INSTITUTE OF LAW RESEARCH AND REFORM
Edmonton, Alberta

CORPORATE DIRECTORS' LIABILITY

Research Paper No. 17

February 1989

INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors are A.C.L. Sims (Acting Chairman); Professor P.J.M. Lown (Director); M.B. Bielby; C.W. Dalton; J.L. Foster, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin; Professor D.P. Jones, Professor J.C. Levy; The Honourable Mr. Justice D. Blair Mason; Dr. J.P. Meekison; B. Rawlins and C.G. Watkins.

The Institute's legal staff consists of Professor P.J.M. Lown (Director); R.H. Bowes; B.R. Burrows and M.A. Shone. W.H. Hurlburt, Q.C. is a consultant to the Institute.

Professor Richard W. Bauman had the main carriage of this report. He was with the Institute from August of 1987 to June of 1988. He is now with the Faculty of Law at the University of Alberta.

TABLE OF CONTENTS

PART I - EXECUTIVE SUMMARY

The Institute has been asked by the Minister of Consumer and Corporate Affairs to review the laws, both in Alberta and in other jurisdictions, that require directors of business corporations to act with care, skill and diligence. The purpose of the review is to determine if the Alberta corporations scheme requires amendment.

Current Alberta Law

The current standard, as expressed by the Alberta Business Corporations Act, requires a director to "exercise the care, diligence and skill that a reasonably prudent person would exercise under the circumstances". This was enacted in 1980, following a recommendation by the Institute that the standard be raised beyond that set by common law. The common law standard as expressed in the *City Equitable* case, is that a director is not expected to exhibit "a greater degree of skill than may erasonably be expected from a person of his knowledge and experience".

There is some concern that the standards set in common law, and also the somewhat higher standards set in Canadian jurisdictions over the past two decades, may not reflect the reality that outside directors of large corporations are increasingly persons of professional status and skills. Directorships are no longer merely honourary positions. Should the law be changed to reflect this professional status, with the appropriate, and much higher, professional standard of care and skill?

Trends and Case Law in Other Jurisdictions

Until 1985, corporate directors faced similar personal liability throughout the common law world. In that year the Delaware Supreme Court, in the *Trans Union* case, introduced what appeared to be significantly higher standards of care and diligence. In that case, 10 members of a board of directors were held personally liable for $23.5 million in damages paid to the shareholders of their company, following a cash-out takeover deal. The court found the directors negligent when they approved a share price recommended by the company president, without reviewing any documentation and without making an effort to determine whether a higher price could have been obtained for the shareholders.

In some interpretations, this case and several others which followed it seemed to be part of a trend, with courts assuming an intrusive role in overseeing both the process by which business decisions are reached and also the merits of the decisions themselves. Other observers saw it as merely following the existing rule that courts should intervene only when directors fail to exercise reasonable business judgment.

Although there has been disagreement among observers about whether the *Trans Union* case in fact served to raise the common law standards, the case had an immediate effect on the corporate community. In particular, the insurance industry has taken the judgment as meaning the courts will adopt higher standards, and this will encourage disgruntled shareholders to sue.

Practical Consequences of Changed Standards

While *Trans Union* cannot take all the blame, directors' liability insurance rates have skyrocketed while coverage has been diminished. Although evidence of higher judicial standards has so far been limited to U.S. jurisdictions, the insurance industry calculates risk based on conditions affecting insurance claims throughout the continent.

Increased liability may also create problems for corporations in attracting and holding directors, with some highly qualified persons being unwilling to accept the risk they may now see, for the relatively small fees usually offered for directorships. Those who are willing to serve may become much more conservative in business decisions. Both these consequences are bad for business.

Legislative Responses

There are several alternatives for legislative reform in this area:

* The standard can be lowered substantially, as in Indiana, where a director can now be found liable only where his action "constitutes wilful misconduct or recklessness".

* In Delaware and other states, the law now permits a corporation to change its constitution to protect its directors from certain types of liability.

* Although no jurisdiction has yet done so, a ceiling could be established for the amount of damages that can be awarded for managerial negligence.

Conclusion

It is clear from our review that it would be premature in Alberta to adopt any one of these choices without further study. The Institute of Law Research and Reform has several recommendations as a result of its initial review:

The Institute should continue to monitor judicial and legislative changes in this area, particularly any innovations made in Canadian jurisdictions.

There should be an inquiry into the availability and extent of D &) liability insurance for corporations formed in Alberta, based on consultation with members and clients of the insurance industry. The inquiry should cover the use of D & O insurance, its costs, the frequency and amount of claims and the factors that influence substantial changes in terms and availability.

Finally, the Institute recommends that a separate study be conducted to assess the extent that, over the past decade, persons in Alberta may have become less willing to serve as directors of corporations. Research would include surveys of current, past and prospective directors and officers and would explore other factors, besides that of legal liability for managerial negligence, that affect the decision to stand for election to a corporate board.

PART II - CORPORATE DIRECTORS' LIABILITY

A. Introduction

The genesis of this research project lies in a request to the Institute from the Minister of Consumer and Corporate Affairs to review the laws, both in Alberta and elsewhere, requiring directors of business corporations to act with care, skill, and diligence. In addition, the Minister indicated that the Institute might, in a preliminary fashion, consider the reasons and prospects for amending Alberta's current legislation to take into account both new developments in the courts' application of existing statutory standards, and also the practical consequences attributable to such developments.

We begin by examining current law and policy bearing on the standard of care applicable to directors of Alberta business corporations. We also explore some startling legal decisions in U. S. jurisdictions over the past three years that have apparently tightened up the standards that govern directors' conduct. Those decisions have prompted state legislators in that country to revise their corporations schemes and to provide various means to limit the risks to which directors are exposed. After reviewing these topics, this paper broaches two principal issues. First, are there any grounds for predicting that Canadian courts will follow the pattern set in the U. S.? Second, might it be advisable, even without any impending judicial reinterpretation of the law, to amend Alberta's corporations scheme to protect directors in this province from undue legal hazards?

B. Current Alberta Law

The law in Alberta holds directors of business enterprises formed under the Business Corporations Act[1] to specified standards of conduct in the performance of their directorial duties.[2] Many of the duties with which directors are charged are set down in the ABCA, though several of them were originally developed at common law. For the purposes of the present discussion, the duties applicable to directors are of four different types.[3] First, the ABCA makes directors liable for financial misconduct in circumstances stipulated by the statute, where the directors would not have been liable at common law. For example, the Act fixes personal liability on the directors for taking certain actions that impair the capital of the corporation.[4] Second, the Act makes directors of a corporation liable for up to six months' worth of unpaid employees' wages.[5] Third, directors owe to their corporations fiduciary duties. On this score, the Act is largely declaratory of rules that existed at common law.[6] Fourth, they must demonstrate a minimum level of care, skill and diligence in carrying out their tasks on behalf of the corporation. That level of care is very broadly defined by the statute. Although this memorandum is concerned primarily with the standards of care applicable to this fourth type of obligation, it will help us focus on these standards if they are initially compared with the more rigorous fiduciary standards.

---

1 Business Corporations Act, S.A. 1981, c. B-15, as am., hereafter referred to as the ABCA.

2 Unless the context otherwise requires, the term "directors" here also encompasses officers of the corporation. Moreover, reference in this paper to a director as "he" is meant to be generic rather than gender-specific.

3 Directors of Alberta corporations can be held civilly liable also for false or misleading statements in a prospectus or for insider trading in violation of provincial securities laws.

4 See ABCA, sections 42 and 113(1).

5 See *ibid.*, section 114(1).

6 See *ibid.*, section 117(1)(a).

(1) Directors' Fiduciary Obligations

Once elected to serve at the head of a business corporation, a director is liable for failing to discharge stringent fiduciary duties. The law expects him to act honestly, loyally, and in the best interests of the corporation.[7] Special rules regarding disclosure have evolved over contracts the corporation enters into with another party in which a director has an interest. Both the courts and the legislators have been careful to elaborate standards holding a director to strict account for ignoring a conflict of interest. As illustrated in prominent Canadian cases of the past fifteen years, directors are subject to an exacting standard when they try to take advantage of a business opportunity they learned about as a result of serving as directors.[8] Even after a director has resigned or retired, fiduciary duties will continue to operate, so that the corporation's interests, or those of the members of the corporation, will be protected against economic harm. The law of director's fiduciary duties is itself still developing, with courts interpreting the common law and statutory standards as covering a broad range of corporate executives.[9]

---

7 For the common law background of these duties, see *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378 at 381 and 389, per Lord Russell of Killowen. Corporations themselves are being held to account as fiduciaries for their commercial conduct: see the decisions in *Standard Investments Ltd.* v. *Canadian Imperial Bank of Commerce* (1985), 22 D.L.R. (4th) 410, 52 O.R. (2d) 473 (C.A.), leave to appeal to S.C.C. refused (1986), 65 N.R. 78 and *International Corona Resources Ltd.* v. *Lac Minerals Ltd.* (1987), 44 D.L.R. (4th) 592, 62 O.R. 1 (C.A.), leave to appeal to S.C.C. granted Oct. 2, 1987.

8 See *Peso Silver Mines Ltd.* v. *Cropper*, [1966] S.C.R. 673, 58 D.L.R. (2d) 1; *Canadian Aero Service Ltd.* v. *O'Malley*, [1973] S.C.R. 592, 40 D.L.R. (3d) 371; and *Weber Feeds Ltd.* v. *Weber* (1979), 99 D.L.R. (3d) 176, 24 O.R. (2d) 754 (C.A.).

9 See, e.g., *W. J. Christie & Co. Ltd.* v. *Greer* (1981), 121 D.L.R. (3d) 472 (Man. C.A.); *MacMillan Bloedel Ltd.* v. *Binstead* (1983), 22 B.L.R. 255 (B.C.S.C.); and *Angus* v. *R. Angus Alberta Limited* (1988), 58 Alta. L.R. (2d) 76 (C.A.). This last case, it should be noted, was decided under the provisions of the Companies Act, R.S.A. 1980, c. C-20, not the ABCA.

(2) Directors' Duty of Care

By contrast with its treatment of these fiduciary duties, the law has traditionally applied more lenient standards to the director's duties of exercising care that corporate decisions are reasonable, and of exercising skill in overseeing the management of the corporation. These are not fiduciary standards. Directors are expected to be careful, but the standard is not the lofty one of utmost, constant care. Courts have not insisted that directors, in performing their obligations of care, skill, and diligence, are strictly trustees who must be exceedingly cautious about engaging the enterprise in risky ventures.[10]

The original standards of care and skill were settled in the case law that can be traced back to decisions by English courts in the Victorian era, when the legal treatment of business corporations was in many aspects first defined.[11] The modern English authority that best sums up the prevailing judicial attitude, the *City Equitable* case, dates from 1925.[12] There it was clearly settled that a director was not in law expected to exhibit "a greater degree of skill than may reasonably be expected from a person of his knowledge and experience".[13] In assessing the performance of a business director, courts

---

10 There were eighteenth-century attempts by courts to construe the duty of diligence on the standard appropriate to a trustee, but this fiduciary analogy was finally laid to rest in this century: see Kenneth B. Potter, "Directors' and Officers' Liability Insurance" (1971) 9 Alta. L. Rev. 331 at 332.

11 See, e.g., *Turquand* v. *Marshall* (1869) L.R. 4 Ch. App. 376; *Re Denham & Co.* (1883), 25 Ch. D. 752; and *Marquis of Bute's Case*, [1892] 2 Ch. 100.

12 *Re City Equitable Fire Insurance Company Ltd.*, [1925] 1 Ch. 407.

13 *Ibid.* at 428. Romer J. cited with approval the judgment in *Re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425 (C.A.) in which it was said at 428 that a director:

> . . . is not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance.

would use as one criterion the qualifications and experience of that particular defendant, not those that one might expect of a reasonably suitable director.

This and other propositions deriving from the judgment in *City Equitable* have continued to serve as the background for statutory stipulations of minimum standards of conduct. Some changes have been made. For example, the strictly subjective test applicable at common law has been modified. The standard under the ABCA includes an objective element in the test to be applied to any particular case of alleged negligence of a director. A court will look also at how a "reasonably prudent person" (though not a "reasonably prudent director") would have conducted himself "in comparable circumstances".

The court in *City Equitable* made it clear that "directors are not liable for mere errors of judgment" and they are "not bound to give continuous attention to the affairs of the company".[14] This latter element was illustrated by Mr. Justice Romer in the following way. A director's duties are intermittent. They are performed at board meetings or at meetings of committees constituted by the board. A director is not legally expected to attend all such meetings, though, as the court added, the director "ought to attend whenever, in the circumstances, he is reasonably able to do so".[15] Moreover, a director is justified in entrusting to an officer of the company other matters of business and in relying on an officer's advice and information, so long as there are no grounds for suspicion that the officer is dishonest or incompetent.[16]

It should be emphasized that in the developed Canadian jurisprudence we find strikingly few instances where a director has been found by the courts to have fallen short of the standards articulated in *City Equitable*. Two principal factors explain this. First, the legal standard demanded of directors has traditionally been so low that it

---

14 *Re City Equitable*, *supra* n. 12 at 429.

