NOTE

EMERALD PARTNERS v. BERLIN: IS IT MISUNDERSTOOD?

ABSTRACT

Since Van Gorkom, *directors are afraid of personal liability due to the expanded reach of the duty of care. This fear was appeased by the enactment of § 102(b)(7) of the Delaware General Corporations Act, however,* Emerald Partners v. Berlin *seems to have brought back the fear of personal liability. It has been assumed that* Emerald Partners *affected the rights that the directors had gained under § 102(b)(7) to get a § 12(b)(6) dismissal for failure to state a claim and subjected them to an entire fairness analysis when they should be entitled to a § 12(b)(6) dismissal.*

This note discusses the actual effect of the decision in Emerald Partners *and how it has been misread to take away the rights provided by § 102(b)(7).* Emerald Partners *took away no right; it clarified that although the right given by § 102(b)(7) to exculpate the directors for breach of duty of care was still strong, it may not be a right that can be given effect by a § 12(b)(6) dismissal when breach of another fiduciary duty was also an issue. In effect,* Emerald Partners *does nothing more than provide when directors can get a § 12(b)(6) dismissal under the § 102(b)(7) provision in the corporation's charter.*

I. INTRODUCTION

The recent decision by the Supreme Court of Delaware in *Emerald Partners v. Berlin*[1] (*Emerald Partners III*) has caused a lot of anxiety for directors. Directors fear that *Emerald Partners III* has taken away the protection of § 102(b)(7).[2] But *Emerald Partners III* does not suggest that the directors will not be exculpated if there is a § 102(b)(7) provision in the charter. In fact, it has stressed that when there are claims,

---

[1]787 A.2d 85 (Del. 2001).

[2]DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

such as those in *Smith v. Van Gorkom*[3] with an exculpation clause in the corporation's charter, there will be a § 12(b)(6) dismissal.

Emerald Partners III clarifies that even though § 102(b)(7) protection exists, it is not the solution to all of a director's problems. Moreover, it is not an escape from an entire fairness analysis. This decision merely limits the use of § 102(b)(7) to its intended purpose. This note analyzes the effect of the *Emerald Partners III* decision. Part II sets out the facts of the case. Part III addresses the issues which led to *Emerald Partners III*. Those issues are broken down into the following subheadings: the business judgment rule, the *Van Gorkom* case, and the Delaware corporate law provision of § 102(b)(7). Part IV analyzes the effect of *Emerald Partners III* on § 102(b)(7) protection.

II. FACTS

May Petroleum, Inc. is a Delaware corporation based in Dallas, Texas.[4] "May was engaged in oil and gas exploration, and later was in the business of acquiring oil and gas properties, companies and other types of investments."[5] Craig Hall was the chairman and chief executive officer (CEO) of May.[6] He also owned 52.4% of the May common stock.[7] The Hall corporations consisted of thirteen corporations, which grew out of the real estate business founded by Hall in 1968. The general partner of those corporations was either Mr. Hall or an entity controlled by him.[8]

May merged with these thirteen corporations. At the time of the merger, there were five directors on the board: Messrs. Hall, Berlin, Florence, Sebastian, and Strauss.[9] The latter three were not affiliated with, nor financially dependent on Hall, but Hall corporations had employed Berlin for ten years.[10] It was Mr. Hall who proposed that the May board consider a merger of May and the Hall Corporations.[11] Hall's reasons for the merger were that it would unite the complementary strengths and satisfy the needs of the two organizations.[12] He mentioned that May had been

---

[3]488 A.2d 858 (Del. 1985).

[4]Emerald Partners v. Berlin, No. 9700, 2001 Del. Ch. LEXIS 20, at *5 (Del. Ch. Feb. 7, 2001).

[5]*Id.*

[6]*Id.* at *1.

[7]*Id.* at *2.

[8]*Emerald Partners*, 2001 Del. Ch. LEXIS 20, at *13.

[9]*Id.* at *5.

[10]*Id.*

[11]*Id.* at *15.

