The Business Judgment Rule
– Reglens ophav og dens indmarch i dansk retspraksis

The Business Judgment Rule
- The origin of the rule and its entrance into Danish Jurisprudence

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I de senest 10 år har der verseret en række retssager omkring ledelsesansvar i større koncerner. Det har hovedsagligt drejet sig om finansielle virksomheder, men også andre slags selskaber har haft deres ledelse til eftersyn i retssystemet. Fælles for mange af disser sager er, at retterne har udvist en vis tilbageholdenhed med at efterprøve de beslutninger, som direktører og bestyrelsesmedlemmer har taget, som en del af deres job. Dette er ikke noget nyt i sig selv, men systematikken udvist af retterne har dannet en skitse, som på mange måder ligner det internationale retspraksiskoncept Busines Judgment Rule ("BJR").

The Business Judgment Rule's kerne filosofi er, at en dommer skal udvise forsigtighed med at tilsidesætte de forretningsmæssig skøn, som foretages som led i at drive en virksomhed. Denne forsigtighed påkræves, da det kan være svært for en dommer ikke at være delvist påvirket, af det negative resultat, som beslutningen har fået, og som er grundlaget for erstatningssagen. Dette kombineres med en corporate governance betragtning, der dikterer, at det kan være meget besværligt at lokke kompetent folk til arbejdet som bestyrelsesmedlem, hvis alle deres beslutninger bliver testet og efterprøvet, og de derved risikerer store erstatningskrav.

Specialet udfolder først de fundamentale elementer, der ligger bag ved BJR. Der redegøres for, hvilken standard der findes i dansk lov for ledelsesansvar samt hvilke lovpligtige krav der er til bestyrelsesmedlemshvervet. Der undersøges derudover hvad der ligger i "selskabets interesse" som er et gennemgående tema i loyalitetspligten. Dernæst beskrives nogle af de betragtninger, som bringes af sammenspillet med Corporate Governance debatten.

I de følgende to kapitler beskrives og analyseres først dele af det Amerikanske common law system, hvor BJR har sin betydeligste oprindelse. Dernæst det danske retssystem, specifikt de bank-sager, hvor reglen virkeligt har fået vind under vingerne. Der undersøges under hvilke forhold reglen opstod, og beskrives hvilke betragtninger det amerikanske retssystem tog særlige hensyn til. Herefter fremstilles de pligter i det Amerikanske system, som opstod i pendant til BJR, og som udgør de grundlæggende elementer for ledelsesansvaret. Derefter følger en analyse af danske retspraksis, og hvordan reglerne har udviklet sig herhjemme. Det konkluderes, at reglen har fundet fuld accept, og nu er en del af dansk ledelsesansvarsret.

Derpå følger en rent komparativ analyse, som viser, at den danske version af reglen nok er bygget på den amerikansk model, men stadig har sin egen udformning. Dette viser sig bl.a. ved, at Højesteret har sat sit eget præg på reglen ved at have større fokus på, om uvedkomne interesser har spillet en rolle i skønnet. Samtidigt har højesteret heller ikke direkte bundet BJR til pligterne, som det ses i Amerikansk ret. Reglen står i stedet alene, som et krav om forsigtighed med at tilsidesætte det forretningsmæssige skøn. Analysen viser også, at mange af de interesser der er på spil i en virksomhed, trods reglens indmarch og beskyttelse af ledelsen, stadig har adgang til andre reguleringsmekanismer, og at reglen derfor ikke vil have den samme

afskærende effekt, som den muligvis har i oprindelseslandet. Derved er der opstået en meget eftertragtet balance mellem de residuale interesser og ledelsen i det danske retssystem. Til sidst konkluderes det på basis af det foregående, at den danske version af reglen derfor er mere fleksibel og ligner culpaansvaret, hvilket leder til en diskussion om, hvorvidt reglen bør kodificeres eller holdes som flydende retspraksis.

INDHOLDSFORTEGNELSE

1. Introduction

In the last 30 years since the Nordisk Fjer-scandal there has been an increasing focus on management liability in Danish jurisprudence. The topic shares a close connection to other subjects such as corporate governance, corporate social responsibility and the debate regarding active ownership and shareholder activism.

In the corporate governance sphere, management liability plays a role in the agent-principal problem as an external regulatory-mechanism preventing managers from misusing their position for personal gain and taking needless risks. In opposition to this it is argued that leveraging greater fines and exposing mangers to the risk of damages will scare away competent and capable directors and thereby decrease efficiency within the firms. This is a fine line that needs to be towed and there is a constant struggle in balancing the scale between authority and accountability.

In response to deciding whether a director should be held liable for damages, the Business Judgment Rule ("BJR") grew into existence in Anglo-Saxon courts as far back as 1742[1]. The rule's rise to prominence, however, has been in the last 100 years in the US legal system[2] and it has slowly but surely spread across to European legal systems.[3]

The rule presents a desirable trait to managers; it shields their decisions from review on the outcome of the decision. This is done by limiting the judicial inquiry to the adequacy of the process by which the board reached its decision. This, arguably, prevents the courts from applying 20/20 hindsight to the matters before it. Which in turn, allow the courts to judge the issue of liability on the grounds that were present at the time of the decision rather than with a colored view of the events influenced by the results of the decision.

The rule has been indirectly recognized and applied in a series of court cases in Denmark in the last 10 years against the directors and executives of a set of banks that went bankrupt in the wake of the 2008-2009 Financial Crisis. The pertinent question has become whether Danish jurisprudence has adopted the concept of the BJR wholesale from the US system and applies it as such, or whether the Danish courts are merely applying culpa-based liability but letting the BJR influence the question of liability to some extent.

Dissecting and answering this question requires a pursuit of the origin of the rule in US courts followed by an analyze of how the rule is actively applied in US courts today. The same process will then be applied to Danish jurisprudence and case law. This will allow the paper to finally compare and contrast the two and highlight variations or divergence should any exist.

1.1 Topic of research

The thesis will attempt to answer whether the Business Judgment Rule has been adopted into Danish jurisprudence, and if so, how this may affect the Danish legal landscape. This is done by presenting and analyzing current and former jurisprudence of the BJR in the US common law system. After that follows an analysis of management liability under Danish law with focus

[1] The Charitable Corporation v. Sutton (1742) 26 ER 642

[2] See section 3.1.1

[3] Ponta, The business judgment rule and its reception in European countries, The Macrotheme Review (2015), pp. 127

on the banking cases which discussed the issue in the wake of the financial crisis. Ultimately the results of the analyses are compared to reflect differences and similarities.

1.2 Foundations

Corporations under Danish Corporate law can be structured with or without limited liability. As is typical under this type of system, most smaller business are unincorporated and operate without limited liability while larger companies are incorporated into a limited liability corporation ("LLC"). This creates a desirable situation where the shareholders can take on greater ventures without risking personal assets. Under the Selskabsloven, the Danish Corporations Act ("SEL"), only LLCs are regulated directly through the law. Limited liability companies under Danish law are further split into Aktieselskaber and Anpartsselskaber. For this thesis, Aktieselskaber will be referred to as Public Limited Companies ("PLC") while Anpartsselskaber will be referred to as Limited Liability Companies or LLC. The most pressing difference between the two, is the way the management body is structured. An LLC does not need to have a board while PLCs must employ either a Board of Directors or a Supervisory Board. This means that Denmark is neither a 1-tier nor a 2-tier structure. The duties, scopes and distinctions between the executives, board members and members of the supervisory board are further discussed further in the sections below where necessary and where other differences between PLCs and LLCs are pertinent, the thesis will highlight and discuss it.

1.3 Premise

To draw conclusions, the thesis must be set against a specified outline. The analytical framework used for the thesis is a publicly traded PLC with a 2-tier body of management. The corporation has a mixed board, where most of the seats are held by directors elected by the shareholders but where the executives of the company may hold positions as well. The ownership of the company is assumed to be diversified with a broad, varied and sometimes contradictory array of interests. The owners both big and small exercise the bulk of their control through the Annual General Meeting.

For certain parts of the thesis, it is necessary to examine other settings and corporate environments when they reflect on the main topic. Additionally, at times throughout the paper some of the laws that apply differently between LLCs and PLCs may be drawn upon for perspective or relevance. When a different framework—which deviates substantially from the above mentioned—is employed, it will be specifically highlighted within the chapter or section as necessary.

1.4 Limitation

The focus of the thesis is the Business Judgment Rule and its onset in Danish case law. The rule is an element within the greater subject of management liability which again is part of both liability/torts as well as a part of corporate law. It further leans on the entire corporate governance discussion that is very prominent in this age of active ownership.

To produce a concise and coherent paper, it is necessary to focus solely on the BJR and the management liability rules it builds on. As such only case law and legal discussions pertaining to specifically to the Rule will be discussed. Broader elements of liability are therefore intentionally left out or only summarily discussed.

Due to the limitations on the extent of the paper the thesis will not go into an in-depth discussion of torts and liabilities in general and will not discuss the elements required to establish liability under the culpa rule in Danish law. They will be briefly outlined in section 2.1.

1.5 Legal Methodology

In answering the topic of research for the thesis, the Danish Legal Method[4] is applied. This allows the thesis to determine the current jurisprudence for management liability in Denmark. The Danish Legal Method uses a source-and-interpretation focused standard which requires identifying and finding the most relevant legal sources and then weighing them up against each other. Through interpretation and argumentation, the sources are then given assigned value and collectively they allow a description of the current legal landscape and jurisprudence, the *lex lata* or sometimes *de lege lata*.

The primary source is Selskabsloven, but the thesis incorporates multiple legal sources such as the literature from legal scholars, legislative committee reports, case law and Ph.D. theses. The legislative material can be used to determine the intentions of Parliament and it remains a viable source of information, but it must also be valued as what it truly is, comments on the law, not the law itself.[5] The thesis will use primary sources whenever possible, but some unpublished verdicts have been unobtainable. When referring to these verdicts, the thesis has used secondary sources. These secondary sources have been chosen for their authority and authenticity, such as published verdicts citing unpublished ones.

A comparative analysis is used in the thesis. This type of analysis entails a presentation of both system which will highlight similarities and differences. This method is employed as it is most apt way of demonstrating whether the Danish rule is its own creation or whether it stems from US law.

While the BJR has come to be widely accepted across all the states in the US[6] the paper will focus solely on a few sources of law due to some of the subtle but significant difference in how the rule is applied across the 50 states. It is most appropriate to use Delaware's cases and laws due to its leading position for incorporation[7] and rich case law. The paper will look to the Delaware General Corporation Law ("DGCL") as the primary source of statutory US law and will supplement this with the Model Business Corporation Act ("MBCA") when useful. Delaware also has the most significant case law history, and the Business Judgment Rule has its very foundation in the Chancery Courts of Delaware. The chief criterion for selecting the verdicts that are discussed in chapter 3.1 have been their impactful legal precedent which has set the benchmark for the modern interpretation of the BJR. The verdicts are accompanied by analysis from a myriad of law review articles. These articles are the best source for US legal scholarship and offer peer-reviewed and critical insight into contemporaneous legal issues.

2. The Broad Perspective

2.1 The basis of liability

The basis for management liability in Danish law is found in Selskabsloven, ("SEL") § 361, stk. 1. The liability builds on the culpa standard of liability and requires that the manager or director acted intentionally or negligently in their duties and as a result caused damages to

[4] Schaumburg-Müller, On Danish Legal Method, Nordic and Germanic Legal Methods: Contributions to a Dialogue between Different Legal Cultures (2014), p. 141
[5] Radin, Statutory Interpretation. Harvard Law Review 43(6) (1930), p. 868
[6] See section 3.1
[7] Zelby, How Delaware Became the State Where Companies Incorporate, Medium (2019), p. 1-3

either the company or some third party. The rule in § 361 is in this capacity merely a restatement of the culpa standard that applies across all liability issues in Danish law rather than an imposing of some new or different standard.[8]

The method of judging liability under the culpa standard is based on a causality between an act or a decisive choice not to act and the resulting damages to another party. The elements necessary for liability is a basis of liability, such as culpa or strict liability, a foreseeable injury as a result of the act, a causal connection between the act and the injury and lastly, it is necessary for there to be a computable economic loss. [9]

The culpa standard is dynamic. It flows with the normative need for accountability.[10] It is based on an objective person's rational behavior in each situation and changes over time. There are two opposing considerations when it comes to the culpa standard for management liability. On one side you have the need to secure the shareholders, creditors, employees, etc. against unnecessary losses. On the other side you have the need to give management the necessary freedom to act in accordance with their best judgment to make the important decisions required when running a business.