15 *Ibid.*

16 *Ibid.*

would be difficult for a claimant to prove that a director had failed to meet that standard. In addition, the development at common law of certain procedural technicalities that are associated with what is called the rule in *Foss* v. *Harbottle* constituted a significant obstacle to actions alleging negligence.[17]

(3) The Institute's Earlier Work on Directors' Duties

In considering this topic in the context of fundamentally reforming Alberta corporations law earlier in this decade, the Institute in its Final Report took the position that the standard, insofar as it applied to duties of care and diligence, should be raised.[18] The problems with the common law standard, according to the Institute's commentary, were twofold. First, the standard only required that performance which could reasonably have been expected from a director in the circumstances of the defendant. So although the director might have been a business illiterate or capricious by nature or an inveterate gambler, departing significantly from the level of prudence expected of a reasonable person, he might nevertheless have satisfied the common law standard. Second, after examining the case law that had dealt with these issues (though the Report did not cite representative cases), the Institute concluded that courts had been inconsistent in their application of the established standard.

---

17 (1843) 2 Hare 461, 67 E.R. 189. In brief, the rule stipulates that, first, the proper plaintiff in an action against the directors would have to be the company itself, not an individual shareholder. Moreover, if the decision complained of is one that could be made binding on a company by simple majority of its members, then no individual shareholder is entitled to bring an action for that alleged wrong. Specific and narrow exceptions to the rule were developed at common law, but in general, and until statutory mechanisms were created to provide new procedural guidelines, the rule in *Foss* v. *Harbottle* was for many years a formidable barrier to members of a company who had a grievance over which they wished to sue the directors.

18 See Institute of Law Research and Reform, *Proposals for a New Business Corporations Law for Alberta* (Edmonton: Institute of Law Research and Reform, 1980) at 64-66.

The solution proposed by the Institute and eventually enacted in section 117(1)(b) of the ABCA requires a director to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

In particular, in an effort to raise the standard of diligence expected of a director, the ABCA, in section 118, provides that unless a director signifies his or her dissent or abstention at a meeting, or delivers a form of written dissent after the meeting, that director will be deemed to have consented to any resolution made at the meeting of the board or one of its committees. The federal Business Corporations Act goes further than this and includes a deeming provision that has an absent director consenting to any resolution, despite his absence, unless he takes the steps set forth in the Act to register his dissent after becoming aware of the resolution.[19]

With respect to the duty of skill, the Institute in its 1980 Final Report admitted some difficulty. Although it recommended the phraseology of the "reasonably prudent person" as the touchstone for judging standard of skill, the Institute expressed misgivings about whether the interpretation of such a standard would not lead to highly qualified directors being subjected to more rigorous standards than those less qualified. Such a result would discourage from serving those people who might be desirable candidates for the position of outside directors in large corporations, including accountants, lawyers, and experienced executives in other business organizations. As the next Part of this paper suggests, the vexed question whether directors should have imposed on them expectations appropriate to a "professional" class of person continues to be one of the chief issues in this area of business corporations law.

C. Basic Policy Choices

An ironic feature of corporate law reform generally in Canadian jurisdictions in the past two decades is that, on this issue of directors' standard of care, although law

---

19 Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 123(3).

reform agencies and legislators have universally expressed a desire to raise the standard above the existing common law minimum, the resulting statutory formulae very nearly duplicate the standard articulated in *City Equitable*.[20] It has occasionally been lamented that statutory reform has not so far been based on a greater appreciation for how the standards applicable to British commerce in 1925 are now out of date. Directors have become increasingly endowed with professional status and skills. They do not occupy merely honorary positions. They should therefore be "compelled to accept professional standards of care".[21]

Here we find a quarrel between proponents of two different types of reform proposals. First, some commentators would like to see directorships recognized as fully professional, with appropriate legal obligations flowing from the characteristics that attend such status, including acknowledged expertise and the economic reliance of shareholders on the judgment of corporate directors. This would bring corporations law into line with the actual responsibilities that a director assumes in overseeing the enterprise.[22] Struggling against this conception of the director's role is the fear that by placing too much emphasis on the skills and importance of directors, the law will cause an exodus of highly qualified directors from the boardroom. In the latter event, the enterprise itself and the economy as a whole would each be the loser.

The tension between these two visions of how stringent the law should be in regulating the performance of directors, who are, after all, freely chosen by the

---

20 See Ivan R. Feltham and William R. Rauenbusch, "Directors' and Officers' Liabilities in Canada" (1976) 1 Can. Bus. L. J. 321 at 329: "the general language of the new provincial and federal statutes is little different from the language used by Mr. Justice Romer 50 years ago."

21 Allan L. Mackenzie, "A Company Director's Obligations of Care and Skill" [1982] J. Bus. L. 460 at 464-65.

22 A study based on survey data of what sorts of functions board members actually perform in large and medium-sized U. S. firms is contained in Myles L. Mace, *Directors: Myth and Reality* (Boston: Harvard Graduate School of Business Administration, 1971).

shareholders themselves, underlies many of the issues in the contemporary controversy over who should govern a corporation's business affairs and, when these turn out to be improvident, unlucky, or the product of stupidity, who ought to bear primary responsibility for the resulting economic loss to the corporation and its members. Just as the demand for higher standards of care has been a persistent motif in corporations law thinking,[23] so the apprehension that the interventionist state should leave the issue of directors' negligence to be handled by market forces has been a countervailing theme.[24] The vaguely worded and, to a director without legal training or legal advice, often confusing statutory standards of care demonstrate how this tension has not yet been resolved. No matter whether the standards have been set by the common law or by statute, there has always been room for a court in a particular case to interpret the relevant formula literally and to hold directors liable for a demonstrated lack of care or skill. Though this potential for crushing liability has always been present, it simply has rarely been imposed.

D. Judicial Initiatives to Tighten the Traditional Standards

The situation for directors in respect of personal liability for alleged negligence was remarkably uniform throughout the common law world, at least until 1985. In that

---

23 See Roswell B. Perkins, "The Genesis and Goals of the ALI Corporate Governance Project" (1987) 8 Cardozo L. Rev. 661 at 669:

> A reading of Chapter VI of my law school favorite, *Ballantine on Corporations*, the second edition of which is now some forty years old, reveals many stern statements about the liability of officers and directors for corporate losses attributable to their negligence. If Professor Ballantine's writings were extracted and packaged as a statement by any organization as to what current corporation law is or should be, I believe that the promulgating organization would be viewed by those businessmen who are unfamiliar with traditional articulations of corporate law as radical reformers trying to hang honest directors. [footnote omitted]

24 See *infra*, Part VII, for further discussion of what is there called the "neoclassical" theory of the firm.

year the Delaware Supreme Court, in a decision summarized at length below, introduced what appeared to be significantly higher standards by which to ascertain whether defendant directors had satisfied their statutory duties of care and diligence. Various constituencies were concerned at this judicial turn. Directors, their legal advisors, the commercial Bar generally, and insurers all appeared nervous that the Delaware case was a harbinger of higher directorial standards, of an avalanche of lawsuits against directors and officers, and of a consequent insurance crisis.

(1) The Business Judgment Rule

The relevant U. S. law contains a judicially-created doctrine that considerably overlaps with the common law and statutory standards of a director's duty of care. This is the so-called "business judgment rule". It provides that, in the absence of a conflict of interest, the business decisions of a director or group of directors will be treated by the courts as presumptively valid.[25] For example, when disgruntled shareholders of a corporation challenge the decisions or conduct of a director, the rule serves as a bulwark against judicial review of the wisdom of impugned transactions.[26] The precise

---

25 The business judgment rule has been codified in the following terms by the American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 4* (Philadelphia: American Law Institute, 1985) s. 4.01:

> (c) 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.

26 See Harry G. Henn and John R. Alexander, *Laws of Corporations and Other Business Enterprises*, 3rd ed. (St. Paul, Minn.: West, 1983) at 661 where it is pointed out that the rule:

(continued...)

relationship between the common law duties of care and skill and the business judgment rule is fairly difficult to explain, partly owing to varied formulations of the rule in different U. S. jurisdictions.[27] In cases where the business judgment rule has been liberally applied, directors have been shielded from liability so long as minimal procedural prerequisites were satisfied by the board in reaching a business decision. The circumstances often giving rise to contentious claims in this area have involved takeover bids and defensive tactics authorized by the target's management. These "corporate control" cases have proved particularly useful for testing the limits of the director's obligations to act responsibly and to arrive at decisions that do not unfairly prejudice the interests of any stakeholders in the corporation. The business judgment rule to some extent deflects courts from inquiring very closely into a target board's tactical decisions in control contests.[28]

(2) Statutory Standards in the U. S.

As with Canadian jurisdictions, most U. S. states have adopted statutory provisions regarding a director's liabilities. The statutory standards were patterned on the existing common law standards with respect to both fiduciary duties and the duties of care and skill. In general, state corporations laws require a director to act in good faith and with the care of an ordinary prudent person in like position under similar

---

[26](...continued)

> . . . sustains corporate transactions and immunizes management from liability where the transaction is within the powers of the corporation (intra vires) and the authority of management, and involves the exercise of due care and compliance with applicable fiduciary duties.

27 See William A. Klein and John C. Coffee, Jr., *Business Organization and Finance: Legal and Economic Principles*, 3rd ed. (Mineola, N.Y.: Foundation Press, 1988) at 147.

28 Cases can be found in English and Canadian corporations law in which courts have expressed an aversion to second-guessing management decisions made in good faith: see *infra*, n. 69.

circumstances.[29] This is broad language that does not offer much guidance to the prospective director who would wish to know beforehand what the law will require of him. The ingredients of this duty have been judicially evolved. The director is required to oversee the activities of the corporation by attending directors' meetings; to ensure that management provides adequate information on which to base decisions; to review carefully the documentation that is provided; and to monitor the activities which are delegated to officers of the corporation. In determining whether a director is liable for negligence in failing to satisfy the standards set down by statute, the courts will look closely at the particular circumstances of each case, much as Mr. Justice Romer approached the issue in *City Equitable*.

Part of the problem in articulating how the business judgment rule relates to the duties of care and skill arises out of the suggestion, encountered in some U. S. case law, that the business judgment rule protects directors even where they have breached the duty of care imposed on them by statute or by common law.[30] Although this suggestion has met with explicit judicial disapproval, there still seems to be widespread misunderstanding of how the rule is supposed to operate.[31] For example, some courts have adopted the language of "gross negligence" as setting the standard of care for

---

29 A notable exception to this formula was included in Pennsylvania's corporations statute and led to the curious decision in *Selheimer* v. *Manganese Corp. of America*, 224 A. 2d 634 (1966) (Pa. S.C.). The relevant provision defined the standard of care as what ordinarily prudent persons would exercise under similar circumstances "in their personal business affairs". The Pennsylvania court interpreted this standard as imposing a higher standard than that imposed at common law. The state legislature quickly thereafter amended the provision to delete the "personal business affairs" comparison. If this had been retained as the standard, then arguably directors of Pennsylvania corporations would have been required to devote as much time to corporate business as to their own affairs -- hardly a reasonable or practicable test.

30 For instances of this interpretation, see the cases cited in Edward Brodsky and M. Patricia Adamski, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities* (Wilmette, Ill.: Callaghan, 1984) section 2.07 at 17-18.

31 See S. Samuel Arsht, "The Business Judgment Rule Revisited" (1979) 8 Hofstra L. Rev. 93.

directors.[32] In other words, so long as a director's conduct is found to have amounted to something less than gross negligence ("mere", "innocent", or "ordinary" negligence is often the language used), the business judgment rule will protect him. This standard has been austerely criticized on the ground that it could easily be seen as a derogation from the standard of care as it is stated in terms of "the ordinary prudent person".

In the U. S. before 1985, as in Canada and in the U. K., directors in relatively few cases were held liable for breach of their duty of care, skill or diligence.[33] Often cited is the remark by Joseph Bishop twenty years ago that:

> The search for cases in which directors of industrial corporations have been held liable in derivative suits for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack.[34]

The want of cases of substantiated breaches of the duty of care lulled another commentator, as recently as 1983, into describing those cases as becoming an "endangered species".[35]

---

32 Other epithets that have been applied include "fraud", "gross and palpable overreaching", and "gross abuse of discretion": see Brodksy and Adamski, supra n. 30 at section 2.07. The court in Aronson v. Lewis, 473 A. 2d 805 (1984) (Del. S.C.) at 812 noted that "under the business judgment rule director liability is predicated upon concepts of gross negligence".

33 Exceptions to this general observation may be found in cases where the courts imposed liability on financial institutions (but not directors) for breach of the relevant duty of care: see Brodsky and Adamski, supra n. 30, at section 2.07. It appears there is no rigid rule on this, for courts in some states have held financial institutions to a more demanding standard, while courts in other states have explicitly refused to do this.

34 Joseph W. Bishop, Jr., "Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers" (1968) 77 Yale L. J. 1078 at 1099.

35 Stuart R. Cohn, "Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule" (1983) 62 Tex. L. Rev. 591 at 591.

(3) The Trans Union Case

It was against this background that the Delaware Supreme Court stirred up the corporate legal community by holding the ten defendant directors personally liable for millions of dollars of damages in *Smith* v. *Van Gorkom*, widely referred to in the literature as the *Trans Union* case.[36] The implications of *Trans Union* appeared to be that courts would henceforth assume an intrusive role in overseeing both (1) the process by which business decisions were reached, and arguably also (2) the merits of such decisions.

