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The Ramifications of The Delaware Court of Chancery's McDonald's Decision – Beyond Holding That Caremark Oversight Obligations Apply to Corporate Officers

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Last year, we discussed how stockholder complaints concerning environmental, social, and governance ("ESG") issues were making their way to the courtroom and, specifically, how the Delaware Court of Chancery and Supreme Court had, after a period of dormancy, revitalized the potential for director liability for failures of oversight as articulated in *In re Caremark Int'l Derivative Litigation.*[1] *Caremark* and its progeny articulated an obligation on the part of directors to implement effective "reporting or information system or controls"[2] and to monitor them such that the board addresses "red flags" indicating potential misconduct.[3] In *In re McDonald's Corporation Stockholder Derivative Litigation*,[4] plaintiff-stockholders of McDonald's Corporation ("McDonald's" or the "Company") asserted claims for breach of fiduciary duty against McDonald's, its Board of Directors ("Board"), and certain officers relating to an alleged "corporate culture" that "condoned sexual harassment and misconduct."[5] On January 26, 2023, Vice Chancellor J. Travis Laster denied a motion to dismiss filed by one of the company's officer-defendants, the former Executive Vice President and Global Chief People Officer, who argued that Plaintiffs failed to state a claim against him because, among other reasons, the duty of oversight applies only to directors and not officers. In denying the motion, the Court held that "corporate officers owe the same fiduciary duties as corporate directors, which logically includes a duty of oversight," reasoning that "[t]he same policies that motivated Chancellor Allen [in *Caremark*] to recognize the duty of oversight for directors apply equally, if not to a greater degree, to officers."[6] However, the Court explained that the application of the duty of oversight to officers is "context-driven" and will depend on the officer's title and responsibilities.[7] More broadly, *Caremark* claims have been described as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[8]
But *McDonald's* represents yet another relatively recent decision where such claims have survived a motion to dismiss and in some instances moved to discovery, albeit on facts that differ in some ways

from these other cases, most notably, *Marchand v. Barnhill*[9] and *In re Boeing Co. Derivative Litig.*[10] This raises questions about the state of *Caremark* oversight today and what recent caselaw means for directors and officers in understanding the scope of oversight obligations under Delaware law.

Background

In 2015, McDonald's faced its first sales decline in over a decade and set out to shake up its leadership. Among other things, the Company hired Stephen J. Easterbrook as its CEO. Easterbrook had held various positions within the Company from 1993 until 2011, and then rejoined in 2013 as its Executive Vice President and Chief Brand Officer. After his promotion to CEO, Easterbrook "promptly promoted" David Fairhurst to Global Chief People Officer.[11] The operative complaint pleads that Easterbrook and Fairhurst "promoted and participated in a 'party atmosphere'" at McDonald's corporate headquarters, where Company executives "participated in drinking excursions" at company events and "[m]ale employees (including senior corporate executives) engaged in inappropriate behavior . . . routinely making female employees feel uncomfortable."[12] Over time, the Court opined that McDonald's "grew to resemble a boys club," and Fairhurst failed to "address complaints adequately" through his responsibilities as overseer of the human resources department.[13]

These types of issues began to attract media attention. Within a year of Easterbrook and Fairhurst taking over, McDonald's "began to face increasing public scrutiny about problems with sexual harassment and misconduct."[14] The complaint alleges that dozens of employees filed multiple complaints with the Equal Employment Opportunity Commission, workers across the United States went on a one-day strike to protest management's failure to address the hostile work environment, and United States Senator Tammy Duckworth (D-WI) sent a letter to Easterbrook inquiring about the allegations and complaints.[15] The Company's Compliance Department "evaluated" reports of allegations that Fairhurst himself had engaged in sexual harassment and the Board's Audit & Finance Committee discussed the incidents.[16] While Fairhurst was permitted to remain with the Company,[17] the Board and Company management worked to revise McDonald's harassment policies, provide training, offer support to franchisees, and engage outside experts to further advise the Company about preventing sexual misconduct and harassment.[18] But in October 2019, the Board became aware that Easterbrook was engaged in a prohibited relationship with an employee, which violated Company policy. As a result, the Board and Easterbrook negotiated a separation agreement and then the Board terminated Easterbrook without cause. Shortly thereafter, McDonald's general counsel "updated the Board" about additional "employment matters related to [Fairhurst]." The meeting minutes do not explain what information was presented, but the Court concluded that, based on the context, "it is reasonable to infer at the pleading stage that Fairhurst engaged in an additional act of sexual harassment that violated the "Last Chance Letter."[19] The Board then terminated Fairhurst for cause.[20]

