the business judgment rule, corporations are permitted to insure their directors and officers against breaches of the duty of care, and to indemnify their directors for expenses incurred in connection with defending against allegations of breaches.[24] Lastly, Delaware and the vast majority of other states allow parties to contract around the duty of care in various respects. For instance, since the 1980s, almost all states have permitted a corporation to adopt a charter provision limiting or eliminating the personal liability of corporate fiduciaries for breaching the duty of care.[25] Public companies regularly execute such exoneration provisions.[26]

The duty of loyalty prohibits fiduciaries from benefiting improperly from financial conflicts of interest. In stark contrast to the duty of care, the duty of loyalty has traditionally been mandatory. The Delaware statutory provision that enables corporate charters to limit or eliminate directors' monetary liability for breaches of fiduciary duty – codified in DGCL § 102(b)(7) – expressly excludes the duty of loyalty from efforts to weaken or waive it.[27] Moreover, unlike with the duty of care, the deferential business judgment rule is also inapplicable to alleged breaches of loyalty. Loyalty's traditionally mandatory character is part of why commentators have widely held the duty of loyalty to

[22] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
[23] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), *quoting* Aronson, 473 A.D.2d at 812.
[24] *See, e.g.*, Del. Code Ann. tit. 8, § 145(a)-(g).
[25] Del. Code Ann. tit. 8, § 102(b)(7) (empowering corporations to eliminate "the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director"); *see also* WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 229, 246 (5th ed. 2016).
[26] *See* Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, Harvard Law School John M. Olin Center Discussion Paper No. 835; European Corporate Governance Institute (ECGI) - Law Working Paper No. 300/2015, 1, http://papers.ssrn.com/ abstract =2657231.
[27] Del. Code Ann. tit. 8, § 102(b)(7) (specifically precluding a corporate charter from eliminating or limiting director liability "[f]or any breach of the director's duty of loyalty to the corporation or its stockholders"). A small number of states' corporate law may differ from Delaware in this respect. Nevada, for example, seems devoted to developing a niche as a near "liability-free" jurisdiction for managers. Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012). Under Nevada law, the default rule is that there is *no liability for a breach of the duty of loyalty*, absent "intentional misconduct, fraud or a knowing violation of law." Nev. Rev. Stat. Ann. §78.138(7) ("unless the articles of incorporation . . . provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless it is proven that: (a) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and (b) The breach of those duties involved intentional misconduct, fraud or a knowing violation of law.")).

be "the most important duty which arises within the context of fiduciary relationships"[28] as well as the subject of most fiduciary litigation.[29]

The duty of loyalty requires fiduciaries to "exercise their authority in a good-faith attempt to advance corporate purposes."[30] While there is an affirmative dimension to this duty, its normal role is to bar self-interested action by officers or directors, which involves a conflict of interest with the corporation itself. Perhaps the most colorful (if not the most accurate) summary of the duty of loyalty is still the seminal opinion of *Meinhard v. Salmon*[31]—a case involving a contested business opportunity of an unincorporated partnership but has widely been adopted and cited in corporate law jurisprudence. Defendant Salmon and plaintiff Meinhard entered a joint venture to lease and improve a Manhattan hotel, which ultimately proved quite successful. As a result of the venture, Salmon (the active manager) came to owe fiduciary duties to Meinhard (a largely silent partner). Near the end of the twenty-year lease, the hotel's new owner approached Salmon, and offered him a successor lease to manage and improve a vastly larger set of related properties. After the new lease had been signed, Meinhard, who was previously uninformed about the lease offer, discovered it and demanded a pro-rata share. A referee and initial appellate court found that Meinhard indeed was owed an interest in the expanded venture, in a fraction roughly proportionate to his interest in the first one.

In a majority opinion authored by Chief Justice Benjamin Cardozo, the high court of New York affirmed. The opinion quickly became one for the ages. Cardozo famously declared that fiduciary ties demand a duty of "finest" and "undivided" loyalty, far "stricter than the morals of the market place," and instead concluded—with a finishing rhetorical flourish—as follows:

> Not honesty alone, but *the punctilio of an honor the most sensitive,* is then the standard of behavior… the level of conduct for fiduciaries [has] been kept at a level *higher than that trodden by the crowd*.[32]

Although by outside appearances, Salmon appeared to hold the lease alone, in fact "he held it as a fiduciary," and he improperly took "the pre-emptive opportunity . . . [and] appropriated it to himself in secrecy and silence."[33] The broad language of *Meinhard* and similar cases becomes concrete in the various forms of managerial conduct regulated by the duty of loyalty, including transactions between a corporation and its directors; self-dealing; control transactions; and executive compensation. That said, our focus here will be trained on the allocation of new business opportunities between the firm and the fiduciary.

---

[28] 1 REG. OF INVEST. MGMT. & FIDUCIARY SERV. § 11:18; Thomas M. Griffin, *Investing Labor Union Pension Funds in Workers: How ERISA and the Common Law Trust May Benefit Labor by Economically Targeting Investment*, 32 SUFFOLK U. L. REV. 11, 22 (1998) ("Preeminent among the fiduciary duties is the duty of loyalty."); Frances S. Fendler, *Losing Faith: Limited Liability Companies in Arkansas and the Fiduciary Duties of Loyalty and Good Faith*, 31 U. ARK. LITTLE ROCK L. REV. 245, 259 (2009) ("The duty of loyalty is preeminent in the constellation of the fiduciary duties recognized by common law."); *see also supra* note 1.
[29] *See* ALLEN & KRAAKMAN, *supra* note 25, at 229.
[30] *Id.*; Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).
[31] 249 N.Y. 458, 464 (1928).
[32] Meinhard v. Salmon, 249 N.Y. 458, 464 (1928) (emphasis added).
[33] *Id*. at 464; *Id*. at 468 ("the rule of undivided loyalty is relentless and supreme.").

2. The Corporate Opportunities Doctrine

One of the most fundamental aspects of the duty of loyalty is the corporate opportunities doctrine ("COD"), which may constitute the most common and focal violation of that duty.[34] The basic idea of the COD is that corporate fiduciaries may not appropriate for themselves a new business opportunity that belongs to the corporation, unless they first present it to the corporation and receive authorization to proceed personally. As a result of the enormous amount of litigation arising from the COD and its complexity, it may be the only part of the duty of loyalty that has developed its own labyrinth of rules, subcategories, standards, and tests.

The Delaware cases of *Guth v. Loft*[35] and *Broz v. Cellular Information Systems, Inc.*[36] provide defining benchmarks for the modern COD (both inside and outside Delaware). The doctrine states that an officer or director of a corporation usurps a business opportunity if (1) the corporation is able to financially undertake that opportunity; (2) the opportunity is in the corporation's line of business; (3) the corporation has an "interest or a reasonable expectancy" in it; and (4) by pursuing the opportunity personally, the fiduciary "will be placed in a position inimical to his duties to the corporation."[37] Courts engage in a fact-intensive inquiry to see whether a given fiduciary's pursuit of a business opportunity was impermissible under this multi-factor test.

There is a simpler way to think of the doctrine, however, as a sequential inquiry. The first major question is whether a given business prospect constitutes a *bona fide* "corporate opportunity," thereby posing a genuine conflict of interest.[38] A number of fairly involved tests are employed by courts in determining whether a given business prospect is a corporate opportunity.[39] If the prospect is *not* a corporate opportunity, then a fiduciary does no wrong by simply pursuing it herself without informing the corporation. If the prospect *is* a corporate opportunity though, then the appropriate course of action is to offer it to the corporation. If the corporation properly rejects that opportunity –

[34] In re Cumberland Farms, Inc., 249 B.R. 341, 349 (Bankr. D. Mass. 2000) ("Perhaps the most common instance of breach of a director's duty of loyalty is misappropriation of a corporate opportunity."), *aff'd sub nom.* Haseotes v. Cumberland Farms, Inc., 257 B.R. 691 (D. Mass. 2001), *aff'd sub nom.* In re Cumberland Farms, Inc., 284 F.3d 216 (1st Cir. 2002). *See also* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 10 (2007) ("Corporate opportunity 'takings' were, until [§ 122(17)], a fundamental focus in the development of the constraints imposed by the common law on fiduciaries under the heading of the duty of loyalty.").

[35] 23 Del. Ch. 255, 273 (1939).

[36] 673 A.2d 148 (Del. 1996).

[37] Guth v. Loft, Inc., 23 Del. Ch. 255, 273 (1939); Broz v. Cellular Inf. Sys., 673 A.2d 148, 151 (Del. 1996). The same test continues to be employed consistently. *See, e.g.,* In Re. Riverstone Nat'l Inc., SH Lit., C.A. No. 9796-VCG at 21 (July 28, 2016) (applying test to hold that the plaintiff adequately pled facts alleging that the directors of a cash-out merger target were not disinterested, since directors' personal exposure to viable corporate opportunity claims would be "obliterated" under terms of the acquisition).

[38] *See* Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 288-89 (1998) (presenting a summary algorithm for analyzing COD cases).

[39] The three major tests are the "line-of-business" test, *see, e.g.*, Guth v. Loft, Inc., 23 Del. Ch. 255, 273 (1939), the "interest-or-expectancy" test, *see, e.g.*, Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199 (1900), and the "fairness" test, *see, e.g.*, Durfee v. Durfee & Canning, 323 Mass. 187, 80 N.E.2d 522 (1948).

paradigmatically, by a majority vote of disinterested directors – then the fiduciary again does no harm by pursuing it, while if the corporation does not reject it, the fiduciary is barred from pursuit of the prospect.

There are also a number of affirmative defenses that importantly shape the contours of the COD. Thus, some courts have found fiduciaries not to have usurped corporate opportunities because they encountered the opportunity in their personal capacity;[40] the corporation impliedly rejected the opportunity;[41] and most importantly, because the corporation was not able to pursue a given business prospect, perhaps because the corporation's financial condition precluded it from doing so.[42] If even this stylized description of the COD sounds involved, that is largely a reflection of the doctrine itself. The law's attempt to regulate fiduciaries' independent pursuit of business opportunities has produced a doctrine of startling complexity and unpredictability.[43]

The COD is not only among the most litigated and murkiest aspects of the duty of loyalty, but the form of misconduct it targets – the usurpation of business opportunities – is one of the most pernicious types of agency cost. When the issue is one of who "owns" rights to a business opportunity, then the interests of a corporation and its agent are not *merely* misaligned, but may be completely at odds with each other. This is compounded by the fact that the COD addresses behavior that not only can reduce the value of a firm, but in which a fiduciary may usurp from its principal a new venture whose value significantly *exceeds* that of the corporation. For instance, as *Meinhard v. Salmon* illustrates, the value of usurped corporate opportunities can easily exceed the *entire value* of the original venture.[44] In *Meinhard*, the initial lease had been for $55,000, while the new one was for $350,000 to $475,000; the initial building improvements had been for $200,000, but were now to cost $3,000,000.[45]

B. Evolution of the COW: A Brief History of Endeavors to Contract Out of the Corporate Opportunity Doctrine

As noted in our discussion above, the COD has always permitted boards of directors to "reject" a corporate opportunity *ex post*—after it has emerged and has been properly presented to the company by a fiduciary interested in pursuing it individually. Just as with other forms of independent board dispensation, however, this authorization power historically did not apply to the *prospective* (or *ex ante*) waiver of the doctrine as

[40] *See, e.g.*, Central Ry. Signal Co. v. Longden, 194 F.2d 310, 319 (7th Cir. 1952).
[41] *See, e.g.*, Luessier v. Mau-Van Dev., 667 P.2d 804 (Haw. Ct. App. 1983).
[42] *See, e.g.*, Broz v. Cellular Info. Sys., 673 A.2d 148, 155 (Del. 1996).
[43] *See* Talley, *supra* note 38, at 279 n.2 (1998), *citing Northeast Harbor Golf Club, Inc. v. Harris*, 661 A.2d 1146, 1148-49 (Me. 1995) ("[T]here has been much confusion about the specific extent of [the fiduciary] duty when . . . it is contended that a fiduciary takes for herself a corporate opportunity."); *Miller v. Miller*, 222 N.W.2d 71, 79 (Minn. 1974) ("We have searched the case law and commentary in vain for an all-inclusive or 'critical' test or standard by which a wrongful appropriation can be determined and are persuaded that the doctrine is not capable of precise definition."); ROBERT CHARLES CLARK, CORPORATE LAW 244-45 (1986) ("The traditional tests are extremely ambiguous and uncertain in their application.").
[44] 249 N.Y. 458 (1928). Of course, the Great Depression ended up making the Meinhard-Salmon extended venture a disastrous failure.
[45] *Id*. at 464.

to opportunities or projects that had yet to arise. In fact, the notion that parties might contract around (or out of) the duty of loyalty in advance was traditionally considered anathema to foundational commitments of corporate law, where the duty of loyalty is one of its few mandatory components.[46] For the most part, that is still how much of fiduciary law operates (at least in Delaware corporations).[47] But the late twentieth century bore witness to several early attempts to chisel the edges of the status quo, at least insofar as it pertained to corporate opportunity waivers. The judicial response to those early attempts, in turn, arguably catalyzed the subsequent statutory innovations.

1. Primordial COWs

Prior to the amendment of Delaware's code in 2000, no specific statutory authority empowered companies explicitly to contract out of the COD in advance. A company motivated to do so in a legally legitimate fashion had few if any options, save a "nuclear" one: A corporation could – in many states – attempt to cabin the breadth of the doctrine by narrowing the corporate purpose articulated in its charter to specified lines of business, effectively using that scope limitation to cabin the reach of all corporate activity, including the COD. Such measures, however, invite a host of other *ultra vires* challenges to corporate decision making—obstacles that have caused limited-purpose provisions to be disfavored and exceedingly rare in modern times. Indeed, conventional corporate charter wisdom has long advocated extremely broad purpose provisions, authorizing the corporation to engage in "any lawful act or activity" for which corporations may be organized under the applicable corporate statute.[48]

A more tailored form of carve out, on the other hand, had speculative legal validity: Prior to 2000, Delaware statutes did not explicitly permit (or even appear to contemplate) contracting out of the COD. On the other hand, neither did Delaware law unambiguously *prohibit* the practice. Towards the of the twentieth century, several corporations began to experiment with such provisions—experiments that inevitably attracted legal challenges. Perhaps the best known example was the 1989 Delaware

---

[46] *See, e.g.*, Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1598-99 (1989); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1690-91 (1989).

