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Legal Editor: Jacob Metric


First Edition 1993, published as Directors’ and Officers’ Liability, James Fanto


Second Edition Release #10 2015, published as Directors’ and Officers’ Liability, James Fanto, Barry M. Kaplan & Gregory L. Watts


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LCCN: 2005908420
To Erica, Matthew, Elizabeth and Andrew Kaplan
And to Melissa, Parker, Jack and Connor Watts
About the Authors

Barry M. Kaplan is a partner in the Seattle office of Wilson Sonsini Goodrich & Rosati where he is the head of the Wilson Sonsini Northwest Litigation Group. Mr. Kaplan has broad experience in securities and corporate governance litigation, class action defense, and SEC and internal corporate investigations. He has represented numerous public companies and their officers and directors in shareholder litigation, including many well-known companies such as Boeing, Micron Technology, Alaska Airlines, and Starbucks. He has represented and continues to represent many public biotech companies and their officers and directors across the country.

Mr. Kaplan has spoken at dozens of programs on securities litigation and corporate law and governance topics, and has taught courses in securities regulation and shareholder litigation at the University of Washington School of Law. He co-authored the leading treatise on Washington corporate law, originally published by Prentice-Hall.

Upon graduating from the University of Michigan Law School, Mr. Kaplan clerked for the Honorable Charles W. Joiner in the U.S. District Court for the Eastern District of Michigan.

Best Lawyers in America named him the 2012 Securities Litigator of the Year for Seattle—the first time that this honor has been awarded to a Seattle securities litigator. He was again honored with this award for 2016.

Gregory L. Watts is a partner at Wilson Sonsini Goodrich & Rosati, where he focuses on securities and complex commercial litigation, primarily defending companies and their directors and officers in securities class actions, shareholder derivative actions, contested mergers and acquisitions, and SEC investigations and enforcement proceedings. He also advises audit committees, special committees, and boards of directors in internal investigations. Mr. Watts has a nationwide practice, representing clients in fourteen states, and has represented dozens of public companies in securities and shareholder litigation.
A frequent lecturer on director and officer liability, corporate governance, corporate internal investigations, and securities and shareholder litigation, Mr. Watts is an advisory board member of the National Association of Corporate Directors, Northwest Chapter and a former chair of the Northwest Securities Institute. Mr. Watts received his J.D. from Duke University School of Law, where he was a member of the *Duke Law Journal*. 
Preface

Corporate officers and directors have been subjected to constant criticism and increasing legislative and regulatory attention over the past ten years. There is no doubt that some of this criticism has been deserved. We have witnessed all too many instances of misconduct by some corporate officers and directors. The phenomenon of enormously successful and highly compensated leaders of public corporations risking their careers and families by engaging in fraud and misconduct continues to be a source of amazement to the authors. But, having worked for decades with officers and directors of many public companies, from the very large to the very small, the authors firmly believe that the sensational, attention-grabbing stories of corporate misconduct by no means demonstrate the norm. Having fought alongside them in litigation alleging their venality, we have learned that, by and large, the men and women serving as officers and directors of this country’s public companies are honest, honorable, and conscientious. They are committed to living up to their corporate duties for the benefit of their shareholders, employees, customers, and communities.

Much has been made about excessive executive compensation—and there are many valid issues relating to the magnitude of executive compensation, particularly when such compensation is not appropriately tied to the performance of the corporations for which these executives serve. But the fate and success of many public corporations is intimately related to the quality of the leadership and judgment of the CEOs, CFOs, and directors of those corporations. The qualities of leadership and excellent judgment they possess are rare and properly carry a large market value in our view. The authors are also well aware of the popular image of corporate CEOs as displayed in movies, television, and in the press as highly paid “fat cats” cruising around the

1. For a fascinating study of why successful corporate leaders engage in misconduct, the authors recommend Why They Do It: Inside the Mind of the White-Collar Criminal (2016) by Harvard Business School Professor Eugene F. Soltes.
globe on corporate jets living a luxurious lifestyle. The truth, in our experience, is very often quite to the contrary. While these corporate jets are indeed a nice way to travel, they are often just offices in the sky that permit non-stop work. Public company CEOs are among the hardest working people in the business world. We have worked with many CEOs over our decades of practice and have often been chagrined to find that when we arise in the morning and check our email, our CEO clients have been up much earlier, sending us messages and focusing on the affairs of their companies. And, long after we have returned home for the evening, we frequently continue to receive those communications from CEOs who clearly have an incredible work ethic, focus, and reservoir of energy. The fact is that the actual life of a public company CEO is more often than not filled by men and women who work non-stop on behalf of their companies, shareholders, business partners, and employees.

