Shareholder Wealth Maximization and its Implementation under Corporate Law

Bernard S. Sharfman*

I. INTRODUCTION
II. SHAREHOLDER WEALTH MAXIMIZATION AS A NORM OF CORPORATE GOVERNANCE
III. SHAREHOLDER WEALTH MAXIMIZATION AS THE OBJECTIVE OF CORPORATE LAW
IV. WHY COURTS AVOID THE REVIEW FOR SHAREHOLDER WEALTH MAXIMIZATION
V. THE REVLON DUTY: THE EXCEPTION THAT IS LOSING ITS SPECIAL STATUS
VI. EBAY DOMESTIC HOLDINGS, INC. V. NEWMARK
VII. THE IMPACT OF EBAY
VIII. CONCLUSION

*Mr. Sharfman is a Visiting Assistant Professor of Law at the Case Western Reserve University School of Law (spring semesters of 2013 and 2014). Mr. Sharfman would like to thank Professors Stephen M. Bainbridge, Robert Bird, Jay Brown, Christopher M. Brunner, Lawrence Cunningham, George W. Dent, Jr., Martin Gelter, William Judge, Andrew Lund, Andrew Keay, Charles R. Kormos, Henry G. Manne, Haskell Murray, Paul Rose, Lynn A. Stout, Mark Underberg and David G. Yosifon for their helpful comments and insights. This article is dedicated to Mr. Sharfman's wife, Susan Thea David, and his daughter, Amy David Sharfman.

INTERPRETATION BEGETS INTERPRETATION, AND A FATHER'S MISTAKES ARE CORRECTED BY THE ERRORS OF HIS CHILDREN. THERE IS NO REASON TO SUPPOSE, OR TO HOPE, THAT THIS WILL END. THE SUBSTANCE OF HUMAN EXISTENCE IS ARGUMENT, AND EACH OF US HAS A FOOTNOTE TO CONTRIBUTE.

Quoting A.O. Scott from his New York Times Review of the movie Footnote (March 8, 2012).

I. INTRODUCTION

Shareholder wealth maximization is a norm[1] of corporate governance that encourages a firm's board of directors (the board) to implement all major decisions such as compensation policy, new investments, dividend policy, strategic direction and corporate strategy with only the interests of shareholders in mind.[2] There is strong support for the idea that shareholder wealth maximization should be the primary norm underlying the governance of for-profit corporations.[3] Given this majority view, it should come as no surprise that many practitioners and scholars also consider shareholder wealth maximization to be the objective of corporate law[4] with corporate law's fiduciary duties of care and loyalty being the tools of accountability to enforce this objective.

---

[1] A norm can be described as "'a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with.'" JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN at 32-33 (2008). (quoting Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AMER. ECON. REV. 365 (1997)).

[2] *Id.* at 7.

[3] *Id.* at 4. According to Professor Macey, "Corporations are almost universally conceived as economic entities that strive to maximize value for shareholders." *Id.* at 2. Nevertheless, the role of shareholder wealth maximization in corporate governance still can create an interesting debate. For example, a recent series of thought provoking posts and comments on two blogs, The Conglomerate and ProfessorBainbridge.com, debating the role of shareholder wealth maximization in corporate governance, s*ee* Haskell Murray, *Benefit Corporations: Traditional Paradigm* (May 3, 2012), http://www.theconglomerate.org/2012/05/benefit-corporations-corporate-purpose.html, and Stephen M. Bainbridge, *The Vacuity of Corporate Purpose* (May 5, 2012), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-vacuity-of-corporate-purpose.html.

[4] According to Professor Macey, '"For many, particularly those in the law and economics movement, any action by directors, or others that is inconsistent with the goal of shareholder wealth maximization is considered a form of "corporate deviance."' Macey, *supra* note 1, at 2.

As its theoretical foundation, this article accepts shareholder wealth maximization as both the primary norm of corporate governance and the objective of corporate law.[5] If so, then any model of corporate law must explain why courts have historically shown little interest in reviewing a board decision to determine if shareholder wealth maximization was actually achieved. To explain why this restrained approach has been used, this article utilizes a model of corporate law that describes a world where the courts have designated the board of directors as the locus of authority for determining whether or not a corporate decision maximizes shareholder wealth.[6] The courts take this approach because it understands that it is the board, not the courts, which has the information and expertise to determine if a corporate decision meets this objective.[7] This approach is implemented by utilizing a ***strategy*** of protecting managerial discretion in corporate decision making as evidenced by the business judgment rule.[8] A court will only interpose itself in this shareholder wealth maximizing determination if the board decision is tainted with a conflict of interest, lack of independence or where gross negligence in the process of becoming informed is implicated and exculpation clauses do not apply. Utilizing this triad of filters prior to a review for shareholder wealth maximization allows the courts to take both a light-handed and intermittent approach to board accountability, consistent with an Arrowian framework that sees great value in decision making by a centralized authority.[9]

The model just described can be understood as the traditional model of corporate law and, as argued here, is still valid. Thus, when a chancellor or judge veers from this model the judicial opinion must be closely scrutinized to see if the court had valid reasons for implementing a different approach. Such a veering from the traditional path can be found in *eBay v. Newark*,[10] a recent Delaware Chancery Court case where former Chancellor Chandler, in his review of a shareholder rights plan under the *Unocal* test, required the directors to demonstrate that the corporate policy being defended under the first prong of the test enhanced shareholder value (the Link) even though the decision to implement the

---

[5] See Parts II and III for a more detailed discussion of shareholder wealth maximization as the primary norm of corporate governance and as an objective of corporate law, respectively.

[6] See Part IV.

[7] *Id*.

[8] *Id*.

[9] *Id*. For a discussion of how the triad of filters can be applied without the business judgment rule but with the same effect, *see* Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. (2013), available at SSRN: http://ssrn.com/abstract=2277645.

[10] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

rights plan was not yet ripe or even required to be reviewed under the traditional triad of filters.[11] As also argued here, former Chancellor Chandler was wrong in adding shareholder wealth maximization as an additional burden for the board to bear under the first prong of the *Unocal* test.

The discussion that follows, when it references state corporate law, has been pragmatically framed in the context of Delaware corporate law. Delaware is the state where the majority of the largest U.S. companies are incorporated,[12] and its corporate law often serves as the authority that other U.S. states look to when developing their own statutory and case law.[13] Therefore, the primary examples are from Delaware, but the thinking is meant to be global in nature.

Part II describes shareholder wealth maximization as a norm of corporate law. Part III describes shareholder wealth maximization as an objective of corporate law. Part IV explains why courts avoid the review for shareholder wealth maximization but also when it is compelled to do so. Part V describes how the *Revlon* duty has been transformed to be consistent with Delaware's traditional approach to the review for shareholder wealth maximization. Part VI describes how *eBay Domestic Holdings, Inc. v. Newmark* creates a new exception. Part VII explains the impact of *eBay*. Part VIII provides a brief conclusion.

II. SHAREHOLDER WEALTH MAXIMIZATION AS A NORM OF CORPORATE GOVERNANCE

There is widespread support for the idea that shareholder wealth maximization should be the primary norm underlying corporate governance.[14] It is widely accepted that

---

[11] *Id.*

[12] According to the State of Delaware web site, Delaware is the legal home to more than 50% of all U.S. publicly-traded companies and 63% of the Fortune 500. *Why Choose Delaware as Your Corporate Home?*, DEL. DIV. OF CORP., http://corp.delaware.gov (last visited Dec. 28, 2011). *See also* LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007) (stating that Delaware is the "favored state of incorporation for U.S. businesses").

[13] Nadelle Grossman, *Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, 12 FORDHAM J. CORP. & FIN. L. 393, 397 (2007).

[14] Macey, *supra* note 1, at 4. According to Professor Macey, "Corporations are almost universally conceived as economic entities that strive to maximize value for shareholders." *Id.* at 2. Nevertheless, the role of shareholder wealth maximization in corporate governance still can create an interesting debate. For example, a recent series of thought provoking posts and comments on two blogs, The Conglomerate and ProfessorBainbridge.com, debating the role of shareholder wealth maximization in

shareholder wealth maximization enhances corporate decision making and can be understood as a proxy for social welfare maximization.[15] According to Professor Jeffrey Gordon, this norm has been reinforced by the transition over the last 60 years from a typical corporate board of a public company comprised of a minority of independent directors to one that is dominated by them, allowing for a dramatic shift in board focus from managerialism, i.e., the goals of management, to shareholder wealth maximization.[16] Professor Gordon attributes this shift in focus to the theory that independent directors, unlike the insiders and interested outsiders who dominated corporate boards in the 1950s, are less committed to management and its vision.[17] Instead, they look to outside performance signals, such as information provided by the stock market, to assess the performance of the firm.[18] Professor Gordon also notes that facilitating this focus has been enhanced SEC disclosure requirements and more transparent accounting standards, which allow corporate information that once had been known only to insiders to become reflected in stock prices, which in turn have become much better indicators of company performance.[19] According to Professor Gordon, the overriding effect is to commit the firm to a shareholder wealth maximizing strategy as best measured by stock price performance.[20]

---

corporate governance, *see* Haskell Murray, *Benefit Corporations: Traditional Paradigm* (May 3, 2012), http://www.theconglomerate.org/2012/05/benefit-corporations-corporate-purpose.html, and Stephen M. Bainbridge, *The Vacuity of Corporate Purpose* (May 5, 2012), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-vacuity-of-corporate-purpose.html.

[15] As summarized by Professor John Boatright, "[C]orporate decision making is more efficient and effective when management has a single, clearly-defined objective and shareholder wealth maximization provides not only a workable decision guide but one that, if pursued, increases the total wealth creation of the firm." John R. Boatright, *What's Wrong—and What's Right—with Stakeholder Management*, 21 J. OF PRIVATE ENTERPRISE 106, 119 (2006); William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, SEATTLE U. L. REV. 489, 502 (2013) (noting how shareholder wealth maximization is not the same thing as social welfare but can be used as a proxy for its maximization).

[16] Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1540 (2007). Professor Gordon reports that from 1950 to 2005 the percentage of independent directors serving on the typical board of a public company has increased from 22 percent to 74 percent. *Id.* at 1565 tbl. 1.

[17] *Id.* at 1563.

[18] *Id.*

[19] *Id.* at 1541.

[20] *Id.* at 1563.

Further enforcing the norm of shareholder wealth maximization has been a decline over the last thirty years of companies using defined-benefit plans and conversely the rise in defined-contribution plans as the primary means to fund retirement benefits.[21] Since defined-contribution plans strongly depend on capital markets and not the ability of employer contributions to maintain benefit levels, shareholder wealth and its growth has become more important for larger segments of society, creating public pressure on corporate boards to keep their respective share prices growing and at the same time reducing their ability to take the interests of other stakeholders into account.[22]

III. SHAREHOLDER WEALTH MAXIMIZATION AS THE OBJECTIVE OF CORPORATE LAW

Most recently, as we have come to absorb the corporate governance lessons learned from the financial crisis of 2007-08, the shareholder wealth maximization norm has come under heavy and fair criticism from leading corporate governance scholars such as Professors Lynn Stout[23] and Jay Lorsch.[24] Moreover, there are alternative models of corporate governance that do not incorporate shareholder wealth maximization as the objective. For example, Professors Margaret M. Blair and Lynn A. Stout argue, using their team production approach to corporate governance, that shareholder wealth maximization is not the correct objective of a public company.[25]

---

[21] Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, available at http://ssrn.com/abstract=2079607 (2012).