[47] Sutherland v. Sutherland, 2009 WL 857468, at *4 (Del. Ch. Mar. 23, 2009) ("While … a provision [limiting the fiduciary duty of loyalty] is permissible under the Delaware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act, where freedom of contract is the guiding and overriding principle, it is expressly forbidden by the [Delaware corporate statute]"). There is some variation among states, to be sure, but the non-waivability of the duty of loyalty appears relatively constant. *See, e.g.*, NRS 78.138(7) (imposing a floor of liability on directors for breach of fiduciary duty accompanied by intentional misconduct, fraud or a knowing violation of law); In re Amerco Derivative Litigation, 2011, 252 P.3d 681 (Nev. 2011) (reversing dismissal below and finding that plaintiffs adequately plead a breached duty of loyalty for corporate opportunity appropriation under Nevada law).

[48] *See generally* 1A FLETCHER CYC. CORP. § 91 (discussing the near ubiquity of general purpose corporate statutes, including in Model Business Corporations Act). *See also* 1 CORP. FORMS § 1:13 (noting that "Present practice, which is permitted by most state statutes, is to simply include a sentence providing that the corporation can engage in any other activity permitted by law"). *See id.* § 1:16 (offering standard form language for New York corporations: "To engage in any lawful act or activity for which corporations may be organized under the Business Corporation Law, provided that the corporation is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained.")

Chancery Court decision in *Siegman v. Tri-Star Pictures, Inc.*[49] *Siegman* was a putative class action asserting a *Revlon* challenge to a proposed combination between Tri-Star Pictures, Inc. ("Tri-Star"),[50] Coca-Cola, and Time. Under the terms of the contemplated transaction, Tri-Star acquired the entertainment assets of Coca-Cola, and Coca-Cola received a large number of shares of newly issued Tri-Star common stock.[51]

The plaintiffs challenged the validity of several proposed amendments to Tri-Star's certificate of incorporation (executed as part of the combination). One such amendment purported to eliminate liability for Tri-Star's directors for breach of the duty of loyalty under specified circumstances involving the appropriation of corporate opportunities.[52] Another amendment provided that neither Coca-Cola nor Time, as significant block stockholders of Tri-Star, would be liable for any breach of fiduciary duty stemming from having pursued a corporate opportunity belonging to Tri-Star.[53] The business combination was approved by both Tri-Star and Coca-Cola, and the proposed amendments were subsequently adopted by shareholders.

The gravamen of the complaint centered on the director provision, asserting that the COW purported to eliminate and/or limit liability in a way that was simply impermissible under Delaware law. Specifically, § 102(b)(7) of the Delaware General Corporation Law articulated what were (at the time) the exclusive circumstances where a charter could (and could not) eliminate or limit the personal monetary liability of a director for breach of fiduciary duty. The statute provides express limitations on exoneration provisions and excludes any waiver "(i) For any breach of the director's duty of loyalty to the corporation or its stockholders."[54] Effectively, the plaintiffs argued that the COW amendment purported to do exactly this: reduce the directors' liability exposure for a particular type of duty of loyalty breach (an appropriation of corporate opportunities), a move that the plaintiffs argued transgressed the immutable boundaries of § 102(b)(7). The defendants countered that the provision was valid and enforceable under Delaware law, and they moved to dismiss.

Then-Vice Chancellor Jacobs sided with the plaintiffs, noting that the appropriate judicial analysis for a motion to dismiss in this context "requires that the motion must be denied if under any plausible construction or operation," the COW "arguably would contravene" Delaware law. (p. 6). Employing this analytical approach, Jacobs determined that at least one plausible set of facts would – under the articulated terms of the charter provision – eliminate or limit the liability of Tri-Star directors for breach of their fiduciary duty of loyalty. Indeed, Jacobs envisioned a very general scenario as violating § 102(b)(7), where a director appropriated for herself or her other employer a business

---

[49] 1989 WL 48746, *reprinted in* 15 Del. J. Corp. L. 218 (1990). *See also* Delaware Bill Summary, 2000 Reg. Sess. S.B. 363 ("The subsection is intended to eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance raised in *Siegman v. Tri-Star Pictures, Inc.*").
[50] When it formed in 1985, Tri-Star was the first major new movie studio since RKO was formed in 1927. JENNIFER HOLT, EMPIRES OF ENTERTAINMENT: MEDIA INDUSTRIES AND THE POLITICS OF DEREGULATION, 1980-1996, 45 (2011).
[51] A substantial portion of the opinion (denying a motion to dismiss) is devoted to that issue, and is beyond our remit for current purposes. *Siegman*, 15 Del. J. Corp. L. at 218.
[52] *Siegman*, 15 Del. J. Corp. L. at 218.
[53] *Id*.
[54] Del. Code Ann. tit. 8, § 102(b)(7) (2009).

opportunity that rightly belonged to Tri-Star, but merely had not been offered to that director in her capacity as a Tri-Star director or in writing. Finding such a result to be impermissible under the limits established by § 102(b)(7), Jacobs denied the defendants' motion to dismiss.[55]

2. Legalizing Delaware COWs in the DGCL

Siegman and its progeny[56] substantially put to rest the question of how and when corporate opportunities are waivable. Under any fair reading of the opinion, the duty of loyalty was simply not contractible, be it through a corporate governance provision, via a board resolution, or through a contractual provision. In the ensuing decade, the *Siegman* opinion stayed in full force and was rarely discussed by subsequent judicial opinions (inside or outside Delaware).

By the end of the twentieth century, however, market dynamics began biting at the jurisprudential heels of the *Siegman* approach. The dot-com era of the 1990s ushered in a wave of novel market-mediated corporate structures, including spin-offs, partial IPOs, venture capital, private equity, and equity carve-outs. Many of these innovations resulted in extended families of corporate affiliates with partially overlapping ownership, partially overlapping board membership, and partially overlapping lines of business. Such structures, in turn, placed considerable stress on the canonical "undivided-loyalty" model of corporate opportunities: Any time a fiduciary's duties extended to multiple common entities (as was increasingly frequent), she faced the unwinnable prospect of carving up what was judicially indivisible: her loyalty. Consider, for example, the conundrum of allocating corporate opportunities between a parent and its partially owned subsidiary, both operating in a similar industry and sharing common board members and officers. How might those overlapping fiduciaries (or for that matter the parent, as the dominant shareholder of the subsidiary) comply with their simultaneous duties of "undivided loyalty" between the two firms? How should they go about allocating corporate opportunities?

These questions are profound and probably unanswerable. It has long been recognized that the undivided-loyalty model is simply not well adapted for fiduciaries shared by two companies. In fact, the canonical approach may be the *least* attractive from the parties' perspectives, since a time-honored prescription for conduct of "dual agents" under fiduciary law is to disclose the corporate opportunity to *both* interested corporations, effectively encouraging the two to compete with one another for the new

---

[55] Siegman, 15 Del. J. Corp. L. at 236. As the Chancery Court put it, "Article Sixth would eliminate or limit the liability of Tri-Star directors for breach of their fiduciary duty of loyalty - a result proscribed by § 102(b)(7)." It bears observing that Jacobs was more sympathetic to a different contractual provision that purported to limit or eliminate directorial liability to the fullest extent permitted by the Delaware General Corporation Law in the event it were amended in the future. Here, Jacobs found that neither the statute nor its underlying policy forbids such prospective planning in legislative enactments or amendments.

[56] The term *progeny* is somewhat of a stretch. There were precious few post-*Siegman* cases that squarely dealt with advance COWs until after the amendment of the DGCL in 2000 (even though citations to the case made frequent appearances in practitioner journals and law reviews). Thus, much of the practical wake of *Siegman* was the shadow it appears to have cast over corporate conduct for the ensuing decade, an inference bolstered by the legislative history of the ensuing reform (discussed below).

business prospect.[57] While such competition is no doubt attractive to *counterparties* in the business opportunity (offering significant transactional surplus), it seems an unlikely governance feature for augmenting the combined welfare of the fiduciary and the two beneficiaries of her duties.

Nevertheless, by the turn of the century, the corporate structures described above had become increasingly common. Two high-stakes cases during that era – *Thorpe v. CERBCO*[58] and *In Re Digex*[59] – help underscore the resulting challenges. Both cases focused centrally on corporate opportunities claims made by shareholders of a controlled subsidiary, asserting that the parent had usurped a corporate opportunity related to an acquisition of the subsidiary. In both cases, the plaintiffs alleged that the controller had commandeered takeover negotiations with a third party buyer, redirecting the buyer's interest towards the parent and away from the subsidiary, thereby fleecing the subsidiary's minority shareholders of their impending control premium. In both cases, the corporate opportunities claims narrowly lost, under the theory that the prospective acquisition deal was not a corporate opportunity since the parent possessed the power (and the right) to use its voting shares to veto any proposed transaction at the subsidiary level. Nevertheless, both opinions recognized the generic and intractable challenges posed by corporate opportunities claims in cases involving ownership/board/industry overlap. The cases served up a sobering reminder of the uncomfortable indeterminacy of corporate opportunity claims when firms have overlapping dominant ownership and/or boards. They also made apparent that there might be some value to allowing parties to pre-arrange how they would divide property rights over corporate opportunities. Thusly was the stage set for a legal reform push as we entered the twenty-first century.[60]

The wait was not long. In the summer of 2000, the Delaware Assembly amended the state's statutes to add subsection (17) to § 122 of the Delaware General Corporation Law ("DGCL"), explicitly permitting COWs. The statutory location is a notable one. Section 122 is a general and longstanding provision whose purpose is to articulate a variety of powers possessed by Delaware corporations. Many of these powers are fundamental (such as the right to hold property, the right to enter contracts, and the right to sue and be sued). The new subsection (17), however, was different and somewhat *sui generis*, consisting of the sole provision in the section that concerns fiduciary duties. The subsection provides that a Delaware corporation has the power to:

> (17) Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes

[57] *See, e.g.*, *Meinhard v. Salmon*, 164 N.E. 545, 547 ("The trouble about [defendant's] conduct is that he excluded his coadventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency. This chance, if nothing more, he was under a duty to concede."); *Energy Resources v. Porter*, 438 N.E.2d 391 (Mass. App. 1982).
[58] 676 A.2d 436 (Del. 1996).
[59] 789 A.2d 1176 (Del. Ch. 2000).
[60] *See* Lewis S. Black, Jr. & Frederick H. Alexander, Analysis of the 2000 Amendments to the Delaware General Corporation Law 1, 2 (Aspen Corp. Serv. Aug. 1, 2000) (contemporaneous commentary on § 122(17)'s enactment suggested the sale by a parent of minority interests in a subsidiary as an important business context affected by the statute's adoption).

> or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders.

The legislative synopsis accompanying the amendment is worth quoting in full:

> The subsection is intended to eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance raised in Siegman v. Tri–Star Pictures, Inc., C. A. No. 9477 (Del. Ch. May 5, 1989, revised May 30, 1989). It permits the corporation to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise. The subsection does not change the level of judicial scrutiny that will apply to the renunciation of an interest or expectancy of the corporation in a business opportunity, which will be determined based on the common law of fiduciary duty, including the duty of loyalty.[61]

Several aspects of the amendment and its synopsis warrant elaboration. First, and most obviously, the synopsis makes clear that the amendment was meant to repudiate the then-decade-old *Siegman* approach. Indeed, the amendment specifically permits enforceable COWs under Delaware law, a position that—both before and after *Siegman*—most had considered untenable.

Second, the new section explicitly applies symmetrically to *all* corporate fiduciaries, including officers, directors, and dominant/controlling shareholders. By contrast, the statutory provision permitting the duty of care waivers applies much more narrowly to monetary damages for corporate directors;[62] it does *not* extend either to (a) injunctive relief of any kind, or (b) claims for monetary damages lodged against officers or dominant shareholders. This asymmetry has been consistently recognized by the Delaware courts (even if periodically scorned by commentators).[63]

Third, consider the level of specificity required for a corporate opportunities waiver to be effective under the statute. On its face, the amendment requires a COW to be

---

[61] Delaware Bill Summary, S. 363, 140th Gen. Assembly (Del. 2000); 72 Del. Laws, c. 343, § 3 (2000).

[62] DGCL § 102(b)(7) (providing that the certificate of incorporation can include "[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….").

[63] Gantler v. Stephens, 965 A.2d 695, 709 n. 36-37 (Del. 2009)). Although several commentators—including a former Delaware Vice-Chancellor—have criticized this asymmetry, it continues to persist. *See, e.g.*, Stephen P. Lamb & Joseph Christensen*, Duty Follows Function: Two Approaches to Curing the Mismatch Between the Fiduciary Duties and Potential Personal Liability of Corporate Officers*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 45, 46 (2012) (stating that although the § 102(b)(7)'s contribution to corporate law is "incomplete" because "the Delaware Supreme Court held that officers owe the same fiduciary duties as directors . . . but cannot be exculpated for the same class of fiduciary breaches as directors."). *Accord* Meghan Glaspy, *Delaware's* Gantler *Decision: A Solution to Corporate Corruption?*, 12 GEO. J.L. & PUB. POL'Y 289, 307 (2014); Andrew D. Appleby & Matthew D. Montaigne, T*hree's Company: Stone v. Ritter and the Improper Characterization of Good Faith in the Fiduciary Duty "Triad"*, 62 ARK. L. REV. 431, 469 (2009) (stating that "[w]hile *Gantler* leaves officers extremely vulnerable to *Van Gorkom*-like liability, the current 'anti-executive social-political climate' may preclude the courts or legislature from extending officers any section 102(b)(7) protection"); Dennis R. Honabach, Smith v. Van Gorkom: *Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 307 (2006).

worded with some specificity, identifying business opportunities or classes/categories of business opportunities that would be subject to waiver. This construction appears in tension with an expansive, "blanket" waiver, in which a corporation, say, disclaims *all* corporate opportunities, or even a broad waiver purporting to disclaim *all opportunities except* a specified set of carved out exceptions. In contractual parlance, the wording of the section appears at least facially to suggest a type of *sticky* default rule that does not invite corporations to invert or "flip" the default, either *in toto* or in substantial part.[64]

Fourth, consider the means and location for executing an effective COW. The text of the section permits a waiver to be included in a corporation's charter, but it also allows a waiver to simply be adopted by action of the board of directors. Bearing in mind that a charter amendment cannot generally be promulgated exclusively by action of the board once stock is sold,[65] the portion that authorizes an action of the board opens up tremendous latitude, permitting COWs to be couched in a contract approved by the board, a board-promulgated bylaw (if the board has such power under the charter),[66] a board resolution, or any other declarative action promulgated by the board. The fact that a COW may be executed outside the charter context is notable, since the other principal means by which corporations may waive fiduciary duties (the duty of care) specifically requires a charter provision.[67] Indeed, it was the prohibition of waiving the duty of loyalty under § 102(b)(7) that formed the basis of the *Siegman* opinion in the first place. Section 122(17) is thus in some conspicuous ways *broader* than conventional waivers of the duty of care.