[12]*Emerald Partners*, 2001 Del. Ch. LEXIS 20, at *16.

trying to diversify its business, and the Hall corporations had the perfect opportunities for growth but lacked the capital for it.[13] He suggested that the merger would provide the May Corporation the opportunity to give Hall corporations the liquidity it needed, while satisfying its own needs.[14]

Emerald Partners, a New Jersey limited partnership and holder of 315,720 shares of May common stock,[15] objected to the merger. This posed a problem for Hall because May's corporate charter provided for a supermajority vote on any mergers between May and any entity holding more that 30% of its stock.[16] Since the merger was between May and Hall corporations, and Hall held 52% of May's common stock, the supermajority clause would require Emerald Partners' vote to carry out the merger.[17] To avoid the Emerald Partners' vote, Hall transferred 27% of his shares to an irrevocable trust, the beneficiaries of which were his children.[18]

Emerald Partners sued to enjoin the merger. In spite of the proceedings, the merger was consummated. The plaintiff's contention was that the defendant breached their duty of loyalty[19] and their duty of good faith.[20] The defendants, however, contend that at most they breached their duty of care.[21] Therefore, the suit should be dismissed under § 12(b)(6) because of the § 102(b)(7) exculpation clause in May's charter.[22] The Delaware Court of Chancery held that there was not a breach of good faith or a breach of loyalty, thus, the exculpatory clause in the charter applied and the case was dismissed.[23] The plaintiffs subsequently appealed.

In its holding, the Supreme Court of Delaware disagreed with the court of chancery. The supreme court held that although the directors are entitled to exculpation for breach of the duty of care, they will not always be entitled to a § 12(b)(6) dismissal. Where the complaint pleads facts, alleging breach of loyalty such as in *Emerald Partners III*, an exculpation provision will only be considered after the court decides whether the transaction is entirely fair.[24] If the court decides that the transaction was entirely fair, then the issue of exculpation will not need to be decided.

---

[13] *Id.*

[14] *Id.* at *17-*18.

[15] *Id.* at *4.

[16] *Emerald Partners*, 2001 Del. Ch. LEXIS 20, at *32.

[17] *Id.*

[18] *Id.* at *34-*35.

[19] *Id.* at *72.

[20] *Emerald Partners*, 2001 Del. Ch. LEXIS 20, at *86.

[21] *Id.* at *69.

[22] *Id.*

[23] *Id.* at *97-*99.

[24] *Emerald Partners*, 787 A.2d at 93.

Only if the court finds that the transaction was not entirely fair will the court look into the exculpation issue.[25] The supreme court reversed the dismissal and remanded it back to the court of chancery to decide the issue of entire fairness. To be able to understand the analysis in *Emerald Partners III*, it is essential to examine the history of how § 102(b)(7) of the Delaware General Corporation Law originated, and its purpose.

III. TRACKING THE PATH TO *EMERALD PARTNERS III*

A. *Business Judgment Rule: Directors Security*

"A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."[26] The directors control "vast aggregations of property that they do not own," for the shareholders.[27] Therefore, the discretion used in dealing with such a large amount of power over shareholder property requires a system of checks and balances. To enable the directors to make decisions without constant interference, the corporate law is structured to protect directors' decisions based on business judgment.

One protection is the business judgment rule. "Directors traditionally use the business judgment rule as a defense in a shareholder's suit for damages."[28] The rule also provides a shield if shareholders challenge the directors' defensive action in court.[29]

> It is 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. Absent an abuse of discretion, that judgment will be respected by the courts.[30]

Shareholder plaintiffs can rebut this presumption,[31] but they must show that the directors have breached the duty of care, good faith, or loyalty.[32]

---

[25] *Id.*

[26] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

[27] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

[28] Thomas C. Pelto, Sr., Note, *False Halo: The Business Judgment Rule in Corporate Control Contests*, 66 TEX. L. REV. 843, 845 (Mar. 1988).

[29] *Id.* at 844.

[30] *Aronson*, 473 A.2d at 812 (citations omitted).

[31] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

[32] *Emerald Partners*, 787 A.2d at 91.

The business judgment rule "generally insulates corporate boards from judicial second-guessing."[33] Under the rule, however, "there is no protection for directors who have made 'an unintelligent or unadvised judgment.'"[34] If the directors do not get the protection of the business judgment rule, they might be held personally liable.