[22] *Id.*

[23] Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012). Professor Stout has been making the argument that shareholder wealth maximization is not the appropriate corporate objective since at least 1999. *See infra* note 26.

[24] Justin Fox and Jay W. Lorsch, *What Good are Shareholders?*, HARVARD BUS. REV. (July/August 2012).

[25] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (seminal work on team production and corporate law). Professors Blair and Stout model the public company as a team of members who make firm-specific investments in the corporation with the goal of producing goods and services as a team ("team production"), with the board of directors serving as a "mediating hierarchy." *Id.* at 271-76. In this role, board members are "mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together." *Id.* at 281. As a mediating hierarchy, the board acts in a detached manner from the team members. It is a *sui generis* body that acts as a group of trustees, not agents. *Id.* at 290. The board is the ultimate decision making authority within the corporation, constrained only by the

fiduciary duties imposed by corporate law and their desire to do their job in the most efficient manner. *Id.* Endowed with such authority, the board has the freedom to most efficiently balance the interests of the team members, not just focus on the interests of shareholders. *Id.* Any person or entity that makes a specialized investment that has little or no value outside the joint enterprise, a "firm-specific" investment, is a member of the team. *Id.* at 272. The result is "that no one type of team member, such as an equity investor, is a "principal" who enjoys a right of control over the team." *Id.* at 277. Team members are primarily made up of executives, rank-and-file employees, and equity investors, but can also include researchers, creditors, the local community, marketers, and vendors who provide specialized products and services to the firm, among others. *Id.* at 288. For example, if a team of researchers trying to develop a new drug, each may have to invest many years of specialized effort and skill that may only be useful to the firm that employs them and worthless to all firms. *Id.* Another example is when a vendor invests heavily in its production facilities in order to produce a customized product for the firm. Or, when a municipality offers a large package of tax abatements, credits, worker training, etc. in order to entice the firm to build or expand plant capacity in the community and with it brings to the areas a significant number of new jobs. Like equity investors, these stakeholders have made firm specific investments and therefore must be considered residual interest holders, protected only by long-term implicit agreements (noncontractual and therefore non-legally enforceable) that they enter into because they have trust that the board of directors will do its best to make sure they recoup their investments. *Id.* at 273.

Professor Alan Meese does an excellent job in summarizing Blair and Stout's argument why the board as a mediating hierarchy provides value in comparison to a board being guided only by the norm of shareholder wealth maximization:

> According to Blair and Stout, the public corporation is best viewed as a team of shareholders, creditors, workers, managers, and communities." Shareholders are not the only group that make investments that are specific to this "team": creditors, workers, managers, and communities also make investments that are most productive when employed in connection with the corporate enterprise. Like shareholders, who face the risk of opportunism by managers, these other constituencies run the risk of exploitation by shareholders. As a result, it is said, these groups may be reluctant to place their human and financial capital under the control of managers and directors obligated under the shareholder primacy norm "ruthlessly [to] pursue shareholders' interests."" Thus, instead of overseeing managers with a view toward maximizing the wealth of shareholders, they say, directors do and should view themselves as "mediating hierarchs" who resolve competing claims to the collective residual produced by the firm's activities."'

Alan Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1632.

Nevertheless, in the world of corporate law, especially by those who take a law and economics approach to corporate law, the objective of shareholder wealth maximization is firmly entrenched.[26] According to Professors Henry Hansmann and Reiner Kraakman, "There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[27] According to Professors Frank Easterbrook and Daniel Fischel, shareholder wealth maximization can be thought of as the default rule under corporate law because it is the "operational assumption of successful firms."[28] Much more recently, Chancellor Leo E. Strine, Jr. of the Delaware Chancery Court stated his own personal view in a Wake Forest law journal article that "the corporate law ***requires*** directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders"[29] and that directors should only receive the benefit of the business judgment rule if their decision was motivated by a desire to enhance shareholder value.[30] While not judicial precedent, Chancellor Strine's scholarly writings promoting the role of shareholder wealth maximization in corporate law must be assumed to have some influence on the legal thinking of judges and other Delaware Chancellors when they consider issues involving corporate decision making.

Shareholder wealth maximization has also found a prominent role in "theoretical" models of corporate law. For example, in a principal-agent model of corporate law, shareholders are viewed as the owners of the corporation and the board of directors and executive officers are their agents:

> Enterprises choose the corporate form over other types of business organization to realize the gains produced by the separation of ownership from control. This separation enables a specialization of function: Shareholders supply capital and bear the risk that comes with their claim to the firm's residual product, and managers act as shareholders' agents, using their expertise to deploy the

[26] Macey, *supra* note 1, at 2.

[27] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). *See also*, Henry Hansmann, *Reflections on the End of History for Corporate Law*, CONVERGENCE OF CORPORATE GOVERNANCE: PROMISE AND PROSPECTS, Abdul Rasheed and Toru Yoshikawa, eds., Palgrave-MacMillan, 2012 (Professor Hansmann suggests that events over the last ten years have not changed his understanding of the relationship between shareholder wealth maximization and corporate law.).

[28] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36 (1991).

[29] Leo G. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 155 (2012).

[30] *Id.* at 147-148 ("Fundamental to the rule … is that the fiduciary be motivated by a desire to increase the value of the corporation for the benefit of the stockholders.")

> principals' capital in various ventures. This "principal-agent" account of the public corporation, in turn, implies a "shareholder primacy norm," i.e., a recognition that directors and managers do and should run the corporation so as to maximize the wealth of a single owner, namely, shareholders.[31]

Shareholders employ directors and officers to run the company on their behalf and therefore shareholder wealth maximization should be the goal of these agents. The results of corporate decisions that do not have shareholder wealth maximization as their focus are referred to as agency costs.[32] Hence, corporate law should be structured to minimize such costs.[33]

Alternatively, under a nexus of contracts or "contractarian" model of the corporation, shareholders are not perceived to own the corporation but are considered to be only one of many parties that contract with the corporation.[34] Nevertheless, the board of directors still has fiduciary duties to maximize shareholders wealth.[35] This is a result of the hypothetical bargain struck between shareholders and the other parties in the corporation (or with the board of directors as in Professor Stephen M. Bainbridge's director primacy model of corporate law). In this hypothetical bargain, shareholders would argue that since they are the least protected by contract versus other parties, they deserve shareholder wealth maximization as the gap filler in their corporate contract.

In the models just described, a board of directors has a ***legal obligation*** to manage according to shareholder interests.[36] Such a legal obligation is enforced through the fiduciary duties of care and loyalty that a board of directors and executive management

---

[31] Alan Meese, *supra* note 25, at 1631.

[32] *Id.*

[33] *Id.* Of course, even though directors have fiduciary duties, corporate law does not perceive them as agents of shareholders. *See* Restatement (Second) of Agency § 14C (1958) ("Neither the board of directors nor an individual director of a business is, as such, an agent of the corporation or of its members."); Arnold v. Soc'y for Sav. Bancorp, 678 A.2d 533, 539-40 (Del.1996) ("Directors, in the ordinary course of their service as directors, do not act as agents of the corporation ... A board of directors, in fulfilling its fiduciary duty, controls the corporation, not vice versa."). U.S. v. Griswold, 124 F.2d 599 (1st Cir 1941) ("The directors of a corporation for profit are 'fiduciaries' having power to affect its relations, but they are not agents of the shareholders since they have no duty to respond to the will of the shareholders as to the details of management.'")

[34] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

[35] *Id.*

[36] Hansmann and Kraakman, *supra* note 27, at 440-41.

owes to its shareholders.[37] If so, then fiduciary duties must be understood as tools of accountability with the objective of shareholder wealth maximization. In addition, shareholders play a critical role in being the required catalysts for their enforcement by filing direct and derivative law suits.

Yet, corporate law has shown very little interest in directly enforcing the objective of shareholder wealth maximization. We see evidence of this in all aspects of corporate law. First, Delaware General Corporation Law is totally silent on shareholder wealth maximization.[38] Second, court opinions rarely reference shareholder wealth maximization as a guiding principle of corporate law and when they do it is mainly to discuss the *Revlon* duty,[39] i.e., the duty of the board "to seek the best available price … when a company embarks on a transaction -- on its own initiative or in response to an unsolicited offer -- that will result in a change of control."[40] Third, the fiduciary duty of care can be nullified in *most* cases by the business judgment rule[41] or in all duty of care cases where director liability is at issue by an exculpation clause in a corporation's certificate of

---

[37] MACEY, *supra* note 1, at 4. For purposes of this article, we adopt the current Delaware approach by recognizing only fiduciary two duties, care and loyalty, and all other duties, such as the *Revlon* duty, duty to monitor and the duty of candor, etc., are to be understood as the application in a specific context of the board's two fiduciary duties. For example, in *Stone v. Ritter*, the Delaware Supreme Court stated in the context of discussing good faith:

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

Stone v. Ritter, 911 A. 2d 362, 370 (Del. 2006).

[38] Instead, Delaware General Corporation Law simply states that corporations can be formed "to conduct or promote any lawful business or purposes." DEL. CODE ANN. tit. 8, §101.

[39] As established in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[40] Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009).

[41] The exception to this duty of care safe harbor provided by the business judgment rule is that directors must be informed when making a business decision. The standard of review will be gross negligence. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

incorporation.[42] Therefore, if shareholder wealth maximization is being implemented through a fiduciary duty that in an overwhelming number of cases is not being enforced, then how can it be said that this fiduciary duty is being used to achieve the objective of shareholder wealth maximization?

Fourth, a judicial review for a breach in the directors' duty of loyalty is never triggered because a decision has allegedly failed to maximize shareholder wealth. A review for a breach in the duty of loyalty is only triggered when a decision is either tainted or presumed tainted by a conflict of interest or a lack of independence or both. Corporate law makes the critical presumption that conflicts of interest or lack of independence must lead to error in decision making and will find directors liable for the harm caused by board decisions that are so tainted.[43] This presumption is justified based on the logic that if a decision is tainted with self interest, then there is no basis for believing that the decision was made in the best interests of the corporation or its shareholders.[44] Thus, "there is no reason to preserve the authority of the board."[45] When a board decision is so tainted, then it is reviewed under a fairness or reasonableness standard of review with the burden of proof shifted to directors.

IV. Why Courts Avoid the Review for Shareholder Wealth Maximization

The focus on taint means that the courts are using the presence of agency costs as a filter for determining whether to get involved in a review for shareholder wealth maximization. Why it does so is because fiduciary duties as tools for achieving the objective of shareholder wealth maximization must take a back seat to the primary

---

[42] Del. Code Ann. tit. 8, § 102(b)(7). Under section 102(b)(7), shareholders are allowed to incorporate into their certificate of incorporation:

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; …; or (iv) for any transaction from which the director derived an improper personal benefit. . . .

Del. Code Ann. tit. 8, § 102(b)(7) (2001).