The primary burden of proof for liability is direct and is born by the party who is pursuing damages.[11] This standard is not reversed for management liability.[12] It is therefore on the suing party to prove that the manger violated his standard of care in order to obtain a favorable verdict. The standard is not completely rigid, however, and it is within the purview of the courts to reverse the burden if they see fit to do so.[13]

The standard of care for managers has traditionally sprung from the functions and duties of their job. This entails the need to blueprint the duties and functions required of the managers in SEL as well as some of the non-statutory duties imposed.

2.2 Duties and functions of the Board of Directors

The statutory duties of the board are determined in SEL § 115 which states that the board must, among other things, oversee the overall management and strategic duties, instate proper bookkeeping, oversee the executives, and ensure adequate financial resources for the company.

These duties have traditionally served as the foundation for management liability,[14] and coupled together with SEL § 361, stk. 1, have created a liability matrix where a breach of a certain duty outlined in SEL § 115 is tied to a loss suffered by the company, a shareholder or one or more creditors as per SEL 361, stk. 1's listed protected parties.

This has not been without critique. Among others, Sofsrud has raised an argument for a level of separation between the duties and possible liability although without arguing for a complete disconnect between the two. He plainly states that:

[8] Krüger Andersen, Aktie- og anpartsselskabsret (2019), p. 503
[9] Id. at p. 498
[10] Fode, Aktuelle Emner (2013), p. 342
[11] Winther Høy, Bestyrelsens ansvar (2020), p. 82
[12] Id. at p. 83
[13] Ibid.
[14] Gomard, Kapitalselskaber (2013), p. 565

> *"Det betyder at der i vidt omfang må ske en bedømmelse af bestyrelsens konkrete beslutninger (handlinger eller undladelser), uden at der på forhånd kan peges på bestemte pligter på grundlag af en generel beskrivelse af bestyrelsens opgaver."*[15]

This argument, that liability can arise without being tied directly to a statutory duty, has since found some acceptance and support among other legal scholars, though not universally. Schans Christensen states that it is necessary to establish a norm for exactly what makes up negligent behavior and that this norm should be:

> *"[S]tyret af retsregler i den relevant lovgivning eller normer, der har udviklet sig i forbindelse med bestemte . . . funktioner."*[16]

Krüger Andersen puts it even more concretely saying that:

> *"Ansvarsreglens nærmere indhold beror på de opgaver og pligter, de nævnte personer hver for sig har i selskabet. Udfyldningen af culpavurderingen må ske på grundlag af de opgaver og pligter, som selskabslovene pålægger de respektive personer suppleret med normative opfattelser af, hvad der er forsvarlig handlemåde."*[17]

Neither are completely dismissive of the idea that liability extends beyond the statutory duties and that, as stated above, the culpa standard is dynamic and at least what constitutes negligent behavior will change over time and be related to the manager's job, position, duties, et cetera.

Winther Høy agrees with this point and states that:

> *"Bestyrelsens ansvar må således fastlægges ud fra de pligter, der følger af selskabsloven. Ikke på et konkret niveau, men på et mere generelt niveau."*[18]

On top of this, SEL § 127 adds that the board must not act in such a way that it deliberately favors a shareholder or another party at the expense of the company or the other shareholders. This can plainly be restated as an expression of a duty of loyalty towards the company and the shareholders. Collectively, the duties of the board outlined in SEL § 115 and § 127 act as the chief foundation for any management liability. The normative standard for what constitutes negligent behavior is somewhat liquid and will change over time, but it is clear that a board member who sets aside these duties, either negligently or intentionally, can be found liable for the damages if the rest of the elements for management liability are present.

2.3 In the company's best interest

As the paper will come to discuss below, one of the recurring requirements of both Danish and US corporate officers is that they act in the best interest of the company.[19] This subject is broad enough that it could likely carry its own thesis paper and as such will only be shallowly covered in this section. SEL contains several sections which refer to the interest of the company but does so without giving any definition.[20] This leaves the interpretation open to legal scholars and a number of theories exist on the subject.

At the core of the modern theories is the balance between shareholders, stakeholders, corporate social responsibility ("CSR") and profit-maximization in general. The debate is still largely centered around a shareholder vs stakeholder dichotomy, but CSR and profit-maximization are still part of the discussion and CSR especially has had an increasing presence. US common law

[15] Sofsrud, Bestyrelsens beslutning og ansvar (1999), p. 178
[16] Schans Christensen, Kapitalselskaber (2017), p. 701
[17] Krüger Andersen, Aktie- og anpartsselskabsret (2019), p. 498
[18] Winther Høy, Bestyrelsens ansvar (2020), p. 91
[19] See section 3.1.2 & 3.2.2
[20] Selskabsloven §§ 136, 139a, 207

jurisprudence has had a focus on wealth maximization and has most often leaned toward shareholder value while European countries, especially under the EU, have leaned towards stakeholder value. The discussion is often centered around whether the company's interest is an entity of its own or whether it is only a reflection of the shareholders' and stakeholders' interest.[21]

The pure interest of the company under Danish law is likely holistic, reflecting of all the parties affected by the well-being of the company and its continued existence.[22] This means that the court must employ a balancing scale when approaching the subject where it must take into consideration all the factors affected by a board members decision. In smaller companies this will be easier as there are typically only a handful of owners and employees and not a greater impact on local society but in a larger company these factors are scaled exponentially.

Most important of the parties to consider are undoubtedly, however, the shareholders and the creditors in the corporation. The shareholders have a residual ownership in the corporation while the creditors, typically, represent the largest financial interest in the company. These two interests collectively have the strongest interest in the operation of the company. Danish legal jurisprudence seems to recognize this collective interest as the largest part of the interest of the company.[23] These interests share a large portion in the interest in the well-being and outside of a bankruptcy or a decision on whether to continue operating often overlap.[24]

For this discussion of management liability, the company's interest will be regarded as an independent interest that exists separately from the shareholders' and stakeholders' interests as a holistic mix of interests. In this mix of different considerations, the shareholders hold the largest part together with the creditors as the residual owners and financial interests of the company. The interests of the stakeholders broadly speaking, and the general interest of CSR are not unwarranted however and should be weighted by a court reviewing whether the interest of the company was set aside albeit with a conscious awareness of their smaller components.

2.4 Corporate Governance considerations

One of the many causes of management liability suits stems from a disconnect between the shareholders and the managers. This and other issues are the core of the corporate governance debate. Under an agency-theory, the board members are agents of the shareholders who are the principals. Corporate governance attempts to solve the agent-principal issue by introducing a set of mechanisms. This subject large enough that it warrants its own thesis paper, so due to capacity constraints, only a few important aspects are noted in this section.

The disconnect between agent and principal leads to an imbalance of information which in turn can result in shareholders feeling like the managers misused their position of trust to gain a person advantage (a breach of the duty of loyalty) or that they made poor business decisions (a breach of the duty of care). If both parties had perfect information or information symmetry[25] the shareholders would only sue when there was an actual breach instead of when there was only a perceived breach. Having board members constantly needing to inform an ever-larger number of shareholders to avoid an imbalance is an impossible task. It would simply grind the business to a halt and be too costly. Similarly, if there was a constantly scrutiny by shareholders

[21] Ireland, Company Law and the Myth of Shareholder Ownership, The Modern Law Review Vol. 62, No. 1 (1999), p. 34. See also Thomsen et al., Ejerskab og indflydelse i dansk erhvervsliv (2002), pp. 35-37
[22] Werlauff, Selskabsmasken (1991), p. 67-69
[23] Krüger Andersen, Aktie- og anpartsselskabsret (2019), pp. 339-41
[24] Sofsrud, Bestyrelsens beslutning og ansvar, pp. 233-38
[25] Ugur, Imperfect Information and Corporate Governance: Some Policy Implications, Global Business and Economics Review (2003), pp. 193-94

regarding the interests of the managers, it would be very hard to lure qualified and competent people to accept the job as a board member. This means that a middle ground is necessary.

A large portion of corporate law is an attempt to solve issues related to delegation of power from the shareholders to the managers. A notable example is SEL § 131 which disallow interested board members to take part in decisions where they have a direct interest. The same idea is present in the newly introduced § 139d. However, the law often falls short. The Danish *Recommendations for Good Corporate Governance*[26] is an addition to the law in many ways and have outlined a set of rules to be followed to solve some of the most pertinent issues. These recommendations are not required for all firms to follow but serve as a benchmark for any corporations that wishes to streamline their corporate governance.

The Business Judgment Rule can be viewed as a two-way corporate governance mechanism.[27] The Rule functions to protect the managers under certain circumstances by shielding them from liability if there has been no breach of their duties regardless of what the result of the business decision was. This acts as an incentive for managers to pursue business ventures they perceive to be profitable without needing to fear angry shareholders if they turn out to be wrong. It essentially works as an additional layer at the court system's disposal. By allowing courts to turn away suits regarding decisions that were loyal and informationally well founded, the corporate managers are not bogged down by the suits and a higher efficiency can be achieved. Simultaneously, the managers are aware that they are only given this protection if they uphold their fiduciary duties. This, in theory at least, keeps them from acting carelessly or with personal, undue interests at play in their decision-making process.

2.5 The Business Judgment Rule in a nutshell

In response to the need for efficiency in the market as discussed just prior, British and—later but more prominently—US courts developed a practice of interceding in certain cases where shareholders and creditor were suing corporate managers. These suits often came as a response to poor managerial decisions that had resulted in substantial losses for the shareholders or creditors due to defaulting or bankruptcy. The practice required courts to show hesitancy under certain circumstances before assigning liability to the managers. The historic jurisprudence of the Rule is expanded upon further below.[28]

The BJR dictates that courts should show restraint when assessing liability on the part of managers for negative outcomes stemming from pure business decisions. The managers should be afforded discretion in their decision-making process and should be given a certain margin of error to operate within. The reluctance to find managers liable for these decisions should be displayed as long as it is evident before the court, that the managers upheld the duties imposed upon them. The duties of care, loyalty and good faith require that the managers make their decisions on an informationally sound basis, without disloyal interests at play and in good faith to the interest of the company.

The Danish adaptation of the BJR bears similar requirements. The liability under Danish law is based on a culpa standard but is now veiled in a requirement that the courts show caution when deciding whether to set aside a business decision that involved a discretionary element. Similarly, it must be evident to the court that the managers acted loyally and on an objectively

[26] Anbefalinger for god Selskabsledelse
[27] Thomsen, Corporate Governance and Board Decisions, pp. 291-94
[28] See section 3.1.2

reasonable basis when making the decision in order for the protections of the Rule to be maintained.[29]

3. The Narrowed Perspective

> *"Countless cases invoke it and countless scholars have analyzed it. Yet, despite all of the attention lavished on it, the Business Judgment Rule remains poorly understood."*[30]

3.1 US Common Law

The US common law system serves as a two-tier system with federal and state legislation. Only where there is preemption on a federal subject do the states have no say in the matter. There are no federal laws within corporate law and therefore each state has their own independent system and their own set of laws. That means potentially 50 variations of the Business Judgment Rule and 50 attempts by states to interpret the common-law cases and create legislation about the subject. For this thesis, examining the full array of US laws and case precedence would therefore very likely prove an insurmountable task and would serve more as a distraction than a purposeful addition to the paper.

Delaware has proven as the central hub for US corporate legal jurisprudence and has therefor been selected as the sole state to be included for the purpose of statutory law. Delaware in the last 50 years served as the primary place for the development of the corporate legal landscape due to its—carefully planned—positioning as the lead state for incorporation of US companies. The most important cases in the last four decades have come out of the state and have granted the clearest image of what the BJR is. It has, along with states like New Jersey and California, been used as the primary source for the Model Business Corporation Act ("MBCA") which is a continued joint project between the American Bar Association and more than 20 US states.