In *Trans Union* the long-serving president and chief executive officer of the corporation, Van Gorkom, who was nearing retirement age, realized that the corporation had accumulated a great deal of investment tax credits, but had insufficient cash flow to offset them. This made the corporation a particularly attractive target for a takeover or a merger. Almost idly and certainly quite casually, Van Gorkom, without informing his board, inquired of a business acquaintance (who happened to be a takeover specialist) whether he could think of a buyer-corporation that might be interested in a leveraged buyout of Trans Union.[37] The acquaintance immediately indicated that a corporation he controlled would be interested in a cash-out merger. That is, holders of Trans Union's shares would be given a cash payment, at a premium, for their shares.

As Van Gorkom testified, the deal was put together "with amazing rapidity". Within a week after this initial discussion, he and the buyer had agreed on a purchase price of $55 per share for Trans Union's outstanding stock (amounting to 12.5 million shares). The shares were trading on the stock market for $37 to $38 during this period.

---

36 488 A. 2d 858 (1985) (Del. S.C.)

37 This is an arrangement, usually friendly, where the buyer-corporation would use Trans Union's assets as security for the loan of the purchase money.

It appeared that Van Gorkom settled on the $55 per share price after he had the corporate comptroller do some confidential calculations. These indicated that $55 was the figure that would optimally accomodate the leveraged buyout. That was the only form of valuation that was done prior to Van Gorkom taking the proposed deal to his board of directors.

One week after entering into negotiations with the buyer, Van Gorkom presented a draft agreement to a special meeting of the board of Trans Union. The directors had no prior notice of the purpose of the meeting. Van Gorkom made a twenty-minute presentation. A discussion lasting one hour and a half ensued. The directors had no documentation presented to them. The directors then approved the merger. Van Gorkom signed the agreement (without reading it) later that same day at an evening social gathering.

When Van Gorkom subsequently informed Trans Union's senior management of the terms of the deal, he met with stiff resistance. Those officers objected in particular to the offering price as well as to the neglect of the board to test the worth of the shares by soliciting competing bids. In the face of these complaints, Van Gorkom negotiated an amendment to the merger agreement that would allow Trans Union a 90-day period in which to solicit other offers. A couple of these were made, but Van Gorkom proved difficult to deal with. The original terms of the merger agreement were soon after submitted to the shareholders, who overwhelmingly approved the transaction (89% of votes cast favoured it).

The completion of the merger led to a shareholders' suit seeking rescission of the merger or, if this was not feasible, damages. The trial court found in favour of Van Gorkom and his fellow defendant directors. On appeal, after reserving judgment for more than two years, the state Supreme Court, by a 3-2 margin, upheld the shareholders' claim. The matter was finally settled when the defendants, in satisfaction of their personal liability, paid a total of $23.5 million to the shareholders. Ten million dollars of this was covered by a directors' and officers' liability policy, with the balance being paid by the buyer's corporate group.

The central issue in *Trans Union* was whether the directors had satisfied the requisite standard of care and had reached an informed judgment. The majority opinion in the Supreme Court emphasized that Van Gorkom had failed to disclose to his colleagues on the board how the figure of $55 was determined. Nor was this fact passed on to the shareholders through the proxy solicitation materials. The directors also failed to question Van Gorkom about the origin of this figure. These several omissions to satisfy the standard of care expected of directors meant that they could not rely on the business judgment rule for protection.

The dissenting judges took issue with the attempt by the majority of the court to characterize Van Gorkom's maneuvers as a sort of "fast shuffle" meant to obscure his real motives. It still worked out that all the shareholders were paid a substantial premium for their shares: almost 50 per cent over the market price. The majority also were accused by the minority judges of failing to give proper weight to the efforts of the directors to entertain bids after the original merger was proposed. There was some sort of auction, although it remains contestable how much Van Gorkom managed to stifle competing bids.

An immediate lesson of *Trans Union* appeared to be that the directors of a public corporation in which it is proposed to sell off substantial assets are under a duty to obtain some sort of valuation. This need not, however, according to the majority in *Trans Union*, be a fully independent evaluation carried out by an investment banker. It it were, this requirement might, in the case of a large corporation such as Trans Union, cost upwards of a million dollars. The majority carefully explained that some evaluative analysis was needed in the circumstances of the case, although it is open to the directors to have some sort of comprehensive in-house analysis done. The impact of *Trans Union* extends further than this. It left in its wake considerable controversy in business and academic journals over what this decision implied about the standards of care and diligence applicable to directors.

(4) The Meaning of Trans Union

The chief lawyer for the plaintiffs in *Trans Union* denied that the appellate decision represented a raised standard for directors' conduct.[38] Instead, he argued that the case was an anomaly, in which the circumstances were so strange that it is unlikely that even the same Delaware court would find the directors liable without the presence of some bizarre facts that would compare with Van Gorkom's hasty dealing and the board's supine acquiescence. Another experienced commentator has observed that *Trans Union* can be fitted neatly into the existing law on directors' standard of care simply by noting that the Delaware court carefully restricted its discussion to the "process" of decision-making, and did not venture to review the "merits" of the decision to sell the corporation's shares.[39] According to yet another view, *Trans Union* should be seen simply as the literal application of the existing standard of care, not as the invention of something more demanding.[40]

Nevertheless, the criticism and disquiet that *Trans Union* inspired have rippled beyond the borders of Delaware. It has definitely been interpreted by some interests, such as the insurance industry, as a signal that courts will adopt harsher standards in reviewing directors' decisions and thus encourage a multitude of actions based on breach of the duty of care. In the words of Bayless Manning, the court in *Trans Union* was

---

38 See William Prickett, "An Explanation of *Trans Union* to 'Henny-Penny' and Her Friends" (1985) 10 Del. J. Corp. L. 451.

39 See Bayless Manning, "Reflections and Practical Tips on Life in the Boardroom After *Van Gorkom*" (1985) 41 Bus. Law. 1 at 4.

40 See Klein and Coffee, *supra* n. 27 at 148.

perceived to have "exploded a bomb".[41] To the decision, at least symbolically, has been attributed the dramatic rise in premium rates for directors' and officers' insurance. There is some sort of causal connection here, even if the dire consequences predicted for directors after *Trans Union* have not materialized.

Subsequent cases in the Delaware Supreme Court, a few of which followed hard upon *Trans Union*, seem to indicate, at least to one Canadian commentator, that the courts will not unduly concentrate on the deliberative process in deciding whether a business decision is properly reviewable. Instead, cases involving hostile takeover bids and the attempts by the target's directors to resist them,[42] have shown the Delaware courts taking into account "the over-all business context, the character and reputation of the bidder, the motives for the defensive tactics employed",[43] as well as the ethical obligations on the directors' part that the measures taken were soundly reasoned and

---

41 See Manning, *supra* n. 39.

42 See the following cases out of Delaware:

(a) *Unocal Corp.* v. *Mesa Petroleum Co.*, 493 A.2d 946 (1985). The court upheld, on the basis of the business judgment rule, the Unocal board's tactic of a preferred defensive bid, in which all Unocal shareholders, except Mesa, were offered debt securities for outstanding Unocal shares at a premium.

(b) *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (1986). The court found that the directors breached a fiduciary duty by employing the tactic of a "lock-up" option granted to a third party that would allow that third party to obtain Revlon's "crown jewels" or prime assets in the event that a hostile bidder obtained more than 40 % of Revlon's shares. The court did find two other strategies to be valid, viz. a poison pill defence (based on a special note purchase rights plan) and an exchange offer in which Revlon would acquire its own shares.

(c) *Moran* v. *Household International, Inc.*, 490 A.2d 1059 (1985). The court upheld the defendant directors' adoption of a poison pill in the form of a rights offering that was meant to forestall an anticipated takeover bid. The business judgment rule was explicitly applied.

43 See John Howard, "Takeover Battles and the Business Judgment Rule: Recent American Case Law Development" (1986) 11 Can. Bus. L. J. 445 at 457.

reflected a balance among the interests of competing shareholders (and possibly other parties as well, for the court in *Unocal* spoke of other "constitutencies" such as creditors, customers, employees, and "perhaps even the community generally").[44]

The trouble with the view just summarized, which has been put forth by John Howard, is that, despite his reading of the quartet of Delaware cases, the courts in that state after *Trans Union* have indeed seemed eager to enter into the very type of analysis that the business judgment rule was meant to discourage. As Howard's own discussion shows, the courts have inquired deeply into the peculiar circumstances of a takeover situation and have carefully weighed the competing considerations that the directors themselves must have confronted. This type of retrospective analysis appears to shift the burden back on to the directors to show that, *prima facie* at least, their defensive tactic was "reasonable in relation to the threat posed". Such a burden is the obverse of the procedure dictated by the business judgment rule.[45] It is at least arguable that, far from rolling back their extraordinary achievement in *Trans Union*, the Delaware courts, in considering further cases involving contests for corporate control, appear to have continued to redefine the proper sphere within which courts may, in retrospect, assess the business decisions of corporate boards.

This trend, if that is how it might provisionally be characterized, has been at least apparently sustained by the decision of the Second Circuit Court of Appeal in *Hanson Trust PLC* v. *ML SCM Acquisition Inc.*[46] In this case, which also arose in the context of an impending takeover battle, the remedy sought and obtained was an injunction prohibiting the corporation from granting a lock-up option on assets that the court found

---

44 It should be noted that Anglo-Canadian courts have been reluctant to recognize that directors, in discharging their duties, should consider interests beyond the immediate economic welfare of the shareholders of a corporation. See, e.g., *Parke* v. *Daily News Ltd.*, [1962] Ch. 927.

45 See the discussion in Peter Brennan, "New Cases on the Business Judgment Rule: Defending Defensive Tactics Becomes More Difficult" (1986) 14 Sec. Reg. L. J. 245.

46 781 F.2d 264 (1986) (2d Circ.).

were substantially undervalued. The directors of the target corporation were not personally sued for their negligence. Nevertheless, the language used by the court in *Hanson Trust* to enjoin the corporation's poison pill maneuver has indicated to some critics that "the court seemed concerned more with the product of the decision rather than the process behind it".[47] This would translate, therefore, into an implied rejection of the business judgment rule. Other observers have declined to interpret the *Hanson Trust* case as an extension of the approach used in *Trans Union*. Klein and Coffee, for example, attempt to restrict *Hanson Trust* to a special category of recognized exceptions to the business judgment rule, based on the fact that the remedy asked for was an injunction and not damages from the directors.[48] On this analysis, *Trans Union* would be the sole case to date in which a court has rigorously applied the traditional standard of care. There is properly speaking, then, no "trend" toward judicially-evolved higher standards of care, but only a singular case indicating how the established standard can be literally applied.

Whether and to what degree *Trans Union* and other similar cases represent a departure from the conventional law on directors' standard of care is a question that crucially depends on how the "process" of decision-making is distinguished from its "product". Those who criticize the *Trans Union* decision as a rejection of the business judgment rule are apt to emphasize how the majority judges in that case overstepped the traditional limits on what matters they could properly consider in determining the amount of care shown by the defendants.[49] The majority effectively imposed a standard of care that could lead to directors' liability for bad decisions, even when the procedures for reaching those decisions were in line with prevailing business practice.

---

47 Thomas C. Lee, "Limiting Corporate Directors' Liability: Delaware's Section 102(b)(7) and the Erosion of the Directors' Duty of Care" (1987) 136 U. Pa. L. Rev. 239 at 251.

48 See Klein and Coffee, *supra* n. 26 at 148.

49 See Daniel R. Fischel, "The Business Judgment Rule and the *Trans Union* Case" (1985) 40 Bus. Law. 1437.

E. Practical Consequences of Changed Standards

There are several effects frequently cited as due to the spectre or reality of higher standards for directors after *Trans Union*. Usually mentioned first is the skyrocketing and even prohibitive costs of directors' and officers' insurance in jurisdictions where the law permits corporations to purchase insurance to cover breaches of the duties of care, skill and diligence.[50] There are reports that many insurers either have restricted the coverage offered, with lower dollar limits, higher deductibles, and broader policy exclusions. Alternatively, they have withdrawn from the market. With the rising tide of corporate mergers and acquisitions, where the transactions involve billions of dollars, insurers have become wary of the extraordinary risks. As the cases from the U. S. have shown, the hostile takeover or the sale of large blocks of corporate stock or assets has typically led to a derivative action by a minority shareholder who alleges managerial carelessness or lack of skill.

Business corporations formed in Alberta, operating both within this province and elsewhere, have felt the pinch of obtaining adequate D & O insurance coverage. From the information we have been provided by an Edmonton representative of a national insurer, there were dramatic changes in the types and costs of coverage between 1985 and 1987. Exclusions increased, so that, for example, the policy would not cover liability arising out of suits where a director had sued an officer in the same corporation. Premiums shot up, not necessarily in response to Alberta conditions and the risks to which directors are exposed here, but rather in response to the damage amounts being awarded throughout the North American market for D & O insurance. It should be stressed that calculation of risk, even for a corporation that intends to carry on business

---

50 The impact of cases holding directors liable for breaches of statutory duty on the cost and availablility of D & O insurance is described in Ronald E. Mallen and David W. Evans, "Surviving the Directors' and Officers' Liability Crisis: Insurance and the Alternatives" (1987) 12 Del. J. Corp. L. 439; Dennis J. Block, Nancy E. Barton, and Alan E. Garfield, "Advising Directors on the D & O Insurance Crisis" (1986) 14 Sec. Reg. L. J. 130; and Joseph Hinsey IV, "Directors' and Officers' Insurance: A Status Report" (1986) 18 Inst. on Sec. Reg. 179.

solely within this province, still heavily depends on the conditions affecting insurance claims throughout the continent. Some Canadian insurers have apparently gone so far as to deny applications for insurance from enterprises that indicate they will do business in the U. S. The astonishing amounts of damages that have been awarded in some states pose a major problem for corporations. It is not so much the increased likelihood of liability for directors' conduct that is responsible for this. Rather, insurers are equally concerned about the mind-boggling legal costs involved in defending a suit. In addition, the relative advantages offered by class action procedures in U. S. jurisdictions makes the risk underwritten by D & O coverage that much greater.