[43] Michael P. Dooley, *Two Models of Corporate Governance*, 47 Bus. Law. 461, 487 (1992).

[44] *Id.*

[45] *Id.*

strategy used by corporate law to achieve this objective; the protection and promotion of board authority or what can simply be referred to as "managerial discretion." This strategy of protecting managerial discretion necessarily means keeping fiduciary duties weak and the courts primarily out of the business of determining whether or not a decision maximizes shareholder wealth. The problem is that this approach is counterintuitive and therefore subject to being misunderstood, especially by those who have been trained in the law and believe that accountability should always be the default rule. However, corporate law takes a more pragmatic approach. It says that we must accept that agency costs may be a part of corporate decision making but that it must be tolerated to a certain degree in order to make sure that we allow corporate decision making to get as close to shareholder wealth maximization as possible. This requires that the locus of authority for corporate decisions and therefore the determination of what is a shareholder wealth maximizing decision be vested in the board of directors and not shareholders or the courts.

To understand corporate law's strategy, it might be helpful to visualize a line with absolute managerial discretion at one end and absolute accountability at the other as represented by a judicial review of every board decision for a breach of fiduciary duties. On this line there is an optimal point between absolute authority and absolute accountability that allows for shareholder wealth maximization. Corporate law, even though it does not know exactly where this optimal point may lie at any point in time, has taken the position that the optimal point must reside much closer to absolute authority than to absolute accountability. In identifying where that balancing point may be the courts takes a very pragmatic approach to how much accountability it should provide in its review of corporate decisions. It does so by cleverly focusing on what they can do best, trying to identify whether a board decision is tainted with interestedness, lack of independence or gross negligence, an approach that provides accountability but at the same time defers the substantive component of corporate decision making to the board of directors.

However, this is not necessarily the way it must always be. Corporate law or corporations themselves through amendments to their articles of incorporation may over time shift the substantive component of corporate decision making away from the board and its executive officers to stockholders or the courts if it becomes clear that this will benefit the objective of shareholder wealth maximization. As discussed below, there are several good arguments why the locus of authority must remain with the board of directors for the foreseeable future in order to maximize shareholder wealth, continuing to make valid Professor Bainbridge's argument that under corporate law the "preservation of managerial discretion should always be the null hypothesis."[46]

A. The Foundation: The Board of Directors as the Locus of Authority under

[46] Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 109 (2004).

Statutory Law

Del. Gen. Corp. L. Section 141(a) provides the legal foundation for the board of directors to be a corporation's locus of authority in determining whether corporate decisions are shareholder wealth maximizing: "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[47] While it is possible for a corporation to contract away from this default rule by modifying its certificate of incorporation or becoming a statutory close corporation,[48] it is quite clear that statutory law is taking the position that the correct locus of authority for corporate decision making lies with the board of directors.

But Del. Gen. Corp. L. does stop with Section 141(a) in promoting board authority. Del. Gen. Corp. L. also provides that only the board can decide if a dividend is to be paid;[49] the board has authority to make significant acquisitions without shareholder approval if the board decides to acquire another company, as long as the board does not dilute existing shareholders by more than 20% or the board pays for the acquisition in cash;[50] the board can sell company assets without shareholder approval as long as it does not sell substantially all of its assets;[51] the board is not required to follow the commands of its shareholders, even if shareholders pass a unanimous resolution requesting the board to act in a specific manner;[52] the board has sole discretion to initiate changes to the corporate charter[53] (This is a very powerful tool to keep shareholders from disturbing the balance of power that is and should be tilted in favor of centralized authority.); shareholders are required to make demand before filing a derivative suit or must demonstrate demand futility;[54] and, as already mentioned, a corporation may include exculpation clauses in its' charter,[55] relieving the directors of duty of care liability, and in

---

[47] DEL. CODE ANN. tit. 8, § 141(a).

[48] DEL. CODE ANN. tit. 8, § 351.

[49] *Id.*

[50] DEL. CODE ANN. tit. 8, § 251(f) (2001).

[51] Del. Code Ann. tit. 8, § 271.

[52] Blair & Stout, *supra* note 25, at 291.

[53] DEL. CODE ANN. tit. 8, § 242(b)(1). In certain states, shareholders may amend the corporate charter without board approval. For example, *see* OHIO REV. CODE tit. 17, § 1701.71(A)(1).

[54] *Id.*

[55] *Id.* at § 102(b)(7).

doing so supports the business judgment rule's traditional role in making sure that directors are not held liable for honest mistakes in judgment that turn out badly. In sum, statutory corporate law endorses the board of directors as being the locus of authority for determining when a decision is shareholder wealth maximizing.

1. The Value of Authority

Statutory corporate law promotes the board of directors as the locus of authority because it recognizes that a centralized, hierarchical authority is necessary for the successful management of a ***large*** organization. It is the not perfect locus of authority, only the best one that is currently available.[56] In terms of corporations, public companies immediately come to mind when one thinks of large organizations. Public companies can be thought of in broad terms as those whose shares trade on a public stock exchange and do not have a controlling shareholder. Of course, large corporations such as Apple, General Electric, Microsoft, ExxonMobil, and General Motors are public companies, but the definition also covers the thousands of other corporations that are significantly smaller but still of significant size. However, large organizations that take the corporate form are not necessarily public companies but also include publicly traded companies with controlling shareholders such as Google, Facebook and LinkedIn. In addition, we need to include those large companies such as Cargill, Inc. and Mars, Inc. that take the corporate form but whose shares are privately held.

Statutory corporate law's promotion of board authority can be justified based on Kenneth Arrow's theory of large organizations.[57]

---

[56] Directors, as human beings, have limitations on their ability to foresee all possibilities and choose the path that will allow a corporation to truly maximize shareholder wealth. Dooley, *supra* note 43, at 462. The board of directors, even acting as a group, cannot overcome this limitation on human cognitive ability even though it can be argued that a board, as a small group, can make better decisions that a decision maker acting alone. *See* Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2002).

[57] KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 68 (1974). Professor Michael Dooley was the first to make the connection between the work of Kenneth Arrow and the structure of Delaware corporate law. Dooley, *supra* note 43, at 467. Professor Bainbridge has adopted Professor Dooley's application of Arrow's theory and readily acknowledges the contribution Professor Dooley has made in the development of his director primacy model. *See* Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *supra* note 46, at 85 n.11 ("I should acknowledge the debt director primacy

> Arrow's [theory] starts out with the basic proposition that "authority is needed to achieve a coordination of the activities of the members of the organization." But, more importantly, centralized authority enhances organizational efficiency. According to Arrow, efficiency is created in a large organization because "the centralization of decision-making serves to economize on the transmission and handling of information." Arrow's theory on how centralized authority creates value is based on four propositions:
>
> (1) Since the activities of individuals interact with each other, being sometimes substitutes, sometimes complements, and frequently compete for limited resources, joint decision on the choice of individuals' activities will be superior to separate decisions.
>
> (2) The optimum joint decision depends on information which is dispersed among the individuals in the society.
>
> (3) Since transmission of information is costly, in the sense of using resources, especially the time of the individuals, it is cheaper and more efficient to transmit all the pieces of information once to a central place than to disseminate each of them to everyone.
>
> (4) For the same reasons of efficiency, it may be cheaper for a central individual or office to make the collective decision and transmit it rather than retransmit all the information on which the decision is based.
>
> For an organization to be successful in its decision making, its decisions must be based on adequate information and made in a timely manner. This requires the organization "to facilitate the flow of information to the greatest extent possible." Such facilitation requires "the reduction of the volume of information while preserving as much of its value as possible." Centralized authority allows for "superior efficiency" by minimizing the number of communication channels required in a large organization.[58]

---

owes to Professor Dooley's so-called 'Authority Model.'"). For a good discussion of Professor Bainbridge's application of Arrow's work, see Brett H. McDonnell, *Professor Bainbridge and the Arrowian Moment: A Review of The New Corporate Governance in Theory and Practice*, 34 DEL. J. CORP. L. 139 (2009). (describing Professor Bainbridge's argument in applying Arrow's work).

[58] Bernard S. Sharfman, *The Enduring Legacy of* Smith v. Van Gorkom, 33 DEL. J. CORP. L. 287, 294–95 (2008) (quoting ARROW, *supra* note 57, at 68–70) (citations omitted).

In sum, information scattered over a large organization must be both filtered and transmitted to a centralized authority in order for a large organization to make informed decisions and minimize error in decision making.[59]

2. The Value of Authority and Large Corporations

As Professors Dooley and Bainbridge have so astutely pointed out in their writings, the value of authority is of major benefit to public companies, i.e., publicly traded corporations without controlling shareholders.[60] But it is not necessary to limit Professor Arrow's theory to just public companies. All large organizations that take the corporate form, such as Google or Cargill, Inc.,[61] benefit from centralized authority and professional management. These companies have tens of thousands of employees and have made huge investments in plant and equipment and real property holdings. In such companies pieces of information may be scattered over different states, countries and even continents.[62] To have the holders of these scattered bits of information, including the overwhelming majority of shareholders, make decisions that affect the company as a whole would lead to sub-optimal decision making.[63] Therefore, it is much more efficient for the board of directors and executive management, the corporate actors that possess an overwhelming information advantage, to make corporate decisions rather than shareholders.[64] The need to make informed decisions provides corporate law a very good reason to minimize the role of shareholders, the courts, and other uninformed stakeholders in a large company's decision-making process.[65]

---

[59] ARROW, *supra* note 57, at 68–70 (1974).

[60] Dooley, *supra* note 43 and Bainbridge, *Director Primacy, The Means and Ends of Corporate Governance*, *supra* note 34.

[61] For example, it was reported by the Wall Street Journal that most of the stock in Cargill Inc. is owned by about 100 people who are descendents of the founding families. *See* Gina Chon, Anupreeta Das and Scott Kilman, *Cargill to Give Up Mosaic Stake in $24.3 Billion Deal*, The Wall Street Journal (January 19, 2011), available at http://online.wsj.com/article/SB10001424052748703954004576090290720390356.html.

[62] Sharfman, *What's Wrong with Shareholder Empowerment?*, 37 J. CORP. L. 903, 905 (2012).

[63] *Id.*

[64] *Id.*

[65] *Id.*

a. The Protection of Board Authority and Small Companies

What may be somewhat puzzling is that statutory corporate law not only protects the board authority of large organizations, but small ones as well. Why statutory corporate law would provide the zealous protection of board authority to small close corporations makes sense if we divide small close corporations into two types: the first type is a company with ambitions to eventually becoming significant in size in terms of employment, plant and equipment and real property so as to become the next Apple, Microsoft, or IBM; and the second is a company with no expectation of becoming much larger than when first organized. The first type may benefit greatly from corporate law's protection of board authority by being able to freely maneuver without shareholder interference in implementing a strategy of becoming large in size or maintaining itself as a large organization.[66] However, this is not true of the second type of close corporation and most likely a major reason why, excluding the benefit of pass through taxation, small companies have gravitated to becoming Limited Liability Companies (LLCs) and not corporations.[67]

3. The Value of Accountability

However, statutory corporate law does not allow the board of directors to wield its authority without any accountability. Statutory corporate law is most concerned that "unaccountable authority may be exercised opportunistically."[68] Such opportunistic behavior includes corporate management shirking its duties or trying to extract private benefits from the corporation.[69] These types of behavior lead to agency costs in large

[66] Sharfman, *Why Proxy Access is Harmful to Corporate Governance*, 37 J. CORP. L. 387, 396 (citing Ronald H. Coase, *The Nature of the Firm*, *in* 4(16) ECONOMICA 386, 393–97 (1937)). ("Why a corporation would decide to produce what it needs internally under a command and control structure—and thereby potentially grow to great size—and not simply purchase from external sources, is a function of transaction costs and the marginal analysis that goes into determining which is the better alternative.").