After these issues came to light, stockholders sought information from the Company pursuant to Section 220 of the Delaware General Corporation Law and, thereafter, filed a derivative suit in the Delaware Court of Chancery against the Company, the Board, Easterbrook,[21] and Fairhurst. The claims against Fairhurst were asserted for breach of fiduciary duty arising out of his inappropriate conduct with employees and for failing to exercise adequate oversight in response to sexual harassment and misconduct at McDonald's.[22] Fairhurst moved to dismiss on the grounds that, among other things, no Delaware law "recognize[s] an oversight claim against corporate officers."[23] The Court explained that while the duty of oversight generally applies equally to officers as it does to directors, the exact scope of oversight will differ for each officer depending on their responsibilities at the company.[24] Here, the Court went on to find that Plaintiffs stated a well-pled claim against

Fairhurst, including based on allegations from which the Court could reasonably infer that Fairhurst "knew about and played a role in creating the Company's problems with sexual harassment and misconduct, which led to the external signs that took the form of employee complaints and a ten-city strike."[25] The Court also found that Plaintiffs stated a claim for breach of fiduciary duty of loyalty in connection with Fairhurst's own acts of sexual harassment, as those acts were not done to "further the best interests of the Company" and instead were done for "selfish reasons."[26] The Court therefore denied the motion to dismiss and allowed Plaintiffs' allegations against Fairhurst to proceed.

Takeaways

1. **<u>Corporate Officers Owe a Fiduciary Duty of Oversight.</u>** The Court succinctly found that "this decision clarifies that corporate officers owe a duty of oversight."[27] The Court explained that while this is the first decision expressly finding an oversight duty for officers, the holding is in line with *Caremark* itself and Delaware Supreme Court precedent holding that "the fiduciary duties of officers are the same as those of directors,"[28] and is well supported by other legal principles, academic authorities, and decisions from other jurisdictions.[29] In support of his finding, Vice Chancellor Laster observed that the three major reasons identified by Chancellor Allen in *Caremark* for imposing oversight obligations on directors, apply equally – if not more so – to corporate officers. *First*, while Delaware corporate law charges the board of directors with managing the affairs of a company, it is the officers who actually manage the day-to-day business operations and must supervise employees to keep operations running.[30] *Second*, officers generate and collate the timely and relevant information to pass on to the board of directors to allow the board to effectively oversee business operations. Accordingly, officers "must make a good faith effort to ensure that information systems are in place."[31] *Third*, the board's oversight obligations stem, at least in part, from the corporation's obligations under the federal Organizational Sentencing Guidelines requiring compliance and ethics programs within a company. These guidelines dictate that "high-level personnel," including both directors and officer-executives, are responsible for establishing these programs. Based on these three reasons, Vice Chancellor Laster wrote that the "foundational premises for recognizing the duty [of oversight] . . . easily encompass officers" as well.[32] The Court also found that where a company has sufficient internal reporting systems in place, officers are "optimally positioned to identify red flags and either address them or report upward to more senior officers or to the board."[33]