The MBCA is a guided attempt at reflecting as many facets of US corporate Law as possible while still maintaining a concise wording similarly to the Restatements of law created by the American Law Institute ("ALI"). For that reason, the MBCA has been included as well as a primary source of written US law. Lastly, the ALI have published a set of simplified yet prudent rules to serve as inspiration for states looking to change their laws in the future. These ALI Principles of Corporate Governance has proved extremely valuable to the reshaping of many state laws and have been cited widely in case law. As such, the ALI's principles are also included and referenced as a primary source of the current US legal landscape.

3.1.1 The origins of the Business Judgment Rule and it's continued transformation

The Business Judgment Rule traces its roots all the way back to English common law and specifically the *The Charitable Corporation v. Sutton* case where the Lord Chancellor designated the managers of a company as both agents of the owners and trustees of the company. This designation meant that the managers had to live up to certain duties that were then imposed on the trustees of irrevocable and revocable trusts. However, while imposing this burden on the managers, the Lord chancellor also gave us the quote which is said to be the source of the Rule:[31]

[29] Schans Christensen, Kapitalselskaber (2017), p. 701
[30] Bainbridge, The Business Judgment Rule as Abstention Doctrine, Vanderbilt Law Review Vol. 57, p. 83
[31] Sharfman, The Importance of the Business Judgment Rule, 14 New York University Journal of Law and Business 27 (2017), p. 33

> "*For it is by no means [justified for] a judge, after bad consequences have arisen from such executions of [the manager's] power, to say that [the managers] foresaw at the time what must necessarily happen; and therefore, were guilty of a breach of trust.*"[32]

With this now famous quote by the Lord Chancellor, the managers of the corporations were given a shroud of protection that had to be pierced by disproving the presumption that the managers had acted in a manner that breached the trust.

The Rule's first peripheral onset in the US in a recognizable shape came in the case of *Percy v. Millaudon* in 1829 where a group of bank board members had been sued due to misconduct by the banks chief officer and president which had resulted in massive losses to the shareholders. In it the court stated:

> *"The test of responsibility, therefore, should be, . . . the possession of ordinary knowledge; and [be rebutted] by showing that the error of the [manager] is of so gross a kind that a man of common sense, and ordinary attention, would not have fallen into it."*[33]

This is an early example of a concept very close to the Duty of Care as we know it in contemporaneous US common law. An objective test of whether the directors were reasonable in their informational basis when making the decision.

Aspects of corporate governance had begun to seep further until the legal discussions throughout the late 19th and early 20th century and in 1919 the Michigan Supreme Court ruled in the *Dodge v. Ford Motor co.* In it the Court stated that:

> "*Courts of equity will not interfere in the management of the directors unless it is clearly . . . an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders.*"[34]

With this holding, the Michigan Court drew a similar line in the sand as the court in Louisiana. This was clear signaling that courts should be reluctant in meddling in pure business decisions and should give deference to the board members if they acted reasonably prudent and with loyalty to the business.

The Business Judgment Rule developed concurrently with corporate governance discussion and the development of the duty of care and loyalty, perhaps as a reflection to the duties. [35] In Delaware by the 1960s, the Rule had begun to take shape and at this point, existed in the Delaware legal landscape as a concept that the courts should stay out of board room business unless the directors showed absolute signs of carelessness. In 1967, the Chancery Court of Delaware chiseled out, what would be the state's first concrete formulation of a rule of abstention, saying:

> "*The question, then, is reduced to one of business judgment with which the court should not interfere absent a showing of 'gross and palpable overreaching*."[36]

Almost simultaneously in another case, the Chancery Court held that:

[32] The Charitable Corporation v. Sutton (1742) 26 ER 642
[33] Percy v. Millaudon 6 Mart. (n.s.) 616 (1828), p. 78
[34] Dodge v. Ford Motor Co., 204 Mich. 459 (Mich. 1919), p. 500
[35] McMurray, An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule, 40 Vanderbilt Law Review 605 (1987), p. 613
[36] Meyerson v. El Paso Natural Gas Co., 246 A.2d 789 (Del.Ch. 1967), p. 794

> "*[D]irector defendants charged with responsibility for corporate losses . . . should not be held accountable unless plaintiff could show that they were guilty of 'bad faith, negligence, or gross abuse of discretion.* "[37]

These Delaware decisions cooperatively stated a firm rule which dictated that the courts should not interfere with nor set aside any decisions with a discretionary business element, so long as the decisions were absent of disloyalty or gross negligence in the execution of the duty of care on the part of the managers. Though it had not yet been given a precise phrasing, the core philosophy of the Business Judgment Rule was by this point recognized as part of the corporate legal landscape in Delaware.

3.1.1.1 The seminal cases, Zapata Corp. v. Maldonado, 1981-present day

Delaware corporate law practices continued to evolve on the foundation with an increasingly greater deference given to the managers.[38] The rule was still undefine in the shape that we recognize it in today, but its importance was not unnoted.[39] This importance grew exponentially with the ruling in the *Zapata Corp. v. Maldonado* case. There, the Court said:

> "*The board's managerial decision-making power . . . comes from [DGCL] § 141(a). The judicial creation and legislative grant are related because the 'business judgment' rule evolved to give recognition and deference to directors' business expertise when exercising their managerial power under § 141(a).*"[40]

In a short paragraph, the Delaware Supreme Court summed up the now establish rule, that the court must defer to the managers in examining business decisions which have led to derivative civil suits. The court further established the Rules initial application in cases, stating:

> "*The 'business judgment' rule is a judicial creation that presumes [discretion], under certain circumstances, in a board's decision.*"[41]

This created the outline of the modern Business Judgment Rule. The Court referred to the directors having a broad informational basis to rest their decision upon as well as good faith, which, as discussed below, then fell in under the duty of loyalty.[42] The Court further stated how the rule acted as a presumption that the managers had been sufficiently prudent in their job and as such put the evidentiary burden on the plaintiffs.

Continuing this legal precedence, the court expanded on the idea that Board members need discretion in the execution of their duties in the *Aronson v. Lewis* case. Here the court expounded that:

> "*[T]he presumptions under the business judgment rule [are] that a board's actions are taken in good faith and in the best interests of the corporation.*"[43]

The court thereby underlined that the Rule cloaked the actions of the director in a presumption of independence and proper exercise, which had to be overcome by the plaintiff. [44] The case gave the formula for the BJR formulated as a presumption that builds on the basis that the officers and directors are presumed to be acting in the best interest of the company. This thereby

[37] Chasin v. Gluck, 282 A.2d 188 (Del. Ch. 1971), p. 193
[38] McMurray, An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule, 40 Vanderbilt Law Review 605 (1987), p. 625
[39] Balotti, Rejudging the Business Judgment Rule., The Business Lawyer, vol. 48, no. 4, (1993), pp. 1337-38
[40] Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), p. 782
[41] Ibid.
[42] See section 3.1.3.3
[43] Aronson v. Lewis, 473 A.2d 805 (Del. 1984), p. 810
[44] Id. at pp. 814-18

acts as a cloak to protect the managers against shareholders and creditors who, in the light of perfect hindsight, want to test any decisions made by the managers.[45]

The *Aronson v. Lewis* formulation further nurtures the idea from corporate governance that managers must be given a margin to operate within in order to achieve market efficiency. By allowing the managers to veil themselves in the cloak of the Rule, they are given propriety to assess necessary risks and to pursue business ventures which they believe to be profitable and in the interest of the company.[46] These corporate governance considerations were at the heart of Cede & Co. v. Technicolor, Inc., where the court said:

> "*The rule operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.* "[47]

And that:

> "*As a rule of evidence, it creates a 'presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company.* "'[48]

The Court once again held that the Rule is a presumptive veil put on the managers that they have acted in a favorable manner to the company and that only if the plaintiff can overcome this evidentiary burden can a lawsuit against the managers proceed. This directly continued the precedent from *Aronson v. Lewis* and with *Cede* the rule was cemented in Delaware corporate law. At the same time the Court decisively tied the protection of the Business Judgment Rule to the fiduciary duties of the managers.[49]

3.1.2 The duties imposed on the officers and directors of US companies

Conjointly, the seminal cases outline a trifecta of duties imposed upon officers and directors. A duty of loyalty to the company that must be valued above the directors own interests. A duty of care to attain knowledge and information and to confer with others to such an extent that the director possesses the necessary foundation to make a reasonable decision. And lastly, the director must act in such a way that he is showing good faith to the company and acting only in way that is in its interest.

These duties are collectively known as the fiduciary duties and form a standard of conduct which lies as the foundation of director liability in the US common law system. The business judgement rule interacts with this standard in that it presents itself as a presumption that the directors conducted themselves correctly when they made in their decision. It is on the plaintiff to overcome this presumption by showing that the directors breached one the three duties.

3.1.2.1 Duty of care

Central to the fiduciary duties is the duty of care. When managers oversee a corporation, they must make a near endless series of decisions and simultaneously delegate a variety of jobs to their coworkers and employees. The duty of care requires that when a director makes such a

[45] Winther Høy, Bestyrelsens ansvar (2020), p. 241
[46] Sharfman, The Importance of the Business Judgment Rule, 14 New York University Journal of Law and Business 27 (Fall 2017), p. 34
[47] Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993), p. 360
[48] Ibid. (Citing Aronson v. Lewis)
[49] Id. at p. 361

decision or delegation, he has first informed himself about the business he oversees and reviewed pertinent information. This assures that the director is acting with the vital foundation required to make calculated business decisions.

"[T]o invoke [Business Judgment Rule]'s protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties. "[50]

The MBCA draws a similar outline of the conduct required by the directors to avoid liability, stating that they must be informed and acting with reasonable care within the circumstances.[51] This standard is evidently objective in its formulation, speaking to how a reasonably informed similar person would act in the same situation. This is not far from the familiar Bonus Pater Familias standard but with a reasonable businessperson or board member setting the baseline.

The standard for violating the duty of care in Delaware is gross negligence.[52] The director must be shown to have remarkably deviated from what would be expected from a similarly situated board member, again imposing an objective standard.

The most important case for the duty of care is the *Van Gorkom* case. The outcome of the case surprised and shocked the US corporate legal community[53] when it found the directors guilty of setting aside their duty of care thereby establishing a clear precedence for fiduciary breaches within the realm of the duty of care.

Most importantly the case instituted a rule that that the board must make their decisions on a wholly informed foundation in order to shield themselves under the Business Judgment Rule. Summing up, the court stated that this required a review of the information attained by the directors, stating that:

> *"The determination of whether a business judgment is an informed one turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'"*[54]

This shows the necessary criterion; an analysis of whether the director properly informed themselves through an objective lens but with a respect of reasonability as to the information readily available to the director.

3.1.2.2 The duty of loyalty

The duty of loyalty dictates that the decisions made by board member must not be in their own interest at the expense of the company's. The rule can be understood as prohibiting any conflicts between the director's interest in personal gain and the interest that benefit the company she serves. The duty of loyalty is fulfilled when the decision made is influenced solely by the interest of the company and when no personal or third-party interests have been weighed above that of the company. Therefore, fundamentally speaking, the duty of loyalty requires that the officers devote their loyalty only to the company and its shareholders and rid themselves of any bias or self-interest.

[50] Aronson v. Lewis, 473 A.2d 805 (Del. 1984), p. 812
[51] Model Business Corporation Act (2016), § 8.30(b)
[52] Aronson v. Lewis, 473 A.2d 805 (Del. 1984), p. 812
[53] Honabach, Washburn Law Journal 2006, p. 307
[54] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (citing Zapata Corp. v. Maldonado, Del.Supr., 430 A.2d 779 (1981)), p. 872

Conflicts with the duty of loyalty often occur when the director is on "both sides" of the deal that the company is making[55] The breaches can also happen when a board member puts aside his duty of loyalty by serving only a specific person or group of owners within the company.[56] The interest that the officer must show loyalty to is the collectively whole of all the owners and she must not favor one group over another.