[67] John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 843 (1999) (noting that LLC statutes were written with close corporations in mind).

[68] Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *supra* note 46, at 107.

[69] Dooley, *supra* note 43, at 465. According to Professor Dooley, "Although opportunism is often equated with 'cheating,' for present purposes it will be useful to think of opportunism as embracing all failures to keep previous commitments, whether such failures result from culpable cheating, negligence, 'understandable' oversight, or plain incapacity." *Id.*

corporations.[70] Examples of statutory and regulatory tools of accountability used to combat such opportunistic behavior include required shareholder approval of major corporate actions such as merger agreements,[71] a shareholder's right to inspect a corporation's books and records for a proper purpose, required shareholder approval for changes to the articles of incorporation,[72] the power of shareholders to unilaterally propose and adopt bylaws,[73] proxy contests, and director independence requirements for companies listed on U.S. stock exchanges.

This light, but significant level of statutory accountability is again consistent with Professor Arrow's understanding of large organizations.[74] The centralized authority needs to be held accountable for its decisions or else it may act irresponsibility with the "likelihood of unnecessary error."[75] However, an increase in corporate law's tools of accountability does not necessarily result in enhanced corporate decision making. The fear is that in the process of trying to correct errors resulting from irresponsible decisions, "the genuine values of authority" will be destroyed.[76] Such "a sufficiently strict and *continuous* organ of responsibility can easily amount to a denial of authority."[77] In such a

---

[70] Paul Rose, *Common Agency and the Public Corporation*, 63 VAND. L. REV. 1355, 1361 (2010) (citing Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. FIN. ECON. 305 (1976)). As explained by Professor Rose:

Under a classic theory of the firm, agency costs in the corporate context increase as ownership is separated from control. As the manager's ownership of shares in the firm decreases as a percentage of the total, the manager will bear a diminishing fraction of the costs of any nonpecuniary benefits he takes out in maximizing his own utility. To prevent the manager from maximizing his utility at the expense of the shareholders, shareholders will seek to constrain the manager's behavior by aligning the manager's interests with the shareholders' interests.

Id. at 1361 (citations omitted).

[71] DEL. CODE ANN. tit. 8, at §251(c).

[72] *Id.* at §242.

[73] *Id.* at §109.

[74] Arrow, *supra* note 57, at 73-74.

[75] *Id*.

[76] *Id.*

[77] *Id.* at 78 (emphasis added).

scenario, accountability can be understood to cross over the line to where a new and competing locus of authority is created, a locus of authority, such as uninformed shareholders, which does not benefit from the informational advantages of the original authority.

Accountability under statutory corporate law also has the characteristic of being intermittent. That is, shareholder involvement in corporate decision making is the exception to the rule. It is only in the unusual situation when a fundamental change to the corporation is about to occur that shareholders are asked to participate. For example, allowing shareholders the statutory right to have veto power over a board approved merger agreement but in almost all other decision areas not allowing shareholders a voice. As suggested by Professor Arrow, to correctly implement accountability "it would appear that [accountability] must be intermittent. This could be periodic; it could take the form of 'management by exception,' in which authority and its decisions are reviewed only when performance is sufficiently degraded from expectations . . . ."[78] Thus, statutory corporate law, by being both light handed and intermittent, implements a delicate balancing act between board authority and accountability with the target point being heavily weighted toward authority.

B. Chancellors and Judges as the Locus of Authority for Determining Shareholder Wealth Maximization

Corporate accountability does not end with statutory corporate law. A second source of corporate accountability is provided by the courts and its application of fiduciary duties. These duties, if overzealously applied, could potentially eviscerate the statutory approach of enabling the board to be the locus of authority for determining whether or not corporate decisions are shareholder wealth maximizing. But to their credit, chancellors and judges, as previously discussed, apply both a light handed and intermittent approach to fiduciary duties, an approach consistent with statutory law.

Chancellors and judges take this approach because they want directors to be the locus of corporate authority and thus the determiners of whether or not a decision maximizes shareholder wealth. Long ago, courts realized that they do not have the business acumen to set corporate policy or objectives and such review would only harm the efficiency of corporate decision making. Judges recognize that they are lacking in information, skill in decision-making, expertise and interests (lacking a stake in the company) relative to corporate management. As stated by the Michigan Supreme Court in the famous case of *Dodge v. Ford*,[79] "judges are not business experts."[80] In *Kamin v.*

[78] *Id.*

[79] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

[80] *Id.*

American Express Company,[81] the court stated that "[t]he directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations, or tax advantages."[82] Finally, in *Shlensky v. Wrigley*,[83] the court said in regard to its dicta on the wisdom of the decision not to install lights in Wrigley field, "[W]e do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability."[84]

Such statements provide a strong rationale for why corporate law has so strongly embraced the business judgment rule, as described below, as a means to protect directors from injunctive relief that interferes with their decision making or for the taking on of personal liability when honest mistakes of judgment turn out badly:

> The business judgment rule, as a general matter, protects directors from liability for their decisions so long as there exist a business decision, disinterestedness and independence, due care, good faith and no abuse of discretion and a challenged decision does not constitute fraud, illegality, ultra vires conduct or waste. There is a presumption that directors have acted in accordance with each of these elements, and this presumption cannot be overcome unless the complaint pleads specific facts demonstrating otherwise. (citations omitted)[85]

But most importantly, when the preconditions of the business judgment rule are met; independence, disinterestedness, and due care (the focus of a decision's potential taint), etc.; there is no room for a review of the **merits** of a business decision:[86]

The courts desire to avoid reviewing a decision for shareholder wealth maximization is consistent with its approach of utilizing the business judgment rule to avoid reviewing the merits of a corporate decision. After all, given that the norm of corporate governance is shareholder wealth maximization, then determining whether or not a decision is wealth maximizing is critical to determining whether or not a decision is meritorious. Hence,

---

[81] 383 N.Y.S.2d 807 (Sup. Ct. 1976).

[82] *Id.* at 810-11.

[83] Shlensky v. Wrigley, 95 Ill. App.2d 173, (1968).

[84] *Id.* at 181.

[85] Robotti & Co., LLC v. Gulfport Energy Corp., C.A. No. 3128-VCN, Noble, V.C. (Del. Ch. Jan. 14, 2010) at 31.

[86] Steven M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *supra* note 46, at 99. ([I]f the requisite preconditions are satisfied, there is no remaining scope for judicial review of the substantive merits of the board's decision.)

this component of corporate decision making must be protected by the business judgment rule as well. Moreover, determining whether a business decision is shareholder wealth maximizing is not just about plugging in a formula and calculating the result which any computer or calculator can do, but actually creating the formula that will be utilized to determine if a particular decision maximizes shareholder wealth. One can think of this in terms of a mathematical formula where the decision maker is given the responsibility of choosing the variables and estimating the coefficients of those variables. This requires many sources of knowledge and expertise that chancellors and judges lack, including experience in the particular business that the company may be in, product and company knowledge, management skills, financial skills, creative and analytical thinking pertinent to a company's business, confidential information, etc. For example, who has the knowledge and expertise to decide whether a distinctive corporate culture enhances or detracts from shareholder value? The clear answer is that the board and its executive management is the proper locus of authority for making this decision.

In practice, chancellors and judges have simply intuited what Professor Kenneth Arrow has observed in regard to the efficient functioning of large organizations. That is, an increase in managerial accountability does not necessarily result in enhanced organizational decision making.[87] Authority, not accountability, must be the value emphasized and protected to maximize the efficiency of such decision making.[88] The fear is that in the process of trying to correct errors resulting from irresponsible decisions, "the genuine values of authority" will be destroyed.[89] Such "a sufficiently strict and *continuous* organ of responsibility can easily amount to a denial of authority."[90] As Arrow suggested, "if every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B and hence no solution to the original problem."[91] This statement by Professor Arrow really hits the nail on the head when it comes to the judicial review of board decisions. As judicial review increases, the more the courtroom becomes the boardroom. As Professor Bainbridge stated, "the power to review differs only in degree and not in kind from the power to decide."[92]

---

[87] ARROW, *supra* note 57, at 68. It should be noted that Professor Arrow was talking in the context of large organizations which of course include many public companies. However, this thinking would also seem to apply to small organizations as well, including close corporations such as craigslist.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 78 (emphasis added).

[91] *Id.*

[92] Stephen M. Bainbridge, *Unocal at 20, Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006).

Think about this in terms of courts significantly increasing their review of business decisions for shareholder wealth maximization. This increased review would make the courts a competing locus of authority for this determination. Such a locus of authority would have less expertise, information and interest than the board of directors in the determination of whether or not a business decision maximizes shareholder wealth. The increased review by a disadvantaged locus of authority would simply lead boards to modify their shareholder wealth maximization calculus to conform to a court's expectations, not its own, leading to sub-optimal decision making. As a result, the enhanced accountability created by this type of judicial review would lead to fewer decisions that result in shareholder wealth maximization, not more!

1. Implementing Fiduciary Duties as Tools of Accountability

Even though courts do not want the responsibility of reviewing for shareholder wealth maximization, this does not mean that the courts totally abandon the use of fiduciary duties as tools of such review. As already discussed, Professor Arrow argues that accountability in a large organization with a centralized authority requires accountability that is implemented with both a light touch and applied intermittently. So instead of focusing directly on shareholder wealth maximization, the courts look for other types of corporate behavior that would indicate that decisions are not being made to maximize shareholder wealth. As already mentioned, the duty of care implicates such behavior when the directors are not adequately informed when making a decision.[93] If the directors are shown to have acted with gross negligence in becoming informed, then liability may result under a fairness standard of review with burden shifting, assuming no exculpation clause is in place, or the decision is enjoined.[94] This is consistent with Professor Arrow's light handed and intermittent approach.