2. **<u>The Application of Officers' Oversight Duty is "Context-Driven" and Depends on the Officer's "Areas of Responsibility."</u>** Even though the Court held that an officer's duty of oversight is "comparable" to a director's duty, it explained that this "does not mean that the situational application of those duties will be the same" for officers and directors.[34] While directors are "charged with plenary authority over the business and affairs of the corporation," – *i.e.* "the buck stops with Board" – officers generally have a more constrained area of authority with specific responsibilities.[35] Though the CEO and COO "likely will have company-wide oversight portfolios" and therefore duties akin to those of directors (with the CEO likely also serving on the board), other officers generally would face *Caremark* liability only for failing to impose systems of reporting or ignoring red-flags within their specified area of authority. As Vice Chancellor Laster wrote, "[w]ith a constrained area of responsibility comes a constrained version of the duty" to implement internal control systems.[36] Therefore, generally, officers will be responsible for monitoring or reporting red flags only within the purview of their responsibilities. Still, if a red flag were "sufficiently prominent," any officer

regardless of delineated responsibilities "might have a duty to report upward about it."[37] For example, an officer could not escape *Caremark* liability after receiving "credible information that the corporation is violating the law" and then "turn a blind eye and dismiss the issue as 'not in my area.'"[38] Here, the Court found that Fairhurst "had an obligation to make a good faith effort to put in place reasonable information systems so that he obtained the information necessary to do his job and report to the CEO and the board, and he could not consciously ignore red flags indicating that the corporation was going to suffer harm."[39]

3. **There Are Implications Flowing from the Principle that Oversight Obligations Are An Aspect Of The Duty of Loyalty.**

As the Delaware Supreme Court has explained, under *Caremark*, the oversight duty is an aspect of the duty of loyalty.[40] The Delaware Supreme Court stated in *Marchand* that "to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it."[41] Several consequences flow from that principle, including:

- Pleading and Proof: To adequately allege and plead an oversight claim, a plaintiff must establish that the officer "intentionally acts with a purpose other than that of advancing the best interests of the corporation."[42] Here, the Court found that plaintiffs adequately pled that Fairhurst engaged in bad faith and failed to address red flags for two reasons. *First*, the complaint supported a reasonable inference that Fairhurst consciously ignored red flags. As Global Chief People Officer, he was responsible for promoting a safe and healthy work environment, yet the Company's human resources department failed to take action in response to numerous harassment reports during Fairhurst's tenure. The Court also stated that Fairhurst himself committed multiple acts of sexual harassment and it is "reasonable to infer . . . [he would] turn a blind eye to red flags about similar conduct by others."[43] *Second*, the Court found that Fairhurst's own acts of sexual harassment, on their own, constituted bad faith because they were committed "for an improper purpose, unrelated to the best interests of the Company."[44]

- Exculpation: There are implications for an officer's ability to invoke the company's bylaw exculpation provision. Section 102(b)(7) permits stockholders to preclude monetary liability on the part of directors and, since August 1, 2022, officers, to the company and its stockholders for breaches of the duty of care, but not breaches of loyalty. Officers facing *Caremark* claims based on conduct pre-dating the amendment are not able to benefit from the exculpation provision[45] and, perhaps more importantly, could not invoke the provision in the *Caremark* context regardless of when the conduct occurred because, if properly pled and proven, *Caremark* claims would state and prove a loyalty breach and fall outside a Section 102(b)(7) charter provision.

4. **Questions Remain About *Caremark's* Application Outside "Mission-Critical" Company Areas and What Constitutes a "Mission-Critical" Area.** In *In re Boeing*[46] and *Marchand v. Barnhill*,[47] Delaware courts permitted *Caremark* claims to survive motions to dismiss based on

allegations that the boards failed to properly oversee "mission-critical" aspects of the company. In *Boeing*, the board allegedly did not establish a proper control system and otherwise ignored red flags from public reports related to the safety of the company's airplane fleet. In *Marchand*, the board of Blue Bell Creameries USA Inc. allegedly did not establish effective controls related to overseeing the safety of the company's ice cream production facilities. According to these courts, airplane and food safety, respectively, were "mission-critical" to these organizations. As described in *Boeing*, "*Marchand*'s mandate that the board rigorously exercise its oversight function with respect to mission critical aspects of the company's business, such as the safety of its products that are widely distributed and used by consumers," such that the directors faced a "substantial likelihood of liability" on the oversight claim for purposes of assessing demand futility.[48] And while *Marchand* indeed used "mission-critical" phraseology, it also more generally stated that *Caremark* "does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's *central compliance risks.*"[49] (emphasis added).