B. Van Gorkom *Took the Air Out of the Business Judgment Rule Balloon*

On January 29, 1985, the Supreme Court of Delaware delivered an opinion in *Smith v. Van Gorkom*. Even "[a]fter fifteen years, *Smith v. Van Gorkom* remains intellectually frustrating."[35] "[T]he imposition of liability on the defendants in the case seems profoundly unjust."[36]

Van Gorkom brought the directors' fear of personal liability to a head. The decision has since been a heated topic of debate and discussion and will predominantly be remembered for its finding that directors of a Delaware corporation breached their fiduciary duty of care[37]and were held personally liable for resulting damage.[38] *Van Gorkom* announced limits on the protections directors sought under the business judgment rule. The court's deference to the directors' judgment in breach of the duty of care matters was curtailed to a large extent, and in turn, subjected the directors to an unexpected and unimagined volume of liability. *Van Gorkom* displaced the security blanket that the business judgment rule had previously provided.

In *Van Gorkom*, the Supreme Court of Delaware "subjected directors to personal liability even though there were no 'allegations of fraud, bad-faith or self-dealing or proof thereof.'"[39] Prior to the decision, it was simply

---

[33]Theodore D. Moskowitz & Walter A. Effross, *Turning Back the Tide of Director and Officer Liability*, 23 SETON HALL L. REV. 897, 898 (1993).

[34]*Van Gorkom*, 488 A.2d at 872 (quoting Mitchell v. Highland-Western Glass, 167 A. 831, 833 (Del. Ch. 1933)).

[35]Jonathan R. Macey, Symposium, *Smith v. Van Gorkom: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U.L. REV. 607 (2002). Though Mr. Macey wrote the article when the decision in *Van Gorkom* was 15 years old, even after 17 years it is still intellectually frustrating.

[36]*Id.*

[37]Lawrence A. Hamermesh, Symposium, *A Kinder, Gentler Critique of* Van Gorkom *and Its Less Celebrated Legacies*, 96 NW. U.L. REV. 595, 605 (2002).

[38]R. Franklin Balotti & Mark J. Gentile, *Commentary from the Bar: Elimination or Limitation of Director Liability for Delaware Corporations*, 12 DEL. J. CORP. L. 5, 7 (1987).

[39]Charles M. Elson & Robert B. Thompson, *Symposium: Van Gorkom's Legacy: The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NW. U.L. REV. 579, 580 (2002).

inconceivable that directors acting in good faith and in the best interests of the corporation and its shareholders could be found grossly negligent and exposed to personal liability for an every day business decision on a merger that greatly enhanced shareholder wealth.[40]

Directors are not willing to face personal liability when their decisions were made in good faith and when they believed they were acting in the interest of the corporation. *Van Gorkom*'s holding created a stir in the job market for corporate directors and a crisis in the directors and officers (D&O) insurance business. D&O insurance became extremely expensive because the insurance companies had to insure areas that they had not previously believed were subject to exposure. Corporations faced the problem of finding good directors. Against that backdrop, the Delaware General Assembly acted.

C. *Section 102(b)(7) Serves a Limited Purpose*

In 1986, the Delaware General Assembly enacted § 102(b)(7).[41] Its purpose was to allow the shareholders to choose whether or not "to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care."[42] Since it was the shareholders who finally relied on the directors to discharge their fiduciary duties, it was the shareholders who had the power to adopt this clause in the charter.[43]

Section 102(b)(7) allows the shareholders to incorporate a clause into the corporation's charter exculpating directors from any monetary liability stemming from a breach of the duty of care.[44] It makes it clear, however, that shareholders cannot exculpate directors from a breach of their duty of loyalty to the corporation or its stockholders.[45] The exculpation provision also does not apply to any breaches of the duty of good faith, "which involve intentional misconduct or a knowing violation of law," or "any transaction from which the director derived an improper personal benefit."[46] Additionally, the director's liability under § 174 of title

---

[40]DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

[41]*Id.*

[42]*Emerald Partners*, 787 A.2d at 90.

[43]*Id.*

[44]DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

[45]*Id.* § 102(b)(7)(i).

[46]*Id.* § 102(b)(7)(ii), (iv).

8 cannot be limited or eliminated[47] nor can directors be protected against remedies of injunction and rescission.