The duty of loyalty is more vigorously enforced by the courts but still consistent with Professor Arrow's approach to accountability in a large organization.[95] As already mentioned, a judicial review for a breach in the directors' duty of loyalty is never

[93] The exception to this duty of care safe harbor provided by the business judgment rule is that directors must be informed when making a business decision. The standard of review will be gross negligence. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[94] *Id.*

[95] Professor Dooley suggests that while breaches of both duties represent opportunistic activity, it is socially more acceptable to punish someone for putting his interests above the corporation for personal profit (breach in the duty of loyalty) versus someone who made a flawed (negligent) but honest mistake in judgment (breach in the duty of care). Michael Dooley, *supra* note 43, at 469.

triggered because a decision has allegedly failed to maximize shareholder wealth. This shows respect for the board of directors as being the locus of authority for making this determination. However, this protection of managerial discretion is voided when a decision is either tainted or presumed tainted by a conflict of interest or a lack of independence or both. Corporate law makes the critical presumption that conflicts of interest or lack of independence must lead to error in decision making and will either enjoin the transaction or may find directors liable for the harm caused by board decisions that are so tainted.[96] This presumption (but not final determination of breach) is justified based on the logic that if a decision is tainted with self interest, then there is no basis for believing that the decision was made in the best interests of the corporation or its shareholders.[97] Thus, "there is no reason to preserve the authority of the board."[98]

Yet, this is not the end of the duty of loyalty inquiry. When a board has breached its duty of loyalty in the making of a corporate decision, then the decision is reviewed on a fairness standard of review with the burden of proof shifted to directors. Thus, like a breach in the duty of care, the board gets the opportunity to show that their actions, even though tainted, may still be consistent with directors striving for shareholder wealth maximization.

A standard of review such as fairness, by dropping the protection of managerial discretion as corporate law's primary strategy when taint exists, puts shareholder wealth maximization directly into focus as the objective of corporate law. Still, such standards do not require the courts to attempt to determine whether the decision under review actually maximizes shareholder wealth. Instead, they require evidence from the board of directors that they were ***striving*** to maximize shareholder value. For example, under an entire fairness standard of review the courts allow the board of directors to meet their burden by showing fair dealing and fair price.[99] Such a showing is not the same as demonstrating that the directors used the optimal process or that the transaction yielded the highest price possible, but it is enough to give directors the benefit of the doubt that they were striving to maximize shareholder value. As stated by former Chancellor Allen when explaining the meaning of fair price:

> A fair price does not mean the highest price financeable or the highest price that fiduciary could afford to pay. At least in the non-self-dealing context, it means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably

[96] *Id.* at 487.

[97] *Id.*

[98] *Id.*

[99] Weinberger v. UOP, Inc., 457 A.2d 701, 711(Del. 1983).

accept.[100]

This approach reflects the courts' understanding and wisdom that they are not in the best position for determining whether a board decision or a certain value offered or realized actually maximizes shareholder wealth, especially in hindsight,[101] and so must still give the board the benefit of the doubt, as the locus of authority with the best opportunity to get as close to shareholder wealth maximization as possible, if they can provide evidence that they were striving for shareholder wealth maximization.

2. Market Tools of Accountability

In addition to the courts implementing tools of accountability, it should not be forgotten that the major tools of corporate accountability are not legal creations.[102] Chancellors and judges should remember that the major tools of accountability in minimizing agency costs come from the marketplace; the product, financial and labor markets; not the courtroom.[103] For example, if it can be assumed that there exists "a high positive correlation between corporate managerial efficiency and the market price of shares of that company," then a company's low share price will indicate to management that it is not currently making shareholder wealth maximizing decisions and that changes need to be made.[104] Therefore, courts should not try and substitute their feedback for what can be provided by the marketplace.

---

[100] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1143 (1994).

[101] As a result of "hindsight bias," a particular outcome becomes more probable in hindsight as opposed to the same outcome made with foresight. Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 591-592 (1994).

[102] Michael Dooley, *supra* note 43, at 525 ("The necessary conditions for accountability are supplied by competitive forces in the product market, in the internal and external markets for managers and, ultimately, in the market for corporate control.")

[103] According to Stephen Bainbridge, "Corporate managers operate within a pervasive web of accountability mechanisms that substitute for monitoring by residual claimants. Important constraints are provided by a variety of market forces. The capital and product markets, the internal and external employment markets, and the market for corporate control all constrain shirking by firm agents." Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, *supra* note 34, at n. 103.

[104] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965).

V. THE *REVLON* DUTY: THE EXCEPTION THAT IS LOSING ITS SPECIAL STATUS

For many years the *Revlon* duty had been the lone and inconsistent exception to corporate law's strategy that the courts **will not** focus on shareholder wealth maximization unless one of corporate law's triad of filters is present: interestedness, lack of independence or gross negligence. The *Revlon* duty requires a board "when it undertakes a sale of the company, to set its singular focus on seeking and attaining the highest value ***reasonably*** available to the stockholder."[105] Under this enhanced scrutiny standard of review, the burden is on directors to demonstrate that they have this singular focus and the court will closely scrutinize the process by which the board settled on a price.[106] Most importantly, the *Revlon* created a presumption that the decision to sell the company was tainted. Moreover, until *Lyondell v. Ryan*,[107] there was no way a board could overcome this presumption and avoid a court imposed reasonableness review of the sale price. However, this is no longer the case at least in the context of director liability, a fact that may surprise many practitioners and corporate law students alike. The discussion below describes how *Lyondell* has transformed the *Revlon* duty so that it now conforms, in the context of evaluating director liability, to corporate law's traditional approach to shareholder wealth maximization.[108]

To understand why the *Revlon* duty had been an outlier to corporate law's traditional approach to the review for shareholder wealth maximization for so many years, it is important to understand that it originated out of the *Unocal* test, a test which begins with the presumption that a board decision is tainted with self-interest, i.e., entrenchment.

A. The *Unocal* test

The *Unocal* test is a two pronged test that the Delaware courts use to review defensive measures taken by a board of directors to repel attempts by an outside investor

---

[105] Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427, at *2 (Del. Ch. July 29, 2008) (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)), *reprinted in* 34 DEL. J. CORP. L. 333, 336 (2009), *rev'd*, 970 A.2d 235 (Del. 2009).

[106] Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994).

[107] Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).

[108] However, the approach found in *Lyondell* for purposes of determining director liability has yet to be applied when the plaintiff seeks to enjoin a sale of the company. Thus, a reasonableness review still exists in that context. *See* In re Dollar Thrifty Shareholder Litigation, 2010 WL 5648895 (Del.Ch. 2010) and In re Cogent, Inc. Shareholder Litigation, Cons. C.A. No. 5780-VCP (Del. Ch. 2010).

or group of investors to gain control of the corporation. Under the first prong, for a defensive measure to pass the test and not result in a finding that the directors breached their fiduciary duties, the burden is on the directors to show that they had "*reasonable* grounds for believing that a danger to corporate policy and effectiveness existed."[109] This burden is met by reasonable investigation and a showing of good faith.[110] The finding of good faith requires a showing that the directors acted in response to a perceived threat to the corporation and not for the primary purpose of entrenching themselves in office.[111] Consistent with corporate law's traditional approach, evidence of good faith and reasonable investigation is "materially enhanced … by the approval of a board comprised of a majority of outside independent directors."[112]

Under the second prong, the board must demonstrate that the measure was "*reasonable* in relation to the threat posed."[113] A defensive measure fails the proportionality test if it was implemented for an "inequitable purpose."[114]

The *Unocal* test is considered an intermediate standard of review typically referred to as "enhanced scrutiny."[115] As a standard of review, it is situated between the business judgment rule and entire fairness."[116] The *Unocal* test can be thought of as a "conditional business judgment rule."[117] That is, in order for the defensive measure to receive the protection of the business judgment rule, the directors must first pass the *Unocal* test. This test is necessary because directors may be conflicted and "acting primarily in their own interests," such as for purposes of trying to entrench themselves in office,[118] when responding to a takeover threat that is either imminent[119] or in the future.[120] Therefore, the

---

[109] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

[110] *Id.*

[111] *Id.* at 954.

[112] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 at 955.

[113] *Id*.

[114] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 30.

[115] *Id.* at 28.

[116] Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011).

[117] Stephen M. Bainbridge, *Unocal at 20, Director Primacy in Corporate Takeovers*, *supra* note 93, at 796 (citing Dooley, *supra* note 43, at 515).

[118] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 at 954.

[119] *Id.*

Unocal test adds a significant layer of accountability prior to a board receiving the protections of the business judgment rule.[121]

In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court case where the *Unocal* test originated, the test was applied to a company's self-tender offer for its own shares made in response to a two-tier front loaded tender offer made by a hostile bidder.[122] In *Moran v. Household Intern., Inc.*,[123] the test was applied to a rights offering that was implement to ward off possible threats, but not an imminent threat.[124] The rights plan in *Moran*[125] is the type of defensive measure found in *eBay*, the case that is the major focus of this article.

In a director-centric approach to corporate law we can interpret the *Unocal* test as an acknowledgement by the courts, whether right or wrong, that the hostile takeover bid, as a market tool of accountability, moves the balance between authority and accountability too far in the direction of accountability. Therefore, defensive measures have value in moving the balance back toward authority as they allow the board to take an active role[126] in being "the defender of the metaphorical medieval corporate bastion and the protector of the corporation's shareholders."[127] However, this balancing act is not complete. The problem with defensive measures is that they can result in errors in corporate decision making if implemented for purposes of entrenchment. Former Chancellor Chandler describes the entrenchment issue in the context of a poison pill as follows:

> The Rights Plan, on the other hand, implicates Unocal concerns in my view because rights plans (known as "poison pills" in takeover parlance) fundamentally are defensive devices that, if used correctly, can enhance stockholder value but, if used incorrectly, can *entrench* management and deter

[120] Moran v. Household Intern., Inc., 500 A.2d 1346 at 1349 (The *Unocal* test was applied to a rights offering that was adopted as a preventive measure to ward off coercive two-tier tender offers that might arise in the future.).

[121] *Id.* at 1357.

[122] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 at 949-50.

[123] 500 A.2d 1346 at 1350.

[124] *Id.* at 1349.

[125] *Id.* at 1348.

[126] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 at 954 ("a board of directors is not a passive instrumentality").

[127] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995).

value-maximizing bidders at the stockholders' expense.[128]

This awareness of entrenchment has created a presumption that directors have a conflict of interest whenever they implement defensive measures. As stated by the Court in *Unocal*:

> Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.[129]

This presumption is evidenced by the Court taking the extraordinary measure of putting the burden of proof on the board to show that it has met both prongs of the *Unocal* test.[130] Such burden shifting is an acknowledgement that the board atmosphere is extremely ripe for error in decision making as a result of the desire for entrenchment. This requires the standard of review to be a tool of accountability that goes beyond what the business judgment rule requires.

B. The *Unocal* test and the *Revlon* Duty

The *Revlon* duty made its debut in a case where defensive measures taken to ward off a hostile bidder were initially reviewed under the *Unocal* test.[131] However, during the merger process, the court found that the deal protection measures inserted into a merger agreement with a white knight could not be reviewed under *Unocal* and that a new standard of review needed to apply when it became clear to the board that the break-up of the company was inevitable:

> The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities under the Unocal standards. It no longer faced threats to corporate policy and effectiveness, or to the stockholders' interests, from a grossly inadequate bid. The whole question of defensive measures became moot. The directors' role

---

[128] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 28.

[129] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 at 954-55.

[130] Dooley, *supra* note 43, at 516 ("Placing this initial burden of justification on the board is truly extraordinary and demonstrates clear recognition that the board's resistance may have been selfishly motivated.")