Interestingly, while D & O insurance underwent great changes within this decade, it now appears in the comments we have elicited from the industry that premiums, in Canada at least, have gone down in the past year and that there is greater choice among insurers. Where in 1985 there were only three national companies offering D & O insurance, now there are six. This has meant more competition and on matters of premiums, deductibles, and so forth, there is now more choice than before.

It would perhaps be misguided to portray the problems of obtaining D & O insurance as caused simply by such decisions as *Trans Union*. The so-called liability crisis has more than one cause. Professional liability insurers generally are facing major difficulties in offering affordable coverage. The bases on which claims will be compensated are being fundamentally re-arranged. This applies to all professional groups, including medical practitioners, lawyers, engineers, and so forth.

Even in respect of directors' liability, courts have been concerned with more than simply standards of conduct for directors in relation to their care, skill or diligence. Perhaps a more important factor in making it difficult to purchase D & O insurance are cases based on other types of civil actions, particularly those launched under U. S. securities statutes. It has recently been pointed out by commentators who have charted claims against D & O policies that:

> The severity of losses follows a judicial trend to liberalize exposure under the federal securities laws, state Blue Sky laws, and the newly discovered RICO statute.[51]

Judicial scrutiny of corporate management is arguably becoming closer under many different heads of legal liability. In addition to successful civil actions such as *Trans Union*, there have been prosecutions of directors for workplace negligence resulting in employees' deaths.[52]

If an apprehended insurance crisis is the first problem attributed to *Trans Union*, the second is the chilling effect it supposedly has had on the process of attracting and holding directors. Evidence gathered and reported through the financial and legal press has indicated that some highly qualified persons are declining to seek renewal of their terms as corporate directors, or are refusing directorships initially.[53] This is happening especially where corporations either have not or cannot obtain D & O insurance coverage. Lacking such protection, outside directors in particular would be risking all of their own personal assets in agreeing to serve. The immediate return to them will usually take the form of the prestige associated with a directorship and a small amount of direct remuneration which is vastly out of proportion to the ruinous liability that could accrue.

As a third possible consequence, it has been argued that directors generally, even though they might act in good faith and not out of self-interest, are jittery about the uncertainties present in this area of the law and will be inclined to take too conservative a course in their business decisions. This will work to the ultimate detriment of

---

51 Mallen and Evans, *ibid.* at 443. "RICO" refers to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. s. 1961 (1982).

52 See David R. Spiegel, "The Liability of Corporate Officers" (Nov., 1985) 71 A.B.A. J. 48.

53 See Faye A. Silas, "Risky Business: Corporate Directors Bail Out" (June, 1986) 72 A.B.A. J. 24.

corporate earnings and thus of the shareholders' value. The recent judicial stringency about standards of care will therefore ultimately dampen entrepreneurial activity.

Finally, the new standards arguably will jeopardize the widely recognized need to have outside directors serve on the boards of large corporations.[54] This trend in corporate governance, by which boards of large, publicly distributing corporations are increasingly made up of directors from outside the corporation, has been favourably noticed by both academics and judges. In one of the recent Delaware cases cited above, *Moran* v. *Household International*, the court drew inferences favourable to the defendant directors from the fact that a majority of the board which approved the disputed business tactic were outside directors.[55]

Any anticipated increase in litigation alleging directors' negligence will force corporate boards and their legal advisers to pay close attention to the indemnification procedures that a corporation's by-laws might contain. Under both the federal Business Corporations Act and the ABCA, corporations are permitted to indemnify directors for costs, charges and expenses that arise out of claims other than those made by or on behalf of the corporation.[56] The excepted claims can give rise to indemnification only with court approval. It would be fruitless to set up permissive procedures by which shareholders, through derivative actions, for example, can force directors to pay to the corporation damages for losses due to the directors' incompetence, only to have the

---

54 Representative of the discussion on the advantages of the director who is neither an employee, a manager, nor a significant stakeholder in the corporation, are the following articles: Victor Brudney, "Independent Director -- Heavenly City or Potemkin Village?" (1982) 95 Harv. L. Rev. 597; Barry D. Baysinger and Henry N. Butler, "Revolution Versus Evolution in Corporation Law: The ALI's Project and the Independent Director" (1984) 52 Geo. Wash. L. Rev. 557; and Roberta S. Karmel, "The Independent Corporate Board: A Means to What End?" (1984) 52 Geo. Wash. L. Rev. 534.

55 See *supra* n. 42.

56 See ABCA, section 119. Indemnification of directors was permitted at common law: see Potter, *supra* n. 10 at 338.

corporation pay back those amounts to the negligent directors. Therefore, court supervision in these circumstances has been made compulsory. For claims against which directors have been substantially successful in defending themselves, both statutes require the corporation to indemnify the defendant directors.[57]

The corporation, after indemnifying directors for costs associated with an action for negligence,[58] will ordinarily, if it has the benefit of a D & O liability insurance policy, seek reimbursement under that policy from the insurer. The standard modern form of insurance policy contains a section that provides for the corporation's reimbursement, but covers only those losses for which the corporation is permitted by law to indemnify the director.

F. Legislative Responses to the Judicial Initiative

In reaction to the developments signalled by the decision in *Trans Union*, some state legislatures have adopted one of three different counter-strategies. In some states, lawmakers have already chosen to amend the corporation laws to relax the standards of care that directors must exhibit or even to eliminate the director's duty of care. The second type of response is to permit the individual corporation to amend its charter to protect any director of that corporation from liability for breach of certain duties. A third approach, as yet untried by any jurisdiction, is to establish in some form a ceiling on the amount of damages that can be awarded in a case of proved managerial negligence.

---

57 ABCA, section 119(3).

58 These might include damages, settlements, and expenses such as legal fees incurred in defending an action.

(1) Lowered Standard of Care

The first approach, substantial elimination of the duties of care, skill and diligence, has been adopted in, among other states, Indiana, where a director now can be found liable only if the breach or failure to perform "constitutes willful misconduct or recklessness".[59]

---

59 See Ind. Code Ann. s. 23-1-35-1 (West. Supp. 1987), which provides:

> (a) A director shall, based on the facts then known to the director, discharge the duties as a director, including the director's duties as a member of a committee:
>
> > (1) in good faith;
> >
> > (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> >
> > (3) in a manner the director reasonably believes to be in the best interests of the corporation.
> >
> > . . .
>
> (e) A director is not liable for any action taken as a director, or any failure to take any action, unless:
>
> > (1) the director has breached or failed to perform the duties of the director's office in compliance with this section; and
> >
> > (2) the breach or failure to perform constitutes the willful misconduct or recklessness.

Other states that have recently adopted a revised standard of care include Florida and Virginia.

(2) Charter Amendment

The second approach, involving permissible charter amendments, has been the route followed by legislators in Delaware and in at least seven other states.[60] These amendments cannot, however, relieve directors for breaches of fiduciary duties. The statutory provision is enabling only. It remains necessary for a board to propose the amendment of the corporation's constitution in this fashion and for the corporation's membership to approve the proposal.

Under the charter amendment approach, the standards evolved in *Trans Union* remain intact. Moreover, if a claimant seeks a remedy other than monetary damages, the charter amendment approach will be irrelevant. Shareholders or other aggrieved parties could still seek other remedies, such as injunctive relief, rescission of a contract, or an accounting for profits.[61]

It has been suggested that in jurisdictions where corporations are able to cap or to eliminate their directors' liability, courts anxious to preserve a monetary remedy for breach of the duty of care will simply start subsuming breach of that duty under the duty of loyalty (which is usually not covered by the legislative amendment).[62] The U. S. penchant for conflating fiduciary duties with the duties of care and skill make this a more plausible argument than it might appear in a Canadian context.[63]

---

60 By 1987 the following states enacted such permissive legislation in their corporations codes: Arizona, Arkansas, Kansas, Michigan, New Jersey, New York, and Pennsylvania.

61 For a discussion of the types of remedies that might conceivably be sought in actions based on management negligence, see L. C. B. Gower et al., *Gower's Principles of Modern Company Law*, 4th ed. (London: Stevens & Sons, 1979) at 606-10.

62 See Leo Herzel, R. W. Shepro, and Leo Katz, "Next-to-Last Word on Endangered Directors" (Jan.-Feb., 1987) 65 Harv. Bus. Rev. 38.

63 For an illustration of how duty-of-care standards are often confused with standards relating to directors' fiduciary duties, see Kristin A. Linsley, "Statutory Limitations

(continued...)

(3) Limiting Damages

A third type of strategy by which it would be possible to soften the blow of any new-found tendency of the courts to hold directors liable has been proposed by the American Law Institute in its recommendations on principles and policies that ought to govern the use of the derivative action. The ALI's draft recommendations in 1987 included the principle that, with exceptions for certain types of egregious conduct, damages for directorial negligence should be subject to a ceiling that would "not be disproportionate to the economic benefits received by the director or officer for serving the corporation during the year of the violation".[64] This limitation on damages could be created in three different ways: by statute; by amendment of the corporation's charter; or by judicial decision. The latest ALI draft addressing this issue mentions only the first two of these three methods.[65] Under the ALI approach, a corporation's members could amend the charter even in the absence of a provision permitting this in the relevant state statute. Where a corporation has amended its charter to limit directors' liability, section 7.17 of the ALI recommendations would require a periodic review and ratification of the limitation on damages by a general meeting of the shareholders.

G. A Canadian Trend Towards Higher Standards?

There have been no reported cases to date in which a Canadian court has expressly followed the approach of the Delaware Supreme Court in *Trans Union.* As

---

[63](...continued)
on Directors' Liaiblity in Delaware: A New Look at Conflicts of Interest and the Business Judgment Rule" (1987) 24 Harv. J. Legis. 527.

[64] See the American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 7* (Philadelphia: American Law Institute, 1987) s. 7.17.

[65] Tentative draft no. 6 of the ALI proposals covering this topic, issued in 1986, would have added the third method of setting a cap on liability.

noted above, courts have continued to extend the scope of which persons owe fiduciary duties to a corporation,[66] but this judicial activity does not necessarily translate into higher standards under the rubric of the duties of care, skill and diligence. The two classes of duty have been fairly rigidly kept apart. Some Canadian academic lawyers have urged that the courts take a more active role to ensure that the standards of care be rigorously applied in cases of alleged directors' negligence.[67] This kind of academic thinking reflects a persistent strain of corporate commentary, already evident earlier this century, that favours a more stringent assessment by the courts of the performance of directors.[68]

The debates in the U. S. during the past two decades over "shareholder democracy" and "corporate social responsibility" have survived into the late 1980's. They are now channelled largely through the ALI's Corporate Governance reform project and the controversy engendered by its draft proposals. These have kept issues of directors' duties and liabilities at the forefront of business and academic discussion. To the extent that contemporary Canadian corporate law regimes owe a great deal to U. S. models, we can expect the same stirrings for reform, whether they be judicial or legislative in origin, eventually to have some impact on the interpretation of existing laws in this country.

One might argue that a Canadian court could more easily engage in the type of analysis exhibited in *Trans Union*, if only because Canadian corporations law does not include a developed business judgment rule. There are *dicta* to be found in various Commonwealth decisions, from many different courts, that judges feel uncomfortable about retrospectively reviewing the merits of decisions made by boards of directors, but

---

66 See *supra* n. 9.

67 See Harry J. Glasbeek, "The Corporate Social Responsibility Movement -- The Latest in Maginot Lines to Save Capitalism" (1988) 11 Dal. L. J. 363.

68 See the remarks quoted in *supra* n. 23.

this aversion has not taken the form of a settled legal presumption.[69] Without an established doctrine, like the business judgment rule, on which directors and their legal advisers have tended to rely explicitly, the route to judicial rethinking of the traditional standards of care might be straighter and smoother. As one commentator has already pointed out, the circumstances in the recent controversial cases from the U. S. could, "with minor variations", have occurred in Canada and therefore required assessment under the relevant provincial or federal laws on directors' duties in the face of an attempted takeover.[70]

H. The Disputed Rationale for Change in Alberta's Corporations Regime

As we noted in Part F of this study, the legislative changes that have been made in the U. S. on this issue have taken two basic forms. Legislators have chosen either, first, to eliminate or reduce potential liability through modifying the statutory standard of care or, second, they have retained the existing formula and have created means by which corporations can themselves take steps to insulate their directors from the risks of negligent performance of their duties. Under current Alberta laws, a corporation cannot, either by contract or by inclusion of any exculpatory clause in the corporation's articles, by-laws or resolutions, relieve directors from liability for failure to meet their statutory standards of care.[71]

The choice between these strategies, or indeed the decision to be content with the current Alberta provisions, involves disputed empirical assumptions as well as serious policy questions with economic, political, and ethical dimensions. The remainder of this Part canvasses various arguments that have been made about the advisability of

---

69 See, e.g., *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.*, [1974] 1 All E.R. 1126 (P.C.) at 1134.

70 See Howard, *supra* n. 43 at 474.

71 See ABCA, section 117(3). An exception is made that permits such exculpatory provisions in a unanimous shareholder agreement.

amending a jurisdiction's corporations laws to limit the potential liability for directors whose conduct falls short of the standard of care a contemporary court, scrupulously concerned for the welfare of plaintiffs in a derivative action, might be inclined to impose. The discussion examines, first, whether the reduction or limitation of directors' liability through legislative intervention is supportable on grounds of efficiency. Second, we briefly consider whether it is reasonable and practicable for a jurisdiction to re-shape its corporation law regime in a way designed to attract more original incorporations and reincorporations.