"[T]he ultimate determination as to the propriety of limiting the ability of a corporation or its stockholders to seek monetary damages from directors for breach of fiduciary duty rests with stockholders of the corporation."[48] Section 102(b)(7), in essence, protects directors from liability in the form of liquidated damages when there is a breach of the duty of care, but not when there is a breach of the duty of loyalty or good faith. This section was created to give back to the directors some of the protection removed by the supreme court in *Van Gorkom*; however, not to be a magic potion that cures all of the problems that a director may face. While § 102(b)(7) may not cure of the director's problems, it provides them a layer of protection by allowing stockholders to dramatically reduce the types of situations where a director's personal wealth is put at risk.[49]

This section has two distinct aspects to it. First, it only allows exculpation of claims arising out of a breach of the duty of care. Second, it only allows exculpation of claimed monetary remedies. It does not exculpate other remedies such as injunction and rescission. Section 102(b)(7) does not deal with any other permutation or combination.

The legislature hoped that § 102(b)(7) would preclude plaintiffs from pressing claims of breach of the fiduciary duty of care, unless there was the most basic factual showing or a reasonable basis to infer that the directors acted in bad faith or that they breached the duty of loyalty.[50] The function of § 102(b)(7) was to render the claims based solely on a breach of the duty of care not cognizable.[51] While preclusion of complaints was the aim, shareholders continued to sue for breach of the duty of care. The courts reacted to this by granting § 12(b)(6) motions to dismiss if the charter had an exculpation clause.[52]

Usually the Delaware courts held that the directors, by way of an affirmative defense, should raise a § 102(b)(7) exculpation clause defense.[53] Some courts took judicial notice of the clause in the charter,

---

[47] *Id.* § 102(b)(7)(iii).

[48] Balotti & Gentile, *supra* note 38, at 12.

[49] *Id.* at 23.

[50] *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 734 (Del. Ch. 1999).

[51] *Id.*

[52] *Id.*

[53] *See* Emerald Partners v. Berlin, 726 A.2d 1215 (Del. 1999). *See also* Rothenberg v. Santa Fe Pac. Corp., No. 11,749, 1995 Del. Ch. LEXIS 117 (Del. Ch. May 18, 1992), *reprinted in* 18 DEL. J. CORP. L. 743 (1993) (holding that a defense based on an exculpatory certificate provision is by its nature an affirmative defense); Boeing Co. v. Shrontz, 11,273, 1994 Del. Ch. LEXIS 14 (Del. Ch. Apr. 20, 1992), *reprinted in* 18 DEL. J. CORP. L. 225, 234 (1993) (holding

even though it was not raised as an affirmative defense, based on the fact that the charter is a public document.[54] In view of this approach taken by the Delaware courts, the defendant directors who worked for corporations with charters that had the exculpation provision, moved for a § 12(b)(6) dismissal when they were faced with a monetary claim for breach of the duty of care.

The courts struggled with granting the dismissal when the complaint pleaded both a breach of the duty of care and a breach of another fiduciary duty. The general reaction of courts faced with a motion to dismiss in such circumstances was to grant the motion to the extent it dealt with a breach of the duty of care and to deny the rest. For example, in *Chaffin v. GNI Group, Inc.*, the plaintiffs claimed that the defendant directors had breached their fiduciary duties of care and loyalty to the shareholders by approving the merger.[55] The court in *Chaffin* granted the motion to dismiss with regard to the money damages for breach of the duty of care and denied the motion with regard to issues of the duty of loyalty.[56]

IV. THE LAW AS SET OUT IN *EMERALD PARTNERS III*

The courts had been granting such dismissals since § 102(b)(7) was enacted into the Delaware General Corporations Law. In spite of that fact, *Emerald Partners III* reversed the § 12(b)(6) dismissal granted by the Delaware Court of Chancery.[57] As a result, *Emerald Partners III* reduced the protection § 102(b)(7) provided. It now subjected directors to lengthy and expensive trials where a dismissal of the duty of care claim was warranted. The change was necessary because a dismissal avoided the need

---

that even though provisions in the Articles of Incorporation limiting liability constitutes an affirmative defense and therefore not properly before the court on a motion to dismiss, should the court consider matters outside the complaint, then the motion may be converted into a motion for summary judgment under Chancery Court Rule 12(b)).