[131] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.[132]

The focus of the court now shifted from requiring the board to demonstrate that it acted in ***good faith*** by making a showing that the defensive measures implemented were not for the primary purpose of entrenchment to one where the board was required to make a showing that it had only the interests of shareholders in mind, and not any other stakeholder group[133] or themselves,[134] when implementing deal protection measures in an agreement to sell the company.[135]

The *Revlon* duty[136] is the tool of accountability and shareholder wealth maximization

---

[132] *Id.* at 182.

[133] The court described the board's new good faith obligation when admonishing the Revlon directors for taking into consideration the interests of another stakeholder group, the noteholders, when determining which bidder should have the opportunity to buy the company:

> The original threat posed by Pantry Pride — the break-up of the company — had become a reality which even the directors embraced. Selective dealing to fend off a hostile but determined bidder was no longer a proper objective. Instead, obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action. Thus, the Revlon board could not make the ***requisite showing of good faith*** by preferring the noteholders and ignoring its duty of loyalty to the shareholders. The rights of the former already were fixed by contract. The noteholders required no further protection, and when the Revlon board entered into an auction-ending lock-up agreement with Forstmann on the basis of impermissible considerations at the expense of the shareholders, the directors breached their primary duty of loyalty. (citations and footnotes omitted)

Id. at 182.

[134] *Id.* at 184 (The principal benefit of preferring the noteholders went to the directors, who avoided the possibility of facing the potential of personal liability as a result of a lawsuit filed by the noteholders.).

[135] *Id.* at 182 (The primary deal protection measure refers to a lock-up agreement the Revlon board's white knight, Mr. Forstmann.)

[136] Other scenarios when the *Revlon* duty kicks in include, "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company," Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289-90 (Del. 1994) and when a board begins to negotiate a transaction that **may** result in a sale or change of control. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) ("The time for action under *Revlon* did not begin until

is the objective of that tool in this final period decision.[137] It represents the application of a board's fiduciary duties of care and loyalty in the context of a unique and narrowly defined fact pattern.[138] That is, the "board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[139]

Significantly, it is the adequacy of the process and the reasonableness of the result, not the actual obtaining of "the highest value reasonably available to the stockholder,"[140] that is the focus of the court's enhanced scrutiny. As described by the court in *Paramount v. QVC*,[141] enhanced scrutiny has the following features:

> The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in

July 10, 2007, when the directors began negotiating the sale of Lyondell."). In the latter situation, "there is no sale or change in control when control of both companies remains in a large, fluid, changeable and changing market." Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289-90.

[137] Why the board would willing to sell control of the company may be the result of being offered such a premium over its current stock price that it may feel compelled to sell to satisfy the interests of its shareholders; an acknowledgement that a different management group may be able to manage the organization more efficiently; or perhaps a recognition that a new management team under the direction of a control group may be less inhibited in breaching long term agreements with certain stakeholders that long ago outlived their usefulness to the organization. *See* Andrei Shleifer and Lawrence H. Summers, *Breach of Trust in Hostile Takeovers: Causes and Consequences*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach ed., 1988) (citing Michael C. Jensen, *Takeovers: Folklore and science*, HARVARD BUS. REV. 109-21 (November-December 1984). As the ultimate decision making authority in the corporation the board has the right enter into these transactions for the benefit of shareholders.

[138] Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 239 (Del. 2009).

[139] *Id.*

[140] Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427, at *2 (Del. Ch. July 29, 2008) (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)), *reprinted in* 34 DEL. J. CORP. L. 333, 336 (2009), *rev'd*, 970 A.2d 235 (Del. 2009).

[141] 637 A.2d 34.

> light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.[142]

Therefore, "courts will not substitute their business judgment for that of the directors, but will determine if the directors' ***decision*** was, on balance, within a range of reasonableness."[143] Again, the courts are looking for evidence that the board was ***striving*** for shareholder wealth maximization, not that it actually achieved it.

Even so, given that reasonable minds may differ on what "the highest value ***reasonably*** available to the stockholder"[144] may actually mean, the *Revlon* duty would appear to create significant uncertainty and considerable potential liability for a board of directors. Most significantly, there was no way for a board to escape a reasonableness review for shareholder wealth maximization even in the absence of the courts' triad of filters, gross negligence, lack of independence and interestedness. This was partially corrected by *Lyondell*.

In *Lyondell*,[145] plaintiffs sought damages from the Lyondell Chemical Co.'s board of directors for allegedly breaching their duty of loyalty by failing to act in good faith when performing their *Revlon* duty. In finding for the directors, the court methodically went about resurrecting the traditional safe harbor for director liability. First, the court noted that the Lyondell Chemical Co.'s charter included an exculpatory clause which eliminated any duty of care claims from judicial review.[146] Second, all eleven members of the board were independent[147] except for the chairman who was also the chief executive officer.[148] Moreover, there was no evidence that the independent directors were

---

[142] *Id.* at 45.

[143] *Id.*

[144] Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427, at *2.

[145] Lyondell, 970 A.2d 235.

[146] *Id.* at 239.

[147] Under Delaware law, independence is an examination by the court to determine "whether a director, although lacking in a financial self-interest, is somehow 'beholden' to an individual who is interested, or whose decisions are not based on the corporate merits, but rather are influenced by 'personal or extraneous considerations.'" Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 466 (2008) *citing* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993). .

[148] Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427, at *4, *reprinted in* 34 DEL. J. CORP. L. at 338.

improperly interested[149] or acted with ill will.[150] In sum, a board that was exculpated from duty of care liability, disinterested and independent meant that plaintiffs could only seek relief based on the sole claim that the board "breached their duty of loyalty by failing to act in good faith."[151]

For purposes of the *Lyondell* decision, failing to act in good faith is equivalent to acting in bad faith.[152] In terms of what is meant by acting in bad faith in the context of how a board conducts the sale of the company it serves,[153] the *Lyondell* court applied the rule that "bad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[154] This meant that "[o]nly if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty."[155] Moreover, there are "no legally prescribed steps that directors must follow to satisfy their *Revlon* duties."[156] Thus, "the directors' failure to take any *specific* steps during the sale process could not have demonstrated a conscious disregard of their duties."[157] The result is that the court and the board may now be able to avoid a review for shareholder wealth maximization even under the *Revlon* duty!

Under the *Revlon* duty, the Delaware Supreme Court has allowed for a review for shareholder wealth maximization even if the board was independent, disinterested and not negligent in becoming informed. The problem with this approach is that when the

[149] Under Delaware law, "[a] director is interested in a given transaction if she stands to gain monetarily from it in a way that other shareholders do not." Rodrigues, *supra* note 77, at 466 *citing Aronson*, 473 A.2d 805 at 812.

[150] Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427, at *10, *reprinted in* 34 DEL. J. CORP. L. at 349-50.

[151] *Lyondell*, 970 A.2d 235 at 240.

[152] *Id.* at 240, n.8.

[153] While not at issue in *Lyondell*, directors, even if not self-interested, could also have failed to act in good faith by considering the interests of other stakeholders when under their *Revlon* duty. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1986) ("the Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders.").

[154] *Id.* at 243.

[155] *Id*.

[156] *Id*.

[157] *Id.*

judiciary diverts corporate decision making from the board of directors to itself without the presence of taint, then there is a great risk that sub-optimal corporate decision making will occur as such decision making is placed in the hands of a less efficient decision maker, the courts. As Professor Bainbridge has stated, "the power to review differs only in degree and not in kind from the power to decide."[158] Fortunately, *Lyondell* has partially closed this exception and it is hoped the *Lyondell* approach will subsequently be applied when the *Revlon* duty is being used to enjoin a transaction. Unfortunately, the lesson learned in *Lyondell* seems to have been ignored in *eBay*.

VI. EBAY DOMESTIC HOLDINGS, INC. V. NEWMARK

In *eBay*,[159] former Chancellor Chandler reviewed the legality of a shareholder rights offering (the Rights Plan) approved by the board of directors of craigslist, Inc. (craigslist), a close corporation with a control group that consisted of shareholders Craig Newmark (Newmark) and James Buckmaster (Buckmaster).[160] The case was initiated by eBay Holdings, Inc. (eBay), a wholly owned subsidiary of eBay, Inc. and the only other shareholder besides Newmark and Buckmaster.[161] Newmark and Buckmaster served as two of the three members of the company's board of directors.[162]

Besides challenging the legality of the Rights Plan, eBay also challenged the legality of two other corporate actions, the implementation of a staggered board and the "seeking to obtain a right of first refusal in craigslist's favor over the craigslist shares eBay owns."[163] However, only the Rights Plan implicated shareholder wealth maximization, the focus of this article.

---

[158] Stephen M. Bainbridge, *Unocal at 20, Director Primacy in Corporate Takeovers*, *supra* note 93, at 769.

[159] 16 A.3d 1.

[160] Newmark owned 42.6%, Buckmaster 29% and eBay Holdings, Inc. 28.4%. of craigslist, respectively. *Id.* at 11. A voting agreement between Newmark and Buckmaster provided them with control of craigslist. *Id.* Specifically, the **voting agreement** required Newmark and Buckmaster to vote their shares so as to elect one board member designated by Newmark and one board member designated by Buckmaster. *Id.* at 13. Since a **shareholder agreement** between Newmark, Buckmaster and eBay Holdings, Inc. required the craigslist charter to have a three member board of directors (*Id.* at 11), Newmark and Buckmaster as a group had control of the company.

[161] *Id.* at 6.

[162] *Id.* at 11.

[163] *Id.* at 6.

The Rights Plan worked as follows:

> The Rights Plan pays a dividend to craigslist stockholders of one right per share of craigslist stock. Each right allows its holder to purchase two shares of craigslist stock at $ 0.00005 per share if the rights are triggered. There are two triggers. The first trigger involves acquisitions by Jim, Craig, or eBay. If any of these three becomes the "Beneficial Owner" of 0.01% of additional craigslist stock, the rights are triggered. The second trigger involves anyone other than Jim, Craig, or eBay. Should any such person become the "Beneficial Owner" of 15% or more of craigslist's outstanding shares, the rights are triggered.[164]

The effect of the Rights Plan "restricted eBay from purchasing additional craigslist shares and hampered eBay's ability to freely sell the craigslist shares it owned to third parties."[165] The court held that Newmark and Buckmaster had violated their fiduciary duties as directors by adopting the Rights Plan and ordered it rescinded.[166]

A. eBay *and the* Unocal *Test*

The Chancery Court reviewed the Rights Plan under the *Unocal* test, the standard test for reviewing defensive measures.[167] This in itself is somewhat controversial because of the unique set of circumstances in which the Rights Plan was implemented. As the court noted, up to that point the ample number of cases involving the review of rights plans had involved only public companies and besides not being aware of any cases involving the review of rights plans implemented by a private company, such as craigslist, it is a rarity for a private company to even implement a rights plan.[168] The reason why a private company would not want to do this is because the small number of shareholders of a private company would not want to delegate the power to negotiate the sale of their own shares to a third party, the board of directors, when an unsolicited takeover attempt occurred.[169] Moreover, the Rights Plan was not initiated for purposes of entrenchment, since Newmark and Buckmaster controlled the company through a voting

---

[164] *Id.* at 23.

[165] *Id.* at 6. eBay could no longer sell its shares in blocks of more than 14.99%. *Id.* at 35.

[166] *Id.* at 35.