(1) Rival Views of the Need for Legislative Reform

Let us suppose that the Delaware cases described in Part D are a sure sign that courts will take a more active role in reviewing both the process and the results of the exercise of decision-making power of the boards of directors. One consequence of this is that directors will be forced to re-assume some of the powers they would perhaps in the past have been inclined to delegate.[72] From the point of view of "neoclassical" corporate theory, judicial activism on this score is, economically speaking, anathema. It overrides the proper test of a corporate board's effectiveness, which is how the corporation performs in the marketplace.[73] The legislative changes accomplished to date among various U. S. jurisdictions have been generally welcomed by those commentators oriented to a a neoclassical understanding of the business firm and by legal advisers who are concerned about the potentially crushing liability to which directors could be exposed if the traditional standards of care were applied strictly.

The neoclassical approach has itself been criticized for misguidedly placing excessive faith in the inherently corrective role of the market. Moreover, it is disputable whether efficiency either is or ought to be the focal criterion for testing whether a

---

72 For a list of the sort of precautions that corporate legal advisers might urge on their clients after *Trans Union*, see Manning, *supra* n. 39.

73 For a resounding criticism of *Trans Union* in this vein, see Fischel, *supra* n. 49.

common law or statutory rule is reasonable. Courts and other lawmakers have recognized that business realities incessantly fluctuate and that market mechanisms break down. The structure of the modern public corporation bears little similarity either to the types of business vehicle popular in the nineteenth century, when enterprises were less capital-intensive and the split between ownership and management had not yet been achieved,[74] or to the ideal picture of an industrial or financial system painted by neoclassical theorists.

Those who object to the neoclassical emphasis on the policy of protecting directors from too rigorous a standard of care doubt whether market responses can always deter and discipline inefficient decisionmaking at the top of the corporate hierarchy. They point out that management can exercise inordinate influence over directors, particularly where a majority of board members are drawn from outside. Moreover, it is conventional wisdom that management usually controls which persons are invited to join the board.[75] By maintaining strict duty-of-care liability, the law would provide an incentive for directors to monitor and, where necessary, to challenge the recommendations made and actions taken by the corporation's senior officers. Lowering the standard of care to one which, as now in some U. S. states, requires "willful misconduct or recklessness" to be proved on the part of directors would remove any legal incentive for them to engage in the basic functions of attendance, oversight and reasonable decision-making they have been selected to perform.

---

74 See Adolf A. Berle and Gardiner S. Means, *The Modern Corporation and Private Property*, rev. ed. (New York: Harcourt, Brace & World, 1968).

75 See Robert C. Clark, *Corporate Law* (Boston: Little, Brown, 1986) at 109:

> It is a notorious fact that in the overwhelming majority of elections for directorships in public corporations the public shareholders simply vote for whomever is proposed by the corporation's official nominating committee . . . [T]his committee of the board was often made up of directors who were officers, or friends of the officers, and it was careful to nominate only candidates who were likely to be well disposed to incumbent management.

The Delaware legislature's provision allowing charter amendments also appeals to the neoclassical vision of the corporation. That vision rests on the assumption that corporations can be seen as constituted by a "nexus of contracts".[76] The contracts involved are those between the firm and investors, employees, suppliers, creditors, and consumers.[77] The modern separation of ownership and control, a basic attribute of the large public enterprise, represents a functional response to the specialization of modern contractual relationships. Neoclassical theory takes it for granted that investors can use their bargaining position to negotiate restrictions on the ability of managers and directors to abuse their position.

The drawbacks of the neoclassical theory and the types of arrangements it supports, such as the capacity of shareholders to negotiate, in effect, what shall be the level of directors' duty of care and the amount of liability flowing from a breach of that duty, are mainly over the costs it ignores and the alternative conceptions of democratic corporate governance it leaves out. If the market were perfect, so that there were no transaction or contracting costs, the solution enacted in the Delaware amendment might be optimal; but the actual conditions attendant on modern corporate legal structures are not so simple.[78]

First, the scope for effective shareholder action is much smaller than conventionally depicted in neoclassical theory. A review of the literature on shareholder approval of management proposals reveals widespread shareholder apathy in public corporations where holdings are widely dispersed. Furthermore, with the ability of management, under modern laws, to control the proxy solicitation contest, it would be a mirage to see shareholders and managers as bargaining fairly over the allocation of risk

---

76 See Craig W. Hammond, "Limiting Directors' Duty of Care Liability: An Analysis of Delaware's Charter Amendment Approach" (1987) 20 U. Mich. J. L. Ref. 543.

77 See Victor Brudney, "Corporate Governance, Agency Costs, and the Rhetoric of Contract" (1985) 85 Colum. L. Rev. 1403.

78 See Melvin Aron Eisenberg, *The Structure of the Corporation: A Legal Analysis* (Boston: Little, Brown, 1976).

within a particular corporation.[79] In the projected charter amendment approach to the issue of limiting directors' liability, shareholders would most likely face the stark choice between ratifying or rejecting the proposed amendment. There would be no scope for compromise or for suggesting alternative arrangements. Naturally, directors will be guided by considerations of self-interest to propose limiting duty-of-care liability to the lowest standard allowed by law. Ostensibly also, such a measure would save the corporation those costs otherwise required to obtain D & O insurance against the risks of negligence.

The neoclassical faith in using market forces as the ultimate standard by which to measure directors's conduct is simply not shared by eminent corporate law commentators. In the words of Victor Brudney:

> Notwithstanding the efforts of the academic free marketers and their associates in the business community, there has not yet been demonstration or acceptance of the proposition that the markets alone provide an adequate mechanism for narrowing managerial discretion so as to press management to improve its efficiency, much less to press management to perform optimally for the stockholders of their corporations.[80]

Any further discussion of these issues, which turn on a rigid divide between those legal commentators and economists who have a neoclassical understanding of the firm and those who do not share this basic outlook, would require venturing far into the domains of social, economic, and political theory. The distinction between the "nexus of contracts" view of the business organization and what has been called, for the purposes

---

79 See generally, Edward S. Herman, *Corporate Control, Corporate Power* (New York: Cambridge University Press, 1981) and Arthur J. Jacobson, "Democratic Participation and the Legal Structure of the Economy of Firms" (1983) 50 Social Research 803.

80 Victor Brudney, "The Role of the Board of Directors: The ALI and Its Critics" (1983) 37 U. Miami L. Rev. 223 at 235. See also Edward S. Herman, "The Limits of the Market as a Discipline in Corporate Governance" (1984) 9 Del. J. Corp. L. 530.

of systematic analysis, the "organicist" view, has broad implications for how corporations law in any particular jurisdiction is shaped.[81] The topic of directors' liability for duty-of-care violations is a useful context in which to bring this distinction into clearer focus.

(2) The Goals in Reforming Standards of Care

The final substantive issue to be addressed in this research paper is whether a statutory limitation on directors' duties of care, skill and diligence might encourage enterprises to reincorporate in Alberta. Luring business corporations to "continue" under the ABCA would be one way of promoting the province's industrial and commercial growth. There would be both economic and symbolic gains. It would enhance the revenue from corporate taxes accruing to the province. It would also help to secure the prestige of having numerous corporate headquarters located here.

There is no doubt that one incentive for incorporators to choose a particular jurisdiction in which to charter their enterprise is the perceived freedom the local laws allow for entrepreneurial protection. In the context of the topic of this paper, the laxer the standards applicable to directors' duties of care and skill, the less risk involved in the direction and management of the corporation. This is the basis for William Cary's characterization of the competition among states for franchise taxes from chartering corporations as a "race for the bottom".[82] The ambition to become the great facilitating jurisdiction partly explains Delaware's remarkably dominant role in the world of U. S. corporations. The history of that state's adroit maneuvers to ensure its attractiveness as a base for corporate activity is a fascinating tale.[83]

---

81 See Roberta Romano, "Metapolitics and Corporate Law Reform" (1984) 36 Stan. L. Rev. 923.

82 William L. Cary, "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 83 Yale L. J. 663.

83 See Philip A. Loomis, Jr. and Beverly K. Rubman, "Corporate Governance in Historical Perspective" (1979) 8 Hofstra L. Rev. 141.

There are prominent critics of the scheme whereby one jurisdiction purposely relaxes its laws and becomes exceptionally permissive in order to attract new corporations. From the point of view of investors' welfare, the trend to protect directors and officers against regulatory liabilities means that corporate democracy suffers. For this reason, it has even been suggested in the U.S. that corporations law be removed from the legislative sphere of the individual states and reposed instead solely with the federal government.[84]

This suggestion has met with two objections. First, the defenders of neoclassical theory dispute the claim that corporate democracy is weakened by the enactment of measures protecting directors against personal liability. Second, the idea that a jurisdiction can make itself attractive by enacting laws that fortify management against investors has been vigorously challenged, primarily through the use of the literature of financial economics. According to some of this literature, if legal laxity indeed leads to greater risks for investors, then corporations that have been reincorporated in Delaware ought to show a share price decrease to reflect shareholder apprehension about the laws purportedly unfavourable to their interests. Since, on the evidence available, this price reduction has not occurred, the conclusion is drawn that investors are not particularly guided by considerations of directors' liability in assessing the value of certain stocks.[85]

If such studies demonstrably refute Cary's arguments against leaving incorporation as the domain of the state legislatures, then analysts must look elsewhere for an explanation of why incorporators choose one jurisdiction rather than another in which to create an enterprise. Diluted liability rules by themselves cannot explain this decision. It has been argued that Delaware, at least, has been an attractive home for corporations

---

84 See Cary, *supra* n. 82.

85 For a summary of the studies that support the opposing sides in this debate, see Roberta Romano, "The State Competition Debate in Corporate Law" (1987) 8 Cardozo L. Rev. 709.

because it is most responsive to the interests of large public corporations.[86] Romano has developed the "hostage" argument, which holds that Delaware, because of its heavy reliance on franchise taxes, must keep its corporations code up-to-date so that it will not lose corporations which might otherwise migrate to other states.

Delaware is unique in specifically providing in its state constitution that all amendments to its corporations code must be approved by at least a two-thirds majority of both houses of the state legislature. This means that changes are not easily achieved and directors of corporations can rest assured that the favourable climate created by laws current at the time of incorporation will likely continue unchanged.

A further reason often recognized as contributing to the hegemony of Delaware as an incorporating jurisdiction is the history of common law precedents that have been developed by Delaware courts. This is not a resource that can readily be duplicated by another jurisdiction in a short period. Acknowledged judicial expertise and reputation cannot be hatched overnight.

In Canada, because of the substantial uniformity of provincial and federal laws regarding duty-of-care liability, it would be rash to claim that this single criterion would at present have any real effect on where incorporators will decide to create their vehicle. Decisions on location are probably determined on such other grounds as where the business of the corporation will largely be carried on, which corporate tax regime seems most favourable to the proposed venture, and where the directors will be drawn from. In a few cases, Canadian corporations law illustrates how a corporation has migrated to a different provincial jurisdiction simply for the expedient reason that the laws of the

---

86 *Ibid.*

importing province favoured the ability of the incumbent management to hang onto its power.[87] These did not involve standards of directors' liability.

In summary, owing to the complex factors that appear to be necessary for one jurisdiction to be able to claim corporate leadership, it is only remotely possible that one province, such as Alberta, by altering its laws over directors' duty of care, could expect, on the basis of that action alone, an influx of reincorporations. The reasons reviewed that relate to the special case of Delaware demonstrate how several factors account for that state's prominence. Few of these are present in any contemporary provincial corporations regime in Canada. In particular, an individual province with aspirations to become Canada's version of Delaware would have to be willing to expose itself to the extraordinarily heavy reliance on revenue generated through incorporation fees and corporate taxes.

---

87 See the litigation surrounding the Buckley family's attempts to maintain their position in *Brown* v. *Duby* (1980), 28 O.R. (2d) 745 (H.C.J.) and *Jacobsen* v. *United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427 (Alta. Q.B.).

I. Conclusion

Several lessons emerge from this review of the law surrounding directors' obligations to exercise care, skill, and diligence in looking after the affairs of their enterprises. By contrast with the controversies that have arisen in the U. S. in the past few years, Canadian judges, legislatures, and law reformers have been comparatively quiescent about changing the traditional formula that sets the level of care expected of corporate directors. Nevertheless, Canadian corporations have to some degree felt the impact of changes in U. S. law, primarily because the conditions regarding the availabilty of D & O insurance in this country are essentially reflective of the entire continental market.

