Agency Relationships

- Actual Authority
  - Protects reasonable expectations of A
    - Expressed
    - Implied (Cargill)
      - Reliance on Past Practices (Mill St.)
- Apparent Authority (Lind)
  - 3rd party believed A was acting on P’s behalf
- Inherent Authority (vicarious)
- Ratification (3-70 Leasing)
- Ostensible Authority (Humble/Hoover)
  - Right of Control

Fiduciary Duties

- Duty of Care
- Duty of Loyalty (Reading/Singer)
- Consent

Valuation

- Time Value of Money
  - Present Value
  - Discount Rate
  - Net Present Value
  - Risk & Return

\[
\frac{\text{Payable Amt}}{(1 + \text{Discount Rate})^n} = \text{Present Value} \quad \text{Future Value} = X(1+r)
\]

\[
n = \# \text{ of years in the future}
\]

\[
X = \text{Value Today} \\
r = \text{Interest Rate (i.e. .03 = 3%)}
\]

Centralized MGMT

- Amending bylaws § 109
- Special Meetings
- Removing Dirs
- Replacing Dirs
- Electing Dirs
  - Standard
  - Cumulative Voting
- Classified Boards
- SH Powers (Manson)
  - §§ 242 & 251 & 271
Capital Structure
- Options
- Debt
- Limited Liability
- **Piercing the Corp. Veil**
  - Respondeat Superior (*Walkovsky/Zaist*)
  - Alter Ego Approach
    - Standard of Review - *Sea Land*
      - Lack of Formalities
      - Commingling of funds & assets
      - Sever undercapitalization
      - Treating corp assets as one’s own
    - Standard of Review - *VA Law*
      - Undue Domination & control of the corp by Δ
      - Corp was a device or sham used to disguise wrongs, perpetuate fraud, or conceal crime.
  - **Reverse Piercing**

![Diagram showing forward and reverse piercing with SH's other corporations and financial symbols](image-url)
**Direct v. Derivative**

- **Standard of Review:**
  - Nature of wrong alleged
    - To SHs or Firm
  - Relief sought
    - Who would benefit? SHs? Firm?

- **Demand Requirement**
  - (1) Must make demand on entire board
    - OR
  - (2) Demand must be Excused.

  - **Demand Excused Test**
    - \( \pi \) must please particularized facts creating reasonable doubt that:
      - 1 – Maj. of bd. is interested either in the underlying trans or
      - 2 – Maj. of bd. is interested in the lawsuit (test: does BJR apply to the underlying trans?)

  - **Aronson** – suing *current* BoD (i.e. a maj. or the current bd is the same bd that did whatever you’re suing about)
    - (1) Maj. of Dirs are Independent & disinterested? **OR**
    - (2) Challenged trans was product of a valid exercise of BJR?

  - **Rales** – When different BoD members comprise current BoD.
    - (1) Maj dominated & (2) BJR doesn’t insulate demand req’t **OR**
    - (3) Maj. of BoD has interest

  - Waives Prong 1 of **Aronson**
  - Prong 2 of **Aronson**

  \( \pi \) thinks bd. was interested:
  - No Demand

- **Demand Excused - Special Litigation Committees (SLCs)**
  - Standard of Review – Demand Excused (**Zapata**)
    - (1) Did SLC act independently, in good faith, & w/reasonable investigation?
    - (2) Ct – using its own independent business Jment, decide if motion s/b granted.
  - Standard of Review – Judge Strine Test (**Oracle**)
    - Whether a director is for any material reason incapable of making a decision w/the best interests of the corp. in mind.
      - (i.e. – if they run in the same circles as the board; basically any relation at ALL – L donates to law school that G cares about, etc.)
    - Burden on \( \Delta \) to get a truly independent SLC – no relationships.
Aguero – Arlen Corp (attack)

- NY Standard of Review – Marx
  - (1) Maj. interested/controlled
  - (2) BoD didn’t fully inform themselves
  - (3) Challenged transaction wasn’t product of BJR
    - **Doesn’t include “reasonable doubt” standard like DE**
- NY (Auerbach)
  - Board being sued selected SLC – excused
- IF DEMAND REQUIRED → Test = BJR

### Challenges to Disinterested Bd. Actions

- Fully Informed Boards (Van Gorkem)
  - **Standard of Review** – Gross Negligence
  - **Test** – Bd must get all material information reasonable avail. to them as a standard.
- **Burden Shift** (Cinerama)
  - Once you show a breach of due care – burden shifts to \[\Delta\]
- **Waste Test** (Disney)
  - Does it look like a “Gift”
  - Did Bd. have all information reasonably available?
- **Good Faith & Loyalty**
  - DE reads the **letter** of the SH approval & the **spirit** (Tyson)
    - Half truths can constitute a fraudulent statement
  - **Particularized Facts** - Circumstantial Evidence so overwhelming to create reasonable doubt (Ryan)