[167] *Id.* at 28 ("The Rights Plan …implicates *Unocal* concerns … because rights plans … fundamentally are defensive devices that, if used correctly, can enhance stockholder value but, if used incorrectly, can entrench management and deter value-maximizing bidders at the stockholders' expense.").

[168] *Id.* at 30-31.

[169] *Id.* at 31, n.95.

agreement and by making up a majority of the board, or to keep these shareholders from considering a premium price for their shares.[170] Overlaying all of these facts are the allegations that Ebay used craigslist's nonpublic information in establishing a company to compete with craigslist.[171]

Given the facts of *eBay*, Professor D. Gordon Smith suggests that it may be more appropriate to describe *eBay* as a case of minority oppression.[172] If so, then a more appropriate standard of review may have been entire fairness or possibly "reasonable expectations" as established in *Litle v. Waters*.[173] Nevertheless, the *Unocal* test was the standard of review utilized and what is most significant about the application was that former Chancellor Chandler identified *shareholder wealth maximization* as the objective guiding the first prong of the *Unocal* test.[174] More specifically, for directors to meet their burden of proof under the first prong of the *Unocal* test, they must show that the corporate policy they are trying to defend enhanced shareholder value under *Unocal*'s reasonableness standard of review.[175] If not, then the Rights Plan could not be justified.

Consistent with *Moran*, former Chancellor Chandler applied the *Unocal* test to the craigslist' Rights Plan in the following manner: "First, did Jim and Craig properly and reasonably perceive a threat to craigslist's corporate policy and effectiveness? Second, if

---

[170] *Id.* at 31.

[171] *Id.* at 35.

[172] D. Gordon Smith, *eBay v. Newmark: A Modern Version of Dodge v. Ford Motor Company* (September 9, 2010), http://www.theconglomerate.org/2010/09/ebay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html. Minority shareholder oppression, in the form of a "squeeze out" of the minority shareholder from the operations and management of the company or the "freeze out" of the minority shareholder in his ability to sell or cash out his shares in the company, can arise in the scenario where the minority shareholder has a limited ability to sell his shares either because of a lack of public market or because of restrictions placed on the sale of his shares by a shareholder agreement. *See* Ladd A. Hirsch & James D. Sheppard, *Claims for Oppression by Minority Shareholders in Private Companies under Texas and Delaware Law: A Plaintiff's Perspective*, 2012 Securities Regulation and Business Law Conference (February 10, 2012), available at http://www.diamondmccarthy.com/files/utcle__hirsch_article_for_utcle_2012_securities_reg._and_bus._conf._law__the_rights_and_remedies_of_oppressed_minority_shareholders_in_private_companies_copy1.pdf.

[173] Civ. A. No. 12155, 1992 WL 25758, 18 DEL. J. CORP. L. 315 (Del. Ch. Feb. 11, 1992).

[174] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 35.

[175] *Id.* at 33.

they did, is the Rights Plan a proportional (reasonable) response to that threat?"[176]

In regard to the first prong of the *Unocal* test, Newmark and Buckmaster argued that the Rights Plan was necessitated by the alleged threat to craigslist's corporate culture that would follow in the aftermath of their deaths and the distribution of their shares to their heirs.[177] They speculated that their heirs would sell their shares to eBay and thereby give eBay control of the company.[178] At that point, eBay would no doubt alter the company's values, culture and business model away from their "public service mission" to one where the objective would be maximizing the company's profits.[179]

However, the court found that Newmark and Buckmaster did not adopt the Rights Plan "in response to a reasonably perceived threat or for a proper corporate purpose."[180] The court's holding was based on its determination that the craigslist' culture did not enhance shareholder value and therefore was not worthy of being protected by a defensive measure.[181] According to the court:[182]

> Ultimately, defendants failed to prove that craigslist possesses a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value to support the indefinite implementation of a poison pill. Jim and Craig did not make any serious attempt to prove that the craigslist culture, which rejects any attempt to further monetize its services, translates into increased profitability for stockholders.[183]

The Rights Plan failed the first prong of the *Unocal* test and therefore the court felt justified in rescinding it.[184] The Rights Plan also failed the second prong of the *Unocal* test, the proportionality test, since the court found that the defensive measure simply did

[176] *Id.* at 31-32.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.* at 32.

[181] *Id.* at 33.

[182] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 28 ("In the typical scenario, the decision to deploy a rights plan will fall within the range of reasonableness if the directors use the plan in a good faith effort to promote stockholder value.").

[183] *Id.*

[184] *Id.* at 35.

not have a connection to the protection of the craigslist' culture[185] and was only meant to punish ebay.[186]

B. Why Make the Link?

Former Chancellor Chandler's application of the *Unocal* test begins by skeptically looking at corporate culture as being worthy of a defensive measure:

> It is true that on the unique facts of a particular case--*Paramount Communications, Inc. v. Time Inc.*[187]--this Court and the Delaware Supreme Court accepted defensive action by the directors of a Delaware corporation as a good faith effort to protect a specific corporate culture. It was a muted embrace.[188]

The corporate culture that former Chancellor Chandler was referring to was Time's "journalistic integrity"[189] and why it was a "muted embrace" was because of the very skeptical dicta provided by former Chancellor William Allen in the underlying Chancery Court case:

> Chancellor Allen wrote only that that he was "not persuaded that there may not be instances in which the law might recognize as valid a perceived threat to a 'corporate culture' that is shown to be palpable (for lack of a better word), distinctive and advantageous."[190]

---

[185] *Id. See also*, David Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark*, YALE L. J. 2405, 2012 (2012) (discussing how the Rights Plan failed the second prong of the *Unocal* test).

[186] *Id.*

[187] 571 A.2d 1140 (Del. 1990).

[188] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 32. It should be noted that the court in *Unocal* provided a non-inclusive laundry list of diverse concerns that could warrant a defensive measure including "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 at 955.

[189] Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 at 1144.

[190] *Id.* Chancellor Allen's complete dicta on corporate culture is as follows:

> I note parenthetically that plaintiffs in this suit dismiss this claim of "culture" as being nothing more than a desire to perpetuate or entrench existing management

Consistent with the dicta of former Chancellor Allen in *Paramount*, former Chancellor Chandler does not outright reject the craigslist corporate culture as being worthy of a defensive measure but instead created an additional *Unocal* filter by reviewing the craigslist corporate culture for shareholder wealth maximization under a reasonableness standard of review consistent with *Revlon*.[191]

Unfortunately, this *Revlon* approach is the problem as it is a violation of what the *Unocal* test and more generally the judicial approach to corporate decision making is all about. Writing well before *eBay*, Professor Michael Dooley noted that the *Unocal* test had nothing to do with shareholder wealth maximization and everything to do with evaluating *the motives* of the board in implementing defensive measures: "[T]he Unocal "reasonableness" test is intended to function as a filter for conflicted interest, rather than as an objective measure of whether the board's action was reasonably calculated to maximize shareholder wealth."[192] Very simply, if directors can meet their burden of proof

---

> disguised in a pompous, highfalutin' claim. I understand the argument and recognize the risk of cheap deception that would be entailed in a broad and indiscriminate recognition of "corporate culture" as a valid interest that would justify a board in taking steps to defeat a non-coercive tender offer. Every reconfiguration of assets, every fundamental threat to the status quo, represents a threat to an existing corporate culture. But I am not persuaded that there may not be instances in which the law might recognize as valid a perceived threat to a "corporate culture" that is shown to be palpable (for lack of a better word), distinctive and advantageous.

Time, Inc. Paramount Commc'ns, Inc. v. Time Inc., 1989 Del. Ch. LEXIS 77, 1989 WL 79880, at *4 (Del. Ch. July 14, 1989), aff'd, 571 A.2d 1140 (Del. 1990).

It should be noted that whatever former Chancellor Allen thought of corporate culture back in the 1980s, recent research by managerial scholars suggest that corporate culture can be a very valuable corporate asset, perhaps the most valuable "strategic asset" that a company can have in order to maintain a competitive advantage. See Eric G. Flamholtz and Yvonne Randle, *Corporate culture, business models, competitive advantage, strategic assets and the bottom line, Theoretical and measurement issues*, 16 J. Human Resource Costing & Accounting 76 (2012); Eric G. Flamholtz, *Conceptualizing and measuring the economic value of human capital of the third kind: corporate culture*, 9 J. Human Resource Costing & Accounting 78 (2005); Eric G. Flamholtz, *Corporate culture and the bottom line*, 13 European Mgt. J. 39 (2001); Eric Van den Steen, *Culture Clash: The Costs and Benefits of Homogeneity*, 56 MGT. SCIENCE 1718 (2010).

[191] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 33.

[192] Dooley, *supra* note 43, at 521. *See also* Bainbridge, *Unocal at 20, Director Primacy in Corporate Takeovers*, *supra* note 92, at 829-842.

under the two prong test then the business judgment rule applies.[193] If so, then plaintiffs can only overcome the business rule judgment that protects the decision to implement the defensive measure by demonstrating that one of the triad of filters is present. If plaintiffs can do this, then an entire fairness standard of review is required[194] and shareholder wealth maximization becomes the focus of the court. As such, the *Unocal* test can be understood as a "conditional business judgment rule."[195] Conditional in the sense that the board's decision to implement a defensive measure is provided the opportunity to be brought back under the business judgment rule, a rule where the protection of managerial discretion is the accepted strategy for achieving shareholder wealth maximization.

If so, why would former Chancellor Chandler create the Link and thereby violate corporate law's traditional approach to the *Unocal* test as well as the judiciary's traditional desire to avoid a review for shareholder wealth maximization prior to the application of its traditional triad of filters?[196] To begin forming the answer, it is critical

---

[193] *See* Bainbridge, *Unocal at 20, Director Primacy in Corporate Takeovers*, *supra* note 93, at 800 (citing Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 271 (Del. Ch. 1989).

[194] *Id.*

[195] *Id. at* 796 (citing Dooley, *supra* note 43, at 515).

[196] Remember, Buckmeister and Newmark had formed a controlling group through a voting agreement and therefore it was already demonstrated that they were not primarily acting for purposes of entrenchment. Thus, they had already satisfied their good faith burden under the first prong of the *Unocal* test. This meant there was essentially no conflicts of interest filter under this prong except for reasonable investigation, a relatively light burden for the directors to bear. For example, the court in *Selectica* found that the board of Selectica had undertaken a reasonable investigation in determining whether Net Operating Loss (NOL) carryovers were an asset worth protecting by utilizing an old report valuing the NOL carryovers and soliciting advice from financial experts regarding their value:

> The record reflects that the Selectica Board met for more than two and a half hours on November 16. The Court of Chancery heard testimony from all four directors and from Brogan, Reilly, and Heaps, who also attended that meeting and advised the Board. The record shows that the Board first analyzed the NOLs in September 2006, and sought updated Section 382 analyses from Brogan in March 2007, June 2007, and July 2008. At the November 16 meeting, Brogan advised the Board that the NOLs were a "significant asset" based on his recently updated calculations of the NOLs' magnitude. Reilly, an investment banker, similarly advised the Board that the NOLs were worth protecting given the possibility of a sale of Selectica or its assets. Accordingly, the record supports the Court of Chancery's factual finding that the Board acted in good faith

to note that former Chancellor Chandler did not need to use the Link to conclude that craigslist had failed the first prong of the *Unocal* test. This is so because he found that craigslist's did not have a "distinctive" corporate culture that needed protecting, just a sales strategy that emphasized giving away free services.[197] Based on former Chancellor Allen's dicta, a failure to demonstrate a distinctive corporate culture should have been enough to fail the first prong of the *Unocal* test. Moreover, former Chancellor Chandler also reviewed the appropriateness of the Rights Plan under the second prong of the *Unocal* test assuming that the craigslist corporate culture was worthy of protection and found that it also failed the proportionality test because the Rights Plan simply did not have a connection to the protection of the craigslist' culture and was only meant to punish ebay for competing with craigslist.[198] Nevertheless, even though it was clearly not necessary, former Chancellor Chandler still felt compelled, through the application of the Link, to convey the point that without shareholder wealth maximization as the objective of the alleged corporate interest, a defensive measure cannot be implemented.