The Institute, in its major project last decade of revising Alberta's corporations scheme, declared that the standard of care applicable to corporate directors should be raised. At the same time, it advised that a compromise formula should be adopted, so that directors would not be held to an inappropriately high standard of care. They ought not to be treated as "professional" directors. The recent controversies in the U. S. show that basic policy disagreements are not resolved by the adoption of a statutory standard that not only requires directors to conduct themselves in light of their qualifications, responsibilities, and remuneration, but also tends to absolve them if they do not always perform up to a professional standard of care. The key issue in any discussion of further statutory reform is whether the existing formula is sufficiently flexible to settle what level of care is proper for every kind of director of every sort of business corporation under all conceivable circumstances. Section 117(1)(b) of the ABCA was purposely designed to set the level of care expected at something above the lowest common denominator. If this heightened standard can be plausibly interpreted as charging directors with a duty to devote more attention to the affairs of their corporations then they and their legal advisers had formerly thought, then the issue of how directors' conduct should be regulated begs for reassessment.

This reassessment would have to involve analysis of various empirical and normative questions. One has to come to grips with information about the kinds of persons who serve on corporate boards; their qualifications and behaviour; what kinds of matters they have to deal with and the procedures they tend to follow; what exigencies arise in the course of contemporary business that call for extraordinary care by management; what forms of protection directors and their corporations can create or obtain to avoid ruinous derivative suits; and, most importantly, how evolving standards of legal liability affect the care that directors will take. Whether the decision in *Trans Union* represents a major break with pre-existing law, or is just a literal affirmation of the law, is itself disputable.

Even if all these issues were clarified on the basis of empirical data that might be gathered, that is not the end of the matter. Law reformers and legislators would still have to weigh the various policy factors that pertain to the issue of how directors' liability ought to be treated by statute. As suggested in this study, there are competing views on whether legal regulation itself is the proper solution to ensuring careful conduct by directors. It is also far from clear that a legislative relaxation of the standard of care applicable to directors would substantially influence which legal regime a corporation might choose to operate under. Moreover, re-designing corporations law to lessen the standard of care expected of directors is a sensitive political topic attended by numerous considerations that go far beyond creating a favourable climate for business.

In consequence of the findings in this paper, we reach the following conclusions. First, the evidence we have reviewed does not support the claim that a reduction in the level of directors' liability will, by itself, lead to the establishment of Alberta as a centre for incorporations and enhanced corporate activity.

Second, we conclude that any change in the level of directors' liability is premature at this time. If any such change is contemplated, it must be based upon a thorough review of three areas. These are: (a) continued monitoring of judicial and legislative developments in the area of corporate directors' liability, particularly as innovations might be made in Canada; (b) an inquiry into questions about the availability and extent of D & O liability insurance for corporations formed under the ABCA. Such a study should be based on consultation with industry members and their clients. It should present a portrait of the use of D & O insurance, its costs, the frequency and amount of claims, and the factors that influence substantial changes in the terms on which a policy is offered and under which recovery can be obtained; (c) an assessment of the extent to which persons within this province over the past decade have generally become less willing to serve as directors of business corporations. Research in this area would include a systematic survey of the views held by current, past, and prospective directors and officers. It would also encompass information indicating the various factors, besides that of legal liability for managerial negligence, that affect the decision to stand for election to a corporate board.

BIBLIOGRAPHY

The following bibliography has been compiled as part of this research project on corporate directors' liability. It pays particular attention to academic literature published in the past decade that assesses pertinent developments in Canadian and U.S. law and legal thinking. Not all of the items listed here have been referred to in the text of this study.

I. Books and Reports

American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 4* (Philadelphia: American Law Institute, 1985)

American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 7* (Philadelphia: American Law Institute, 1987)

Berle, Adolf A., and Means, Gardiner S., *The Modern Corporation and Private Property*, rev. ed. (New York: Harcourt, Brace & World, 1968)

Bishop, Joseph W., Jr. *The Law of Corporate Officers and Directors: Indemnification and Insurance* (Wilmette, Ill.: Callaghan, 1982)

Brodsky, Edward, and Adamski, M. Patricia, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities* (Wilmette, Ill.: Callaghan, 1984)

Cary, William L., and Eisenberg, Melvin A., *Cases and Materials on Corporations*, 6th ed. (Mineola, N.Y.: Foundation Press, 1988)

Clark, Robert C., *Corporate Law* (Boston: Little, Brown, 1986)

Conference Board of Canada, *Canadian Directorship Practices: Compensation of Boards of Directors*, 7th ed. (Ottawa: Conference Board of Canada, 1987)

Dan-Cohen, Meir, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (Berkeley and Los Angeles: University of California Press, 1986)

Eisenberg, Melvin Aron, *The Structure of the Corporation: A Legal Analysis* (Boston: Little, Brown, 1976)

Gower, L. C. B., et al., *Gower's Principles of Modern Company Law*, 4th ed. (London: Stevens & Sons, 1979)

Hadden, Tom; Forbes, Robert E.; and Simmonds, Ralph L., (eds.), *Canadian Business Organizations Law* (Toronto: Butterworths, 1984)

Henn, Harry G., and Alexander, John R., *Laws of Corporations and Other Business Enterprises*, 3rd ed. (St. Paul, Minn.: West, 1983)

Herman, Edward S., *Corporate Control, Corporate Power* (New York: Cambridge University Press, 1981)

Institute of Law Research and Reform, *Proposals for a New Business Corporations Law for Alberta* (Edmonton: Institute of Law Research and Reform, 1980)

Klein, William A., and Coffee, John C., Jr., *Business Organization and Finance: Legal and Economic Principles*, 3rd ed. (Mineola, N.Y.: Foundation Press, 1988)

Mace, Myles L., *Directors: Myth and Reality* (Cambridge, Mass.: Harvard Graduate School of Business Administration, 1971)

Pratt, John W., and Zeckhauser, Richard (eds.), *Principals and Agents: The Structure of the Business* (Boston: Harvard Business School Press, 1985)

Schaeftler, Michael A., *The Liabilities of Office: Indemnification and Insurance of Corporate Officers and Directors* (Boston: Little, Brown, 1976)

Stone, Christopher D., *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper & Row, 1975)

Welling, Bruce, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1984)

II. Articles

Arsht, S. Samuel, "The Business Judgment Rule Revisited" (1979) 8 Hofstra L. Rev. 93-134

Arsht, S. Samuel, "Fiduciary Responsibilities of Directors, Officers and Key Employees" (1979) 4 Del. J. Corp. L. 652

Austin, R. P., "The Corporate Fiduciary: *Standard Investments Ltd.* v. *Canadian Imperial Bank of Commerce*" (1986) 12 Can. Bus. L. J. 96-110

Balotti, R. Franklin; Adams, Kevin G.; and Sparks, A. Gilchrist, III, "Directors' Fiduciary Duties in Corporate Control Contests" (1986) 18 Inst. Sec. Reg. 9-115

Balotti, R. Franklin, and Gentile, Mark J., "Elimination or Limitation of Director Liability for Delaware Corporations" (1987) 12 Del. J. Corp. L. 5-23

Baysinger, Barry D., and Butler, Henry N., "Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation" (1985) 71 Va. L. Rev. 1257-1303

Baysinger, Barry D., and Butler, Henry N., "Modes of Discourse in the Corporate Law Literature: A Reply to Professor Eisenberg" (1987) 12 Del. J. Corp. L. 107-33

Baysinger, Barry D., and Butler, Henry N., "Race for the Bottom v. Climb to the Top: The ALI project and Uniformity in Corporate Law" (1985) 10 J. Corp. L. 431-62

Baysinger, Barry D., and Butler, Henry N., "Revolution Versus Evolution in Corporation Law: The ALI's Project and the Independent Director" (1984) 52 Geo. Wash. L. Rev. 557-81

Bishop, Joseph W., Jr., "Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers" (1968) 77 Yale L. J. 1078-1103

Block, Dennis J., Barton, N. E., and Garfield, Alan E., "Advising Directors on the D & O Insurance Crisis" (1986) 14 Sec. Reg. L. J. 130-49

Block, Dennis J., and Miller, V., "Responsibilities and Obligations of Corporate Directors in Takeover Contests" (1982) 11 Sec. Reg. L. J. 44-72

Block, Dennis J., Barton, N. E., and Radin, S. A., "Indemnification and Insurance of Corporate Officials" (1985) 13 Sec. Reg. L. J. 239-52

Borowski, Irwin, "Corporate Accountability: The Role of the Independent Director" (1984) 9 J. Corp. L. 455-73

Branson, Douglas M., "Countertrends in Corporation Law : Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure" (1983) 68 Minn. L. Rev. 53-115

Branson, D. M., "Tenth Anniversary Essay: Toward a Philosophy of Corporate Law" [1979] Ariz. St. L. J. 217-44

Brennan, Peter, "New Cases on the Business Judgment Rule: Defending Defensive Tactics Becomes More Difficult" (1986) 14 Sec. Reg. L. J. 245-65

Brown, Meredith M., "Developments Relating to the Business Judgment Rule" (1980) 11 Inst. Securities Reg. 263-87

Brown, Meredith M., and Churno, M. P., "The Business-Judgment Rule" (1986) 17 Inst. Sec. Reg. 247-71

Brown, Meredith M., and Daivs, Vicki M., "Indemnification of Directors and Officers, and Limitations on Director Liability" (1986) 18 Inst. Sec. Reg. 117-77

Brown, Meredith M., and Phillips, William J., "Business Judgment Rule: *Burks* v. *Lasker* and Other Recent Developments" (1981) 6 J. Corp. L. 453-80

Brown, P. A. R., "Corporate Governance in the United Kingdom" (1981) 56 Notre Dame Law. 936-46

Brudney, Victor, "Corporate Governance, Agency Costs, and the Rhetoric of Contract" (1985) 85 Colum. L. Rev. 1403-44

Brudney, Victor, "Independent Director -- Heavenly City or Potemkin Village?" (1982) 95 Harv. L. Rev. 597-659

Brudney, Victor, "The Role of the Board of Directors: The ALI and Its Critics" (1983) 37 U. Miami L. Rev. 223-42

Brudney, Victor, and Clark, Robert C., "New Look at Corporate Opportunities" (1981) 94 Harv. L. Rev. 997-1062

Burgman, Deirdre A., and Cox, Paul N., "Corporate Directors, Corporate Realities and Deliberative Process: An Analysis of the *Trans Union* Case" (1986) 11 J. Corp. L. 311-69

Buxbaum, Richard M., "Corporate Legitimacy, Economic Theory, and Legal Doctrine" (1984) 45 Ohio St. L. J. 515-43

Cary, William L., "Federalism and Corporate Law: Reflections upon Delaware" (1974) 83 Yale L. J. 663-705

Chittur, Krishnan, "The Corporate Director's Standard of Care: Past, Present, and Future" (1985) 10 Del. J. Corp. L. 505-43

Christy, J. G., "Corporate Mismanagement as Malpractice: A Critical Reanalysis of Corporate Managers' Duties of Care and Loyalty" (1984) 21 Hous. L. Rev. 105-77

Coffee, John C., Jr., "The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards" (1987) 8 Cardozo L. Rev. 759-77

Coffee, John C., Jr., "Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis" (1985) 52 Geo. Wash. L. Rev. 789-828

Coffee, John C., Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich. L. Rev. 386-459

Coffee, John C., Jr., "Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance" (1984) 84 Colum. L. Rev. 1145-1296

Coffee, John C., Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86 Colum. L. Rev. 669-727

Cohn, Stuart R., "Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule" (1983) 62 Tex. L. Rev. 591-638

Conard, Alfred F., "A Behavioral Analysis of Directors' Liability for Negligence" [1972] Duke L. J. 895-919

Conard, Alfred F., "Theses for a Corporate Reformation" (1986) 19 U.C. Davis L. Rev. 259-302

Cox, James D., "Compensation, Deterrence, and the Market as Boundaries for Derivative Suit Procedures" (1984) 52 Geo. Wash. L. Rev. 745-88

Cox, James D., and Munsinger, Harry L., "Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion" (1985) 48 (No. 3) Law & Contemp. Probs. 83-135

Curzan, Myron P., and Pelesh, Mark L., "Revitalizing Corporate Democracy: Control of Investment Managers' Voting on Social Responsibility Proxy Issues" (1980) 93 Harv. L. Rev. 670-700

Davis, K. B., Jr., "Judicial Review of Fiduciary Decisionmaking--Some Theoretical Perspectives" (1985) 80 Nw. U. L. Rev. 1-99

Dawson, Francis, "Acting in the Best Interests of the Corporation -- For Whom are Directors 'Trustees'?" (1984) 11 N.Z.U.L. Rev. 68-81

Delzer, Bill, "Trends in Corporate Director Liability" (1972) 17 S. Dakota L. Rev. 468-82

Dent, G. W., Jr., "Revolution in Corporate Governance, the Monitoring Board, and the Director's Duty of Care" (1981) 61 B. U. L. Rev. 623-81

Duesenberg, Richard W., "The Business Judgment Rule and Shareholder Derivative Suits: A View From the Inside" (1982) 60 Wash. U. L. Q. 311-44