Finally, while § 122(17) grants increased latitude for enforcing valid COWs, the legislative synopsis notes that the initial adoption of a COW is subject to traditional fiduciary principles – just as the renunciation of an opportunity when it arises. Thus, should a financially conflicted board decide to adopt a COW without first seeking to cleanse the decision through conventional means (such as a vote of disinterested directors or shareholders),[68] then the very act of executing the COW could be challenged under Delaware's stringent entire fairness standard (and possibly invalidated).

3. *Subsequent Delaware Litigation*

Although Delaware's amendment arrived with great fanfare, the new amendment's footprint in case law and commentary has been surprisingly faint. In the decade and a half since § 122(17) was promulgated, the statute appears to have been invoked in only a single Delaware case and in only a few secondary sources.[69]

[64] As we discuss below, however, a portion of the legislative synopsis casts some doubt on the requirement of specificity for an effective COW. *See infra* text accompanying notes__-__.
[65] *See* DGCL § 242(b).
[66] DGCL § 109 allows the certificate of incorporation to grant the board concurrent power to pass, amend, and repeal corporate bylaws.
[67] DGCL § 102(b)(7).
[68] See DGCL § 144.
[69] A small number of other cases discuss waivers fleetingly, but with no reference to the DGCL. By contrast, the enabling statute for duty of care waivers has been invoked in at least 165 cases and 120 secondary sources over that same time period.

The 2009 Chancery Court opinion in *Wayne Cty. Employees' Ret. Sys. v. Corti*,[70] appears to be the only Delaware opinion to date to engage the statutory framework for COWs explicitly (although cursorily). Like *Siegman*, *Corti* was a purported shareholder class action challenging a business combination involving a waiver of corporate opportunities. The combination in question called for Vivendi S.A. ("Vivendi") to transfer its subsidiary Vivendi Games, Inc. to Activision, Inc. ("Activision") in return for newly issued shares of Activision and a post-closing tender offer by Vivendi for up to half of Activision's remaining shares.[71] Together, Vivendi's acquisition of shares through the business combination and back-end tender would result in Vivendi acquiring a majority of Activision voting stock, which it then renamed Activision Blizzard. The charter of the surviving corporation (Activision Blizzard) included the following broadly-worded COW[72]:

> (b) In the event that a director or officer of the Corporation who is also a director, officer or employee of Vivendi acquires knowledge of a potential transaction or matter which may be a corporate opportunity for both the Corporation and Vivendi (a "Mutual Corporate Opportunity"), such director or officer shall to the fullest extent permitted by law have fully satisfied and fulfilled his fiduciary duty with respect to such Mutual Corporate Opportunity, and the Corporation to the fullest extent permitted by law waives and renunciates [sic] any claim that such Mutual Corporate Opportunity constituted a corporate opportunity that should have been presented to the Corporation, if such director or officer acts in a manner consistent with the following policy: a Mutual Corporate Opportunity offered to any person who is an officer or director of the Corporation, and who is also an officer, director or employee of Vivendi, shall belong to Vivendi, unless such Mutual Corporate Opportunity was expressly offered to such person in his or her capacity as a director or officer of the Corporation (an "Activision Opportunity "), in which case such Activision Opportunity shall not be pursued by Vivendi. In the event Vivendi decides to pursue any Mutual Corporate Opportunity (other than an Activision Opportunity), then, subject to any contractual restrictions on Vivendi with respect to confidentiality, Vivendi shall provide prompt written notice to the Corporation of such decision.

Plaintiffs – shareholders of the target Activision – alleged, *inter alia*, that the above provision was invalid under Delaware law, because it contravened § 122(17)'s limitations through its sweeping language. The provision, plaintiffs contended, failed to specify explicitly which corporate opportunities (or classes/categories thereof) were being renounced as the statutory text possibly requires.[73] Rather, the provision utilized the opposite, *holus-bolus* grammatical construction, categorically sweeping away all liability exposure with the *exception* of opportunities that were expressly offered to

---

[70] No. CIV.A. 3534-CC, 2009 WL 2219260, at *1 (Del. Ch. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010).
[71] *Id*. at *1.
[72] We detail the text of the COW at some length here, as it helps motivate some of our decisions in coding the COW database detailed and summarized in the next section.
[73] *Id*.

Activism fiduciaries in their capacity as such.[74] In short, plaintiffs averred, this COW fell outside the ambit authorized by § 122(17).

Chancellor Chandler was unmoved, denying plaintiffs' motion for a preliminary injunction of the contemplated transaction. Charting an analytic course that was notably distinct from Jacob's approach in *Siegman*, Chandler held that "[t]he mere existence of [the broadly worded COW] does not threaten plaintiff with harm that justifies expending judicial resources to render a declaratory judgment on the issue of whether the corporate opportunities allegedly renounced by [the COW] are sufficiently 'specified.'"[75] Any plausible harm to plaintiff due to the wording of the waiver, Chandler concluded, "is too remote and speculative to justify rendering a declaratory judgment, and plaintiff is not entitled to a declaratory judgment merely because it is able to conjure up hypothetical situations in which the challenged provisions may be applied contrary to Delaware law."[76] Ultimately, Chancellor Chandler took no position on the question of whether such hypothetical situations might actually arise down the road, in which case the Activision-Blizzard COW might be invalidated under the statute. But any such claim would have to wait for an *actual* disputed business opportunity.

It is unclear how the Court might have wrestled with the *Conti* COW had the case presented an actual contested business opportunity. While the text of § 122(17) could arguably favor the plaintiffs' preferred narrow construction, the legislative synopsis suggests that the plaintiffs' position faces an uphill battle. The synopsis offers several characterizations of how corporations' power to renounce business opportunities in advance might be used: "categories of business opportunities may be specified by any manner of defining or delineating business opportunities or the corporation's or any other party's entitlement thereto or interest therein, including, without limitation, by line or type of business, identity of the originator of the business opportunity, identity of the party or parties to or having an interest in the business opportunity, identity of the recipient of the business opportunity, periods of time or geographical location."[77]

After *Conti*, there appear to be no other opinions endeavoring to interpret § 122(17). Although parties in a few post-*Conti* cases have advanced theories touching on the applicability / scope of a purported waiver, none of these opinions has discussed the section explicitly, and in each of them the waiver argument has been either struck down on other grounds or avoided so as to shed little additional light on how § 122(17) is likely to be applied in future Delaware cases.[78]

---

[74] *Id*.
[75] *Id*. at 18.
[76] *Id*. at 19.
[77] Delaware Bill Summary, S. 363, 140th Gen. Assembly (Del. 2000); 72 Del. Laws, c. 343, § 3 (2000).
[78] One notable 2012 case that takes up the enforceability of a COW most directly is Dweck v. Nasser, 2012 WL 161590 (unpublished opinion, Jan. 2012). In *Dweck,* the CEO / minority shareholder of a Delaware corporation was found to have appropriated the corporate opportunity doctrine in forming several competing children's retail businesses. The defendant asserted that her conduct was permitted under a waiver, but Vice Chancellor Laster disagreed, noting that the purported waiver had never been executed by the plaintiff / controlling shareholder. And, while the defendant and the plaintiff had evidently executed a COW in the governance documents of a separate company they had formed, Laster held that such a provision was not binding on the fiduciaries of the instant corporation. The court never reached the issue of judicial construction of the COW against the statutory language in § 122(17).

4. *Non-Delaware COWs*

Delaware was the clear pioneer in authorizing corporate opportunity waivers through statute. However, not long after the Delaware reforms took root in 2000, other states began to follow suit. Table 1 below offers an overview of the states that have followed Delaware to date in amending their statutory frameworks explicitly to allow COWs:

State	*Implementing Statute*	*Effective Date*	*"Specified" COs, or Classes or Categories*	*Waiver by Charter*	*Waiver by Bylaws*	*Waiver by Action of Board*	*Waiver May Cover Directors*	*Waiver May Cover Officers*	*Waiver May Cover SHs*	*Others Explicitly Identified as Eligible for Waiver*
DE	Del. Code Ann. tit. 8, § 122(17)	Jul. 1, 2000	Yes	Yes	Possible*	Yes	Yes	Yes	Yes	
OK	Okla. Stat. Ann. tit. 18, § 1016(17)	Nov. 1, 2001	Yes	Yes	Possible*	Yes	Yes	Yes	Yes	
MO	Mo. Ann. Stat. § 351.385(16)	Oct. 1, 2003	Yes	Yes	Possible*	Yes	Yes	Yes	Yes	Employees and Agents
KS	Kan. Stat. Ann. § 17-6102 (17)	Jan. 1, 2005	Yes	Yes	Possible*	Yes	Yes	Yes	Yes	
TX	Tex. Bus. Orgs. Code Ann. § 2.101(21)	Jan. 1, 2006	Yes	Yes	Possible*	Yes	Yes	Yes	Yes	Managerial Officials
NV	Nev. Rev. Stat. Ann. § 78.070(8)	Oct. 1, 2007	Yes	Yes	Possible*	Yes	Yes	Yes	No**	
NJ	NJ Stat. Ann. 14A:3-1(q)	Mar. 11, 2011	Yes	Yes	Possible*	Yes	Yes	Yes	Yes	
MD	Md. Code Ann., Corps. & Ass'ns § 2-103(15)	Oct. 1, 2014	No***	Yes	Possible*	Yes	Yes	Yes	Yes	
WA	Wash. Rev. Code Ann. § 23B.02.020(5)(k)	Jan. 1, 2016	No***	Yes	No	No	Yes	Yes**	Yes	Any other person****

* No statute explicitly authorizes bylaw waivers; but in these states, (i) waiver is permitted by an action of the board *and* (ii) bylaw amendment power is or can be extended to the board
** Shareholders not specifically mentioned in statute
*** "Specified" not present; but refers to "classes or categories"
**** Board must specifically approve application of waiver as to an officer and/or related person of an officer

Table 1: Statutory Authority for Corporate Opportunity Waivers, By State

Note from the Table that the other states promulgating waiver statutes represent more of a trickle than they do a flood. Promulgating states moved in relatively evenly-spaced intervals, with no two states adopting waiver statutes in the same calendar year. It is also worth noting that outside of Delaware, only a few adopting states (Maryland and Nevada) are considered "bellwether" states for incorporation. Notably absent from the list are New York and California—two of the largest jurisdictional homes to incorporated entities outside Delaware.

The structures of the follow-on statutes are similar – but not always identical – to Delaware's. Oklahoma, Kansas, New Jersey and Maryland each have provisions that closely track § 122(17) in all respects. However, there are also variations providing more or less latitude. For example, Maryland and Washington omit the express modifier "specified" in describing the scope of waivable classes or categories of business opportunities. In addition, Missouri and Washington extend the scope of permissible waivers to cover others beyond officers, directors, and dominant shareholders. In Missouri, in fact, a COW may also cover *any* agent or employee, and Washington allows COWs to cover "any other persons" beyond the usual suspects.[79] At the same time, Washington's statute is also more restrictive in at least two ways. First, the waiver *must* be part of a charter provision, and cannot be adopted by action of the board. Second, insofar as a COW reaches officers and dominant shareholders, the statute requires

[79] One must not make too much of these seemingly more expansive provisions, particularly in the light of the fact that non-managerial employees, independent contractors, and other non-fiduciaries generally owe weaker (if any) fiduciary duties to the corporation as principal. *See* Mattel, Inc. v. MGA Entertainment, Inc., 782 F.Supp.2d 911 (2011). Moreover, such employees may be protected by other statutory mandates that help ensure their rights to compete with the principal. *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (prohibiting non-compete restrictions as a matter of public policy for California employees, regardless of state of incorporation). While a version of the corporate opportunity doctrine certainly applies to such actors, for them it is a far more forgiving legal proscription.

specific board approval (effectively a "reaffirmation") of the waiver when a business opportunity arises that the officer/dominant shareholder wishes to pursue.

Given the paucity of developed case law even in Delaware, the leadership position that Delaware generally has in establishing precedents, and the fact that the other promulgating states moved later to introduce their amendments, it would be reasonable to expect the case law to be even less developed outside Delaware. Our investigation reaffirms this conjecture: Beyond *Conti*, we were unable to find *any* reported cases interpreting the statutory provisions described in Table 1.

The lack of attention COWs have received in judicial opinions and commentary might lead one to believe that the authorizing statutes have simply not created much interest among eligible firms, and that corporations have by and large declined the invitation to waive or truncate the application of the corporate opportunity doctrine as to their fiduciaries.

II. THEORY: EFFICIENT CONTRACTING OVER CORPORATE OPPORTUNITIES

The immense unpredictability of the corporate opportunity doctrine has long generated interest among commentators in developing a coherent account of the doctrine, which could serve as a normative lodestar for courts. Among these accounts are *contractarian* approaches that seek to fashion a corporate opportunities doctrine based on precepts of efficient contract design between a corporation and its fiduciaries: that is, how would they plausibly bargain over their prospective rights to corporate opportunities *ex ante*, given their capital constraints, information constraints, and relative bargaining power? While not unique among conceptual approaches, the contractarian account can be of considerable value to efficiency-minded courts attempting to adjudicate the thorny equities around disputed claims of ownership of new business prospects.

A significant limitation of the contractarian account, however, was that the law traditionally prohibited parties from using contracts to alter the relevant fiduciary obligations. Thus, if the contractarian account was to have any sway, it would be through the immutable precepts of the doctrine as announced and understood by courts. Since Delaware's 2000 reforms, of course, jurisdictions have begun to permit parties to contractualize corporate opportunities. With this change, the contractarian project acquired far greater significance, both as a *normative* guidepost for doctrine and as a vehicle for predicting – as a *positive* matter – the incidence of COWs as well as their qualitative characteristics. Section A of this Part briefly outlines a contractarian account, adopting and extending a theoretical framework originally developed by one of us in prior work.[80] Section B suggests why it may frequently be important that corporations be able to allocate corporate opportunities *ex ante*, rather than merely at the time of board presentation – *ex post* – which historically was the sole tool available.