Although the duty is not expressly stated in the DGCL, it can conversely be determined within § 144 which pertains to interested officers. The sections states that transactions must be "fair" to avoid being ruled null and void in future lawsuits.[57] The duty has been much more clearly stated by the Delaware Supreme Court:

> *"This is merely stating in another way the long-existing principle of Delaware law that [the] directors on [the company]'s board still owed [the company] and its shareholders an uncompromising duty of loyalty."*[58]

And that:

> *"The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."*[59]

This is unambiguous in its requirement. No unwarranted interested are allowed to influence the decision-making process. The ALI Principles include the duty of loyalty within their general scope of the application of the business judgment rule stating that:

> *"A director or officer who makes a business judgment in good faith fulfills his duty under this Section if:*
>
> *(1) he is not interested in the subject of his business judgment . . .*[60]

Not interested in this sense means having no personal stake in the result of the decision. Similarly, the MBCA sets out a matrix of rules which mimic the BJR and with specific reference to the duty of loyalty states that a director will not be found liable unless it is proven that unwarranted personal, financial, or business interests influenced the conduct of the director.[61]

3.1.2.3 The duty of good faith

The duty of good faith is well recognized in corporate law[62] as a moral baseline and something that must be adhered to in contract negotiations. It parallels the duty of loyalty in its requirement for directors to show devotion to their firms, but it draws its own distinctions by attempting to elimination certain types of improper conduct by managers and directors.

Despite the rule having been displayed as lacking independence from the duty of loyalty, and the courts of Delaware admitting the rules underdevelopment,[63] it should nonetheless be recognized as a fiduciary duty with at least partial autonomy. This is readily evidenced by its inclusion in several statutes, among others the MBCA.[64]

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[55] Velasco, The Diminishing Duty of Loyalty, 75 Wash. & Lee L. Rev. 1035 (2018), p. 1040
[56] Id. at p. 1092
[57] Delaware General Corporation Law, Title 8, Chapter 1, § 144
[58] Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), p. 710
[59] Guth v. Loft, Inc., 5 A.2d 503 (1939), p. 510
[60] ALI Principles (1994), section 4.01(c)
[61] Model Business Corporation Act (2016) §8.30(a)(i)
[62] Eisenberg, The Duty of Good Faith in American Corporate Law, European Company and Financial Law Review, Vol. 3, No. 1, 2006, p. 1
[63] In re Walt Disney Co. Derivative Litigation, 906 A.2d 27 (Del. 2006), p. 63
[64] Model Business Corporation Act (2016)

In a similar way to how the DCGL does not directly include the duties of care and loyalty in § 141, it does once again conversely include good faith as a requirement for, among other things, indemnification:

> *"§ 145 . . . if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation . . .."*[65]

This shows the DCGL recognizing the duty of good faith as separate from the duty of loyalty. The Delaware Court has further highlighted this distinction, stating that:

> *"A shareholder's complaint must allege well pled facts that, if true, implicate breaches of loyalty* ***or*** *good faith"*[66]

However, neither the MBCA[67] nor the DCGL offers any explanation as to what exactly lies within the concept of good faith as pertaining to director liability. To interpret what can reasonably be extrapolated from the duty of good faith we turn to case law, specifically In re Walt Disney Co. Derivative Litigation:

> *"A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."*[68]

The best interest of the company language is present in the duty of loyalty as well. This gives further rise to the discussion of whether good faith is a duty of its own or whether it falls under loyalty. However, the repetitive nature of the court in highlighting the intent of the director leaves an impression that the duty of good faith, as opposed to the duty of loyalty and care, is very much a subjective duty.

Stone v. Ritter is often cited as the Delaware court's dismantling of the duty of good faith as an independent duty and aligning it as a part of the duty of care or loyalty or both. The court stated that:

> *". . . [A]lthough good faith may be described colloquially as part of a "triad" of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly."*[69]

This has been interpreted to mean that the duty of good faith is only an element present in the other two duties.[70] There is continued discussion regarding whether good faith covers a wide variety of improper conduct with may in fact be informed and loyal but be in bad faith. [71] Examples of this covers such topics as illegal action or making decisions that are contrary to regulatory compliance yet benefit the firm. The larger consensus ultimately takes *Stone v. Ritter* on its face and accepts the duty of good faith as part of the duty of loyalty.

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[65] Delaware General Corporation Law, Title 8, Chapter 1, § 145
[66] Emerald Partners, v. Berlin, 787 A.2d 85 (Emphasis added), p. 91
[67] Model Business Corporation Act (2016), p. 206
[68] In re Walt Disney Co. Derivative Litigation, 906 A.2d 27 (Del. 2006), p. 67
[69] Stone v. Ritter, 911 A.2d 362 (Del. 2006), p. 370
[70] Winther Høy, Bestyrelsens ansvar (2020), p. 247
[71] Hill, Stone v. Ritter and the Expanding Duty of Loyalty, 2007, pp. 1777-79

3.1.2.4 An assortment of duties

The commonly used variation of the Business Judgment Rule has been adopted by the ALI:

> *"A director or officer who makes a business judgment in good faith fulfills his duty under this Section if:*
>
> *(1) he is not interested in the subject of his business judgment;*
>
> *(2) he is informed with respect to the subject of his business judgment to the extent he reasonably believes to be appropriate under the circumstances; and*
>
> *(3) he rationally believes that his business judgment is in the best interests of the corporation."*[72]

This gives us the trifecta of requirements, loyalty, care and good faith. Summarily, these duties impose a standard of conduct on the directors which sets the foundational elements required by the BJR for directors to be shielded. This in a sort can leave the impression that the BJR is merely a reversed restatement of standard of liability for directors.

3.1.3 Evidentiary burden

Under US common law, the burden of evidence lies with the plaintiff bringing the lawsuit. This means that the claimant must prove that the decision made by the directors failed to live up to the fiduciary duties put upon them if they want to breach the protection granted by the Business Judgment Rule.

> "*The business judgment rule, which was properly applied by the Chancellor, allows directors wide discretion in the matter of valuation and affords room for honest differences of opinion. In order to prevail, plaintiffs had the heavy burden of proving [the alleged breach].*"[73]

If the plaintiff can carry this burden and bring sufficient evidence to overcome the innate presumptions born by the BJR, the burden is shifted to the directors. They in-turn now have a burden to prove that the decision falls within the Entire Fairness Doctrine in order to avoid liability.[74]

> *"Under the entire fairness standard of judicial review, the defendant directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price."*[75]

The doctrine affords the directors a chance to prove that although a duty was breached, the decision in the end lead to a result that was fair to the parties and/or the company. In order to pass the test applied by the doctrine, the decision had to have been objectively fair and reasonable. It is a heavy burden to overcome.[76] The Doctrine applies mainly to cases where the duty of loyalty was breached and pertains primarily to a fairness in the price on something where a director was interested whether this be stocks in the company, sale of goods, etc.[77]

Summarily, the burden of proof sits with the plaintiff as it does in all common law civil suits unless there's statutory strict liability. The BJR does not change this, and no professional re-

[72] ALI Principles (1994), section 4.01(c)
[73] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), p. 889
[74] Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993), p. 361
[75] Ibid.
[76] Licht, Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review, 2019, p. 18.
[77] Id. p. 16.

sponsibility is applied to the directors. The presumptions carried by the BJR heightens the burden that the plaintiffs must overcome. Should they successfully do so, the burden is shifted to the directors who find an *out* in the entire fairness doctrine which allow them to escape liability in certain circumstances if they can prove that the decision lead to an objectively fair and reasonable deal despite the breach.

3.1.4 The US Legal landscape

Despite how ubiquitously the Business Judgment Rule is, its definition and applications are still not crystal clear. Stephen Bainbridge's statement, quoted at the beginning of the chapter, still holds true in many ways. The Rule exists both as a standard of liability in conjunction with the fiduciary duties and simultaneously as a cloak to shield managers from interference in the governance process. Further complicating the Rule is its ambiguity when it comes to the procedural application as an abstention doctrine.

What remains clear is that in its application as a standard of liability, the BJR works as a presumption that must be overcome by plaintiffs seeking damages from managers for losses incurred as a result decisional responsibility. The Rule's presumption is this; unless proven otherwise, the courts will presume that the managers acted in good faith to the company and relied on a broad and informed basis for their decision. This presumption ties directly to the fiduciary duties. The managers are presumed to have upheld their duty of care by becoming necessarily informed, their duty of loyalty by setting aside any unwarranted interest and their duty of good faith by acting in a manner favorable to the company's interest. This means that the plaintiff must prove that the managers set aside one or more of these duties before the suit will be tested on the merits of the outcome of the decision. This leaves the managers protected by the courts in any scenario where no breach can be sufficiently proven.

This type of application sees the rule as an evidentiary presumption where the court is *stacked against* the plaintiff from the outset and where a heightened burden must be overcome in order to even get to the case on its merits. In this shape, it serves most naturally to protect the directors of the company rather than the company itself. There is a parallel theory for the application of the Rule, led primarily by Stephen Bainbridge, which sees the rule as one of abstention.

In the abstention doctrine, the BJR focuses on protecting the company as a whole, thereby serving the shareholders better.[78] Under the abstention doctrine, the courts are asked to abstain even further from review on the merits unless a breach of the fiduciary duties is clear *prima facie*. The doctrine shifts even greater weight to the duty of loyalty by maintaining that courts should not even review whether the duty of care was upheld unless a breach of the duty of loyalty is present.[79] Under the abstention doctrine, the duty of loyalty is thereby given a heightened importance and is placed ahead of the duty of care. This essentially shifts the balance of authority versus accountability even further in the direction of the managers as the can make decisions on an objectively unreasonable basis as long as they were entirely loyal to the company and did so without giving weight to any outside interest.

While the abstention theory is gaining grounds both in the US and in European countries[80], the BJR as a standard of liability remains the most widely accepted application of the rule and is the most common application in the US. Working unitedly with the entire fairness standard, the Rule gives deference to the decisions of the directors and thereby have decided that the

[78] Telman, The Business Judgment Rule, Disclosure and Executive Compensation (2006), Tulane Law Review, Vol. 81, 2007, p. 36
[79] Winther Høy, Bestyrelsens ansvar (2020), p. 249
[80] Telman, The Business Judgment Rule, Disclosure and Executive Compensation (2006), Tulane Law Review, Vol. 81, 2007, p. 38

directors are in the best position to make the most prudent decisions for the company. As long as the directors display the necessary prudence in executing of the duty of care by diligently informing themselves on a reasonable basis, make decisions in light of the circumstances that they reasonably should have known about, and show a dedicated loyalty to the company, the courts will not interfere with the decisions made in the board room.

3.2 Danish civil law

Unlike under the US common law system, the Danish civil law system follows as the continental-European rule of law by placing statutory laws above case law unless the law is left open to interpretation. The courts therefore first look to written law as a guide before turning to prior precedence. The Business Judgment Rule still only exists as case law, however, and consequently the analyses include in the following sections are therefore reflected to the relevant cases.

The Danish Legal system has a adopted many rules from other systems throughout the years, but the BJR is among the newest. For this reason, the amount of pertinent cases is still sparse in Danish jurisprudence, but it is a constantly growing field with a continually more important spot in both corporate and liability law. Further, the Supreme Court—with the aid of several important Circuit Court[81] rulings—have greatly expanded on the subject in the last 8-10 years, giving a clearer picture of the Rule and its place in the legal landscape.

3.2.1 The Business Judgment Rule in Danish jurisprudence

The Business Judgment Rule in some form or shape is now generally accepted as part of the Danish Legal landscape by most scholars but the definition still not entirely clear.[82] As a sole opponent to this acceptance is Thorbjørn Sofsruds. In his docotoral thesis, he states that:

> ""*Fokusmodellen bygger ikke på forudsætningerne i the business judgment rule. Det er opfattelsen, at reglen ikke er anvendelig som grundlag for ansvarsbedømmelsen.*"[83]

And that:

> *"Det er hverken muligt at foretage en entydig afgrænsning mellem skønsmæssige og ikke-skønsmæssige beslutninger, mellem forretningsmæssige og ikke-forret- ningsmæssige beslutninger eller pege på en bestemt retsvirkning i sådanne tilfælde. Og dette må være forudsætningen, hvis der skal kunne tales om en regel om domstolenes respekt af det forretningsmæssige skøn."*[84]

Between the two statements, it is evident that Sofsrud is not accepting of the Rule, at least a standard of liability. Further, he claims that it is not possible for the courts to apply the BJR as the necessary foundations for a review through the lens of the Rule are not available to an outsider such as a judge. Sofsrud's focus-model for assessing liability gained some traction, and Winther Høy gives it real consideration in his own doctoral thesis, but it virtually stands alone as opposition to the rule.