At the same time, other recent Delaware decisions have dismissed *Caremark* claims, including in areas deemed "mission critical," where the board of directors took remedial action that turned out to be insufficient at rectifying red flags,[50] made a good faith effort to establish board-level monitoring systems that proved to be insufficient,[51] or where plaintiffs generally did not plead "sufficient particularized facts to support a reasonable inference of scienter and therefore actions taken in bad faith by the Board."[52] In *City of Detroit Police & Fire Ret. Sys.*,[53] the Court of Chancery addressed the "mission critical" aspect of a pipeline operating company maintaining pipeline safety. In *Lending Club*, the alleged failure of oversight involved compliance with consumer protection laws, presumably a core compliance function for a consumer lending company. And in *Bingle*, the plaintiffs alleged that an online service provider failed in its "mission critical" cybersecurity efforts.[54] None of these decisions discussed any heightened obligations, or constraint on the application of oversight duties, based on whether the underlying issue was "mission-critical" or represented a "central compliance risk," perhaps because the courts found insufficient the allegations of an oversight breach in the first place. Indeed, the *Bingle* court observed that it need not address the extent to which the "decisions or omissions of Directors [are] reviewable under *Caremark* in such a scenario," i.e., where the *Marchand* "shibboleth" mission-critical applies but plaintiffs insufficiently plead "bad faith liability" on the part of directors for failing to oversee company operations.[55]

McDonald's (and *Bingle* for that matter) therefore raise questions about the importance of a "mission-critical" finding to the result on an oversight claim, at least at the pleading stage. Vice Chancellor Laster does not use the phrase "mission critical" anywhere in the *McDonald's* opinion, and the Court may have been suggesting a somewhat more expansive modern version of *Caremark*. The workplace environment, while undeniably a crucial aspect of the functioning of an organization, is not necessarily a unique feature of a particular company relative to other companies, but rather could be deemed important to success across the corporate landscape. It is unclear whether the Court would have considered workplace issues "mission-critical," or, at least tacitly, whether the Court rejected that label as not relevant to the viability of a *Caremark* claim. According to plaintiffs, McDonald's placed value on the workplace environment. The Court noted that McDonald's "prides itself on being 'America's best first job,'" and its policies called for constructing a workplace environment that "builds trust, protects the integrity of our brand and fuels our success."[56] On the other hand, that issue did not receive a Tier 1 risk rating under the Company's internal risk assessment methodology. Rather, the Company's risk management system identified maintaining a "Respectful Workplace" in the "Top Tier 2" level.[57] These risks are, according to McDonald's, not mission-critical: "Tier 1" risks are "[c]ritical to McDonald's mission and values," whereas McDonald's Tier

2 risks have the "[p]otential for sustained, negative impact to brand" and are "[m]ore likely to become Tier 1 risks given the circumstances."[58] Read this way, and given the absence of any reference to mission-critical tasks in the opinion, the decision could be interpreted as moving beyond the mission-critical language of *Marchand*, *Boeing*, and other recent decisions analyzing *Caremark* claims.

5. ***McDonald's* Underscores The Importance For Boards to Implement Systems to Monitor ESG-Related Issues, and Promptly and Effectively Address Red Flags or Other Material Information.** While the *McDonald's* decision is consistent with the existing Delaware authorities cited in the opinion and is therefore not necessarily "new" law, it does serve as an important reminder to officers and directors about the importance of implementing internal controls and reporting systems to enable companies to address corporate misconduct. This is particularly important as plaintiffs increase pressure on companies to address the impacts of various "ESG" issues, such as compliance with safety regulations, assessment of climate-related risks and opportunities, or, as here, harassment. Whether or not the area is alleged or found to be mission-critical, problems arising out of these areas of corporate activity very well could have a material impact on the company at issue. And, at least in some cases, the ESG issue in fact could wind up being found to involve a mission-critical area or core compliance function. Directors and officers therefore need to assess the extent and quality of information monitoring systems in core-ESG areas and then appropriately address information yielded by those systems.