[54]*See In re* Wheelabrator Techs., Inc. S'holders Litig., No. 11,495, 1992 Del. Ch. LEXIS 196, at *38 (Del. Ch. Sept. 1, 1992), *reprinted in* 18 DEL. J. CORP. L. 778, 801 (1993). *See also* Diceon Elecs., Inc. v. Calvary Partners, L.P., 772 F. Supp. 859, 861 (D. Del. 1991) (holding that "[o]n a motion to dismiss the Court is free to take judicial notice of certain facts that are of public record if they are provided to the Court by the party seeking to have them considered").

[55]No. 16,211-NC, 1999 Del. Ch. LEXIS 182 (Del. Ch. Sept. 3, 1999).

[56]*Id. See also* O'Reilly v. Transworld Healthcare, Inc., 745 A.2d 902 , 914 (Del. Ch. 1997) (holding that claims against directors can be dismissed under certificate of incorporation provisions tracking § 102(b)(7) only where the complaint fails to plead sufficiently that the directors' conduct falls into at least one of the exceptions under which the directors are not afforded the provisions' protection).

[57]*Emerald Partners*, 787 A.2d at 87.

for an entire fairness analysis. According to the supreme court, § 102(b)(7) was not intended to do that.[58]

Emerald Partners III did not take away any protections given by § 102(b)(7). The directors were only guaranteed one thing under the section's exculpation provision—exculpation from personal liability if the provision was in the corporation's charter. A § 12(b)(6) dismissal is not part and parcel of the protection provided by § 102(b)(7). It is only available when the plaintiff's claim is based solely on breach of the duty of care.

The focus of *Emerald Partners III* was the entire fairness analysis.[59] The court held that the entire fairness analysis could not be avoided, in spite of a § 102(b)(7) provision in the charter, when there is a squeeze out merger or the controlling shareholder is on both sides of the transaction.[60] When there are issues of loyalty alleged in a complaint, the entire fairness analysis is required. A squeeze out merger or a controlling shareholder on both sides of the transaction, are instances inextricably intertwined with issues of loyalty due to their inherently interested nature.[61] The court did not hold that the directors would not get exculpation due to a § 102(b)(7) provision. It found that, in such cases, the exculpation issue can be decided only after the entire fairness analysis is applied.[62]

Section 102(b)(7) guaranteed exculpation from monetary liability when there is a breach of the duty of care. It did not guarantee that it would

---

[58] *Id.* at 92-94.

[59] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). Entire fairness was analyzed in great detail in *Weinberger*. The court held:

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

Id. (citations omitted).

[60] Emerald Partners v. Berlin, 787 A.2d 85 (Del. 2001).

[61] *Id.* at 93.

[62] *Id.* at 94. The court observed:

> Only if the board's actions do not withstand the judicial scrutiny of the entire fairness analysis, then "[t]he Court of Chancery must identify the breach or breaches of fiduciary duty upon which liability [for damages] will be predicated in the *ratio decidendi* of its determination that entire fairness has not been established."

Id. (quoting Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1165 (Del. 1995)).

always be easily achieved by a § 12(b)(6) dismissal nor did it promise that the directors would be able to avoid the entire fairness analysis. *Emerald Partners III* makes it clear that when there is a question between application of the entire fairness analysis and a § 12(b)(6) dismissal, the entire fairness analysis will apply. The question of choosing between a § 12(b)(6) dismissal and the entire fairness analysis arises when there is a breach of loyalty claim. The facts of *Emerald Partners III* showed that the director stood on both sides of the transaction; hence it was a question of breach of loyalty invoking the entire fairness analysis.

The court, to distinguish its own situation from one where a § 12(b)(6) dismissal is granted, relied on its judgment in *Malpiede v. Townson*,[63] which lends support to the fact that the protection given by § 102(b)(7) remains untouched by *Emerald Partners III*. In *Malpiede*, the court granted a § 12(b)(6) dismissal for a breach of the duty of care claim.[64] The court held that if the presumption of the business judgment rule is challenged by only the allegation of the breach of the duty of care, then the court would not go through the entire fairness analysis.[65] Therefore, if the plaintiff pleads facts supporting a claim that is barred by the exculpatory charter provision, then a § 12(b)(6) dismissal is possible and the court will not conduct the entire fairness analysis.