---

[80] For a more fulsome exposition, *see* Talley, *supra* note 38. Recall that Delaware amended its statute in 2000. *See supra* notes 60-62 and accompanying text.

Before proceeding, however, we feel compelled to reiterate a lawyerly disclaimer from the introduction: Our conceptual arguments of how COWs *could* be efficient should not be understood to evince a conviction that they *are* efficient. That conclusion simply does not follow. Indeed, the agency cost paradigm remains a powerful frame for corporate law, and it is entirely possible that the main reason for the adoption of COWs is managerial opportunism.[81] Indeed, some empirical work on LLCs suggests that entities that contract around fiduciary defaults often do so at their own peril and with wealth destructive consequences.[82] Instead, our aim here is far more modest: we aspire to show that there exist *plausible* cases where waivers can augment shareholder-value. Ultimately, the normative desirability of COWs cannot be settled on theoretical grounds and requires empirical investigation (which we turn to in Part III).

A. Framework

We begin with a simple framework involving only two parties: (1) a single "principal" (referred to either as Player "P", or the "firm"), and (2) a single agent (Player "A"), who ostensibly works on P's behalf.[83] In the corporate opportunities context, the principal will generally refer to the focal corporate entity, while A is meant to represent an officer, director, or dominant shareholder of P. One of the principal's key economic functions (and a source of value creation) comes from evaluating new business "projects" that are presented to the firm, and taking on those projects that are sufficiently well-suited to the firm's capabilities (generating a net profit in the process).

Assume (for simplicity) that each new project yields revenues of \$100 (in expectation). Different projects, however, require different mixes of skills and specialties. Accordingly, the *net revenues* that P can capture from each project vary heterogeneously across projects. Some projects, for example, may be directly in the firm's "sweet spot" and maximally profitable, while others are so far afield from the firm's area of specialty that they are wholly unprofitable. We use the Greek letter θ to represent the specific "type" of skill/specialty requirements entailed in a project presented to the firm. To fix ideas, suppose (arbitrarily) that the value of θ describes the percentage composition of verbal (relative to technical) skills that the project requires. When $\theta = 0\%$ the project is entirely technical in nature, while when $\theta = 100\%$ it is entirely verbal. Projects with intermediate values of θ entail a proportional mixture of technical and verbal requirements. Suppose that *ex ante*, the next project's requirements are probabilistically distributed evenly (or "uniformly") between 0 and 100%.

Project heterogeneity is crucial to how corporate opportunities should be allocated because the project's *net* profitability turns on how closely aligned it is with the principal's (or the agent's) skill sets. Suppose (for concreteness)[84] that the principal specializes in completing projects that are 50% verbal in nature (i.e., projects of type $\theta =$

[81] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).
[82] *See, e.g.*, Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections?*, 42 J. CORP. L. (2016); Mohsen Manesh, Contractual Freedom Under Delaware Alternative Entity Law, 37 J. CORP. L. 555 (2012).
[83] We address more complex scenarios in the next subsection.
[84] Although we hypothesize specific numbers and linear functional forms for purposes of discussion, the framework easily generalizes to other formats. *See* Talley, *supra* note 38.

50%) and can complete those projects at a relatively low cost, assumed (arbitrarily) to be \$20, for expected net revenues of \$80. Should the offered project differ from the principal's area of expertise, P could still conceivably accept it, but only by bearing an *adaptation cost* away from her "sweet spot" to do so. Namely, it costs the principal an additional \$4 to for each percentage increment she moves away from her specialty. For instance, to take on a project with a forty percent concentration of verbal tasks (θ =40%), P would need to bear a cost of \$60 (i.e., \$20 in fixed costs plus an additional \$40 representing the cost of moving 10 percentage points from her specialty at \$4 per point). In mathematical terms, the principal's cost of taking on a given type of project can be summarized by the cost function $C_P(\theta) = 20 + 4\cdot|\theta - 50|$. Figure 1 below contains a diagrammatical representation of the firm's cost and profit structure given these parameters. This cost structure is intended to capture the intuition behind a firm's "line of business": Although the principal operates most profitably when the project coincides with its "sweet spot" of expertise (i.e., where θ = 50%), P can nonetheless adapt its production techniques to take on projects that are further afield. Doing so, however, comes at a cost, which increases with the "distance" between the firm's specialty and the requirements of the project (and thus the degree of adaptation required). Given the numerical figures posited above, the firm would never take on any negative-value project where θ < 30% or θ > 70%. In an economic sense, then, the firm's effective "line of business" is that set of projects the firm would have an economic incentive to pursue – in Figure 1, this would correspond to any project whose requirements fell on the region defined by 30% ≤ θ ≤ 70% (a region shaded in light grey).

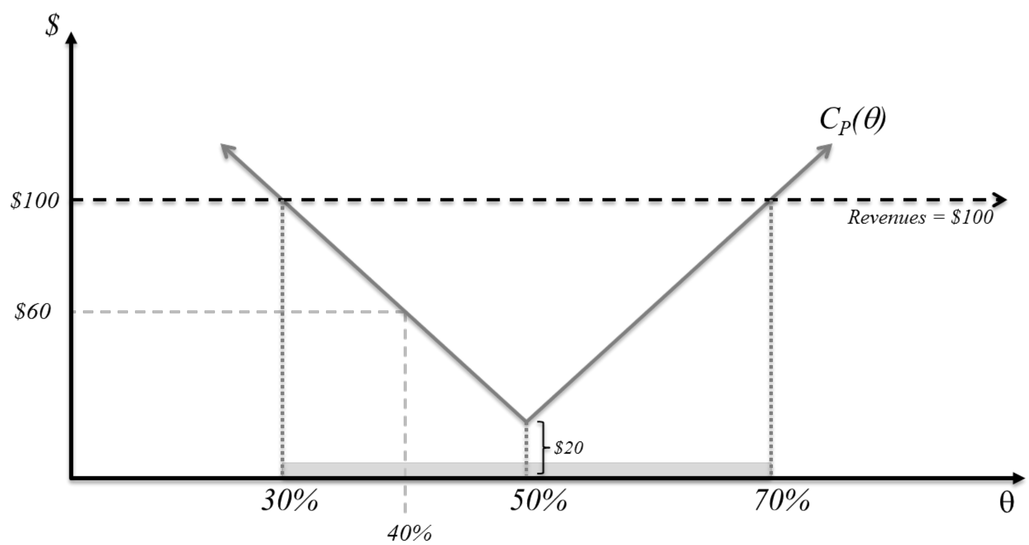

Figure 1: Representation of Principal's Cost Structure / Line of Business

For our purposes, the agent's key role at the firm is to attract and receive information about new potential business projects that arrive and that may be of interest to the firm. If merely identifying new prospects was *all* the agent could do, then there would be no need for the corporate opportunity doctrine. The problem in both real-life and our model is that the agent's ability to spot and attract new business prospects will often coincide with a private ability to take on projects herself, outside of the productive infrastructure of the principal. Such a capacity for the agent is easy to imagine, such as when the agent/fiduciary is a controlling corporate shareholder of the principal, or the principal of a financial firm that also invests in competitors.

Thus, the agent may have her own interest in pursuing the project on the outside (either individually or through a firm in which she has an interest). In particular, suppose the agent faces a fixed cost of x to take on any new project (a cost figure that need not correspond with the principal's fixed cost of \$20). Suppose further that the agent's "sweet spot" within her area of specialty is denoted by z (which also need not correspond to the firm's sweet spot of 50%). Finally, suppose that the agent's marginal cost of adaptation were b dollars for each percentage point difference between the project and the agent's own specialty (where the value of b similarly need not correspond to the firm's marginal cost of adaptation of \$4 per percentage point). All told, then, the agent's cost of taking on a project of type θ can be summarized by the cost function $C_A(\theta) = x + b\cdot|\theta - z|$.

Standard economic intuition suggests that, so long as the characteristics of the offered project (reflected in θ) are observable by both sides or readily verifiable by a third-party adjudicator, then an optimal contract allocates control over the project to the lowest cost producer as between P and A. Indeed, this division uniquely maximizes the total joint surplus that is available to the principal and agent collectively. Under such a division of authority, the parties can use an assortment of side payments (such as wages, licensing fees, or transfer pricing) to divide the contingent revenues from the undertaken project in any fashion they wish. In prior work, one of us has already demonstrated this proposition formally.[85]

Moreover, and central to our purposes, it is possible to use a COW – if properly crafted – to achieve the optimal allocation of authority over prospective projects. Within our framework, the particular form of the optimal COW depends on the relative configurations of the principal's and agent's adaptation costs. Figure 2 illustrates four archetypal configurations, each of which gives rise to a different type of optimal waiver; the scope of the optimal COW is illustrated with the dark gray bands overlaying the principal's line of business (in light gray). In the Figure, we assume the principal has the same specialization / adaptation costs as articulated above, and we vary the agent's cost structure (by varying the values of *x, z,* and *b*). Figure 2a assumes that the agent's specialty is at *x=40%,* that she faces a fixed cost of *z=\$80* to take on the project, and that her marginal cost of adaption is the same as the principal's, at *b=\$4.* Because of the agent's high fixed costs, in this configuration it turns out that there is no project that the agent would ever be more efficient at taking on than the principal, and thus it would never be optimal for the principal to waive any opportunities falling within its line of business. Figure 2b maintains the agent's specialty at *x=40%,* but assumes a far lower fixed cost (of *z=\$20*) and a higher marginal cost of adaptation (of \$15 per 1%

[85] *See* Talley, *supra* note 38, at 357 (Proposition 1). Talley also analyzes the optimal contracting problem when the characteristics of the project (θ) are observable only to the agent. In such a circumstance, the optimal contract effectively gives the agent a "call option" to appropriate the corporate opportunity individually in return for paying an exercise price whose value is set by the various cost configurations of the principal and the agent. Because we see little evidence of such contractual structures in our data, we suppress that analysis here and concentrate on the complete information case, which appears to have ready instantiations in observed data.

adaptation). Here, the optimal COW will tend to permit the agent to appropriate a specific class of projects clustered near her specialty, but it will reserve for the principal rights as to all other projects. Such a provision would waive "only as to" a specified class or margin of projects closely matching the agent's sweet spot.[86] Figure 2c continues to maintain the agent's specialty at *x=40%,* but assumes a fixed cost of $70 and a marginal adaptation cost of $0.60. For this configuration, the agent's fixed cost is sufficiently high that the principal remains the most efficient producer only near its own sweet spot; however, the agent's low marginal cost of adaptation gives her a cost advantage for projects that are near the periphery of the principal's line of business. This configuration would be consistent with a waiving "all but" a specified margin of projects near the principal's specialty.[87] Finally, Figure 2d assumes an agent specialty very close to the principal's (of *x = 48%*), a lower fixed cost (or *z=$10*), and the same marginal adaptation cost. For this configuration, the agent is always the lowest cost producer, and an optimal COW would effectively give her free rein to pursue any and all projects, "to the fullest extent" allowed by law.

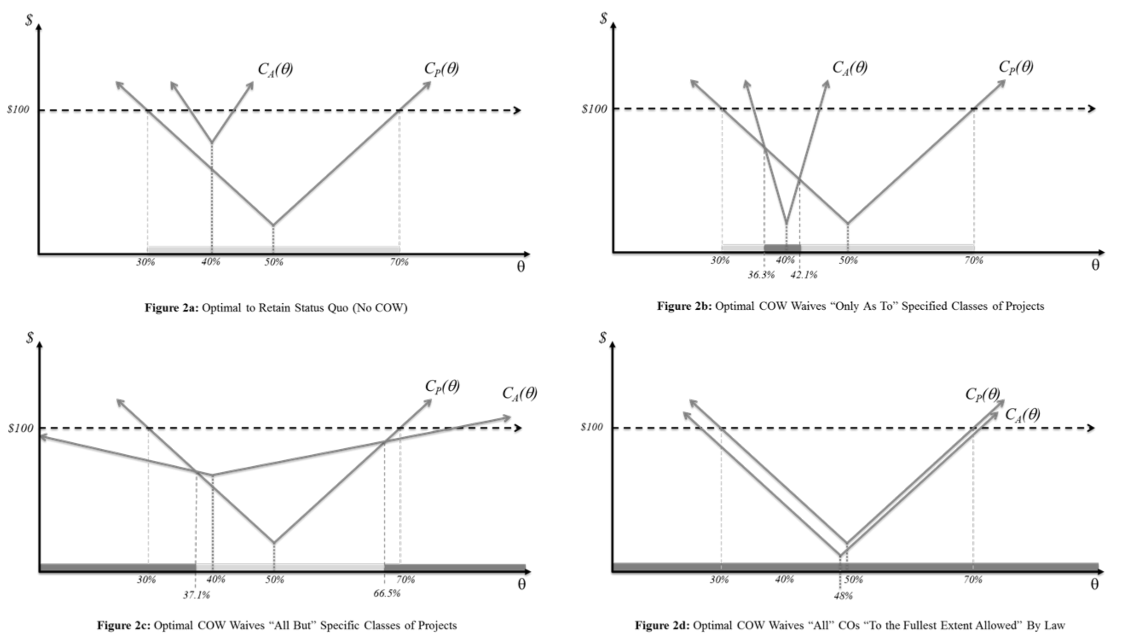

Figure 2a: Optimal to Retain Status Quo (No COW)

Figure 2b: Optimal COW Waives "Only As To" Specified Classes of Projects

Figure 2c: Optimal COW Waives "All But" Specific Classes of Projects

Figure 2d: Optimal COW Waives "All" COs "To the Fullest Extent Allowed" By Law

Figure 2: Optimal COWs (Gray Bands) for Various Principal-Agent Cost Configurations

The qualitative analysis above delivers several insights about the situations where we would be likely to see different waiver configurations. First are those instances – presumably very common – in which agents would never be more efficient at pursuing a project than their corporate principal (see Panel 2a). Absent significant agency costs, such corporations will compose a universe that falls almost entirely outside our data set, simply because they will generally (and efficiently) eschew waivers. Our coding system would thus not detect corporations that mention the renunciation of business opportunities in order to specifically declare that they are not doing so. However, because

[86] In the figure, this class corresponds to projects falling on the interval 36.3% ≤ θ ≤ 42.1%.