[81] Landsretten
[82] Schans Christensen, Kapitalselskaber (2017), pp. 721-26. See also Krüger Andersen, Aktie- og anpartsselskabsret (2019), pp. 498-501 and Winther Høy, Bestyrelsens ansvar (2020), pp. 254-57
[83] Sofsrud, Bestyrelsens beslutning og ansvar (1999), p. 138
[84] Ibid.

The Rule has since had considerable exposure as a result of the banking economic crisis and the image drawn there lends itself to the conclusion that the courts wholly agree that the Rule is now a part of the process when assessing management liability.[85]

3.2.1.1 A new rule or merely a new name

There is also a general consensus that the founding case for the entrance of the Business Judgment Rule in Danish jurisprudence is the *Havemann*[86] case. In the case, a number of directors, aided by their attorneys, made an active decision to continue the business which was on the brink of bankruptcy in an attempt to save it. The attempt failed and a supplier lost a considerable amount in the following bankruptcy and sued to hold the managers liable. The Court was left to decide, whether this was a business decision and whether such decision should result in liability. The Court found that it was a discretionary decision and importantly that such a decision warranted some protection; highlighting that the directors and lawyers had worked tirelessly to try to save the business and that a valid reason to attempt the deliveries was as such not grounds for liability[87]

This seems to point out that the courts had already at this point accepted something very close to the Rule. Although there may have been earlier rulings that indicated the same thing and alternatively that there may have been other factors at play,[88] this is the general foundation used by most scholars as a basis for later analysis. Gomard had previously discussed the subject and had come to a similar conclusion although with the important distinction that only entirely unreasonable decisions were not protected. [89] In his later analysis of the subject, he continued his rational and argued, as the courts would later agree, that business decisions are protected as long as they are made on an informationally sound basis.[90] In reviewing the Danish Corporate Act, *Betænkning 1498:2008* also pointed out, how the practice was seemingly already taking place as well, saying that:

> *"Domstolene synes . . . at vise en vis tilbageholdenhed med at foretage en vurdering af de forretningsmæssige skøn, som ledelsen har foretaget, når dispositioner er foretaget i selskabets interesse."*[91]

Collectively, the jurisprudence highlights that there were already a set of notions at play in the courts that as a whole took the shape of something very close to the BJR.[92] A series of later cases confirmed this idea and gave more detail on the elements required for the Rule's application giving credence to the conclusion that the concept already existed in the Danish legal landscape.

3.2.1.2 The foundation for the contemporary Business Judgment Rule in Danish jurisprudence

As the newer bank cases show, the Business Judgment Rule allow managers to be protected from liability as long as they make their decision on an objectively reasonable foundation and with loyalty to the company by not allowing unwarranted interests to influence the decision.

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[85] See section 3.2.2.1 below
[86] U.1977.274 H
[87] U.1977.274 H, p. 275
[88] Winther Høy, Bestyrelsens ansvar (2020), pp. 257-58
[89] U.1971B.117, p. 120
[90] U.1993B.145, p. 147
[91] Erhvervs- og selskabsstyrelsen, betænkning nr. 1498/2008: Modernisering af selskabsretten (2008), p. 38
[92] Fode, Ledelsesansvar og ansvarsbegrænsninger, pp. 85-86. See also Gomard, Kapitalselskaber (2013), pp. 565-66

These are two of the cornerstones of the BJR as we know it from the US common law system, the duty of care and the duty of loyalty. These elements were not entirely new in Danish Jurisprudence when the courts later almost wholly adopted the rule in the banking and have been present in Danish case law for a while.

The duty on the managers to make their decisions based on a substantiated foundation was at the core of both U.2001.873 H, U.2006.2637 H as well as U.2015.2075 H. In U.2001.873 H, the court held that it was not reasonable to forego consulting with an outside real-estate specialist and the Court there highlighted how the two partners of the firm had rested their decision on an objectively unsound foundation by not examining the market price of a parcel of land that they had made the decision to sell. This confirmed the presence of a duty of care and is supported by U.2006.2637 H. There the former board members of an association were sued in the wake a bankruptcy for their decision to continuing to operate beyond the point of hopelessness. The Supreme Court pointed out, however, that the directors had been in ongoing consultation with their lawyers and accountants and that they had, within the circumstances, reasonably informed themselves before making the decision. [93]

Further affirming the idea of a duty of care and that upholding it can lead to protection from liability is U.2015.2075 H. In it, the chairman of the board of an IT company was sued after it's sudden and abrupt bankruptcy as a result of deceptive practices by the CEO. The Court there held that the Chairman had adequate exercised his duties, despite the eccentric behavior by the CEO, and as a result would not be held liable for making the decision to continue to operate after substantial accounting issues were uncovered. The court highlighted that the chairman had based his decisions on otherwise reliable information from the officers of the company as well as the accounting firm (which were sued alongside the chairman).[94] The case confirms the presence of a duty of care and clarifies some of the factors that can be weighed in deciding whether it was upheld, such as circumstances, advice from other professionals and adequate pipes for information from the company to the board.

As to the duty of a loyalty, it is similarly present in earlier cases. Most notably and most cited is the *Røde vejrmølle* case.[95] In the case, the owner of the company Larkgate was hired by another company in its supply chain, Røde Vejrmølle, as its CEO. In the case it is highlighted that the CEO was hired to increase the profit margin on a number of products including the one that Larkgate bought. Later the price was instead reduced by the CEO and the margin was trimmed to almost nothing. In the bankruptcy proceedings for Røde Vejrmølle the CEO was sued to recoup the differences. The Court found that while the CEO was an interested party, no unwarranted interests had affected his decision. The discretionary decision had been based solely on market behavior and that:

> *"Direktør M har således ikke handlet illoyalt overfor bestyrelsen, og den af ham benyttede fremgangsmåde . . . har været fuldt forsvarlig, hvorfor der ikke er noget ansvarsgrundlag."*[96]

This directly confirms the presence of a responsibility on part of officers to act in a loyal manner to the interest of the company. It further showed how the court heightened its inquiry when there was a reasonable belief that unwarranted outside interest could have unduly influenced the decision, something that has been underscored in the banking cases.

[93] U.2006.2637 H, p. 2665
[94] U.2015.2075 H, pp. 2153-55
[95] U.1981.973 H
[96] Id. at 981

As we can see in the wake of *Havemann*, the courts gave further clarification on the requirements for the Rule and these verdicts, together with a few other cases left out for capacity reason, gave us the outline of the BJR without specifically naming the rule. The cases also gave the courts a set of fundamental pillars and precedence to build on later. In the last 10 years, largely because of the economic crisis, we have been able to concretely observe how the Rule is taking shape in Danish case law.

3.2.2 The Business Judgment Rule in practice

When turning to the Business Judgment Rule in practical application in Danish law, we still only have sparse legal precedence from the courts that uses the contemporary rule. As detailed above, the history of BJR spans close to 50 years in Danish jurisprudence. While it now holds an expanding presence in the courts, the sections above have also outlined how only a handfull of seminal cases have sparked actual academic discussion of the rule and its place in our legal system. The importance has notably grown in the last decade, however. As the financial crisis of 2008-09 took hold of the global economy, it forced a number of danish banks to buckle under and declare bankruptcy. In the ensuing years, a set of lawsuits were brought by Finansiel Stabilitet ("FS") in an attempt to recover from some of the executives and directors in those banks.

These lawsuits have given us a broader sample size of cases to lean on when attempting to draw conclusions about the rule's adoption by the courts. The cases all revolve around financial institutions and as such the cases are more specialized in their nature than some of the earlier cases which applied broadly to all limited liability companies. This specialized nature does not defeat the purpose of drawing broader conclusions. The courts applied both the Danish Corporations Act ("SEL") and the Law for Financial Companies ("FIL"). This gave the courts two sets of tools to approach the liability issues and as a result today affords us a chance to dissect the rulings and extrapolate from the parts pertaining to the SEL. The four most important cases in terms of jurisprudence and precedence are the cases against Amager Banken, Roskilde Bank, Capinordic and EIK Bank.

3.2.2.1 Recurring remarks across the bank-cases

The courts repeatedly lay out a set of general remarks that lay a foundation for assessing liability. Among other things, the courts discuss the dichotomy between culpa liability and strict liability. They further discuss whether an inquiry into management liability comes with a higher standard of review than regular liability cases, a form of strict scrutiny, similar to the kind of professional liability found in attorney liability law.[97]

The courts are dismissive of the idea that board members and executives are subject to an unwritten professional liability standard and display decisiveness in applying a culpa-based standard of liability. This is the first step in a fully fleshed integration of the Business Judgment Rule in Danish jurisprudence. For BJR to shield directors from a test on the merits of the decision it requires an objective liability standard with testable elements rather than a strict liability standard where the burden of proof is shifted to the defendant.

The courts further repeated the quotes from Landsretten ("the Circuit Court") in the Roskilde Bank and the Capinordic cases:

[97] Roskilde Bank, p. 443

> "[*D*]*er bør udvises forsigtighed med at tilsidesætte det forretningsmæssige skøn, der er udøvet af bankens bestyrelse og direktion ved bevillingen af et lån.*"[98]

The quote is repeated by the Supreme Court in the Capinordic case[99], and is at its core the philosophy behind the BJR. Although vague in the wording, the signaling is strong. Rather than dive into a full inquiry on the merits, the courts are instead to hold back and review the issues at hand through the lens of the rule. As mentioned above, Moderniseringsudvalget had pointed out that the courts were already—to an extend—displaying this carefulness or were already holding back in some sense.[100] The direct use of the quote finally gave the rule a *stamp of approval* from the Supreme Court.

3.2.2.2 Capinordic[101]

In short, the Capinordic case regarded the management liability of two former directors and an executive. Capinordic Bank ("the bank") had grounded to a halt in the wake of the financial crisis due to large exposure in the real estate sector.[102] After being declaring bankrupt, FS took hold of the remaining assets in the bank in feb. 2010 and soon after brought the case against the former management. FS plead that the three former managers were responsible for the bankruptcy as a whole as a result of an irresponsible management style and strategy. Alternatively, FS plead that the managers were responsible for losses resulting from certain loans.

The bank had an unusually small number of clients and was known in certain circles as a "rich people's bank." The bank solely served these clients and therefore had a relatively limited diversity in their portfolio. FS would later go on to call this very sensitive portfolio that was only combined with minimal securitization risky at best.[103]

At the circuit court, the managers were absolved of the full liability for causing the Bank's bankruptcy. The court found that, the bank had been employing a risky strategy and a limited circle of customers which made it especially vulnerable to economy cycles and fluctuations.

> *"Landsretten finder, at Bankens forretningsmodel med store lån til forholdsvis få kunder, der i betydeligt omfang har været indbyrdes forbundet, har været risikabel og gjort Banken særligt sårbar for konjunkturændringer . . .."*[104]

The court however promptly dispels the notion, that this alone is enough to carry liability for the managers, stating that

> *"[L]andsretten [finder] imidlertid ikke, at den valgte forretningsmodel, der tillige indebar et betydeligt indtjeningspotentiale for Banken, i sig selv kan anses for ansvarspådragende."*[105]

The Circuit court, however, did find that the managers were responsible for losses that the Bank had incurred as a result of loans given when certain criteria were present—or lacking—in the decision process. They were ultimately found liable for losses amounting to just over 90 million DKK. Both parties chose to appeal the verdict.

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[98] Roskilde Bank. p. 491
[99] U.2019.1907H, p. 1955
[100] Erhvervs- og selskabsstyrelsen, betænkning nr. 1498/2008: Modernisering af selskabsretten (2008), p. 38
[101] U.2019.1907H
[102] Id. at p. 1916
[103] Finanstilsynet, notat, 14. oktober 2010
[104] U.2019.1907H, p. 1930
[105] U.2019.1907H, p. 1930

The Supreme Court affirmed the verdict of the Circuit court holding that the managers were not responsible for the bankruptcy as a whole but were liable for the losses incurred as a result of 9 loans totaling 89 million DKK. In its affirmation, the Supreme Court accepted the Circuit Court's application of the Business Judgment Rule, stating that courts should show restraint when examining pure business decisions and that these decisions involved some measure of estimation and discretion.

