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Legal periodicals: a selection

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M.A. Eisenberg, *The Duty of Good Faith in American Corporate Law*, *European Company and Financial Law Review* 2006/1, pp. 1-44.

An important development in American corporate law is the recent explicit recognition in a series of Delaware cases, that corporate managers owe a fiduciary duty of good faith in addition to their traditional duties of care and loyalty. The duty of good faith was not created by those cases. On the contrary, it has long been explicit under the statutes and has also existed implicitly in case law for a long time. Nevertheless, the explicit recognition of the duty of good faith in recent Delaware cases shines a spotlight on that duty.

Briefly, the duty of good faith in American corporate law is comprised of a general baseline conception and specific obligations that instantiate that conception. The baseline conception

consists of four elements: subjective honesty or sincerity; non-violation of generally accepted standards of decency applicable to the conduct of business; non-violation of generally accepted basic corporate norms; and fidelity to office. Among the specific obligations that instantiate the baseline conception are the obligation not to knowingly cause the corporation to disobey the law and the obligation of candour even in non-self-interested contexts.

Turning to the normative issue, there are several basic reasons why the duty of good faith is desirable. To begin with, the duties of care and loyalty do not cover all types of improper conduct by managers, because certain kinds of improper managerial conduct fall outside the spheres of those duties. Most of these types of conduct fall within the duty of good faith. Furthermore, various rules limit a manager's accountability under the duties of

care and loyalty, and these limiting rules should be and are inapplicable to the conduct that violates the duty of good faith.

Moreover, the duties of care and loyalty characteristically function as platforms for liability rules, while the duty of good faith characteristically functions as a condition to the application of rules that do not in themselves impose liability. This difference in characteristic function makes it desirable to treat good faith separately from care and loyalty. Finally, the duty of good faith provides a principled basis for the courts to develop new specific fiduciary obligations that come to be seen as appropriate in response to changes in social and business norms, and in the general understanding of efficiency and other policy considerations that are applicable to corporate law, but cannot easily be accommodated within the duties of care or loyalty.

B. Havel, An outline of Czech Company Law, European Business Organization Review 2005/6, pp. 581-623.

Although this paper focuses primarily on Czech company law, it begins with a description of the general legal development of Czech commercial law, including company law. The first part describes the social and historical background of Czech law after the period of communism as well as some defects ensuing from a paradigmatic understanding of law and problems with Czech case law. The paper tries to manifest that it is impossible to understand the Czech concept of (private) company law without a thorough knowledge of the legal thinking of current Czech judges and the relevant authorities. After this broad introduction, a selection of legal literature dealing with commercial and company law is provided.

The second part of the paper provides some general information on Czech company law, mainly its systematic incorporation into Czech private law and the structure of the Czech Commercial Code. All types of companies (partnership, limited partnership, limited liability company and joint-stock company) and co-operatives are separately dealt with, including the European law connotation, supranational entities and their incorporation into Czech law (*Societas Europea*, European Interest Groupings and the European Co-operative Society). The anticipated future development of Czech private law (civil and commercial law) is sketched, taking into account the drafts of the new Civil Code and Commercial Act as well as other new proposals related to private law.

H-J de Kluiver, Towards a Simpler and More Flexible Law of Private Companies – A New Approach and the Dutch Experience – European Company and Financial Law Review 2006/1, pp. 45-68.

Regulatory competition between European systems of company law has become reality since the ECJ has opened the doors for free movement of compa-

nies under Articles 43 and 48 of the Treaty on the European Communities. Several Member States have enacted reforms of their company laws since. The article introduces the very advanced efforts of the Dutch legislator to modernise and simplify the law of private companies following the proposals of an Expert Group chaired by the author.

F. Woolridge, Duty of Care and Liabilities of Members of the Two Boards of German Public Companies, European Business Law Review 2006/1, pp. 109-120.

The article considers in detail paragraphs 93 and 116 of the German *Aktiengesetz* (*AktG*) dealing with the duties imposed on members of the management board and the supervisory board.