If It Is Discoverable, It May Count: From Shareholder Rights to Inspect Books and Records to Implementing *Caremark* Duties

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Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 **Wash. U. L. Rev.** __ (forthcoming, 2021), available at SSRN.

It is well known that corporate compliance departments' effectiveness depends on the quality of information they receive.[1] In *A New Caremark Era: Causes and Consequences*, Professor Roy Shapira argues that providing information to attorneys for plaintiffs also can enhance compliance. Delaware courts have broadened and are broadening shareholder inspection rights, interpreting DGCL §220. When plaintiff attorneys take advantage of this procedural change, their cases can survive motions to dismiss. Shapira traces out the substantive consequences of this expansion of access: It puts teeth into their *Caremark* arguments.

Demonstrating a confidence in their abilities to prevent fishing expeditions and quickly dismiss strike suits, and generally to engage in what Shapira calls "micro-management," Delaware courts minimize the costs to corporations of expanding discovery. Also demonstrating a confidence in corporations' abilities to properly respond to discovery requests, Delaware courts also have found that the absence of records can demonstrate a violation of *Caremark* duties. As a result, corporations increasingly will paper their decision-making. Even if this is only window-dressing, Shapira insightfully explains that when it is known that these papers are discoverable, internal compliance will be enhanced.

This Article reviews a chain of cases in which the Delaware Supreme Court reversed Chancery dismissals of *Caremark* claims. Substantively, their important contribution is that board failure to monitor "mission critical risks" violates the duty of loyalty. Procedurally, their important contribution is an expansion of pre-filing inspections under section 220.

The Article then reviews developments in Delaware regarding shareholder rights to inspect a corporation's "books and records." Shapira calls it "The Liberation of Section 220." The limitations that inspection requests must show both proper purpose and scope have been eased. Hearsay, especially news reports, has been held to show a credible basis for a proper purpose. Informal communications such as emails and social media postings are now within the proper scope. Section 220 inspections are no longer limited to meeting minutes and similar corporate records.

Courts regularly have dismissed derivative actions because the complaints merely restate public information. Expanding pre-filing discovery enables attorneys who take advantage of section 220 to get their complaints past motion to dismiss. When courts then ensure that cases proceed in the best interests of the corporation, their results both formally and informally, especially in the presence of reputational sanctions, enhance corporate compliance.

One of the most interesting aspects of Shapira's argument is that he traces how these Delaware Supreme Court reversals are played out in law firm news releases. Shapira sees these as "advisory memos." He finds that they "implore" directors to "start working harder" on compliance and "make sure that proper documentation exists." They "admonish their clients to create better reporting and information system and documentation." As a result, Shapira concludes, better *Caremark* compliance will result.

Lauren Edelman has studied similar self-advertisements by HR consultants and she found that they led to greater power and security for HR actors, in part by overstating the results of judicial decisions. It is clear that the news releases that Shapira analyzes sell reasons to employ lawyers. They are advertisements for how the firm can be hired to help corporations. It is less clear if they go beyond the holdings of the judicial decisions to which they respond. If Shapira is right that these memos change corporate behaviors in the directions suggested by the *Caremark* line of cases, then perhaps we should praise the increasingly competitive corporate law environment that generates these "want ads," and not be overly concerned about their accuracy. Even if I am less sanguine than Shapira about what lawyers will supply once hired, Shapira deserves credit for bringing into legal literature the analysis of these self-advertisements. They exist in many areas of the law and have consequences that deserve analysis, as Shapira has demonstrated.

1. Shapira at note 103, citing Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 **N.Y.U. J. L. & Bus**. 965, 976 (2018). *See also*, Robert Rosen, *"*If you count it, it will count:" From Directives to Reports Refined, JOTWELL (April 20, 2017) (reviewing Oren Perez, *The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes*, 17 **Minn. J. L. Sci. & Tech** 153 (2016)).

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