Since the complaint in *Malpiede* only alleged a breach of the duty of care and the corporation's charter had a § 102(b)(7) provision, the court held that the defendants did not have to show that the transaction was entirely fair.[66] The court in *Emerald Partners III* did nothing to change this position taken by the court in *Malpiede*. Even today, after *Emerald Partners III*, if the plaintiff shareholder only alleges a breach of the duty of care, § 102(b)(7) could still be an affirmative defense.

Malpiede, like *Van Gorkom*, was a pure duty of care claim.[67] In *Van Gorkom*, the plaintiffs only claimed that the directors failed to use due care to get information before they decided on the merger.[68] They had not pleaded bad faith or actions of self-interest by the directors against the interests of the corporation.[69] Section 102(b)(7) was enacted by the legislature to cure the problems created by *Van Gorkom*. By reiterating the position of the court in *Malpiede*, which like *Van Gorkom* was based purely

---

[63] 780 A.2d 1075 (Del. 2001).

[64] *Id.*

[65] *Emerald Partners*, 787 A.2d at 93 (citing *Malpiede*, 780 A.2d at 1095-96 & n.70).

[66] *Id.* at 92.

[67] *See* Malpiede v. Townson, 780 A.2d 1075 (Del. 2001).

[68] 488 A.2d 858 (Del. 1985).

[69] *Id.*

on a breach of the duty of care, the court in *Emerald Partners III* reinforces the protection given by § 102(b)(7). The *Malpiede* court found that when a shareholder complaint unambiguously asserts only a due care claim, the complaint will be dismissed under § 12(b)(6), if the corporation's § 102(b)(7) provision is properly invoked.[70]

The exceptions to the § 102(b)(7) exculpation provision include the breach of the duty of loyalty and good faith. The court in *Emerald Partners III* found that, in actions against directors of Delaware corporations with a § 102(b)(7) charter provision, if the shareholders' complaint alleges facts that, if true, would implicate breaches of loyalty or good faith, then the dismissal under § 12(b)(6) is not possible and the court must go through an entire fairness analysis.[71] If, after the entire fairness analysis, the directors are held to have breached their duty of care, they will be exculpated by the § 102(b)(7) provision.

Initially, after reading *Emerald Partners III*, it appears that shareholders could simply plead a breach of the duty of loyalty along with a breach of the duty of care to avoid a § 12(b)(6) dismissal. That would be a dangerous tool in the hands of the plaintiffs. That is, however, not the intent of *Emerald Partners III*. To avoid a § 12(b)(6) dismissal, *Emerald Partners III* states that the plaintiff needs to file a complaint with well-pleaded facts, which show that there is a breach of loyalty; mere allegations will not suffice.[72] The presumption of loyalty in the business judgment rule can be rebutted only by alleging specific facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders.[73]

The plaintiff will have to specifically show some self-interest on the part of the directors or that the transaction was done in bad faith for the benefit of the directors instead of the shareholders and the corporation. This view takes its support from a later case, *Orman v. Cullman*,[74] which clarifies the fact that plaintiffs cannot avoid a § 12(b)(6) dismissal by burdening the complaint with empty allegations of a breach of loyalty or good faith. A § 12(b)(6) dismissal is available when the complaint rests solely on a breach of the duty of care and no other fiduciary duty. The

---

[70] *Malpiede*, 780 A.2d at 1093.

[71] *Emerald Partners*, 787 A.2d at 92.

[72] *Id.*

[73] *Id.*

[74] 794 A.2d 5 (Del. Ch. 2002).

defendant directors' right to get a dismissal cannot be taken away by empty allegations.

V. CONCLUSION

Emerald Partners III was not intended to take away any protection provided by § 102(b)(7). That protection is still alive and kicking; directors can still get exculpation whether or not there is an entire fairness analysis. *Emerald Partners III* simply explains when such exculpation will lead to a § 12(b)(6) dismissal. It establishes the law, which clarifies when a § 12(b)(6) dismissal could be sought as a matter of right, and what the plaintiffs would have to allege and prove to avoid a § 12(b)(6) dismissal.

Section 102(b)(7) was never meant to be a cure for all directors' problems. It certainly was not meant to deprive the plaintiff shareholders of an entire fairness review, which they are entitled to when there is a breach of the duty of loyalty. *Emerald Partners III* explains when a § 12(b)(6) dismissal can be sought automatically or when entire fairness review applies precluding a § 12(b)(6) dismissal.

Janaki Rege Catanzarite