By reading the above, the reader will no doubt realize that the authors of this edition have a definite point of view, formed by years of defending corporate officers and directors. We are certainly aware of, and willing to concede, that improper actions and even fraud by corporate officers and directors does occur—although not nearly as often as suspected. However, we also are of the firm belief that the framework of potential legal liabilities for corporate officers and directors, although frequently misused, serves a very beneficial role in keeping the securities markets fair and in leading corporate officers and directors to remain focused on their responsibilities to their shareholders and corporations. In short, the threat of liability works very effectively to remind and reinforce officers’ and directors’ attention to their duties. Indeed, it was a director liability ruling in *Smith v. Van Gorkom*, 488 A.2d 858 [Del. 1985], that drove home the importance of basic ground rules of director conduct, including that directors should read the documents and take time to fully understand the issues in deciding to sell a company! Similarly, although the authors have spent many years defending corporations and their officers and directors in securities class actions—the overwhelming majority of which we believe had no merit—we have no doubt that the risk of liability for false disclosures plays a vital role in keeping disclosures fair and truthful.

Thus, while we have a definite point of view, we believe we are well suited to fairly and clearly set out in this volume the framework of public company director and officer liability. We hope that this book will be of value to practicing lawyers who need a good overview of the
many interesting and important issues in director and officer liability. While today’s public company general counsel are a very professional and accomplished group, it is often the case that there are many general counsel whose specialized experience and training is not in corporate governance and securities. We particularly hope that this volume will be of assistance to such public company corporate counsel who want a clear and concise overview of the liability issues facing their officers and directors so that they can be as effective as possible in fulfilling their roles. We believe that this volume also may prove valuable to directors and officers who might be interested in understanding more fully their risks and potential liabilities—as well as the protections—again, so that they can better perform their important roles in the governance of public companies. And, of course, we intend this volume to be of value to private practitioners faced with issues of director and officer liability who need a practical guide to the issues.
Acknowledgments

First and foremost, the authors of this Third Edition acknowledge and thank Professor James Fanto, the author of the Second Edition. We have borrowed heavily from Professor Fanto’s prior edition and greatly appreciate the work that he has done on this volume over the years. The authors are also appreciative of the Practising Law Institute, particularly their editor Jacob Metric. The authors are very grateful to Mae Oberste, a law clerk at our firm headed to the Delaware Court of Chancery in 2018 as a judicial clerk, who helped us update and improve this volume.

The authors have been in and around corporate suites and boardrooms for many years and have gotten to know many public company officers and directors. We have learned from many of them just as we have learned from our colleagues in the securities and shareholder litigation defense bar. We also have learned from some very able adversaries—members of the securities and shareholder litigation plaintiffs’ bar. Not wanting to stir up a hornets’ nest, they will remain nameless.

We certainly want to thank and acknowledge our securities and shareholder litigation defense colleagues at Wilson Sonsini Goodrich & Rosati. This is an incredible, talented, knowledgeable group of lawyers, and it is a pleasure working with all of them. The authors are particularly grateful for the amazing members of their litigation team in Seattle—associates John Roberts Jr., Stephanie Jensen, Elon Slutsky, Lianna Bash, and Chris Petroni, paralegals Diana Lopez and Naomi Pierce, and their assistant Rosanna Carter.

Barry Kaplan has been practicing litigation for almost forty years. Along the way he has learned from many practitioners—too many to count. One stands out, however, as he looks back over the years, and that is the late Jim Magee, who was an excellent trial lawyer and a good friend. He taught Barry not only many things about litigation but also how to keep a great attitude and how to enjoy what you are doing, even in the tensest situations. Most witnesses who were examined by Jim were affected by his good nature and demeanor—and many had no idea what good testimony he was getting to their great legal detriment!
Barry also would like to make special mention of United States District Judge Charles W. Joiner, for whom Barry clerked many years ago. Judge Joiner serves as a shining example of an excellent judge. Barry had the pleasure, while writing this book, of visiting with Judge Joiner on his 100th birthday, a year before his passing.

Greg Watts has been practicing litigation for almost twenty years, specializing in the defense of companies and their directors and officers in securities and shareholder litigation. Having joined Wilson Sonsini Goodrich & Rosati fresh out of law school, Greg has learned much about this area of law, and about himself, from his friends and colleagues at the firm. In particular, Greg is deeply appreciative of Doug Clark, Jerry Birn, Leo Cunningham, Ignacio Salceda, and Barry Kaplan. Their friendship, good humor, encouragement and brilliance have shaped Greg’s professional life in innumerable ways. Greg also thanks his smart and beautiful wife Melissa, whose love and faith in him has kept him going, and his three sons Parker, Jack and Connor, who constantly remind him that nearly every rule has an exception. No professional accomplishment comes close to the joy Greg feels from being a husband and father.

It must, of course, be made clear that, while we cherish our professional relationship with Wilson Sonsini Goodrich & Rosati, the views expressed—and any errors that may be found—in this volume are ours.
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