> *"Højesteret finder, at der bør udvises forsigtighed med at tilsidesætte det forretningsmæssige skøn, der er udøvet af bankens bestyrelse og direktion ved bevillingen af et lån."*[106]

Using almost the exact phrasing of the court below, the Supreme Court adopted the BJR as a legal concept and inexorably chiseled out a spot for the rule in danish jurisprudence.

The Court based its decision on the merits on a number of criteria which are all part of the Danish implementation of the Business Judgment Rule which mimic the US common law version of the rule.

3.2.2.2.1 The basis of the decision

The Court sets out the same foundational rule that is now common ground in most instances in the adoptions of the BJR. To be protected, a decision must be taken on a broad and informed basis with the company's interest at heart.

> *"Det er dog en forudsætning herfor, at den konkrete disposition er truffet af ledelsen på et oplyst, kvalificeret og forsvarligt grundlag, ligesom dispositionen eller beslutningen skal være truffet i selskabets interesse"*[107]

The Court affirmed the argument, that the decision to grant loans relied on a business judgment and as such is offered the same protection as other forms of loans.[108] The Court furthered that such a decision in ordered to be responsible had to be informed regarding a variety of client criteria. The Court highlights four specific criteria for review in the Capinordic case, the purpose of the loan, the general financial situation for the client, what securitization were used and the client's ability to operate his business, the last point likely meaning how the business has historically performed.[109] The Court however, adds that these four points are specifically applicable to this case and that each case and each decision can merit other factors of inquiry.[110]

They expanded on this point saying that:

> *"Der må lægges vægt på den viden, som det enkelte ledelsesmedlem på dette tidspunkt havde eller havde adgang til. Det må endvidere tillægges betydning, om direktionen eller bestyrelsen - hvis der har været anledning hertil - har sørget for, at nødvendige yderligere oplysninger blev tilvejebragt, før lånet blev bevilget."*

In essence, the Court outlined where the focus should lie when examining whether a decision was informed or not. It falls in line with the notion of how the rule is applied in Danish law and is a clarification of what it entails to view a decision through the lens of the Business Judgment Rule.

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[106] Id. at p. 1955
[107] Id. at p. 1943
[108] Id. at p. 1955
[109] U.2019.1907H, p. 1955
[110] Ibid.

3.2.2.2.2 Outside interests

Importantly, the court noted that where unwarranted interests were present in the decision-making process, the same protection under the BJR should not be granted, stating that:

> *"Samme forsigtighed skal ikke udvises, hvis det må antages, at en bevilling af et lån eller en anden disposition knyttet hertil ikke alene er foretaget ud fra forretningsmæssige hensyn til banken, men også ud fra andre - og banken uvedkommende - hensyn."*[111]

The Court underscored that the presence of unwarranted interests will not only result in less protection under the rule but will also spur a deeper inquiry into the decision process. This means that the courts will closely examine exactly what interests were at the heart of the decision and whether the banks interest had been set aside. This idea was pressed by the court, stating that:

> *"Højesteret finder, at der i en sådan situation må stilles skærpede krav til, at det er blevet sikret, at bankens interesser ikke er tilsidesat."*[112]

As detailed below[113], this holding by the Court actually goes beyond the inquiry on the merits as seen in the US courts. The Supreme Court here sets a precedence that disloyal interests uncovered in a decision should more than just dispel the protections of the BJR. It should lead to a heightened form of judicial scrutiny and a deeper dive into the decision-making process that took place in the boardroom.

3.2.2.2.3 Application of the inquiry model

The Court's review of the loan to Nanocover A/S in the case is a great exemplification of the way the Court approaches a business decision. The Court initially concludes that granting loans to a corporation is a business decision that falls within the scope of the application of the rule.[114] It then follows a path of examining the foundational basis for the decision followed by looking at whether unwarranted interests were at play.[115] This is followed by a review of the foundation of the decision. The Court concludes that the managers had insufficiently established a solid basis for granting the loan.[116] They base this on the fact that the managers were solely acting on past financial filings and failed to do any further due diligence.

> *"Bevillingen af lånet skete alene på baggrund af Nanocovers årsrapport for 2007, hvilket navnlig henset til oplysningerne om selskabets negative økonomiske udvikling, ikke udgjorde et fyldestgørende beslutningsgrundlag for bevilling af lånet"*[117]

Adding to this, the Court lays out how the Bank further failed to obtain adequate securitization and highlights how Navocover was virtually given a blank cheque which goes to showing the level of irresponsibility and negligence in granting the loans.

Following this, the court establishes how the managers each had unwarranted interests in granting the loan and that these outside interests persisted in the decision-making process for on the part of all three managers.[118] Having conclude that these interests were at play, the Court makes no reference to any carefulness, nor does it show any restraint in reviewing the decision of

[111] Ibid.
[112] U.2019.1907H, p. 1956
[113] See section 3.3.1.2
[114] U.2019.1907H, p. 1939
[115] Id. p. 1951
[116] U.2019.1907H, p. 1951
[117] Ibid.
[118] Id. p. 1960

granting the loan. While not explicit in the dispensing of the protections of the Business Judgment Rule, it can be conversely concluded that the Court at this point is no longer applying the Rule.

3.2.2.2.4 Concludingly

The verdict in its entirety affirms that the Business Judgment Rule is a part danish jurisprudence and dismantles whatever doubts that were left surrounding its existence. The Court explained the need to examine whether an informed decision was made by analyzing objectively what on foundation of knowledge the managers made their decision. The Court thereby have left managers with a margin for error when they make business decisions. The Court has outlined what carries weight and what doesn't, in an analysis of liability, and has cemented the idea, that courts should show reluctance or at least display carefulness before they set aside decisions made by officers and directors. Most importantly, the Court further underscored the need to explore whether outside interests held sway over the directors. If that is the case, the Court stressed that this should lead to not only the BJR not applying or at least not granting protection, but rather to a greater scrutiny by the courts.

3.2.3 The Circuit court decisions in EIK Bank, Amagerbanken & Roskilde Bank

Partially outshone by the Capinordic verdict are the three other seminal bank-cases. Finansiel Stabilitet ("FS") similarly pursued the managers of these banks in the wake of the financial crisis. Each of them acted as substantial pillars for the eventual Capinordic verdict in the Supreme Court and each of them brought to the table a variety of business decisions for the courts to examine. Within the scope of this thesis, the cases are not varied enough to warrant their own individual sections with in-depth analyses but collectively they bring enough perspective to substantiate a section on their similarities and differences.

In Roskilde Bank, the Circuit Court carefully laid out their reasoning in finding that the overall strategy of a bank in and of itself cannot lead to liability for its managers.[119] Not unsurprisingly, this falls within the general norm of the manager liability theory.[120] The same notion was hinted at in EIK where the overall choice of an expansive and risky growth-model was not in itself enough to carry liability.[121] It has been suggested by Winther Høy that even the choice of strategy should fall within the protection of the Rule but this is yet to be confirmed by the courts.[122] In EIK however, the risk-profile of the bank was highlighted as an element in the analysis of the decisions made by the managers.[123] This falls in line with what was later confirmed in Capinordic; the approach by the courts when examining business decisions should be a holistic one.

Such a holistic analysis entails that the courts should approach the decisions made in the boardroom or elsewhere with a certain self-qualification. A reminder of sorts, that the courts are outsiders looking in, through somewhat opaque glass, at a decision made in the past and with an inevitable bias induced by the results of the decisions made by the managers.

The courts have the purview to go beyond examining the foundation of the decision and whether disloyal interests were at play but the Business Judgment Rule dictates that they should

[119] Roskilde Bank, p. 453
[120] U2019B.299, p. 301
[121] EIK Bank, p. 388
[122] Winther Høy, Selskaber – aktuelle emner II (2019), pp. 208-211
[123] EIK Bank, p. 386

not. A difference in respect for this sentiment is also clear between Roskilde and EIK. In EIK, the courts looked beyond the decision in the manner prescribed above. In the case, the court looked in part at the commercial dealings and seems to have given some value in their judgment to the outcomes of the dealing, contrary to the sought-after method. The Court did repeat the sentiment that it should air on the side of caution when approaching the loans and recognized that they are business decisions. And yet, the court in more than one instance, visibly move away from the core of the BJR and dig straight into what are obviously strictly commercial aspects.[124] The court repeatedly reference to concept of "upsides."[125] The court stated these upsides are unwanted interests and as such do not belong in the decision-making process. This perhaps is the underlying factor that pushed to the court to go deeper in their analysis of the loans, viewing them as disloyal interest.

This is a visible contrast to the examination of the outcomes of the business decisions in Roskilde. Here the court transitions to a methodology much closer to the one seen in the Supreme Court verdict in Capinordic. The court in Roskilde show much more fidelity to BJR and decisively stick to examining the foundation of the decision and gaging whether unwanted interests had played any part in the decisions.[126] However, this adherence to the rule was not clear-cut or without lapse. The court in reviewing the loan to—the ominously named—X decided to find the managers liable despite finding that FS had not proven that the managers had invited outside interests, acted disloyally or on an unfounded basis.[127] Overall however, this is a much stronger display of adherence to the philosophy of the BJR with a clear deference to the decisions made on a well-informed and loyal foundation.

The courts across the three cases all agree, that no strict liability befalls managers of banks. This means that despite the requirement in FIL § 64 that managers must be experienced and capable of performing their duties, the so-called Fit & Proper clause, they are not strictly liable as a result of their choice of profession. This is different from the "professional-liability" known from the legal and accounting profession. This was confirmed in the Capinordic case and leaves culpa liability as the sole standard of liability for managers. This is a confirmation of the plain reading of SEL § 361, stk. 1 and has not caused much discussion in the legal community outside of wide acceptance.[128]

As confirmed and discussed in Capinordic above, Amagerbanken highlighted how the presence of unwanted outside interests in the decision-making process results in the protection of the Business Judgment Rule disappearing. Specifically, in Amagerbanken the court did not find that such interests were present.[129] But the issue was discussed, and the case adheres to the overall conclusion on the subject that spans all four cases.

Roskilde draws distinction in showing that the protection of the BJR does have its limits. The court in reviewing the loan to X, seem to have indicated that even though there was no disloyal behavior and despite the informational foundation being solid, managers can still be found liable if the decision is a display of gross negligence.[130] The point is possibly also present in

[124] Id. at p. 417-18
[125] Id. at p. 391
[126] See e.g., Roskilde Bank, pp. 495, 502
[127] Roskilde Bank, p. 508-10
[128] Winther Høy, Bestyrelsens ansvar (2020) p. 674
[129] Amagerbanken, p. 1071
[130] U.2019B.299 (referencing Roskilde's loan to X), p. 305

Amagerbanken, the court there choosing not to apply the BJR to loans regarding certain speculative trades in currency. This has been accredited to the court possibly deeming this gross negligence on the part of the bank.[131]

The cases unitedly agree that managers cannot be found liable for damages simply because they breached rules set forward in the FIL. In EIK, FS plead that violating FIL § 70 should in and of itself carry liability. The court found that this is not the case.[132] The court expanded that while it does not carry liability on its own, it can be part of a holistic review of the decisions and can be counted as a factor. The court simultaneously found that this same notion applies to the internal bylaws of the company. They applied this to violations of the banks own credit-policy holding it as a factor but not a sole deeming of culpability.[133] The court in Roskilde reached a similar conclusion in reviewing the overall liability for the bankruptcy of the Bank as a result of the way the Bank was organized. There the court found that a violation of internal memos or rules by itself could not result in liability but, as in Amager, it could be counted as a factor in the courts determination of whether the standard of liability was violated.[134]

In the same spirit, the courts noted that merely ignoring or not acting accordingly to warnings or rating assessments from Finanstilsynet ("FT") could not of its own accord impose liability on the managers. Acting in concoction with the issues of timing and granting loans in the run up to or during the financial crisis, the courts all noted that these are once again factors that can supplements the courts review of the informational basis of the decision.[135] Concluding that violating internal rules or sections of FIL is unwarrantable but not grounds for liability exclusively was later confirmed in the Capinordic Supreme Court case.[136]

3.2.4 EIK Bank Supreme Court decision – An expansion of the danish rule?[137]

The Circuit Court verdict in EIK Bank was appealed by both parties, and almost a year after setting the seminal precedence in Capinordic H, the Supreme Court ruled in the EIK Bank case. The Court absolved the bank's managers of liability, finding that the Circuit Court had overstepped, and that the decision was not in line with the standard of liability set out by the Court in Capinordic.