[87] In the figure, the waiver would allow the agent to pursue projects falling on the disjoint intervals θ ≤ 37.1% and θ ≥ 66.5%.

non-waiver of corporate opportunities is the legal default we expect to observe few such disclosures.[88]

Second, in situations where the agent has a lower fixed cost than her principal, the optimal allocation of new opportunities will enable the agent to pursue specific types of opportunities closely related to the agent's specialty (see Panel 2b). An example of this could be a director who also manages a specialty enterprise on the side. For specific projects related closely to that side enterprise, the director may be the lowest cost producer of a new project, and an efficiency-enhancing waiver would permit the director to pursue such projects.

Third, there are those configurations in which we might expect the fiduciary agent to more easily adapt to pursue projects outside of her specific specialty than the principal (see Panel 3c). Where the agent is more versatile than the principal, the most efficient allocation of corporate opportunities will retain a core set for the principal centered around its specialization, but will allocate the remaining opportunities to the agent – an "all but" scope for the waiver.

Two general business scenarios are plausible candidates for including agents more versatile than their principals. The first are financial fiduciaries. Venture capitalists, private equity firms, and hedge funds are all capital investors who are well-known for making major minority or controlling investments in companies as well as for placing their own principals and employees onto the boards of the companies in which they invest.[89] Both the directors these firms place on a company's board as well as the firms themselves (if their ownership interest is significant enough) can become the sponsored firm's fiduciaries. As a result, they would be obliged under the COD's typical strictures to present any potentially relevant new business prospects to the sponsored entity. Yet, because of the range of other companies in which these financial firms often invest – and in which they might be interested in investing – the financial fiduciary (and/or her employer) will often be more versatile than the principal. Second, partial corporate spin-offs may often create situations where parent companies remain major shareholders in a

[88] On the other hand, if the agency problem is sufficiently severe that the agent can induce the firm to cede new prospects to her (inefficiently), that cost should be observable in reductions to company value. We test this proposition empirically in Part III.

[89] *See* Stephan H. Coonrod and Annamarie C. Larson, *Washington's New Provisions on Advance Waivers of Corporate Opportunities: Opening the Road for Investors*, Apr. 2015, K&L Gates Legal Insight ("Venture capital and private equity firms commonly finance multiple investments in the same area of activity and require a seat on the board of directors as a condition to their investment."); Chris E. Abbinante and Jessica B. Fairchild, Sidley Austin LLP, *Obtaining Advance Waivers In PE Transactions*, Mar. 18, 2010; Christopher E. Austin & David I. Gottlieb, *Renouncing Corporate Opportunities in Spin-offs, Carve-out IPOs and Private Equity Investments*, https://vcexperts.com/buzz_articles/320 ("In the private equity or financial investor context, funds that make multiple investments in the same or similar industries may want to avoid any undue restrictions imposed by the duty of loyalty on their ability to pursue other investments, even competing ones, or to direct a particular opportunity to the entity for which it is best suited."); Christopher K. Aidun & Ernest Ceberio, *Current Trends in Venture Capital Fundraising: 2002*, 7 No. 2 CYBERSPACE LAW. 2 (2002) ("Every venture or strategic investor should insist that each portfolio company adopt allocation rules" under § 122(17)).

subsidiary – and thus owe it fiduciary duties – but where the parent company remains the lower-cost adapter to newly arising business opportunities.[90]

Finally, and most strangely, is a configuration in which all new business opportunities are waived (see Panel 4b). This scenario is slightly bizarre because if the agent is the lowest cost pursuer of *all new business prospects* it raises the question of why the principal is even in business. If the agent is the more efficient party to pursue all future business, then perhaps the agent should simply buy out the principal's business. One context in which it might still make sense for a principal to exist as a going concern but waive all business prospects is where the principal is close to capacity on current projects, but lacks the ability to scale up. The current corporate opportunity doctrine already treats such limitations of the principal as sufficient to defeat a cause of action, but a broad waiver could serve to clarify and ensure these limitations as dispositive for a factfinder.

B. Ex Ante versus Ex Post Waivers

The traditional corporate opportunity doctrine has always permitted a corporation's board to "reject" a business opportunity presented to it by a corporate fiduciary, leaving the fiduciary free to pursue it herself.[91] So a reader may reasonably ask how precisely the *ex ante* waivers authorized by § 122(17) and its ilk differ from what could be called the *ex post* waivers already countenanced at common law. After all, the *ex post* allocation of corporate opportunities to fiduciaries was permissible before § 122(17) and remains so afterward. The key feature of the traditional doctrine was that *all* corporate opportunities were initially allocated to the corporation.[92] That allocation was *mandatory* in advance, but became a waivable *default* when a fiduciary actually presented a given opportunity to the board.

Advance waivers will have an important efficiency role to play precisely when it is less costly to allocate *ex ante* what could in principle be bargained over *ex post*. One might think that the common law's preclusion of *ex ante* waivers was sensible, simply because parties will always prefer paying fiduciaries with money and retaining opportunities (renegotiating as needed later on). Corporate entities might seem uniformly to be the more diversified party and better suited to bear the risks of new business prospects. The modern corporate context enormously complicates this picture, however. If the corporate fiduciary is a larger, controlling shareholder, or a director who belongs to and implicates with her duties a private equity firm, then the fiduciary may well be more highly diversified than the company adopting a COW (especially if that company faces a high cost of insolvency). If opportunities are more efficiently allocated to fiduciaries, and this is known by both parties, then *any additional transaction cost* ex post will justify an appropriate *ex ante* allocation, formerly forbidden by law. None of this is to say that a default allocation of all business opportunities to a corporation's fiduciaries is the

[90] Christopher E. Austin & David I. Gottlieb, *Renouncing Corporate Opportunities in Spin-offs, Carve-out IPOs and Private Equity Investments*, https://vcexperts.com/buzz_articles/320 ("In the case of a spin-off or carve-out, the parent company, which may well be in the same or similar line of business as its subsidiary, may want to preserve its flexibility to pursue potential business opportunities that might also be of interest to the subsidiary without running afoul of its fiduciary duties.").
[91] *See supra* Subsection I.A.2.
[92] *Id*.

efficient one – only that freeing corporations to replace the default allocation may sometimes produce beneficial results.

Indeed, we will see that waivers under § 122(17) differ importantly in several respects, which together can make *ex ante* waivers both less costly to adopt and which could result in different – and more efficient – allocations of corporate opportunities than the allocation resulting from *ex post* waivers.

1. Transaction Costs

To a large extent, the distinction between *ex ante* and *ex post* waivers hinges on evaluating the frictions of transaction costs. In an idealized Coasean world where transaction costs are zero, the timing of a waiver may not matter much: whenever it is efficient for a corporation to renounce an opportunity in its fiduciary's favor, it will do so, whether *ex ante* or *ex post*. In such a setting, as with many other Coasean environments, the legal rule becomes irrelevant.[93] Indeed, even if transaction costs were positive but always the same across time and context, then the choice of legal default would not have great significance. In the actual circumstances of corporate life, however, there are a number of reasons to expect the presence of transaction costs to sometimes make bargaining between the board and corporate fiduciaries more problematic when done on an ad hoc basis than through an *ex ante* waiver.

Most obviously, *ex ante* waivers allow a corporation *to commit credibly* to ceding certain corporate opportunities (along with other contractual *quid pro quos*) at the moment of contracting. For instance, if the fiduciary is a controlling shareholder, it may be providing financing to a corporation years before it expects the corporation to encounter the valuable new business prospects it desires the corporation to renounce.[94] This would be difficult to do exclusively with *ex post* waivers as the board could simply refuse down the road to permit a fiduciary to pursue a promised opportunity and its prior promise would be valueless. This could matter significantly if what a given fiduciary, say a controlling shareholder, sought from an investment was in important part new business opportunities it would generate. Further, without an *ex ante* waiver, the controlling shareholder would have a strong incentive to retain a 100% controlling position in order to ensure opportunities were allocated to it. With an advance waiver, however, the fiduciary could freely diversify when it became efficient for it to do so.

Advance waivers can thus significantly enhance the bargaining space – in the form of new business prospects – that a corporation has available to transfer in exchange for cheaper financing (or the service of an outstanding officer, the expert input of a venture capitalist, or the rolodex of an outside director). This is a central function of contract: to ensure that parties can credibly commit to follow through on their commercial undertakings, enabling transactions whose performances are separated in time. Without the possibility of *ex ante* commitments, financing that a fiduciary would have provided in exchange for promised opportunities may not be exchanged, resulting in foregone gains from trade.

---

[93] Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[94] There is a vast literature on credible commitments and their important role in commerce. *See, e.g.*, Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119 (2015).

Another limitation on *ex post* waivers is that the context of fiduciaries' involvement in a corporation is a classic site for the fiduciary's development of highly *specialized skills and abilities*. A director or officer typically invests years of work in a company and will usually acquire knowledge and abilities that are valuable at the company but are of less or no use elsewhere. A well-known hold-up problem can thus emerge. For example, the corporation may know that a fiduciary's service to it is worth, say, $50,000, but only $30,000 to any other company. One can further assume – plausibly, in the context of at least some early-stage companies – that corporate opportunities are one of the most valuable forms of compensation a corporation has to offer. The framework developed in Section A above likewise focused on situations in which the fiduciary could, in terms of comparative advantage, simply be the *more efficient* party to pursue a new business opportunity. In the absence of enforceable advance waivers, the corporation may promise to provide the fiduciary with a variety of opportunities as compensation, but then fail to renounce them as anticipated.[95] If the fiduciary expects this, then she will have significantly dampened incentives to perform the specialized tasks and invest in firm specific knowledge vis a vis what is optimal. As a result, both the corporation and its fiduciaries stand to benefit from an enforceable contract for allocating corporate opportunities among them in advance. Nonetheless, it is worth noting that the hold-up problem can obviously run both ways – fiduciaries may hold up the corporation, just as it may hold-up its fiduciaries. There seems to be no *a priori* reason to view one party to be more opportunistic than the other,[96] but the prospect of subsequent hold-up by the firm can be a significant driver for an *ex ante* waiver.

2. *Board Dynamics*

Advance commitments can carry a host of other benefits as well. From a psychological vantage point, the members of a board may find it easier to commit to relinquish prospective business opportunities upfront, in say a charter or contract provision, than in a later ad hoc process when the opportunity is directly presented and the loss of prospective profits is palpable.

Depending on when the adoption of an *ex ante* waiver occurs, it can also allow a board to avoid a conflicted vote, and potentially, to be insulated from any possible breach of duty of loyalty allegation. For instance, if a COW is adopted in a firm's IPO charter, then a prospective corporate fiduciary can bargain with the corporation at arm's length and the pre-IPO board can hold a vote on whether to include the COW without any member needing to recuse herself.

3. *Liquidity constraints*

---

[95] *See, e.g.*, Benjamin Klein et al., *Vertical Integration, Appropriable Rents and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 326 (1978); Steven Tadelis & Oliver Williamson, *Transaction-Cost Economics*, *in* THE HANDBOOK OF ORGANIZATIONAL ECONOMICS (Robert Gibbons & John Roberts eds., 2013).

[96] There are some instances in which opportunism by the corporation is significantly more likely. Consider a joint venture ("JV") entity formed by two major rival corporations for a narrow and specific collaborative purpose. Typically, both of those rivals will owe the JV fiduciary duties. *See* Sarath Sanga, *The Corporate Joint Venture: A Contractual Solution to Fiduciary Conflicts* (Working Paper) (discussing fiduciary duties owed by members of corporate joint venture). In this circumstance, there may be far more scope for the entity to be weaponized by one corporation and used to hold-up its rival (via fiduciary duty claims), than for the rivals to hold up the JV.

Another potential driver of advance waiver activity is the influence of liquidity constraints, either at the firm or the fiduciary level. In conventional economic frameworks, agents (the fiduciary) are wealth and capital constrained, and thus unable to "pre-pay" for non-monetary contractual rights that they value most highly. When such rights consist of the allocation of corporate opportunities, the parties may be unable to reach an agreement allocating those projects to the fiduciary even when the fiduciary is the most efficient producer. In this case, of course, the default rule (reserving rights for the corporation) may well be optimal, and thus there would be little need for an *ex ante* waiver.[97]

In other instances, however—particularly involving startups—the *corporation* is the party that is cash poor and capital constrained, hindering its endeavors to attract managers, directors and potential investors. Although the entrepreneur could offer to remunerate these actors with equity, doing so has a dilutive effect on founders, common shareholders, and employees—an effect that can erode internal incentives to maximize value. One possible alternative in such situations is to offer in-kind modes of compensation, including the allocation of property rights over future business opportunities. Symmetric to the discussion above, in-kind compensation of this sort may efficiently require the corporation to waive rights on certain projects where it is marginally the more efficient producer, thereby providing the fiduciary a platform from which to profit from the new opportunity itself (or alternatively to resell it to the corporation at a less capital constrained juncture). In this case, executing a seemingly broad waiver may still create value for shareholders if it is combined with attracting significant managerial talent.

4. *Rules versus Standards*

Ex ante waivers may also offer distinct benefits because they authorize private parties, through contract, to replace the immensely complex and nebulous *standard* of the common law with a *rule* crafted by the parties themselves (or at least a more refined standard).[98] Even if the parties would ultimately end up with the same allocation of corporate opportunities *ex post* as *ex ante*, the ability to substantially *clarify* that allocation through advance contracting can substantially reduce the scope for litigation costs stemming from either opportunism or honest mistake. To be sure, few contractual provisions define perfectly clear boundaries, and the COWs we observe do not even attempt to do so. Nonetheless, COWs generally replace a *highly indefinite standard* in one of fiduciary law's most convoluted areas with significantly better defined directives (and sometimes with very well-specified ones). This may be able to deliver substantial cost savings which can be divided by the parties.

In addition, the clarity of advance waivers can help establish clear ground rules that serve as the backbone for a long-term commercial relationship. Consider, for example, the 2007 COW disclosed by NetSuite Inc. ("NetSuite"), related to its significant block shareholder and board member Lawrence Ellison. As a condition to his involvement with the company, Mr. Ellison demanded a broad COW from NetSuite,

[97] This point is developed more fully in Talley, *supra* note 38, at 357-60.

