

Nordic Finance & The Good Society Seminar

Title: *Contracting Out the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*

Date: December 7, 2016

Speaker: Eric Talley, Columbia University

About Eric Talley:

Eric Talley is the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, New York. He is an expert in the intersection of corporate law, governance, and finance, and he teaches a variety of courses that include corporate law, mergers and acquisitions, contract and commercial law, microeconomics, corporate finance, securities regulation, quantitative methods, game theory, and economic analysis of law. Talley has held permanent or visiting appointments at the University of California, Berkeley, University of Southern California, Caltech, University of Chicago; Harvard University; Georgetown University, RAND Graduate School; and Stanford University. He serves on the boards of the American Law and Economics Association (ALEA), as well the Society for Empirical Legal Studies, and was the society's co-president in 2013–2014. Talley is a frequent commentator in the national media, and he speaks regularly to corporate boards and regulators on issues pertaining to fiduciary duties, governance, and finance. Talley holds a J.D. from Stanford University, where he was the articles editor for the *Stanford Law Review*; a Ph.D. in economics from Stanford University; and a B.A. degree from the University of California, San Diego.

Abstract:

For centuries, the duty of loyalty has been the hallowed centerpiece of fiduciary obligation, widely considered one of the few “mandatory” rules of corporate law. That view, however, is no longer true. Beginning in 2000, Delaware dramatically departed from tradition by granting incorporated entities a statutory right to waive a crucial part of the duty of loyalty: the corporate opportunities doctrine. Other states have since followed Delaware's lead, similarly permitting firms to execute “corporate opportunity waivers.”

Surprisingly, more than fifteen years into this reform experiment, no empirical study has attempted to measure either the corporate response to these reforms, or to evaluate the implications of that response.

This Article presents the first broad empirical investigation of the area. Contrary to conventional wisdom, we find that hundreds of public corporations have adopted waivers – often with capacious scope and reach. We thus establish a central empirical fact that is an important baseline for further discussion: public corporations have an enormous appetite for contracting out of the duty of loyalty when freed to do so. Our analysis further sheds light on the high-stakes normative debate around the relationship between fiduciary principles and freedom of contract. What types of corporations choose to contract around default rules? When they do so, do such measures tend to bolster or thwart shareholder welfare? We develop an efficient contracting approach to explain why corporations – and their shareholders – might favor tailoring the duty of loyalty, and provide empirical evidence that Delaware’s experiment has generally been a success.