> *"Det er ikke i overensstemmelse med den ansvarsnorm, der er fastslået ved Højesterets dom i Capinordic-sagen (UfR 2019.1907), når landsretten har fundet, at de er erstatningsansvarlige for bankens tab på engagementet. Der bør, som fastslået i den dom, udvises forsigtighed med tilsidesættelse af det udøvede forretningsmæssige skøn."*[138]

The Court repeats the now very familiar terminology, stating that the court must be cautious in their approach when setting aside strictly business decisions made by managers. The call for precaution echoes the now established sentiment that while the courts are equipped to review the law, they must give managers a margin to operate within.

[131] Winther Høy, Bestyrelsens ansvar (2020), p. 554-555
[132] EIK Bank, p. 378
[133] Id. pp. 379-380
[134] Winther Høy, Bestyrelsens ansvar (2020), p. 593
[135] EIK Bank, p. 384. See also U.2019.1907H, p. 1927
[136] U.2019.1907H, p. 1943
[137] U.2020.3547H
[138] Id. at p. 3661

Most interestingly, the Court seemingly expands the application of the Business Judgment Rule by granting managers some leeway in determining what the proper basis for the decision should be.

> *"Højesteret finder, at der må udvises forsigtighed med at tilsidesætte bankens ledelses vurdering af, om de foreliggende oplysninger udgør tilstrækkeligt grundlag for kreditvurderingen, eller om der er behov for at indhente f.eks. en ekstern sagkyndig vurdering."*[139]

This section clearly expands the Rule's application by the courts and leaves even greater discretion with the managers. The courts now have to find a *double whammy* in the decisions in order to establish liability; not only does the informational foundation have to be proven as objectively inadequate but it must also be shown that the managers were objectively wrong in choosing this foundation. Thus, if the managers are found to have made a decision on a too limited basis, they can still escape liability by rebutting the plaintiff's claims. This is done by showing that they were reasonable in choosing the specific informational basis.

This expansion of the rule cedes even more power to the managers by expanding the margin and gives even greater discretion. This clearly heightens the evidentiary burden for the plaintiffs and will likely lead to even fewer managers being held liable.

The sole qualification added by the Court is that this cautiousness should not be applied where unwarranted interests are found to be present in the decision-making process[140]. As discussed directly below, this essentially means that the double up on caution is applied as a single duty of care in the danish version of the rule and it—to some extend—elevates the duty of loyalty under the danish rule to being one step above the duty of care in the procedural process.

3.2.5 Danish case law

A review of the three Circuit court case and the two Supreme Court cases have revealed the current Danish standard of liability for managers in Public Limited Companies when they exercise their discretion and making a business-related decision. As a result of the financial crisis and its impact on the global economy, these cases have all revolved around banks and as such stand apart from the older jurisprudence on the subject. Nonetheless, the cases have not revealed any grounds to believe that the application of the Business Judgment Rule on limited liability companies in general would be significantly different from its application in the banking sector specifically. On the contrary, the courts have, however limited, applied even stricter scrutiny to the banking cases by using FIL on top of the regulates in the SEL.

Thus, it is reasonable to believe that the managers in companies in general would be granted the same amount of discretion and given the same margins to operate within. It even allows for speculations of whether the managers in limited liability companies in general are given even greater margins in the areas of the law where FIL apply heightened requires of the managers of banks, such as the Fit & Proper Clause.

Primarily, the cases establish that the liability found in SEL § 361, stk. 1, as the plain reading of section indicates, is based on a culpa standard of liability. No heightened form of liability is imposed on the managers, neither a professional-type liability as exists for lawyers and accountants nor a strict liability. This means from the outset, that in order for liability to be established, the managers must have acted with negligence or specific intent. This negligence or intent for wrongdoing must be found present in the execution of the duties of the managers.

[139] Id. p. 3663
[140] U.2020.3547H, p. 3663

Within the scope of this thesis, the duties of note are the duty to create a substantial informational basis and to act upon that basis as well as the duty to act loyally towards the company. Liability cannot be established without showing a breach of either one or both of these duties.

The duty to establish a proper basis for the decisions is a pendant to the US duty of care. The danish version of the duty requires that the managers establish an objectively sound basis for the decision by seeking out information, deferring to third parties with expert knowledge, accessing public records and so on. As highlighted by the Court in Capinordic, each decision dictates its own needs when it comes to the informational foundation required as a basis for the decision. It's hard, if not impossible, to set out any ground rules for what type of information is always required or what knowledge must be possessed by the managers in order to lift this burden. Naturally, the overall business, the financial consequences and the impact on outside parties all weigh in on this. With the Supreme Court ruling in EIK Bank, this discretion was expanded even more. The Supreme Court acknowledged that the courts should be withholding even in their test of whether the basis of the decision was objectively reasonable. This leads to a double layered protection granted by BJR when it comes to the Danish duty of care. First the plaintiffs must show that the decisional foundation was not objectively reasonable and then they must further show that the choice to using only this foundation was also objectively unreasonable. This results in an immense evidentiary burden for plaintiffs like Finansiel Stabilitet to overcome.

The duty to not let unwarranted or outside interests impact the decision is similarly a pendant to the US duty of loyalty. Distinctively, the Danish version holds even greater importance than the US duty does. The Capinordic verdict, building on the rulings in Roskilde and Amager particularly, shows us that a breach of the Danish duty of loyalty has even greater consequences than its US counterpart. Violating the duty of loyalty entails that the courts will not only completely set aside the discretion granted by the BJR but will lead to a deeper inquiry to show whether these interests collided with those of the company. Finding unwarranted interests at the heart of the decision therefore completely erodes any protection granted by the Rule and allows the court to fully test the decisions on their merits. Due to the heightened protection by the Rule in the Danish duty of care, the duty of loyalty now holds a more important role in the inquiry by the court. This elevation comes due to the power of completely removing the protections given by the BJR if the court discovers any indefensible interests at play.

An analysis of the cases, reveal the duties laid upon the officers and board members of danish limited liability companies when exercising their natural discretions as managers. The duties apply both to the overall organization of the businesses, the choice of strategy for growth as well as day-to-day decisions made by managers. The cases have shown that the evidentiary burden necessary for the managers to be found liable for the entire bankruptcy of a company is extremely tall. As the verdicts show, breaches of internal bylaws and politics set out by management or by the charter of the company alone cannot serve as the sole foundation for liability and the same applies to explicit breaches of regulation and laws. These can, however, serve as elements in a holistic review of the actions of the managers and help paint a picture of what level of carelessness was present and/or was accepted at the company.

The cases further establish that granting a loan is a business decision. While not pertinent to extrapolating general implications, it serves perfectly as an analogy to the type of decisions managers make in businesses in their daily functions. The managers are given discretion to make decisions and this discretion comes with a margin for error. Most importantly the cases establish that this discretion should be respected by the courts. Capinordic affirmed the rule that the courts must give deference to the manager's decision. This means showing caution and

withholding a full review on the merits. This is essentially the same protection offered by the US Business Judgment Rule.

The Roskilde verdict ultimately showed that the Rule does have its limits, and this has not since been overruled by the Supreme Court. Even if the courts find that the foundational basis was reasonable for the circumstances and that no unwarranted interests were at play, they can still find the managers liable for the resulting losses if there was a gross display of negligence or carelessness. This builds on the culpa standard of liability which sets a direct bar for liability at gross negligence and as such falls within the parameters found at the outset of a culpa liability analysis thereby showing that the BJR has no eliminated the culpa standard.

Collectively, this allows a conclusion that management liability in Denmark is based on a culpa standard of liability with no heightened scrutiny at the outset. The standard adds an additional shroud by an adopting of the US Business Judgment Rule which grant the managers discretionary powers when making decisions and allows for a substantial margin of error. This shroud is upheld as long as it is shown that the decisions were made on an informed basis and with loyalty to the interests of the company. If the shroud is pierced by a presence of unwarranted interests or by showing that the decision and its foundation were both objectively unreasonable, the protections by the BJR are lifted and the courts will fully test the decisions on their merits.

4. Compare-and-contrast

This last section before the conclusion will attempt to highlight and discuss some of the naturally occurring differences in the application of the Business Judgment Rule between the Danish legal system and the US legal system. It will further attempt to decipher whether the Danish courts have opted to purposely to remove certain parts of the Rule in its adaption. Based on this, the section will discuss the consequences of the difference, if any, and how the regulatory mechanisms are affected by this. Lastly, it will feature a short discussion on whether the adaption of the Rule is merely a restatement of already codified laws and whether the Rule lends itself to predictability.

4.1 Differences in framework and application

To determine any differences in the application, it is necessary to reexamine the content of the Business Judgment Rule in both systems. While the Rules in both systems seem similar on the surface, their procedural impacts are different which leads to them operating differently and only the US rule maintaining its role as a standard of liability.

4.1.1 Framework and interpretation

The US Business Judgment Rule has become an entire standard of its own for management liability dictating how far the courts should go in their inquiries. The Rule takes the shape of a procedural rule in this capacity and lays out a guideline for the courts to follow when a manager is sued. The court is asked to examine only whether the fiduciary duties were upheld and if they were to dismiss the suit. Here the entire burden is on the plaintiff to prove that the managers erred and thereby breached any of their duties. In this guise, the BJR acts much in the same way as a summary judgment motion. It asks the court to examine the case *prima facie* and not to make any judgment on the merits with the consequence being dismissal of the suit if the plaintiff has not lifted the initial burden. There are still two camps among legal scholars when it comes to the intensity of this initial inquiry. The standard of liability camp argues that the Rule in and of itself is gives the court purview to examine whether all the duties have been upheld. Opposite this is the abstention theory camp. Here scholars argue that the Rule dictates

that no inquiry at all should be made unless there's clear breach of the duty of loyalty. While both sides have followers, the standard of liability camp has won the most resonance with the US courts.[141]

This means that the Rule is interpreted as the basis for liability on which to weigh the manager's actions against. The courts apply their own objective measurement from case to case but always with the fiduciary duties as the specific elements. This is evident from the duties being outlined in such place as the DCGL and the MBCA. Lastly, even if a breach is found, the court will first only shift the evidentiary burden to the managers, allowing them to escape liability under the entire fairness doctrine, rather than immediately assessing liability. Consequently, this allows the Rule to fully facilitate the inquiry from start to finish under US common law.

In its Danish counterpart the rule acts in a presumptive manner rather than as its own standard. The standard of liability here is still culpa. This falls within reason, as the primary source for the assessment of liability is still principally the law itself, specifically SEL § 361. This leads to the fact that gross negligence can still lead to liability singlehandedly.[142] This in turn further means that while the Rule ultimately serves an efficiency purpose, it's application under Danish law becomes secondary. The Rule itself is not a standard for liability.

Under Danish law, cases are not dismissed without an inquiry into the merits like a summary judgment under US law and other merits may be tested initially. First and foremost, the Court will examine whether the managers lived up to the requirements of them set out by SEL in general[143] and only when it encounters what appears to be a discretionary business decision will it apply the Rule. This application comes in the form of reluctance or caution to aside as business decisions. Again, this is difference from the US rule, only under the US abstention theory is the court asked to be caution or to limit its inquiry. Under the standard of liability theory, the court may very well examine the decisions albeit against a certain set of elements.

The Danish rule has adopted the duties of care and loyalty but does not use them as elements in the standard of liability but only as guidelines when examining business decisions. As such, the Danish rule engages by presuming that the managers did not act in a liable way and asks the plaintiff to overcome a further evidentiary burden. The Rule under Danish law has seen the addition of a secondary layer to this burden. To prove a breach of the duty of care, the plaintiff is asked to prove not only that the information basis for the decision was unsound but that the manager was objectively unreasonable to choose this foundation. This a divergence away from its US origins. Adding to this divergence, the duty of loyalty has been given elevated power in comparison to the duty of care under Danish law. It has become evident that a breach of the duty of loyalty leads to a heightened scrutiny by the courts. Most importantly, a breach of the duty of loyalty under the US rule is ostensibly enough to result in the managers being found liable. This is not a given under the Danish Rule where the breach does lead to heightened scrutiny—and in extreme circumstances, a shift of the evidentiary burden—but it must additionally be shown that it also resulted in the interest of the company being set aside. This once again underlines that the Rule is not a standard of liability under Danish jurisprudence.