[98] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992) (offering a canonical economic exposition of the rule-standard distinction).

which NetSuite's board of directors approved and disclosed in SEC filings.[99] After describing the common law standard, NetSuite replaced it with a *bright-line rule*: "[A]s a majority stockholder, Mr. Ellison might, in certain circumstances, have had a duty to present to the corporation matters that come to him that are within our line of business or would be deemed of interest to us. Under the waiver, we have renounced any such duty, and *Mr. Ellison will not need to present any such opportunities to us*."[100]

Although this waiver is clearly quite broad, it may also have been necessary to bring on Ellison as a significant investor. More importantly, this waiver plausibly helped pave the way for a long term relationship between Ellison, Oracle and NetSuite, one that arguably facilitated Oracle's recently announced $9.3 billion acquisition of NetSuite.[101]

As noted earlier, the discussion above is meant to demonstrate only that there exist several plausible economic contexts where corporate opportunity waivers—even broad ones—are value enhancing for both the beneficiary and the waiving corporation. Such contexts, of course, must uneasily co-exist with omnipresent agency cost problems, in which corporate fiduciaries may use their influence at the company to line their own pockets at shareholders' expense. To the extent that the former efficiency-related factors outweigh agency cost considerations, Delaware's reform program has been beneficial for capital investors. To the extent the opposite holds, however, the policy landscape flips. Ultimately, this question is indeterminate within the realm of economic theory alone, and an empirical analysis is warranted. It is to that analysis that we now turn.

III. EMPIRICAL ANALYSIS

The historically unprecedented power that many corporations now have to opt of the corporate opportunities doctrine seems to have been largely overlooked in both case law and law and finance scholarship, generating little systematic analysis in any form.[102] This neglect is surprising, and it seems undeserved for several reasons, ranging from the technical to the policy related.

On the more technical side, the duty of loyalty is a long-hallowed "sacred cow" of fiduciary principles, traditionally unyielding to private, contractual end-runs. Any systematic shift that concerns when and how corporate entities may embrace such waivers is, at the very least, important to document, given its departure with longstanding legal tradition. Second, a cottage industry of "corporate governance" metrics for incorporated entities has taken root in the last decade.[103] These metrics seek to aggregate and assess when firms "opt out" or "contract around" various corporate law default rules

[99] NetSuite Inc. 10-K filed Mar 13, 2009.
[100] *Id*. (emphasis added).
[101] *See* Quentin Hardy & Leslie Picker, *Oracle's $9.3 Billion Deal for NetSuite Will Bolster Its Cloud Offerings*, N.Y. TIMES DEALBOOK, July 28, 2016.
[102] *See, e.g.*, Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 120 (2015) (noting § 122(17) as a rare exception to the mandatory character of the duty of loyalty).
[103] *See* Sanjai Bhagat, Brian Bolton & Roberta Romano, *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1809-14 (2008) (providing an overview and assessment of some of these early trends).

(such as through classified boards, poison pills, duty of care waivers, blank-check stock, and the like). The results can be useful for both scholars and industry groups, such as proxy firms that often address corporate governance votes for institutional clients. Sophisticated producers and consumers of such metrics should be interested in these new mechanisms that permit parties to contract out of the duty of loyalty in order to provide a complete picture of governance arrangements.

More substantively, corporate opportunity waivers bear on central "big picture" debates in corporate law. First, how corporations respond to this new power to tailor can importantly inform scholarly debates regarding whether corporations actually use their capacious legal freedoms to tailor default terms.[104] The question lurking in the background—and one of corporate law's most profound quandaries—is whether we can expect (or trust) corporations, when freed to do so by law, to adopt optimal corporate governance structures on their own accord.[105]

Even more generally, the empirical experience of COWs goes straight to the heart of the principal normative question: Are COWs socially beneficial? This question arises at the intersection of two distinct, but important strains in corporate theory: For the very transaction-cost arguments that motivated the amendments permitting COWs are in significant tension with well-known arguments justifying loyalty as a core check on managerial opportunism and agency costs. Understanding how corporate opportunity waivers have played out in the post-deregulatory environment (and why) may shed light on other areas where scholars vigorously disagree as to whether fiduciary duties should be mandatory.[106]

The scant literature on COWs may be, at least in part, an artifact of the practical difficulty of data collection. Most conventional corporate governance provisions are located in relatively discrete and easy-to-isolate sources (such as the charter or shareholder-approved bylaws). COWs, as documented above, are generally not required to be executed in *any* particular place, and thus they may be scattered across myriad corporate documents, including charters, bylaws, contracts, board resolutions, and the like. Consequently, searching for waivers requires combing through many (if not all) disclosures made by public companies to securities regulators.

In this section, we describe and report on an empirical analysis of a large sample of COWs disclosed by entities, which we extracted and coded based on publicly available data. We find that corporate opportunity waivers are common and widespread among public companies – by our best estimates, well over two thousand issuers seem to have made some use of their new-found freedom to contractually allocate corporate opportunities. Waivers appear across industries, although they are over-represented in private equity and oil and gas.

---

[104] *See* Henry Hansmann, *Corporation and Contract*, 8 AM. L. & ECON. REV. 1, 1 (2006) ("[p]ublicly traded corporations rarely use the nearly absolute freedom afforded them to . . . deviate from the default terms of state corporation law.").

[105] *See* Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STANFORD L. REV. 1326, 1327 (2013).

[106] *See supra* note 46 and accompanying text.

In addition, we also employ in this section a variety of empirical methods to examine the normative question of whether corporations have used the freedom to adopt corporate opportunity waivers to create or destroy value. First, we find that the companies embracing COWs tend *not* to generally exhibit indicia of questionable investment value or managerial practices. Rather, using standard measures of firm value, they appear to have markers of value creation and effective management. We also conduct an event study as a measure of the value created by adopting a corporate opportunity waiver, using the stock market's reaction to their public disclosure as a proxy. Perhaps surprisingly, for those firms where we are able to measure returns on stock-price reaction to an announced COW, the market appears to receive such news positively, generating 3-day cumulative abnormal returns of between 1% and 1.5%. These findings go some way to support the value-creation rationale behind waivers – at least overall – and to allay fears that corporations adopting COWs are systematically those with worse agency costs.

A. Data

To investigate the empirical incidence (and effects) of COW adoption, we constructed an original data set based on disclosures by publicly traded corporations. Typically, if a public company adopts a waiver of corporate opportunities, the adoption is likely to be disclosed in some form of document that the corporation will file with the U.S.'s principal financial regulator, the Securities and Exchange Commission ("SEC"), on the SEC's EDGAR website. We began by utilizing a "mirror" of EDGAR, which replicates over 21 million issuer filings available from 1995 through March 2016.[107] Because most states' statutes authorizing COWs allow them to be implemented across a wide variety of corporate governance documents, we did not constrain our examination of EDGAR filings to any specific filing "form" (such as 10Ks, 8Ks or 14As). To this mirrored data set we applied a Boolean key-word search[108] – similar to what one might use in a WestLaw or LexisNexis query – designed to identify *candidate* instances of a disclosed COW based on a filing's similarity with the search query.[109] This process resulted in 10,682 distinct candidate disclosures.

Our key-word search was designed to be quite general, but in so doing we also assured that it was relatively over-inclusive. One thousand randomly selected excerpts were then selected and manually coded by ourselves and a small group of trained research assistants, by applying a coding rubric we designed, employing forty-one

[107] *See generally* U.S. Securities and Exchange Commission, EDGAR, Company Filings, https://www.sec.gov/edgar/searchedgar/companysearch.html (noting "access to more than 21 million filings"). 1995 was the first year for which the database has reliably global coverage.

[108] The exact search took the form: "[(corporate OR commercial OR business) followed by (opportunit!)] within the same sentence as [(waiv! OR renounc! OR disclaim)]". The "!" marks here serve as root expanders to pick up any stems, alternative endings, or punctuation marks around the relevant word.

[109] For every matching candidate document, we extracted the responsive sentence (or sentences) as well as three preceding sentences and three succeeding sentences around each detected excerpt (or "snippet").

distinct variables. Our coding rubric[110] centered around the three fundamental questions that pertain to any waiver:

1. *How* is a company adopting the waiver? The first seven variables inquire as to how a filing company is adopting a COW, whether in its charter, bylaws, board resolution, or another kind of disclosure.
2. *Who* is covered by the waiver (e.g., a single officer/director, all officers/directors, a controlling shareholder, and so forth)? The next thirty variables inquire into who is covered by the COW. This sequence includes both who is covered at the filing entity (14), and, if another entity is mentioned, then who is covered within the management / ownership structure of that other entity (16).
3. *What is the extent* to which a company is waiving the corporate opportunities doctrine as to those covered? The last four variables inquire into whether the scope of the waiver covers all business opportunities, a specified list of such opportunities, all opportunities except for some specified subclass; or a wildcard term waiving corporate opportunities "to the fullest extent allowed by law" (or a substantive semantic equivalent).

As noted above, the key-word search we used to identify candidate COWs was deliberately over-inclusive, flagging a series of documents that were sure to include some "false positives" – snippets that satisfied the key-word criterion but were judged by coders not to reflect COWs.

After collecting, cleaning, and coding this data set, we also linked it to a variety of other publicly available datasets that are widely used in law and finance scholarship (Compustat and CRSP) to gain insights about the characteristics of issuers adopting COWs and the market reaction to such adoptions. We discuss each of these steps in turn below.

B. Descriptive Statistics on Coded Waivers

Within the randomly selected sample of 1,000 candidate SEC disclosures, our manual coding enterprise yielded 615 responsive documents, reflecting a bona fide COW. Of those 615, 229 were operative provisions in which a filing company enacted a COW, while 386 were disclosures discussing such an operative provision elsewhere. (The remaining candidate documents were deemed to be false positives—reflecting a 38.5% false positive rate from our key-word search.) Extrapolating these rates to the full set of 10,682 candidate disclosures suggests that entire sample should be expected to contain over 6,500 responsive documents over the 21-year period analyzed, or just over 312 disclosures per year. Figure 3 illustrates the yearly counts of COWs within our sample that appear in either an operative provision or a discussion of an operative provision. As can be seen from the Figure, the incidence of disclosed COWs was quite low – though not zero – prior to Delaware's statutory amendment in 2000. The low-level incidence of attempted COWs prior to 2000 is not altogether surprising given the fact that

[110] The coding rubric is available from the authors. We engaged on a significant training and cross-validation program with the research assistants who coded excerpts, making sure that they had material "overlap" in coded terms so as to correct inter-coder inconsistencies.

DGCL § 122(17) was a legislative response to the 1989 *Siegman* case. Even after 2000, however, it appears that the reform was slow to take hold among public corporations. Only in 2005 did the number of COWs break solidly into double digits. By 2010, disclosed COWs were becoming increasingly commonplace, increasing each year through 2015. (Final counts for 2016 are not available as of this writing.)

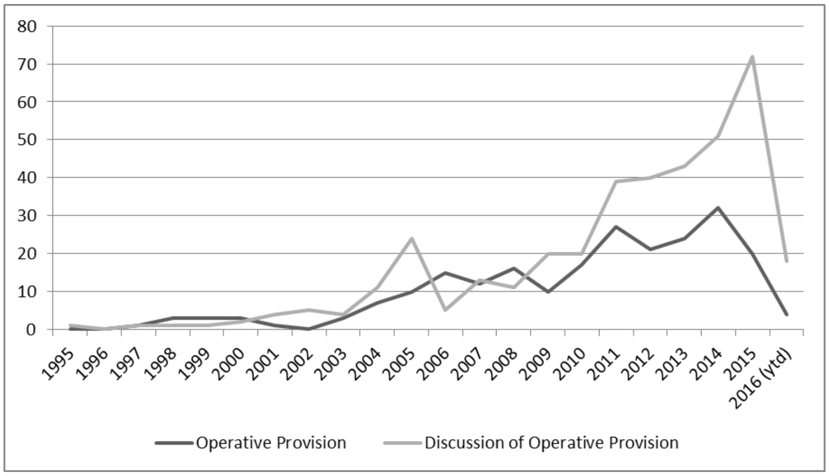

Figure 3: Total COW Disclosures in Sample, by Year

Another important issue surrounding COWs is where they are found within firms' governance documents and other written instruments. Table 2 summarizes the location of manually coded waivers across various document types:

Location of Waiver	***Operative Provision***	***Discussion of Waiver***	***Percentage***
Charter	162	373	77.42%
Bylaws	5	10	2.17%
Board resolution	1	12	1.88%
Other	51	77	18.52%

Table 2: Location of COW in Corporate Governance Documents

Note from the Table that over three quarters of the COWs in the sample appear to be located in the corporate charter, evincing a degree of commitment to the waiver that is difficult to unwind absent a (rare) shareholder vote. That said, nearly one in five waivers appear to be spread across a variety of contractual instruments, which are usually – in contrast – susceptible to renegotiation and restructuring by the board alone, without shareholder involvement.

As noted above, the wording of most states' statutes provides appreciable freedom for the drafters to waive broad or narrow categories of corporate opportunities. Given that the default rule in corporate law is no waiver, a broader express waiver signals a greater departure from traditional fiduciary principles. Table 3 summarizes the scope of COWs in the sample. Note that over half of the waivers coded in the sample either purport to waive "all" corporate opportunities, or waive the doctrine to the "fullest extent" of what is allowed by law. Yet another 30 percent of COWs purport to waive "all but" a reserved class or category of opportunities. These all represent relatively broad waivers. In contrast, only about 12 percent waive in a more modest fashion, limiting the disclaimer to a specified set of opportunities.

Scope of Waiver	*Operative Provision*	*Discussion of Waiver*	*Percentage*
All Corporate Opportunities	108	155	23.95%
"All but" Certain Corporate Opportunities	100	227	29.78%
Specified Corporate Opportunities	34	97	11.93%
"Fullest Extent of Law"	153	214	33.42%
Explicit Non-Waiver of Corporate Opportunities	1	9	0.91%

Table 3: Scope of Waiver

Another important scope consideration is how the coded sample allocates waivers across different types of corporate actors. Recall that this group can include corporate directors, officers and dominant shareholders, all of whom owe fiduciary obligations to the corporation. Table 4 summarizes the target of the coded provisions by the role of the actor. The aggregate counts listed here are far larger than the total number of detected waivers, since waivers routinely apply to multiple classes of actors, and sometimes differentiate between sub-classes of actors. Nevertheless, it appears that within our sample, corporate directors are the most frequent beneficiaries of COWs, an observation consistent with efforts to ameliorate conflicts that come from overlapping directorships across companies.

