

21 Health Matrix 189, *

What should be understood, but may not widely be understood by courts or commentators who are not often required to face such questions, is that compliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests. To employ a different rule—one that permitted an "objective" evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests. Thus, the business judgment rule is process oriented and informed by a deep respect for all good faith board decisions.

Id.; see also *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334 (Del. 1987) ("The duty of care requires a director, when making a business decision, to proceed with a 'critical eye' by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board." (citing *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Fiduciary standards also govern corporate speech to their shareholders, whether such speech is voluntary or required under the federal securities laws. See Faith Stelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 524 (2000) ("Because shareholders' best interests include being accurately informed about corporate affairs so that they are afforded a basis for their rational decisionmaking, managers' fiduciary duties must be understood to apply to the full panoply of official corporate disclosures routinely made by public corporations.").

n22 In the 1970s, the Court extended First Amendment protection to commercial speech because it was convinced that commercial speech served the same or similar functions in a free society as does political speech—it helps to inform people about the existence, availability, and price of goods and services that might be useful to the well ordering of their lives. Nevertheless there are a few important distinctions in the First Amendment's application to commercial speech. The Court has said that the First Amendment provides no protection to commercial speech that is false or misleading. This is distinct from the political speech context, wherein the Court has made clear that government cannot restrict or punish negligently false (or misleading) speech. The Court gives two justifications for these differences. First, the Court believes that commercial speakers have greater access to the truth or falsity of claims they may make about their goods or services than non-commercial speakers have about the truth or falsity of the political, social, theocratic, metaphysical, or moral claims they make. Second, the Court has stated that the profit motive behind corporate speech assuages the Court's traditional concern that liability for false speech will over-deter the production and proliferation of socially useful speech. Thus, the government may forbid false or misleading commercial speech altogether. Where commercial speech is not false or misleading, government may still regulate it provided the government is doing so to advance a substantial government interest and the speech regulation is no broader than necessary to vindicate the interest. However, the Court has definitively held that the government has no legitimate interest in keeping people from receiving truthful, non-misleading information about goods and services that are legal. For example, government has no substantial interest, the Court has held, in limiting advertising for legal goods and services in order to reduce the consumption of such things. Therefore, the Court almost never upholds restrictions on truthful, non-misleading speech. See David Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 543-551 (2006) [hereinafter *Resisting Deep Capture*] (reviewing commercial speech doctrine).

n23 *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

n24 See *Resisting Deep Capture*, supra note 22.

n25 See id. at 520-25 (examining the power of junk food advertising to mislead consumers with respect to the adverse health consequences associated with habitual consumption of such products); see also Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. J. 1645, 1691-1711 (2004) [hereinafter *Broken Scales*] (reviewing junk food marketing).

n26 Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 775 (2007).

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