In all, this has moved the Danish adoption both closer and farther away from the original US rule. In one sense, the secondary nature of the Danish rule means that it takes a backseat in the process compared to the US rule. Only when the issue under review is strictly business decisions does the rule finally apply. On the other hand, the inflated influence of the duty of loyalty brings the Danish rule very close to the US rule by the abstention theory. It could be argued,

[141] See section 3.1.4
[142] See section 3.2.3
[143] See SEL §§ 111, 115, 131

however, that the US courts have opted not to follow the abstention theory. This would mean that the Danish rule moving closer to Bainbridge's theory actually means that it is moving farther away from the US precursor.

4.1.2 Similarities in the intensity of inquiry

The Danish courts seem to examine the surrounding circumstances more and the discretionary decision less, similarly to their US counterparts. A repeated theme in the Danish banking cases is the review of the circumstances surrounding the decision rather than a review of the decisions themselves. The Danish courts mostly withhold their inquiry into the actual decisions until they find clear indications of either an unsound basis or the presence of unwarranted interests. A greater focus is put on such elements as timing of the loans given, warnings from FT, the financial situation of the company and internal policies. Adding to this is the double layer now present in the duty of care. This leaves an even greater presumption of discharge of the managers on the part of the court. Collectively this indicates that the Danish courts are entirely moving away from testing the decisions on its merits and lessening their inquiry.

This means that the Danish courts are closing in on the norm set by the US courts. It is evident in US case law, that the courts still find it within their purview to examine the decisions made by the managers, however, the US courts similarly find it a prerequisite to testing the decisions that the plaintiff show a breach of the duties. This is supported by the use of the entire fairness doctrine which is clearly applied as a shift in the evidentiary burden.[144]

4.2 Are the various interests still protected with the adoption of the Rule in Danish law

The adoption of the Business Judgment Rule has resulted in the scale between authority and accountability being shifted further towards management discretion, what consequences this will have for the interests at play in a corporate structure remains to be seen. Under the current corporate governance philosophy in Denmark there are a multitude of interests that are represented by—and holds a stake in—the wellbeing of a company. With the Rule now being close to fully adopted, it begs the question how this will affect the myriad of interests.

Interests such as the employees as well as social considerations have taken leaps forward in their representation within companies. These interests are now recognized as integral parts of the sphere of influence for corporations and they are valid interests to consider when making strategic and day to day decisions in the board rooms.[145] The employees have been given a greater presence in the boardrooms with a minimal of 1/3 of the seats and CSR considerations are often up for debate at general shareholder meetings.

What remains to be seen is how these interests are affected by giving the managers an even longer leash. Employee representation on the board lessens the issue of management abuse in such areas as compensation but it does not eliminate the issue entirely. The employee representations will often act as a watchdog and as uninterested members they are unlikely to abuse the greater discretion given to the managements. However, with the courts tipping the scale in favor of management discretion when it comes to the informational foundation, it can be harder for those representative members to argue against the foundational basis chosen by the other board members. This is escalated by the double layer that was introduced in EIK H which has

[144] See section 3.1.3

[145] Erhvervsstyrelsen, vejledning om selskabslovens krav til børsnoterede selskabers vederlagspolitik og vederlagsrapport (2019), p. 6

greatly increased the burden by requiring proving of both an unreasonable informed basis and an unreasonable choice of that basis.

On the other hand, allowing managers greater discretion may result in them taking into consideration more CSR interests that they previously thought would land them in trouble if the decision was reviewed. As they now have more opportunities to argue why they included such interests, they may be keener to let the company carry a greater social burden.

4.3 Do differences exist in the regulatory mechanisms between the systems that affect the application of the Business Judgment Rule

In the US system, lawsuits play a greater part of regulatory mechanisms in the corporate governance sphere than in the Danish system. This is evident from the sheer numbers. In Delaware alone more than 1100 lawsuits were filed in the Chancery courts in 2018 pertaining to civil corporate litigation, with the fiduciary duty claims ranking among the most common.[146] This likely means that the Rule sees a lot more action there than it does in Denmark, even when accounting for the number of companies, population numbers, etc. Derivative lawsuits also exist under US common law which allow shareholders to petition the company to go after their own directors. The legal sytem as whole thereby play a much greater role as a mechanism for shareholders to keep managers in check. This is paired with the fact that the US regulatory agencies are also forced to employ courts when issuing civil fines, as they do not have inherent power to levy fines for management abuse.

In all, this has put the Business Judgment Rule at the very forefront of corporate governance mechanisms used in balancing the scale in governance-related issues. With the progression that the Rule has had in the last 30 years, it seems that the US is moving ever closer to almost no liability for directors and with continual deregulation—except briefly after the financial crisis—the US shareholders are slowly losing their agency.

In Denmark the Rule has not taken a no-liability shape and the courts have been much more reluctant to give a *free-pass* to the directors. The banking cases dispelled the notion that Denmark was moving entirely in the same direction as the US and the courts have constituted substantial liability in several cases. EIK H is undoubtedly a step further towards lessening liability, but it is not a step that is impossible to overcome for shareholders and creditors.

While lawsuits play a smaller roll in Danish regulatory mechanisms, even if shareholders must employ the courts, third party funding of lawsuits has now become an accepted practice under Danish Law, allowing greater flexibility for the shareholders and may result in an increase in its use[147]. It is still the primary mechanism for civil regulatory agencies like Finansiel Stabilitet that must resort to the courts to recover. However, other mechanisms, such as the adoption of the rules from the Recommendations for Good Corporate Governance[148] for all publicly listed companies as well as the EU Shareholders Rights Directive, show that there are still other venues to regulate the behavior in the boardrooms and at general shareholder meetings.

4.4 Balance in the application of the Rule

While this thesis, nor its author, is not equipped to draw grand conclusions on whether the Business Judgment Rule is being "correctly" applied, it is within the scope of the paper to comment on the overall balance.

[146] American Bar Association National Lawyer Population Survey (2018)
[147] Fode, Ledelsesansvar og ansvarsbegrænsninger (2020), pp. 49-52
[148] See section 2.4

The cornerstone of the philosophy of the US rule have evidently made it into the Danish version of the rule, the courts should intervene as little as possible in discretionary business decisions and should show restraint in using pure business decisions as grounds for liability. There is a need to balance this to keep managers accountable and to leave shareholders and creditors with a means to recover from negligence or abuse by managers.

The Courts have found this balance by focusing their inquiries on whether the managers properly informed themselves prior to their decision and by keeping a sharp eye on whether unwarranted or personal interests affected the decision, without reviewing the decision itself on its merits. This has given the courts a powerful role to act as a governance mechanism without strangling the corporations by bogging down their managers in tedious and never-ending court cases. This balance is much sought-after[149] and rarely achieve but nonetheless it seems that the Danish system is moving closer to it.

4.5 Continued as jurisprudence or introduced as codified law

In the US common law system, the Business Judgment Rule has been kept as jurisprudence as a natural consequence of the way common law functions. States like Delaware have codified some of the elements[150] but without codifying the rule itself. The continued development of the Rule has not kept all states from codifying the Rule and some states like California have opted for a statutory rule[151] that employs the core philosophy of the Rule.

As a civil law legal system, Denmark should consider whether the adoption of a practice as impactful as the BJR should be kept as jurisprudence or be codified into a statute. There are arguments to be made for both sides that impact both predictability and competitiveness as well as general governance issues.

4.5.1 Advantages and disadvantages of codifying the Rule and the need for predictability

When a procedural practice applied by the courts exist only as jurisprudence it often carries an element of uncertainty. This uncertainty can often be, mostly, ironed out by introducing the practice as statutory law. When it comes to management liability, the uncertainty assuredly impacts the day-to-day business in the board rooms. When directors are not sure exactly what circumstances can lead to liability, they inevitably become more risk averse. The same uncertainty is also likely to impact the ability to recruit new directors as very few competent people are likely to take the job if they believe they are prone to become personally liable to creditors and shareholders. The pairing of these two issues is likely to affect the competitiveness of Danish companies as they may struggle to lure new directors to their boards. In an ever more internationalized market, staying competitive is prime and it falls to the government and legislator to aid their businesses as much as reasonably possible. As such, the Danish legislator should consider introducing the Business Judgment Rule as law.

At the same time, the Danish courts have not yet set in stone exactly how the Rule is shaped in Danish law and therefore cannot advice the legislators on how a clear and concise law may be formed. This leads to a prolonged legislative process. In the fast-moving pace of international markets, this may result in an eventual law being outmatched by the national markets we are competing with. Especially within the EU, with the freedom of movement for companies,

[149] Keay, Stakeholder Theory in Corporate Law: Has it Got What it Takes?, Richmond Journal of Global Law and Business, Vol. 9, Issue 3, 2010, p. 248
[150] See section 3.1.2.3
[151] See California Corporations Code Section 309

would an outdated law likely mean Denmark having difficulties incentivizing corporations to establish within our borders. Further speaking to keeping the law as jurisprudence is the need for a rule that can adapt to the said pace of the other markets. Courts have their hands less tied by legal precedent and are undoubtedly able to respond faster and more aptly than the legislature would be. In all, it is a balancing act between the need for predictability and the need for a rule that can climatize to shifting market forces, both of which affect competitiveness. Neither presents an overshadowing argument in favor and neither seem to have a clear-cut solution.

5 Conclusion

The purpose of this thesis has been to present the shape and application of the Business Judgment Rule within Danish jurisprudence and compare it to the shape and application of the original US common law rule. This is done in an exercise to answer whether the Danish adoption of the rule is truly a full-fletched adoption or whether the courts are merely using a new name for an older practice. It is the conclusion of the paper that it is not just a new name for an older practice.

Danish jurisprudence has included elements that are reminiscent of the Rule going back as far as 50 years and we've continually seen the notion that courts should give some form of deference to the business decisions. Nonetheless, it wasn't until the cases ensuing the financial crisis that we saw the Supreme Court fully establish the presence of the Rule in the Danish legal landscape. The Court quoted and affirmed the Circuit Court's wording from Roskilde saying that the courts must show restraint before setting aside any discretionary business decision. In the same cases, the courts outline the elements from the Rule that we know from its US counterpart. To garner the protection of the rule, the managers must uphold their duties to the company. This means they must reasonably inform themselves prior to making the decision and they must only allow warranted interests to influence the decision. If there are shortcomings to either of these requirements, the court should show no such restraint.

The Supreme Court thereby consolidated the various elements that prior jurisprudence had hinted at and packaged them in a familiar shape. The adoption is not without its divergences, however. The Danish Rule seems to show even more deference to the discretionary element of the decision. This is balanced by a slightly deeper inquiry into the circumstances of the decision and what exactly went into the informational basis of the decision than we see in the US standard of liability version of the Rule. This is paired with a more intense focus on whether any disloyalty was present in the decision. If the courts find that the decision was not made on an entirely loyal foundation, the level of scrutiny is heightened. The Danish adoption made a further deviation with EIK H, where the Court held that restraint should further be shown before ruling the informational basis as inadequate. This makes the Danish duty of care double layered and the burden to overcome it that much greater.

In all, the case law reflects an adoption of the BJR that is very near to its ancestry. While not exactly the same, we now see a Supreme Court that is willing to balance the scale between authority and accountability in the board room. This echoes the corporate governance considerations known from the US legal system, which calls for market efficiency and competitiveness, and brings Danish jurisprudence closer to the US standpoint on management liability. This adoption has happened without setting aside the myriad of interests present within the sphere of the corporation, and importantly has not left shareholders without any other regulatory mechanisms. Lastly, arguments can be made for both sides on whether the Rule should remain as jurisprudence or be codified in Danish law. As such it remains uncertain and requires further examination before it can be diligently answered.

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