Dunlap, J. E., "New Protections for Corporate Directors" (1987) 41 Wash. St. B. News 25-28

Easterbrook, Frank, "Managers' Discretion and Investors' Welfare: Theories and Evidence" (1984) 9 Del. J. Corp. L. 540-71

Easterbrook, Frank, and Fischel, Daniel R., "The Proper Role of a Target's Management in Responding to a Tender Offer" (1981) 94 Harv. L. Rev. 1161-1204

Easterbrook, Frank, and Fischel, Daniel R., "Takeover Bids, Defensive Tactics, and Shareholders' Welfare" (1981) 36 Bus. Law. 1733-50

Eisenberg, Melvin A., "The Business-Judgment Rule" (1983) 14 Inst. Sec. Reg. 251-71

Eisenberg, Melvin A., "Corporate Legitimacy, Conduct, and Governance -- Two Models of the Corporation" (1983-84) 17 Creighton L. Rev. 1-19

Eisenberg, Melvin A., "The Modernization of Corporate Law: An Essay for Bill Cary" (1983) 37 U. Miami L. Rev. 187-212

Eisenberg, Melvin A., "New Modes of Discourse in the Corporate Law Literature" (1984) 52 Geo. Wash. L. Rev. 582-608

Eisenberg, Melvin A., "Shortcomings of the Arguments Against Modernizing Corporate Law" (1984) 9 Del. J. Corp. L. 626-28

Engel, David L., "An Approach to Corporate Social Responsibility" (1979) 32 Stan. L. Rev. 1-98

Ewasiuk, R. W., "Certain Peculiar Aspects of Directors' Powers and Obligations Under the Business Corporations Act" (1984) 22 Alta. L. Rev. 541-56

Fama, Eugene F., and Jensen, Michael C., "Separation of Ownership and Control" (1983) 26 J. L. & Econ. 301-25

Feltham, Ivan R., and Rauenbusch, William R., "Directors' and Officers' Liabilities in Canada" (1976) 1 Can. Bus. L. J. 321-39

Fischel, Daniel R., "The Business Judgment Rule and the *Trans Union* Case" (1985) 40 Bus. Law. 1437-55

Fischel, Daniel R., "The Corporate Governance Movement" (1982) 35 V and. L. Rev. 1259-92

Fischel, Daniel R., "The 'Race to the Bottom' Revisited: Reflections on Recent Developments in Delaware's Corporation Law" (1982) 76 Nw. U. L. Rev. 913-45

Fischel, Daniel R., and Bradley, Michael, "The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis" (1986) 71 Cornell L. Rev. 261-321

Fischel, Daniel R., McKinney, L. C., and Goldschmid, H. J., "Responsibilities of Directors in Connection with Unfriendly Tender Offers" (1982) 13 Inst. Sec. Reg. 131-59

Frankel, Tamar, "Corporate Directors' Duty of Care: The American Law Institute's Project on Corporate Governance" (1984) 52 Geo. Wash. L. Rev. 705-18

Fredrick, T. W., "Indemnification and Liability of Corporate Directors and Officers" (1987) 43 J. Mo. B. 287-92

Gelb, Harvey, "Director Due Care Liability: An Assessment of the New Statutes" (1988) 61 Temple L. Rev. 13-50

Gelfond, R. L., and Sebastian, S. B., "Reevaluating the Duties of Target Management in a Hostile Tender Offer" (1980) 60 B.U. L. Rev. 403-72

Gilson, Ronald J., "A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers" (1981) 33 Stan L. Rev. 819-91

Glasbeek, Harry J., "The Corporate Social Responsibility Movement -- The Latest in Maginot Lines to Save Capitalism" (1988) 11 Dal. L. J. 363-402

Goldstein, Elliott, and Shepherd, Michael L., "Directors' Duties and Liabilities Under the Securities Acts and Corporations Law" (1979) 36 Wash. & Lee L. Rev. 759-85

Gower, L. C. B., "Whither Company Law?" (1981) 15 U.B.C. L. Rev. 385-401

Hamilton, Robert W., "The State of Corporation Law: 1986" (1986) 11 Del. J. Corp. L. 3-24

Hammond, Craig W. "Limiting Directors' Duty of Care Liability: An Analysis of Delaware's Charter Amendment Approach" (1987) 20 U. Mich. J. L. Ref. 543-6

Hansen, Charles, "The ALI Corporate Governance Project: Of the Duty of Due Care and the Business Judgment Rule, A Commentary" (1986) 41 Bus. Law. 1237-53

Hawes, Douglas W., and Sherrard, Thomas J., "Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases" (1976) 62 Va. L. Rev. 1-148

Hazen, Thomas Lee, "Corporate Directors' Accountability: The Race to the Bottom -- The Second Leap" (1987) 66 N.C. L. Rev. 171-82

Hebenton, Sholto, "Limiting Directors' Liability" (1987) Bus. & Law 4-6

Henderson, Harold L.; Olson, John F.; and Hatch, Josiah O., III, "Developments Inside the Corporate Boardroom: Functioning Without Insurance or Contractual Protection Against Liability" (1986) 18 Inst. Sec. Reg. 207-88

Herman, Edward S., "The Limits of the Market as a Discipline in Corporate Governance" (1984) 9 Del. J. Corp. L. 530-39

Herzel, Leo, and Katz, Leo, "Smith v. Van Gorkom: The Business of Judging Business Judgment" (1986) 41 Bus. Law. 1187-93

Herzel, Leo, Shepro, R.W., and Katz, Leo, "Next-to-Last Word on Endangered Directors" (Jan.-Feb., 1987) 65 Harv. Bus. Rev. 38-39

Hessen, Robert, "The Modern Corporation and Private Property: A Reappraisal" (1983) 26 J. L. & Econ. 273-89

Hinsey, Joseph, IV, "Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality" (1984) 52 Geo. Wash. L. Rev. 609-23

Hinsey, Joseph, IV, "Directors' and Officers' Insurance: A Status Report" (1986) 18 Inst. Sec. Reg. 179-205

Howard, John, "Takeover Battles and the Business Judgment Rule: Recent American Case Law Development" (1986) 11 Can. Bus. L. J. 445-74

Irenas, J. E., and Moskowitz, T., "Indemnification of Corporate Officers, Agents, and Directors: Statutory Mandates and Policy Limitations" (1984) 7 Seton Hall Legis. J. 117-33

Jacobson, Arthur J., "Democratic Participation and the Legal Structure of the Economy of Firms" (1983) 50 Social Research 803-49

Johnson, Elmer W., amd Osborne, Robert S., "Role of the Business Judgment Rule in a Litigious Society" (1980) 15 Val. U. L. Rev. 49-79

Johnson, Henry F., "Anti-Takeover Actions and Defenses: Business Judgment or Breach of Duty?" (1982) 28 Vill. L. Rev. 51-74

Johnson, Jennifer J., and Siegel, Mary, "Corporate Mergers: Redefining the Role of Target Directors" (1987) 136 U. Pa. L. Rev. 315-416

Karmel, Roberta S., "The Independent Corporate Board: A Means to What End?" (1984) 52 Geo. Wash. L. Rev. 534-56

Kennedy, William F., "The Standard of Responsibility for Directors" (1984) 52 Geo. Wash. L. Rev. 624-52

Kirk, Carey H., "The Trans Union Case: Is It Business Judgment Rule as Usual?" (1986) 24 Am. Bus. L. J. 467-81

Kirk, William E., III, "A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence" (1984) 10 J. Corp. L. 233-60

Kraakman, Reinier, "Corporate Liability Strategies and the Costs of Legal Controls" (1984) 93 Yale L. J. 857-98

Kreider, G. P. "Corporate Takeovers and the Business Judgment Rule: An Update" (1986) 11 J. Corp. L. 633-50

Lee, Thomas C., "Limiting Corporate Directors' Liability: Delaware's Section 102(b)(7) and the Erosion of the Directors' Duty of Care" (1987) 136 U. Pa. L. Rev. 239-80

Leebron, David W., "Games Corporations Play: A Theory of Tender Offers" (1986) 61 N.Y.U. L. Rev. 153-222

Linsley, Kristin A., "Statutory Limitations on Directors' Liability in Delaware: A New Look at Conflicts of Interest and the Business Judgment Rule" (1987) 24 Harv. J. Legis. 527-72

Lipton, Martin, "Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook and Fischel" (1980) 55 N.Y.U. L. Rev. 1231-36

Loomis, Philip A., Jr., and Rubman, Beverley K., "Corporate Governance in Historical Perspective" (1979) 8 Hofstra L. Rev. 141-81

Mace, Myles L., "Directors: Myth and Reality -- Ten Years Later" (1979) 32 Rutgers L. Rev. 293-308

Macey, J. R., and Miller, G. P., "Toward an Interest-Group Theory of Delaware Corporate Law" (1987) 65 Tex. L. Rev. 469-523

Mackenzie, Allan L., "A Company Director's Obligations of Care and Skill" [1982] J. Bus. L. 460-77

Mallen, Ronald E., and Evans, David W., "Surviving the Directors' and Officers' Liability Crisis: Insurance and the Alternatives" (1987) 12 Del. J. Corp. L. 439-72

Manning, Bayless A., "The Business Judgment Rule in Overview" (1984) 45 Ohio St. L. J. 615-27

Manning, Bayless, "The Business Judgment Rule and the Director's Duty of Attention: Time for Reality" (1984) 39 Bus. Law. 1477-1501

Manning, Bayless, "Reflections and Practical Tips on Life in the Boardroom After Van Gorkom" (1985) 41 Bus. Law. 1-14

Miller, Arthur S., "A Modest Proposal for Helping to Tame the Corporate Beast" (1979) 8 Hofstra L. Rev. 79-92

Millspaugh, P. E., "Corporate Democracy Act -- A Renaissance of Death Knell for the Corporate World?" (1981) 4 Corp. L. Rev. 291-306

Moore, Michael G., "Corporate Officer and Director Liability: Is Corporate Behavior Beyond the Control of Our Legal System?" (1980) 10 Capital U. L. Rev. 69-100

Moskin, Morton, "*Trans Union*: A 'Nailed' Board" (1985) 10 Del. J. Corp. L. 405-28

Note, "Business Judgment Rule: A Benchmark for Evaluating Defensive Tactics in the Storm of Hostile Takeovers" (1986) 31 Vill. L. Rev. 1439-93

Note [S. Andrew Bowman], "Business Judgment Rule and the Litigation Committee: The End of a Clear Trend in Corporate Law" (1981) 14 Ind. L. Rev. 617-45

Note, "Business Judgment Rule in Derivative Suits Against Directors" (1980) 65 Cornell L. Rev. 600-33

Note [Regina S. Iorii], "Defensive Strategies and the Business Judgment Rule: Does Almost Anything Go in Delaware?" (1986) 11 Del. J. Corp. L. 535-60

Note, "Delaware Amendment Relaxes Directors' Liability" (1987) 44 Wash. & Lee L. Rev. 641-80

Note, "Delaware's Limit on Director Liability: How the Market for Incorporation Shapes Corporate Law" (1987) 10 Harv. J. L. & Pub. Pol'y 665-89

Note [M. Megan Maher], "Director Liability: Michigan's Response to Smith v. Van Gorkom" (1987) 33 Wayne St. L. Rev. 1039-66

Note, "Directors as Fiduciaries" [1979] 8 Sydney L. Rev. 668-77

Note [Walter R. Hinnant], "Fiduciary Duties of Directors: How Far Do They Go?" (1988) 23 Wake Forest L. Rev. 163-80

Note, "Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review" (1985) 94 Yale L. J. 909-28

Note, "Indemnification of Corporate Directors: A Disincentive to Corporate Accountability in Indiana" (1983) 17 Val. U. L. Rev. 229-80

Note [John Wade Simmons], "Informed Decisionmaking by Directors: The Director's Right to Rely Versus The Duty to Investigate" (1985) 55 Miss. L. J. 571-84

Note [Robert J. Giuffra, Jr.], "Investment Bankers' Fairness Opinions in Corporate Control Transactions" (1986) 96 Yale L. J. 119-41

Note, "*Kors* to *Unocal*: The Business Judgment Rule Speaks With a Forked Tongue" (1986) 16 Sw. U. L. Rev. 815-53

Note [Steven F. Mones], "Mining the Safe Harbor? The Business Judgment Rule After Trans Union" (1985) 10 Del. J. Corp. L. 545-68

Note, "The Personification of the Business Corporation in American Law" (1987) 54 U. Chi. L. Rev. 1441-83

Note, "The Propriety of Judicial Deference to Corporate Boards of Directors" (1983) 96 Harv. L. Rev. 1894-1913

Note, "Revising the Texas Corporation's Power to Indemnify Directors: Evaluating, Insuring, and Distributing the Risk of Legal Liability" (1987) 28 S. Tex. L. Rev. 619-70

Note [Sara L. Slaughter], "Statutory and Non-Statutory Responses to the Director and Officer Liability Crisis" (1987) 63 Ind. L. J. 181-200

Note, "Special Project: Director and Officer Liability" (1987) 40 Vand. L. Rev. 599-812

Note, "Target Directors' Fiduciary Duties: An Initial Reasonableness Burden" (1986) 61 Notre Dame L. Rev. 722-47

Note, "Tender Offer Defensive Tactics and the Business Judgment Rule" (1983) 58 N.Y.U. L. Rev. 621-60