Perhaps the answer to the question of why former Chancellor Chandler implemented the Link lied in the apparent disregard that Buckmeister and Newmark had for shareholder wealth maximization, a disregard that made former Chancellor Chandler feel compelled to react. According to the former Chancellor, "Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future."[199] Given this challenge to the purpose of for-profit corporations where minority shareholders exist, the former Chancellor may have felt no choice but to punish Buckmeister and Newmark for not openly confessing their desire for enhancing their wealth and that of eBay's in the running of their business. As stated by former Chancellor Chandler:

> Directors of a for-profit Delaware corporation cannot deploy *a rights plan* to defend a business strategy that ***openly eschews*** stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.[200]

> reliance on the advice of experts in concluding that "the NOLs were an asset worth protecting and thus, that their preservation was an important corporate objective.

Versata Enterprises, Inc. v. Selectica, Inc., 5 A.3d 586, 600 (Del. 2010).

[197] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 33.

[198] *Id.* at 35. *See also*, David Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark*, YALE L. J. 2405, 2012 (2012) (discussing how the Rights Plan failed the second prong of the *Unocal* test).

[199] *Id.*

[200] *Id*.

The implementation of the Link under these unique set of facts is most reminiscent of what occurred in the famous case of *Dodge v. Ford Co.*[201] where Henry Ford made inflammatory statements to the effect that he did not care about shareholders or making money,[202] allowing the Michigan Supreme Court to shove down the throat of Ford Motor Company a special dividend that Henry Ford did not want the company to pay out. Of course, what people may publicly profess to believe may not even come close to matching the objective facts. At the time the suit was filed by the Dodge brothers in 1916 the Ford Motor Co. was incredibly profitable having increased its annual profits from $4,521,509.51 in 1910 to 59,994,918.01 in 1916.[203] A similar set of facts appears to have applied to craigslist even though the company does not make public its annual revenues and profits. However, according to the AIM Group, a private consulting firm specializing in classified advertising, craigslist earned an estimated $88 million to $99 million in profits on $122 million of revenue in 2010, up from estimated revenues of $100 million in 2009.[204] Revenue and profits per employee was a very impressive $4 million plus with profits of $2.9 million to $3.2 million, respectively.[205] Tellingly, while *Dodge v. Ford Co.* is often cited in academic literature and used in casebooks to demonstrate the primacy of shareholder wealth maximization as the objective of corporate law, it is very rarely used as judicial precedent.[206] As explained below, it is

---

[201] 1919 Mich. LEXIS 720.

[202] According to the Michigan Supreme Court:

> The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give. His testimony creates the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken.

Id. at 77.

[203] *Id*. at 11.

[204] Peter M. Zollman, *Craigslist profits, revenues soar*, (Apr 30, 2010), available at http://aimgroup.com/2010/04/30craigslist-revenue-profits-soar/.

[205] *Id.*

[206] Based on a Lexis search dated December 12, 2012, *Dodge v. Ford Co.* has only been cited by U.S. courts a total of 68 times. More tellingly, it has only been cited by the Delaware courts three times.

hoped that *eBay* will follow the same fate.

VII. THE IMPACT OF EBAY

The impact of *eBay* may bear witness to the old adage that "bad facts create bad law." The Link has added an additional hurdle for the board of directors to satisfy in order to show that they acted in good faith under the first prong of the *Unocal* test. A showing that the board acted in good faith still means that directors must demonstrate that they are not implementing defensive measures for the primary purpose of entrenchment but it also now means that the board must demonstrate that the corporate policy being defended must enhance shareholder value under a reasonableness standard of review.[207] This extra burden would appear to lead the *Unocal* test to where former Chancellor William Allen warned it should not go:

> Delaware courts have employed the *Unocal* precedent cautiously. The promise of that innovation is the promise of a more realistic, flexible and, ultimately, more responsible corporation law. The danger that it poses is, of course, that courts — in exercising some element of substantive judgment — will too readily seek to assert *the primacy of their own view on a question upon which reasonable, completely disinterested minds might differ.* Thus, *inartfully* applied, the *Unocal* form of analysis could permit an unraveling of the well-made fabric of the business judgment rule in this important context. Accordingly, whenever, as in this case, this court is required to apply the *Unocal* form of review, it should do so cautiously, with a clear appreciation for the risks and special responsibility this approach entails.[208]

The result of *eBay* is clear. The court has expanded its role in reviewing corporate business decisions for shareholder wealth maximization, a role that it has traditionally tried to avoid. Moreover, the heightened burden created by the Link is really an indirect attack by the judiciary on the business judgment that led to the board's implementation of the corporate policy being defended. That is, the court is taking upon itself the role of reviewing the legitimacy of corporate policy that was a result of a decision already made under the protection of the business judgment rule. For example, what if eBay had a corporate culture that would pass muster under former Chancellor Allen's skeptical eye? Such a review puts the corporate policy at risk not only from a hostile takeover if a defensive measure cannot be implemented to protect it but also from the feedback

[207] According to former Chancellor Chandler, "In the typical scenario, the decision to deploy a rights plan will fall within the range of reasonableness if the directors use the plan in a good faith effort to promote stockholder value." eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 28.

[208] City Capital Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988). (emphasis and citations omitted)

provided by the courts upon review or perhaps more importantly from the expected feedback corporations believe the courts will provide. Given such feedback or expected feedback, the boards may then modify their corporate policy so as to allow defensive measures to survive judicial review. Here, the court is playing a role in accountability that it should leave to the markets, the source of accountability which provides much better feedback for the boards in terms of whether corporate decisions adhere to shareholder wealth maximization. The markets, not the courts should provide the major feedback on whether or not board decisions maximize shareholder wealth. In sum, in the absence of corporate law's triad of filters, we do not want to substitute court feedback for market feedback in the board decision making process under the *Unocal* test or in any other area of corporate law.

Moreover, the Link may have unintended results. For example, what if the Link is applied to a fact pattern where a company is implementing defensive measures to protect a "green" corporate policy that does not allow for the use of a cheap, but relatively high polluting, energy source such as coal. Such a policy may allow the company to be competitive, but it also reduces shareholder value. Based on *eBay*, it would appear that defensive measures to protect such a policy would not be allowed.

Of course, the significance of the Link would be minimized if the Link were isolated to the eclectic fact pattern found in *eBay*. If so, then it would simply be considered a sport[209] and be of little significance to corporate law. However, it is doubtful that this will remain the case as the *Unocal* test is meant for public companies, the companies that still dominate the U.S. economy and need to implement defensive measures because they do not have a controlling shareholder or shareholder group to ward off a hostile takeover attempt.[210] Already, the process of the Delaware courts applying the Link to fact patterns involving public companies and into the scholarly thinking about the *Unocal* test has begun. In *Goggin v. Vermillion, Inc.*,[211] Vice Chancellor Noble, in discussing the validity of a poison pill implemented by Vermillion, Inc., a small publicly traded Delaware corporation with an independent board of directors and without a controlling shareholder or shareholder group,[212] cited *eBay* for authority when he concluded that the poison pill would likely 'fall within the range of reasonableness' based on what appears to be the directors' good faith effort to utilize the pill 'to promote stockholder value.'"[213] Moreover,

[209] According to Professor Michael Dooley, a case that has "facts so extreme as to be provocative qualify the case as a "sport." Dooley, *supra* note 43, at 475.

[210] Former Chancellor Chandler notes in the context of rights offerings that "The ample case law addressing rights plans almost invariably involves publicly traded corporations with a widely dispersed, potentially disempowered, and arguably vulnerable stockholder base." eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 at 31.

[211] 2011 Del. Ch. LEXIS 80.

[212] *Id.*

[213] *Id.* at 18.

Chancellor Strine has provided a strong defense of Chancellor Chandler's ruling in the previously mentioned Wake Forest law journal article.[214]

Notwithstanding the momentum of incorporating the Link into the first prong of the *Unocal* test, it is hoped that the Link will not be applied to defensive measures implemented by a public company. It is a needless review for shareholder wealth maximization that is inconsistent with corporate law's traditional triad of filters to establish a court's legitimacy for entering into such a review.

VIII. CONCLUSION

The creation and application of corporate law is an enduring struggle to find the optimal amount of decision making autonomy that should be provided the board of directors. Such an optimal point will lead to the most efficient decision making in the context of maximizing shareholder wealth. Statutory corporate law tries to achieve this optimal point by providing a large number of default rules and relatively few mandatory rules that it believes to be "market mimicking."[215] That is, these rules "would be universally adopted by contract, assuming the parties thought about them."[216] The result is that many of these rules are extremely deferential to board authority. The judiciary, on the other hand, tries to achieve this optimal point in corporate law by using a strategy of maintaining the locus of corporate decision making in the hands of the board of directors unless the decision is tainted with interest, lack of independence or gross negligence in the process of making the decision. The judiciary takes this approach because they recognize that the board of directors has a decided competitive advantage in terms of information, decision making skill and the ability to make timely decisions.

However, when the judiciary diverts corporate decision making from the board of directors to itself without proper cause, then there is a great risk that sub-optimal corporate decision making will occur as such decision making is placed in the hands of a less efficient decision maker, the courts. As Professor Bainbridge has stated, "the power to review differs only in degree and not in kind from the power to decide."[217] As we have already discussed, this is the basic flaw in the *Revlon* duty even though it has been partially corrected by *Lyondell* in the context of director liability. It is also the basic flaw in the Link, where a *Revlon* style review for shareholder wealth maximization is required

---

[214] Strine, Jr., *supra* note 29, at 149.

[215] Bernard Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 552 (1991).

[216] *Id.*

[217] Stephen M. Bainbridge, *Unocal at 20, Director Primacy in Corporate Takeovers*, supra note 93, at 769.

without the application of corporate law's traditional triad of filters.

This criticism of the Link is not to say that Chancellor Chandler was not a Chancellor of great distinction and many wonderful opinions. However, even the most outstanding jurist gets it wrong from time-to-time. Unfortunately, this is what occurred in *ebay* and it is hoped that the case will be treated as a sport not only in subsequent applications of the *Unocal* test but also in all other cases where, prior to applying corporate law's traditional triad of filters, the courts may be tempted to expand its review of corporate decisions for shareholder wealth maximization.