Reach of Waiver	*Operative Provision*	*Discussion of Waiver*	*Percentage*
Officer(s)[1]	217	454	30.27%
Director(s)[2]	330	640	43.75%
Dominant Shareholder(s)[3]	217	359	25.98%

[1] This category combines all of: all officers (28; 51), any officers (107; 228), and enumerated officers (82; 175), for operative provisions and discussions, respectively.

[2] This category combines all of: all directors (33; 70), any directors (166; 324), and enumerated directors (131; 246).
[3] This category combines all of: all shareholders (23; 42), any shareholders (108; 182), and enumerated shareholders (86; 135).

Table 4: Corporate Fiduciaries Covered by COW

C. Issuer Characteristics of COW Adopters

Although the exercise of harvesting and coding disclosed COWs is interesting in its own right, it is possible to say somewhat more by linking the firm's SEC identifier (known as the "CIK" number) to several other databases providing industry and financial data pertaining to the disclosing issuers. A particularly interesting industry source is the Compustat database, which constitutes the predominant source of information related to corporate governance and financial performance as disclosed in issuers' annual and quarterly financial reports. Initial efforts to link the pilot sample to Compustat data (for the period 1995-2005) produced approximately 381 matches (by year and issuer) from the approximately 615 waivers coded in the pilot data set.

Using these matched firms, it is possible to consider a host of firm-level indicia. Preliminary analysis suggests the industry representation (2-digit SIC) of disclosed COWs appears to track that of Compustat firms, with a few notable areas of industry overrepresentation. In particular, Oil and Gas issuers represent 9.71% of COWs as compared with 3.95% of Compustat firms. Similarly, Business Services issuers represent 13.12% of the pilot sample, but only 9.04% of the Compustat universe. The over-representation in both industries plausibly reflects the popularity in these industries of ownership structures characterized by multiple investments across portfolio companies. (Additional research and data collection will be needed to test this hypothesis.)

Because corporate law (and the permissibility of COWs) is an artifact of state law, adopters' incorporation jurisdiction is also of obvious interest. Perhaps not surprisingly, the public firms embracing COWs are heavily overrepresented by Delaware corporations. Indeed, as Table 5 illustrates, fully nine out of ten waiver disclosures come from Delaware incorporated companies, far more than the just over 50 percent of public companies from Compustat that are incorporated in Delaware:

State	Coded Matches	Compustat Universe
DE	90.14%	51.16%
MD	3.84%	6.70%
NY	1.10%	2.83%
NV	0.82%	4.98%
Other	4.09%	34.38%
N	365	211,176

Table 5: COWs in Sample, by State of Incorporation

The significant overrepresentation of Delaware may be due to a variety of factors, including the fact that Delaware was the earliest mover, the significant network externalities among the Delaware bench and bar, the (possibly) larger comparative size of Delaware incorporated adopters, and the potential remaining invalidity of COWs in many other states.

One benefit of linking the data on disclosed COWs to other financial databases is that doing so sheds considerable light on both what types of companies embrace waivers and what such adoptions portend for company value. Our empirical analysis provides several interesting insights about the relationship of COW adoption and financial measures related to profitability and value creation. Some of these relationships are reflected in Tables 6a and 6b. As Table 6a illustrates, despite their overwhelming propensity for Delaware incorporation, the sample firms tend to be *smaller* on average – not larger – than the mean Compustat issuer on many balance sheet and income statement metrics, such as assets, long-term liabilities, earnings and revenues. Based on *medians,* however, the COW adopters tend to be somewhat larger than Compustat firms, suggesting that COWs are embraced by a narrow band of firms that are relatively large, but not at the highest end of the distribution. That said, the COW disclosers also appear to have *higher* mean and median total market capitalizations than the Compustat comparators. A particularly useful metric of value creation within finance is the annual return that the issuer makes on its overall assets (ROA)—a valuation metric that is largely independent of debt/equity structures. Here again, COW disclosers within the sample tend to outperform the comparator Compustat group (along both mean and median dimensions) in generating returns for outside capital investors. Table 6b reports the same set of valuation metrics but with both samples limited to Delaware incorporated firms. Most (but not all) of these patterns persist with this limitation.

TABLE 6a: All Entities

	Coded Matches				Compustat Universe			
	N	*Mean*	*Median*	*St. Dev.*	*N*	*Mean*	*Median*	*St. Dev.*
Total Assets	378	6,290.64	1,432.10	21,806.76	233,594	10,464.95	266.01	93,125.62
CapX	371	189.81	31.27	503.65	196,560	170.47	3.83	1,075.93
Long Term Liabilities	378	1,483.04	432.64	3,175.10	233,102	1,762.44	13.86	28,619.72
EBITDA	359	318.28	138.21	582.82	202,002	419.42	10.54	2,495.87
Revenues	375	1,890.28	723.68	3,169.45	232,407	2,209.14	96.98	11,240.06
Total Mkt Value	320	2,788.14	1,396.05	4,075.78	157,047	2,221.90	119.53	12,893.57
ROA	359	-0.45%	9.32%	59.03%	201,161	-120.52%	6.21%	6397.28%

TABLE 6b: Delaware Corps

	Coded Matches				Compustat Universe			
	N	*Mean*	*Median*	*St. Dev.*	*N*	*Mean*	*Median*	*St. Dev.*
Total Assets	326	6,114.33	1,418.56	22,420.30	94,367	7,613.65	232.50	69,722.03
CapX	319	186.84	38.25	514.53	83,856	134.29	4.93	862.10
Long Term Liabilities	326	1,492.31	411.23	3,313.45	94,048	1,276.67	12.36	10,437.96
EBITDA	316	315.97	143.18	595.06	86,235	334.69	11.88	2,027.49
Revenues	323	1,989.25	770.41	3,323.35	93,940	2,058.34	135.44	10,288.59
Total Mkt Value	281	2,679.78	1,406.20	4,049.09	64,390	2,920.16	206.09	14,163.42
ROA	316	1.86%	9.60%	48.86%	85,971	-91.30%	7.12%	3727.67%

Table 6: Financial Valuation Measures Relative to Compustat Universe

The descriptive statistics summarized above paint a picture that holds clear relevance to larger policy debates explored in previous Parts about COWs specifically, as well as the contractibility of fiduciary duties more generally. For example, it does not appear – based on these data – that COWs are systematically embraced by under-achieving firms who intend to use the waiver as a pretext for diverting value away from investors. Rather, these preliminary data suggest that waivers are adopted by relative healthy companies with robust cash flow potential and which deliver attractive returns to their capital investors. This profile is consistent with the efficiency account of COWs, in which they can serve as important complements to building value-enhancing corporate structures by clarifying the boundaries of what is sometimes considered an incurably opaque and recondite area of corporate fiduciary law.

D. Market Reaction to COW Adoptions

Importantly, the results discussed above come strictly on summary observational data. They are thus ill-suited to strong inferences about causality or the welfare effects of COW adoption.[111] Many alternative stories could explain the same relationships. For

[111] Indeed, this is a well-known limitation endemic to much of empirical corporate finance, which frequently marshals observational data.

example, healthy companies might simply be easier for self-interested managers to badger into inefficient COW adoption, since shareholders are less likely to take notice of the loss of value. For this reason, one must take care not to over-argue the inferences one can make from observational data. That said, our study's focus publicly traded companies permits us to use a few other tools to purchase at least some insights into causal relationships. One such tool is to examine the extent to which COWs contribute to (or detract from) firm value via capital market reaction. To the extent that stock prices of public companies tend, on average, to reflect publicly available information,[112] one instructive means for assessing COWs is to consider how market prices react to the *first public disclosure* an issuer makes about the existence of (or plans for) a waiver. Our data set is amenable to such an inquiry: indeed, we are able to identify the first disclosure date with all of Compustat-matched firms reported in the previous subsection, which in turn allows us to match these firms to their securities market prices as reported in the CRSP database.

In assessing the market reaction to any disclosure, it is important to keep in mind that securities prices and returns are naturally volatile, and they move for myriad reasons unrelated to the disclosure. Indeed, most stocks tend to fluctuate pro-cyclically with market conditions. Consequently, to attribute an observed market movement to the occurrence of a particular disclosure event at the firm level, it is important to control for that portion of the price change that is attributable to outside factors, and not the disclosure itself. Measuring market reaction to the (unexpected) disclosure of news related to companies is usually accomplished through a statistical exercise known as an *event study.* Within securities market settings, it is conventional to explore whether the occurrence of an "event" (in this case the first public disclosure of a COW) is related to an ensuing positive or negative market reaction to the news, as measured through the returns on the issuer's equity.

The backbone of the event-study approach focuses on the "abnormal return" of the stock(s) in question on or around the event date as pictured heuristically in Figure 4. The modifier "abnormal" focuses on the degree to which the observed daily returns (the gray dashed lines and markers) in and around an event date compare to the returns one would have expected in that same period of time (the solid lines and markers), accounting for general market conditions. Taking the difference between the observed return of the stock and the return that one would otherwise expect yields a measure of the extent to which the stock's return was "abnormal" – not easily explained by overall market fluctuations. In the Figure, the hypothesized dates of interest (or "event window") are Days 16 through 18 (shaded over in light gray), in which (say) a series of negative corporate disclosures has presumably come to light through securities filings, news stories, or some other information shock. Note from Figure 4 that the hypothesized shock appears to be one that is bad news for the company, resulting in a negative abnormal

[112] This is the most popular articulation of the phenomenon sometimes referred to as the semi-strong form of the "efficient capital market hypothesis" or ECMH. Although the ECMH has drawn some critics over the years, most economists tend to continue to subscribe to its general precepts. *See* Steven L. Jones & Jeffry M. Netter, *Efficient Capital Markets,* in CONCISE ENCYCLOPEDIA OF ECONOMICS (DAVID R. HENDERSON 2D ED. 2008). The United States Supreme Court has recently reaffirmed its own general acceptance of the ECMH in the context of securities market litigation. *See* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011).

return, whose magnitude is represented by the length of the downward pointing black arrows on the event days.

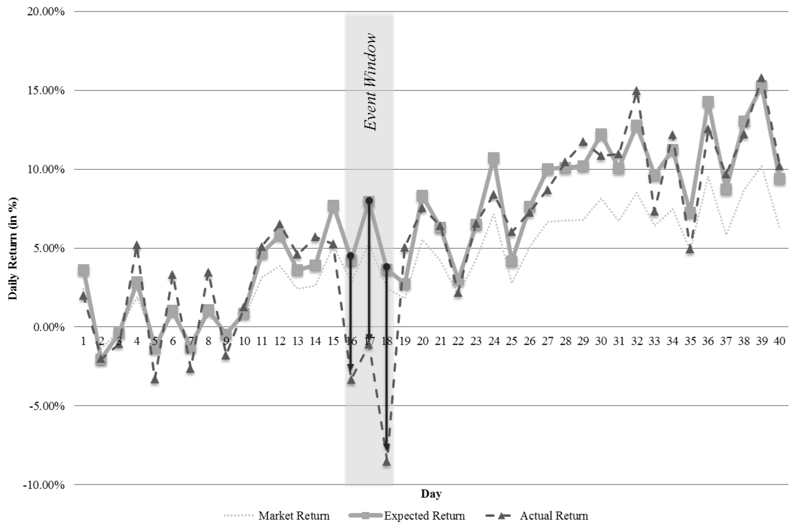

Figure 4: Example Abnormal Return (Event Window = Days 16-18)

Negative abnormal returns are a common scenario in securities market litigation (where the disclosure at issue typically reveals some type of alleged fraud), but depending on the information at issue, abnormal returns could just as easily be positive. (The two sides of the debate over contractibility of the duty of loyalty, in fact, tend to assert that abnormal announcement returns should move in opposite directions.) For each relevant date in the event window, the magnitude of a stock's abnormal return on that date (the black downward pointing arrows) can be represented mathematically as follows:

$$AR_{i,t} = R_{i,t} - \hat{R}_{i,t} \tag{1}$$

where $AR_{i,t}$ denotes the abnormal return of stock i on date t, $R_{i,t}$ denotes the observed return of the stock on that date, and $\hat{R}_{i,t}$ denotes the stock's expected return on that date. The length of the "event window" (the width of the shaded band in Figure 4) is an important defining feature for considering a market reaction to corporate disclosures. In some situations, such as the news of a disastrous event, it is reasonable to expect stock prices to adjust almost immediately. Other disclosures are subtler or involve less actively followed issues, and thus require some time to "sink in" before they are absorbed and reflected by the market price. It seems likely that COW adoptions fit into this latter category – subtle changes in governance whose disclosure may be buried somewhere in an SEC filing. When a disclosure leaks out and/or is learned over the course of many days, it makes sense to allow for a multi-day period during which market reaction to the COW disclosure becomes incorporated into market returns. As this period unfolds, the effect of the disclosure accumulates from each day's abnormal return. Consequently, event studies with multi-period windows focus on the *cumulative* abnormal returns (or $CAR_{i,t}$) associated with the stock over a specified window of days. In Figure 4, the cumulative run would simply be the sum of the negative returns illustrated by the black, downward facing arrows.

Another important feature of a securities market event study is a designated methodology for predicting the "expected return" of the stock ($\hat{R}_{i,t}$). This step is conventionally accomplished by adverting to an asset-pricing model in finance – which predicts a stock's return as a function of overall market conditions. Many alternative asset-pricing model variations exist within the literature, but the most prominent of them is the "Capital Asset Pricing Model" (CAPM), which posits that a stock's return on a given date ($\hat{R}_{i,t}$) using the following relationship:

$$\hat{R}_{i,t} = r_f + \alpha_i + \beta_i \cdot (R_{m,t} - r_f), \tag{2}$$

where $R_{m,t}$ denotes the return of the market on the date in question, r_f denotes the return on a risk free asset (such as treasury bills), α_i denotes a persistent over/under performance of the stock at issue, and β_i represents a statistical measure of that stock's riskiness relative to the market.[113] (In what follows, we use the CAPM as a baseline, but we check the robustness of our results against a variety of other pricing models.)

In order to implement an event study analysis with the hand-coded data on COWs, we matched the first available disclosure date for each unique COW with securities marked pricing data for each disclosing issuer. (This matching process led to the loss of approximately 100 observations from the 381 Compustat matched firms). To estimate reliably the parameters (α_i and β_i) for each of the remaining stocks using the underlying asset-pricing model, we additionally required each matched issuer to have at least 35 days of trading at least one month before to the disclosed COW. This criterion—while consistent with standard practices—imposed a significant data limitation: Because many COWs are disclosed as part of either new or newly spun-off companies, many of our COW-disclosing issuers had insufficient trading days preceding the disclosure. In the end, we were able to identify 83 COW distinct disclosing firms that had sufficient pre-disclosure pricing information to perform an event study.