Note, "*Unocal Corp.* v. *Mesa Petroleum Co.*" (1986) 72 Va. L. Rev. 851-77

Note, "When Challenge Meets Tradition: The Paradox of Thrift Director Liability" (1987) 6 Ann. Rev. Banking L. 413-42

Oesterle, Dale A., "Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability" [1983] Wis. L. Rev. 513-82

Oesterle, Dale A., "The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court" (1986) 72 Cornell L. Rev. 117-57

Partridge, R., "Ratification and the Release of Directors From Personal Liability" (1987) 46 Camb. L. J. 122-49

Pease, Donald E., "Outside Directors: Their Importance to the Corporation and Protection From Liability" (1987) 12 Del J. Corp. L. 25-106

Pennington, R. R., "Recent Developments in Company Law Decisions" (1986) 130 Solic. J. 623-25

Perkins, Roswell B., "The ALI Corporate Governance Project in Midstream" (1986) 41 Bus. Law. 1195-1235

Perkins, Roswell B., "The Genesis and Goals of the ALI Corporate Governance Project" (1987) 8 Cardozo L. Rev. 661-85

Phillips, David M., "Principles of Corporate Governance: A Critique of Part IV" (1984) 52 Geo. Wash. L. Rev. 653-704

Pillai, K. G. Jan, and Tractenberg, Craig, "Corporate Indemnification of Directors and Officers: Time for a Reappraisal" (1981) 15 U. Mich. J. L. Ref. 101-28

Pilon, Roger, "Corporations and Rights: On Treating Corporate People Justly" (1979) 13 Ga. L. Rev. 1245-1370

Potter, Kenneth B., "Directors' and Officers' Liability Insurance" (1971) 9 Alta. L. Rev. 331-46

Presser, Stephen B., and Simpson, Richard E., "Adjusting to the Managerial Revolution: The Law of Corporations in the Federal Courts of Delaware, 1900-41" (1982) 23 Wm. & Mary L. Rev. 725-90

Prickett, William, "An Explanation of Trans Union to 'Henny-Penny' and Her Friends" (1985) 10 Del. J. Corp. L. 451-63

Quillen, William T., "Trans Union, Business Judgment, and Neutral Principles" (1985) 10 Del. J. Corp. L. 465-503

Radin, Stephen A., "The Director's Duty of Care Three Years After *Smith* v. *Van Gorkom*" (1988) 39 Hast. L. J. 707

Reich, Robert B., "Corporate Accountability and Regulatory Reform" (1979) 8 Hofstra L. Rev. 5-37

Rider, A. K., "Changes in Company Law -- Directors' Duties" (1978) 128 New L. J. 1116-18

Romano, Roberta, "Metapolitics and Corporate Law Reform" (1984) 36 Stan. L. Rev. 923-1016

Romano, Roberta, "The Political Economy of Takeover Statutes" (1987) 73 Va. L. Rev. 111-99

Romano, Roberta, "The State Competition Debate in Corporate Law" (1987) 8 Cardozo L. Rev. 709-57

Schwartz, Barry F., and Wiles, James G., "*Trans Union*: Neither 'New' Law nor 'Bad' Law" (1985) 10 Del. J. Corp. L. 429-49

Schwartz, D. E., "The Business-Judgment Rule Under Attack" (1985) 16 Inst. Sec. Reg. 321-33

Schwartz, Donald E., "Federalism and Corporate Governance" (1984) 45 Ohio St. L. J. 545-89

Scott, Kenneth E., "Corporation Law and the American Law Institute Corporate Governance Project" (1983) 35 Stan L. Rev. 927-48

Scott, Kenneth E., "The Role of Preconceptions in Policy Analysis in Law" (1986) 71 Cornell L. Rev. 299-321

Searle, P., "Directors' Liability and the Relationship Between Bankers and Regulators" (1987) 6 Ann. Rev. Banking L. 291-97

Shaneyfelt, Donald L., "Personal Liability Maze of Corporate Directors and Officers" (1979) 58 Neb. L. Rev. 692-717

Silas, Faye A., "Risky Business: Corporate Directors Bail Out" (June, 1986) 72 A.B.A.J. 24

Sommer, A. A., Jr., "The Struggle for Corporate Responsibility" (1987) 8 Cardozo L. Rev. 795-816

Spiegel, David R., "The Liability of Corporate Officers" (Nov., 1985) 71 A.B.A. J. 48-52

Steinberg, Marc I., "Tender Offer Regulation: The Need for Reform" (1988) 23 Wake Forest L. Rev. 1-39

Stigler, George, and Friedland, Claire, "The Literature of Economics: The Case of Berle and Means" (1983) 26 J. L. & Econ. 237-68

Stone, Christopher D., "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) 130 U. Pa. L. Rev. 1441-1509

Stone, Christopher D., "Large Organizations and the Law at the Pass: Toward a General Theory of Compliance Strategy" [1981] Wis. L. Rev. 861-90

Stone, Christopher D., "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 Yale L. J. 1-77

Terrell, A. M., Jr., "Bricks for the Business Judgment Rule -- Recent Developments in Delaware Corporate Law" (1984) 9 Del. J. Corp. L. 329-45

Trebilcock, Michael, "Liability of Company Directors for Negligence" (1969) 32 Mod. L. Rev. 499-515

Veasey, E. Norman, "New Insights Into Judicial Deference to Directors' Business Decisions: Should We Trust the Courts?" (1984) 39 Bus. Law. 1461-75

Veasey, E. Norman, "Seeking a Safe Harbor from Judicial Scrutiny of Directors' Business Decisions -- An Analytical Framework for Litigation Strategy and Counselling Directors" (1982) 37 Bus. Law. 1247-74

Veasey, E. Norman, and Manning, William E., "Codified Standard -- Safe Harbor or Uncharted Reef?" (1980) 35 Bus. Law. 919-46

Veasey, E. Norman, Finkelstein, Jesse A., and Bigler, C. Stephen, "Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance" (1987) 42 Bus. Law. 399-421

Veasey, E. Norman, and Seitz, Julie M. S., "The Business Judgment Rule in the Revised Model Act, the Trans Union Case, and the ALI Project -- A Strange Porridge" (1985) 63 Tex. L. Rev. 1483-1507

Wander, Herbert S., and LeCoque, Alain G., "Boardroom Jitters: Corporate Control Transactions and Today's Business Judgment Rule" (1986) 42 Bus. Law. 29-64

Warden, John L., "The Board Room as a War Room: The Real World Applications of the Duty of Care and the Duty of Loyalty" (1985) 40 Bus. Law. 1431-36

Weiss, Elliott J., "Economic Analysis, Corporate Law, and the ALI Corporate Governance Project" (1984) 70 Cornell L. Rev. 1-37

Weiss, Elliott J., "Of Econometrics and Indeterminacy: A Study of Investors' Reactions to 'Changes' in Corporate Law" (1987) 75 Calif. L. Rev. 551-607

Weiss, Elliott J., "Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse" (1981) 28 U.C.L.A. L. Rev. 343-437

Werner, Walter, "Corporation Law in Search of Its Future" (1981) 81 Colum. L. Rev. 1611-66

Wolfson, Nicholas, "Critique of Corporate Law" (1980) 34 U. Miami. L. Rev. 959-94

Zalecki, Paul H., "The Duties of Corporate Directors in a Takeover Context: A Rationale for Judicial Focus Upon the Deliberative Process" (1986) 17 U. Tol. L. Rev. 313-41

III. Cases

1. Canadian Case Law

Angus v. *R. Angus Alberta Limited* (1988), 58 Alta. L.R. (2d) 76 (C.A.)

Beamish v. *Solnick* (1980), 10 B.L.R. 224 (Ont. H.C.)

Brown v. *Duby* (1980), 28 O.R. (2d) 745 (H.C.J.)

Canadian Aero Service Ltd. v. *O'Malley*, [1973] S.C.R. 592, 40 D.L.R. (3d) 371

Re Dominion Trust Co. (1916), 32 D.L.R. 63 (B.C.C.A.)

International Corona Resources Ltd. v. *Lac Minerals Ltd.* (1987), 44 D.L.R. 592, 62 O.R. 1 (C.A.)

Jacobsen v. *United Canso Oil & Gas Ltd.* (1980), 113 D.L.R. (3d) 427 (Alta. Q.B.)

MacMillan Bloedel Ltd. v. *Binstead* (1983), 22 B.L.R. 255 (B.S.S.C.)

Peso Silver Mines Ltd. v. *Cropper*, [1966] S.C.R. 673, 58 D.L.R. (2d) 1

Standard Investments Ltd. v. *Canadian Imperial Bank of Commerce* (1985), 22 D.L.R. (4th) 410, 52 O.R. (2d) 473 (C.A.)

W. J. Christie & Co. Ltd. v. *Greer* (1981), 121 D.L.R. (3d) 472 (Man. C.A.)

Weber Feeds Ltd. v. *Weber* (1979), 99 D.L.R. (3d) 176, 24 O.R. (2d) 754 (C.A.)

2. U.K. Case Law

Re Brazilian Rubber Plantations and Estates, Ltd., [1911] 1 Ch. 425 (C.A.)

Re City Equitable Fire Insurance Co., [1925] Ch. 407

Re Denham & Co. (1883), 25 Ch.D. 752

Dorchester Finance Co. Ltd. v. *Stebbing* (1980), 1 Co. Lawyer 38

Re Five Minute Care Wash Services Ltd., [1966] 1 W.L.R. 745 (Ch.D.)

Foss v. *Harbottle* (1843), 2 Hare 461, 67 E.R. 189

Holdsworth & Co. v. *Caddies*, [1955] 1 W.L.R. 352

Howard Smith Ltd. v. *Ampol Petroleum Ltd.*, [1974] A.C. 821, 1 All E.R. 1126 (P.C.)

Lister v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] A.C. 555 (H.L.)

The Marquis of Bute's Case, [1892] 2 Ch. 100

National Trustees Co. of Australia v. *General Finance Co. of Australia*, [1905] A.C. 373 (P.C.)

Parke v. *Daily News Ltd.*, [1962] Ch. 927

Regal (Hastings) Ltd. v. *Gulliver*, [1942] 1 All E.R. 378 (H.L.)

Selangor United Rubber Estates Ltd. v. *Cradock* (No. 3), [1968] 1 W.L.R. 1555 (Ch.D.)

Re Thomas Gerrard and Son Ltd., [1968] Ch. 455

Turquand v. *Marshall* (1869), L.R. 4 Ch. App. 376

Re Windsor Steam Coal Co., [1929] 1 Ch. 151 (C.A.)

3. U.S. Case Law

Aronson v. *Lewis*, 473 A.2d 805 (1984) (Del. S.C.)

Auerbach v. *Bennett*, 393 N.E.2d 994 (1979) (N.Y.C.A.)

Barnes v. *Andrews*, 298 F. 614 (1924) (S.D.N.Y.)

Bates v. *Dresser*, 251 U.S. 524 (1920)

Briggs v. *Spaulding*, 141 U.S. 132 (1891)

Cramer v. *General Telephone & Electronics Corporation*, 582 F.2d 259 (1978) (3rd Circ.)

Dynamic Corporation v. *CTS Corporation*, 794 F.2d 250 (1986) (7th Circ.) rev'd 107 S.Ct. 1637 (1987)

Edelman v. *Fruehauf Corp.*, 798 F.2d 882 (1986) (6th Circ.)

Escott v. *Barchris Construction Corporation*, 283 F.Supp. 643 (1968) (S.D.N.Y.)

Fitzpatrick v. *Federal Deposit Ins. Corp.*, 765 F.2d 569 (1985) (6th Circ.)

Francis v. *United Jersey Bank*, 432 A.2d 814 (1981) (N.J.S.C.)

Franz Manufacturing Co. v. *EAC Industries, Inc.*, 501 A.2d 401 (1985) (Del. S.C.)

Graham v. *Allis-Chalmers Manufacturing Co.*, 188 A.2d 125 (1963) (Del. S.C.)

Hanson Trust PLC v. *ML SCM Acquisition, Inc.*, 781 F.2d 264 (1986) (2d Circ.)

Joy v. *North*, 692 F.2d 880 (1982) (2d Circ.); *cert.* denied, 460 U.S. 1051 (1983)

Kamin v. *American Express Co.*, 383 N.Y.S.2d 807 (1976)

Moran v. *Household International, Inc.*, 490 A.2d 1059 (1985) (Del. Ch.), aff'd 500 A.2d 1346

Panter v. *Marshall Field & Co.*, 646 F.2d 271 (1981) (7th Circ.), *cert.* denied, 454 U.S. 1092 (1981)

Revlon, Inc. v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (1986) (Del. S.C.)

Sclensky v. *Wrigley*, 237 N.E.2d 776 (1968) (Ill. C.A., 1st Div.)

Selheimer v. *Manganese Corporation of America*, 224 A.2d 634 (1966) (Pa. S.C.)

Smith v. *Brown-Borhek Company*, 200 A.2d 398 (1964) (Pa. S.C.)

Smith v. *Van Gorkom*, 488 A.2d 858 (1985) (Del. S.C.)

Unocal Corp. v. *Mesa Petroleum Co.*, 493 A.2d 946 (1985) (Del. S.C.)

Zapata Corp. v. *Maldanado*, 430 A.2d 779 (1981) (Del. S.C.)