6. **Companies Should Bolster their Documentation of Reporting Procedures and Otherwise Establish Clear Areas of Officer Responsibility.** In *McDonald's*, Vice Chancellor Laster noted that the "absence of evidence from the Section 220 production" showing that Fairhurst reported incidents of sexual harassment to the board of directors supported the inference that he acted in bad faith.[59] Companies should consider establishing at the officer level similar internal documentation procedures as those used by the board of directors. Because courts look to when and how officers respond to red flags when assessing a *Caremark* claim, well-documented reporting procedures will aid companies in defending against such claims. Putting clear reporting systems in place, and documenting responses to red flags, will allow officers to most effectively address bad acts as they arise and ensure compliance with *Caremark's* obligations. In establishing such procedures, companies should also consider whether officer responsibilities are clearly outlined and communicated to employees. Delineating clear spheres of responsibility will assist officers in establishing clear reporting procedures such that potential misconduct is reported to the appropriate officer.

7. **Directors' and Officers' Duties of Loyalty Encompass Oversight of Others and Their Own Conduct.** Vice Chancellor Laster was clear that "[s]exual harassment is bad faith conduct. Bad faith conduct is disloyal conduct. Disloyal conduct is actionable."[60] The Court found that a fiduciary can act in bad faith by intentionally acting with a purpose other than one that advances the best interests of the company. By violating company policy and committing acts of sexual harassment, an officer acts disloyally, with an improper purpose, and in a manner "unrelated to the best interests" of the company.[61] These constitute unique claims, separate from any employment-related litigation stemming from the same bad acts. When the company suffers harm resulting from fiduciaries committing sexual harassment, stockholders will likely be permitted to utilize derivative claims and have the opportunity to "shift [any] loss that the entity suffered to the human actor who caused it."[62] Of course,

proving damages could be a challenge, and companies should put in place effective anti-harassment and anti-discrimination policies, as well as mandate training for fiduciaries.

8. **Plaintiffs may Face Difficulty Establishing Damages.** The facts of *McDonald's* reflect a somewhat extreme case; not only did Fairhurst commit his own wrongful acts in the course of holding his position, but the corporate culture that he was charged with overseeing garnered the attention of politicians, prompted strikes in several cities, and exposed the Company to several class action lawsuits. Plaintiffs who allege well-documented misconduct or damaging events in support of a *Caremark* claim (*e.g.*, *Marchand*, which stemmed from a listeriosis outbreak from Blue Bell Creameries' products) appear to have more success overcoming a motion to dismiss. But proving damages in connection with *Caremark* claims based on relatively more isolated incidents of misconduct committed by an individual actor within the company may prove more challenging. Indeed, in *McDonalds*, the Court noted this decision is not likely to release a "flood of new employment-style claims" against companies as the "protections associated with derivative claims [still] apply."[63]

9. **Litigation Tip: Beware Redactions.** The Court of Chancery normally permits redactions when producing Section 220 documents for "material unrelated to the subject matter of the demand."[64] But in its production of books and records pursuant to Section 220, the Court noted that McDonald's "raise[d] questions" with its redactions.[65] *First*, the Company redacted a portion of a sentence in an "otherwise responsive sentence within a responsive paragraph."[66] *Second*, the Company redacted an entire paragraph of the minutes of a special session to specifically discuss the issue of sexual harassment.[67] *Lastly*, the Company made five redactions on a single-topic memorandum related to building a respectful workplace.[68] The Court observed that the outcome of the case was not impacted by the redactions and did not conclude whether McDonald's should provide unredacted versions of these records. But the Court implied that it would look closely at the context of how and why corporate documents were created and find redactions inappropriate where there is "no reason to think" that the redactions were implemented to remove non-responsive material.[69] While not outcome-dispositive here, counsel's credibility with the Court is crucial, and overly aggressive redactions (particularly if not for privilege) may cause more harm than benefit for the company.

Please click here for the full opinion.