### Director Inaction

- Nonfeasance (Francis)
- Compliance Programs (Caremark/Stone)
  - **Standard of Review** – Systemic Failure to Exercise Oversight (Caremark)
    - If Director’s are **actively** looking the other way – easy case of deliberate sustained neglect. (DOL)
  - **Standard of Review** – Lack of Good faith (Stone)
    - Have to show conscious disregard for their duties
- Notice (Graham)
BJR – Duty of Care

- **DE 141**
- An Interest of one director will get you out of BJR.
- Fiduciary Duties
  - Waste & Due Care (Barlow/Dodge/Wrigley/Kamin)

**Leaving the BJR – DE 144**

- Once BJR rebutted → DOL analysis
- Transaction voided unless “cleansed” or “deal is fair to firm”.

Did Dir have an “interest” in the transaction?

<table>
<thead>
<tr>
<th>NO</th>
<th>Duty of Care: Was Bd. “Informed” w/respect to the transaction to the extent they reasonably believed to be appropriate under the circumstances?</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO</td>
<td>BJR doesn’t apply</td>
</tr>
<tr>
<td>YES</td>
<td>Good Faith: Did the bd. rationally believe that the biz jment was in the “best interests” of the corporation?</td>
</tr>
<tr>
<td>YES</td>
<td>Qualifies for BJR &amp; fulfilled Duty of Care</td>
</tr>
<tr>
<td>NO</td>
<td>π can only claim Waste (Ultra Vires)</td>
</tr>
</tbody>
</table>

DE § 144

Approved by fully informed/disinterested BOD & SHs

Fair?

Fair? (Can be approved w/unanimous SH vote)

Transaction Voided

Yes | Fair?

Burden shifts to Δ

Avoids fairness

Cleanse!
**DOL**

- **Self-Dealing** Transactions – no Controlling SH *(Bayer/Benihana)*
  - Cleanse *(Lewis)*
- **Corporate Opportunity** – NEVER UNDER BJR
  - Interest – contractual right
  - Expectancy – ordinarily receive
  - Necessity – goods/svcs the firm vitally needs
  - w/i Line of Business *(Guth)*

---

**Self-Dealing** by a **Controlling SH** *(Sinclair)*

- BJR applies to controlling SH if NO self-dealing
- **Test** – Does Controlling SH benefit disproportionately from the benefit to min. SH on a per/share basis.
Proxy Contests

- **Voting System**
  - Must be a policy issue not purely personal (Levin)
  - Compensation (Rosenfeld)
  - **Steps**
    - 1 - § 213 Record Date
    - 2 - Proxy Solicitation
    - 3 - SHs return proxies
    - 4 - Annual/Special Mtg

- **SH Inspection Rights - § 219-20**
  - SH Lists
    - Proper purpose (Crane/Honeywell)
    - Moral v. Economic Purpose (Lovenheim)
  - Corp Records (Seinfeld)
  - Fiduciary Out (AFSCME)

- **14(a) – 8 – Exchange Act**

- **Fraud Provisions**
  - Transaction Causation Test (Mills)
    - (1) Materiality
      - fraud induced the vote and
    - (2) “Essential Link”
      - the vote mattered
    - Individual reliance not necessary
  - Opinions/Beliefs (VA Bankshares)
    - Has to be material
    - ∆ had to NOT believe it &
    - There had to be something false or materially misleading about the subject matter.

Sale of Control

- Equal Opportunity Rule (Zetlin rejects)
- Looting (Perlman)

Freeze Out Mergers & Appraisal Rights

- Standard of Review – Fairness (DOL)
  - Fair Dealing
    - Duty to Disclose
  - Fair Price
    - Going Concern (Weinberger)
    - Appraisal (Emerging Communications)
  - DeFacto Control (Kahn)
Take Overs!
- Break-up OR Change of Control (Revlon)
  - Look out for *De Facto* control!
  - Duty → maximizing SH value
- Defensive Measures used (Unocal) – No Longer Under BJR
  - 1 – “Threat” prong
  - 2 – “Proportionality” prong
    - 2 – step analysis (Unitrin)
      - 1 – Is response itself coercive or preclusive?
        - Yes → problem!
        - No → move on to step 2
      - 2 – Is measure w/i the “range of reasonableness”?
    - Coercive/Preclusive (Omnicare)

Entrenchment Issue (making a company less attractive to outside bidders)
- Standard of Review (Unical)
  - Standard when Bd. is taking actions that involve mgmt of firm
- Standard of Review (Blasius)
  - Standard when firm trying to interfere w/something the SHs get to do all on their own (i.e. kicking out Bd. members).
    - 1 – Do we have a bd. action *intended* primarily to thwart SH action?
    - 2 – Bd. bears a heavy burden of presenting a compelling justification for their action.