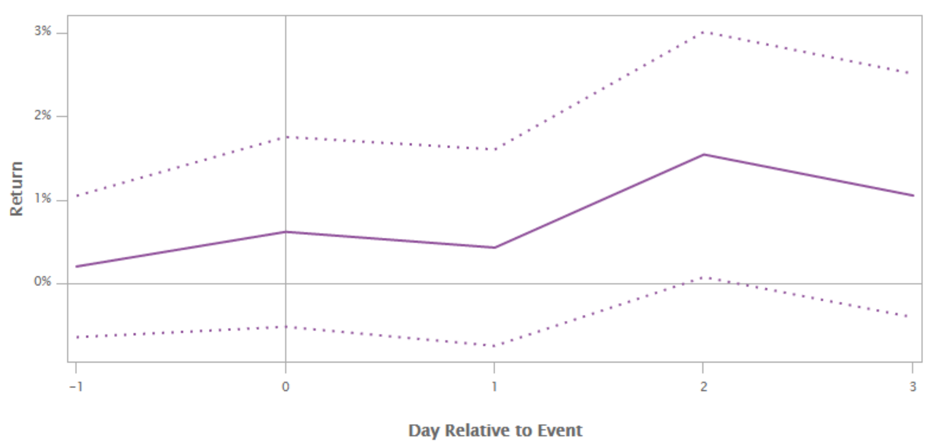

Figure 5: Mean Cumulative Abnormal Return of COW Disclosers (solid line) and 95% Confidence Interval (dashed line)

[113] The CAPM predicts α_i =0 for all securities (which is effectively a no-arbitrage condition), but we allow it to be non-zero to maximize prediction accuracy. Forcing α_i =0 has trivial effects on our results. The β_i term is the ratio of (i) the covariance between the stock's return and the market, and (ii) the variance of market returns. See generally Ivo Welch, Corporate Finance (3rd Ed.), Chapter 9.

We considered three different event windows, each beginning one-day prior to the recorded date of the COW disclosure (to allow for some pre-disclosure leaks), and ending either 1, 2 or 3 days post-disclosure. Figure 5 graphs the mean cumulative abnormal returns of the disclosing issuers (pictured with the solid line), and the 95-percent confidence interval around that mean (pictured with the two dotted lines above and below). Depending on the event window chosen, COW disclosures predict a positive market reaction, with cumulative abnormal returns hovering between 0.5% and 1.3%. The noise associated with these estimates is nontrivial, but for the 4- and 5-day event windows, the effect is either statistically significant, or borderline significant at the standard 95 percent confidence level (two-tailed test).

On first glance, Figure 5 suggests that the market responded reasonably positively to the announcement of the corporate opportunity waiver. We interrogated the robustness of this result in two ways. First, we varied the nature of the underlying asset-pricing model, introducing (1) a simpler market-adjusted abnormal return measure (the equivalent of setting b=1 for all firms); (2) a three-factor model, combining the equity risk premium from CAPM with premia on a large versus small portfolio and high book to market versus low book to market portfolio; and (3) a four-factor model that additionally introduces a momentum factor. Table 7 reproduces the results. Note from the table none of the estimation approaches yield negative average CARs for the announcement of a waiver. Not only are all positive, but in many cases they are near or exceed a *one percent daily return*, which is an economically significant movement. Note further that the 4-day event window spanning days (-1,+2) persistently yields the CAR estimates with the largest magnitudes, and it is either statistically significant or somewhat close to significant in all cases. This is consistent with the news of a COW disclosure taking some time to penetrate the market. However, the weakening of this effect in the (-1,+3) window – a weakening that largely flattens out for longer event windows – suggests that some of the initial average response dampens.

Asset Pricing Model (n=83)	Event Window (Cow Disclosure = 0)		
	(-1,+1)	(-1,+2)	(-1,+3)
Market-Adjusted Returns	0.47%	1.57%	1.03%
	0.974	*2.118***	*1.205*
CAPM (Value Weighted Index)	0.24%	1.26%	0.72%
	0.913	*1.972***	*1.145*
Fama French 3-Factor Model	0.30%	1.21%	0.69%
	0.378	*1.318*	*0.677*
Fama-French-Carhart 4-Factor Model	0.31%	1.34%	0.84%
	0.396	*1.462*	*0.817*

Table 7: Cumulative Abnormal Returns on first COW disclosure (n=83)[114]

[114] Italicized figures are t-statistics. ** dentotes statistical significance at the $p=0.05$ level; * denotes statistical significance at the $p=0.10$ level.

Even if a COW disclosure results in an overall positive market response, however, it does not follow that this response is visited evenly on all types of firms. As noted in the previous subsections, issuers within our sample differ along a variety of dimensions, including incorporation jurisdiction, size, and the type and nature of the waiver at issue. For some types of firms, or some types of waivers, the market response could well be negative. Although our event study sample is somewhat limited in size, it allows us to push on some of these issues further.

Category	In-Group CAR (-1,+2)	In-Group CAR (-1,+2)
DE Incorporation	***DE Firms***	***Non-DE Firms***
Mean CAR	1.45%	0.30%
t-Stat	*2.326****	*0.445*
Subsample	n=69	n=14
Location	***COW in Charter***	***Not In Charter***
Mean CAR	*1.02%*	*2.84%*
t-Stat	*1.707**	*1.784**
Subsample	n=53	n=24
Coverage	***Officers Covered***	***Officers Not Covered***
Mean CAR	1.66%	1.13%
t-Stat	*2.190***	*0.818*
Subsample	n=36	n=45
	SHs Covered	***SHs Not Covered***
Mean CAR	1.69%	1.15%
t-Stat	*0.913*	*1.71**
Subsample	n=17	n=66
Breadth	***Broad Provision***	***Narrow Provision***
Mean CAR	1.23%	1.32%
t-Stat	*1.193*	*1.695**
Subsample	n=57	n=26
Size	***Large Issuers***	***Small Issuers***
Mean CAR	0.01%	2.36%
t-Stat	*0.093*	*2.573****
Subsample	n=39	n=44

Table 8: Cumulative Abnormal Returns, by Group[115]

Table 8 reports on the CARs associated with a CAPM model and an event window of (-1,+2) for a variety of groupings of the data: Delaware versus non-Delaware incorporation, location of the waiver, who is covered by the waiver, breadth of the waiver, and the size of the issuer (as measured by assets). Note that the Delaware incorporated firms appear to enjoy uniquely positive market reception of their COWs, with a CAR of 1.45% that is strongly significant. Non-Delaware issuers, in contrast, experience a very mild (and statistically insignificant) upward abnormal return of approximately 30 basis points. Somewhat surprisingly, locating a waiver in a charter

[115] Italicized figures are t-statistics. *** dentotes statistical significance at the *p=0.01* level; ** dentotes statistical significance at the *p=0.05* level; * denotes statistical significance at the *p=0.10* level For the table, CAPM is used as the baseline asset-pricing model with event window of (-1,+2) around first COW disclosure. A "Broad" provision specifies either "All" COs are waived, or COs are waived "To the Fullest Extent Allowed" by law. Issuers are considered "large" if they have total assets in excess of $1 billion, and are "small" otherwise.

amendment provision (where it is voted on and/or potentially priced by shareholders) does not seem to improve market reception. To the contrary, COWs executed outside of the charter seem to be met with an especially positive mean abnormal return. A particularly interesting aspect of Table 8 concerns how and whether coverage of a corporate officer or dominant shareholder interacts with market reception. One might – on first principles – be especially skeptical about waivers that protect officers and corporate shareholders, since those are the constituencies who are most susceptible to problematic conflicts of interest. Table 8, however, suggests that if anything, market reception to such provisions cuts in the other direction, and COWs that cover officers and / or shareholders meet with appreciable approbation in capital markets.

Note as well from Table 8 that the breadth of the provision does not appear to bear much in predicting market response. However, firm size does: Smaller firms (those with under $1 billion in assets) tend to benefit the most from corporate opportunity waivers. Indeed, they benefit to a significant degree – with a 4-day CAR of nearly 2.4 percent. Such firms are more likely to be in more streamlined entrepreneurial environments, drawing on the expertise of many corporate fiduciaries who have many prospective conflicts as the firm grows. Large established firms, in contrast, are more likely to have significant scope of operations, and they need not work as hard to attract managerial talent.

IV. IMPLICATIONS

The foregoing analysis is no doubt just the tip of the iceberg when it comes to understanding the incidence, drivers, and effects of corporate opportunity waivers. Indeed, a key impetus behind this project was our (and others') desire to understand more about the results of the statutory experiment started over a decade and a half ago in the Delaware State Legislature. The data set we have developed here will not only inform future academics and researchers, but it may provide helpful feedback to those interested in shaping and fine-tuning the substance of fiduciary law in the future.

That said, our analysis of COWs within public companies affords us a few important policy insights about the current state of play. We consider two of them below.

A. Evaluating COWs

Many outside observers and investors would plausibly react with alarm when reading a broadly worded corporate opportunity waiver such as the following: "BE IT RESOLVED: That the Company waives Mr. Ellison's obligation to present Corporate Opportunities to the Company."[116] The breadth of such a provision immediately conjures up images of a thicket of dysfunctional agency costs traditionally believed to plague the diffuse ownership structures of public corporations. Indeed, we initially shared this same instinct. However, our empirical and conceptual analysis suggests that such fears are quite plausibly mistaken—or at least overblown.

From a purely descriptive perspective, based on the evidence analyzed above, it appears that COW adoptions tend *not* to reflect an opportunistic free-for-all among

[116] NetSuite Inc., Board Resolutions Approving Corporate Opportunity Waiver, Oct. 17, 2007, https://www.sec.gov/Archives/edgar/data/1117106/000119312507266011/dex45.htm.

corporate fiduciaries. Rather, they seem to channel corporate and fiduciary expectations in constructive and clarifying directions. We find little evidence, for example, that COWs are typically embraced by underperforming firms, where opportunism and agency costs are rife. Adopting firms appear instead to be moderate in size, with appreciable growth potential, robust revenue patterns, and relatively strong market returns.

An event study analysis, which is better situated for causal inference, suggested a conclusion that is potentially even stronger: securities markets generally appear to welcome the disclosure of COWs, generating positive abnormal returns on announcement. This positive response appears concentrated in moderately sized firms and in Delaware corporations. The underlying scope, breadth, and location of a COW may well matter, but it does not appear to be as critical a statistical factor as some might have thought. Indeed, if anything, the results tend to cut against plausible concerns about specific types of waivers. For instance, waivers covering officers and/or dominant shareholders, or those which are conspicuously broad (such as Mr. Ellison's), could reasonably have been expected to be the most value destroying. The market reaction though suggests that investors expect exactly the opposite of such disclosures.

B. Who Should Design Corporate Governance?

If the master problem of corporate law is designing optimal governance arrangements to resolve the principal-agent problem, then one of the great "meta" questions in the background is precisely *who* should determine those arrangements and *when*. A thicket of descriptive and normative issues are implicated, including the quality of the governance structures offered by law and regulation; whether, when those structures are defaults, corporations tailor their governance around them and whether that governance is superior; and as a result, who should be empowered by law to have the last word on crucial governance issues, like the very loyalty of senior management.

These questions are too fundamental to be answered by any single study or legal issue. Nonetheless, the corporate response to statutory enactments liberalizing COWs – and the market response to that corporate response – have fascinating implications for these debates. At least as regards the duty of loyalty, one descriptive fact seems unassailable – that when freed to do so, a wide range of corporations eagerly embrace the power to contract out of aspects of the duty of loyalty. Further, market participants appear to have approved (or at least have not to have penalized) such actions. In this sense, private actors have been able to engage in a form of value-enhancing tailoring that was not possible prior to the 2000 reforms.

This observation does not imply, however, that it is socially optimal to give corporate fiduciaries the *unmitigated* power to conjure up and adopt fiduciary waivers in any circumstance. Indeed, as noted above, the statutory reforms enabling COWs made no such sweeping pronouncements. Rather, they have allowed expanded contractual freedom while subjecting it to an important caveat: that the process by which waivers are approved must themselves be free from the taint of financial conflicts of interest. This caveat suggests that even the COW reforms did not complete dispatch loyalty's mandatory character from the corporate opportunities doctrine. A vaguer background notion of the duty of loyalty may still have played a considerable role.

CONCLUSION

At the turn of this century, Delaware ignited an unprecedented, multi-state experiment in empowering corporations to waive the corporate opportunities doctrine—an integral part of the fiduciary duty of loyalty. Some sixteen years later, this study has presented what we believe is the first systematic analysis of how corporations responded to this wave of statutory reforms, and the welfare effects of their collective responses. This inquiry is interesting in its own right, but it also shares a nexus with some of corporate law's most important and vexing questions. Descriptively, do corporations actively opt out of corporate law's default rules when freed to do so? And when they do displace default rules, do such efforts add value or act as a new conduit for managerial opportunism and agency costs? Only when we have a good sense of the answers to both of these questions can we make progress on a third, which is among corporate law's most indispensable: Are market forces sufficient to ensure optimal corporate governance for corporations? Our analysis provides evidence that there may be substantial scope for loosening at least some of the ossified strictures of the duty of loyalty, permitting corporations greater freedom to tailor their governance arrangements so as to best suit their needs and capabilities.

More generally, our analysis also reveals an important lesson for the complementary roles that theory, practice, and empiricism can play in legal scholarship. Agency cost theories can provide helpful frames for thinking about the normative stakes involved in analyzing fiduciary waivers, but theory alone is often indeterminate. Practical experiences can help generate insightful anecdotes and stories about purported "best practices," but they too can easily lead to errant conclusions. Lastly, empirical investigation can provide precise evidence about observable phenomena, but if such evidence is left untethered to underlying theory and intuition, it remains unclear why such evidence is either relevant or interesting. This study has attempted to make contributions along all three dimensions, gleaning in the process a rich collection of insights that can usefully inform policy debates. Our analysis lends support to the course that Delaware fiduciary law has begun to chart into the 21st Century. It is a course where stakes remain endemically high, and where foundational debates constantly recur. And perhaps consequently, it is an enterprise whose empirical inquiry seems long overdue.