FOOTNOTES

[1] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

[2] *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006)

[3] Jason Halper et al., *Caremark and "Mission-Critical" ESG Company Operations*, Cadwalader, Wickersham & Taft LLP (February 28, 2022), https://www.cadwalader.com/resources/clients-friends-memos/caremark-and-mission-critical-esg-company-operations.

[4] *In re McDonald's Corp. S'holder Derivative Litig.*, No. 2021-0324-JTL, 2023 WL 387292 (Del. Ch.

Jan. 26, 2023)

[5] *Id*. at *1.

[6] *Id*.

[7] *Id*.

[8] *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019).

[9] *Marchand*, 212 A.3d 805 (Del. 2019).

[10] *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *24 (Del. Ch. Sept. 7, 2021).

[11] Fairhurst had previously served as McDonald's Vice President and Chief People Officer for Europe. *McDonald's*, 2023 WL 387292 at *3.

[12] *Id*. at *4.

[13] *Id*.

[14] *Id*.

[15] *Id*. An additional seven Senators joined a letter sent the following summer inquiring more specifically about sexual harassment at the Company and other workplace safety issues. *Id.* at *6.

[16] *Id*. at *5.

[17] McDonald's "ostensibly" had a zero-tolerance policy, but Easterbrook successfully recommended to the board that Fairhurst instead forfeit 50% of his bonus payments for 2018 and execute a "Last Chance Letter" documenting his harassing behavior. *Id*.

[18] *Id*.

[19] *Id*. at *7.

[20] *Id*.

[21] Easterbrook succeeded on his motion to dismiss for the "plainly dispositive" reason that a previously negotiated settlement agreement between him and the Company provided that the Company "irrevocably and absolutely releases and forever discharges Easterbrook" from all potential claims McDonald's (or stockholders suiting on its behalf) could bring against him. *See In re McDonald's Corp. Stockholder*, No. 2021-0324-JTL, 2023 WL 266519, at *1 (Del.Ch. Jan. 16, 2023).

[22] *McDonald's*, 2023 WL 387292, at *8.

[23] *Id*. at *9.

[24] *Id*. at 1.

[25] *Id*. at *2.

[26] *Id*. at *3.

[27] *Id*. at *1.

[28] *Id*. at *13. (citing to *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).

[29] *Id*. at *13-14.

[30] *Id*. at *10-11.

[31] *Id*. at *11.

[32] *Id*. at *12.

[33] *Id*.

[34] *Id*. at *18.

[35] *Id*. at *19.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*. at *2.

[40] *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019).

[41] *Id*. at 821.

[42] *McDonald's*, 2023 WL 387292, at *28.

[43] *Id*. at *27.

[44] *Id*. at *29.

[45] *See Del. Code Ann. tit. 8, § 102* ("No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective.").

[46] *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934.

[47] *Marchand,* 212 A.3d 805.

[48] *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934, at *26.

[49] *Marchand,* 212 A.3d 805, at 824.

[50] *Richardson as Tr. of Richardson Living Tr. v. Clark*, No. CV 2019-1015-SG, 2020 WL 7861335 (Del. Ch. Dec. 31, 2020) (“LendingClub”).

[51] *City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource, Inc. v. Hamrock*, No. CV 2021-0370-KSJM, 2022 WL 2387653 (Del. Ch. June 30, 2022)

[52] *Constr. Indus. Laborers Pension Fund v. Bingle*, No. 2021-0940-SG, 2022 WL 4102492, at *14 (Del. Ch. Sept. 6, 2022) (“Bingle”).

[53] *City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource, Inc. v. Hamrock*,, 2022 WL 2387653.

[54] *Bingle*, 2022 WL 4102492, at *1.

[55] *Id*. at *1-2.

[56] *McDonald’s*, 2023 WL 387292, at *7.

[57] *Id*.

[58] *Id*.

[59] *Id*. at *27.

[60] *Id*. at *30.

[61] *Id*. at *29.

[62] *Id*. at *30.

[63] *Id*. at *29-30.

[64] *Id*. at *5, n.2.

[65] *Id*.

[66] *Id*.

[67] *Id*. n.3.

[68] *Id*. n.4.

[69] *Id*. n.2.

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