

## I. Types of Businesses

- a. Partnerships (2+ people)
  - i. General Partnerships
  - ii. Limited Partnerships
- b. LLP or LLC (generally under 30 partners)
  - i. Closely Held
- c. Closely Held Corporation (about 30 partners)
  - i. Few owners; the owners manage the firm
  - ii. Most corporations closely held
- d. Publicly Held Corporation
  - i. Dispersed SHs; SH owns firm w/equity right to profit from the firm. 1000s of them; they *Do Not* manage the firm.
  - ii. Most of the economic activity in this country is from publicly held firms

## II. Why DE

- a. Flexible Corporate law that is attractive to corporations
- b. Special corporate trial courts: DE Court of Chancery (specialty court that focuses on corporate matters – Corporations can rely on having their cases heard by people who understand how corporate law works)

## III. Corporate Formation

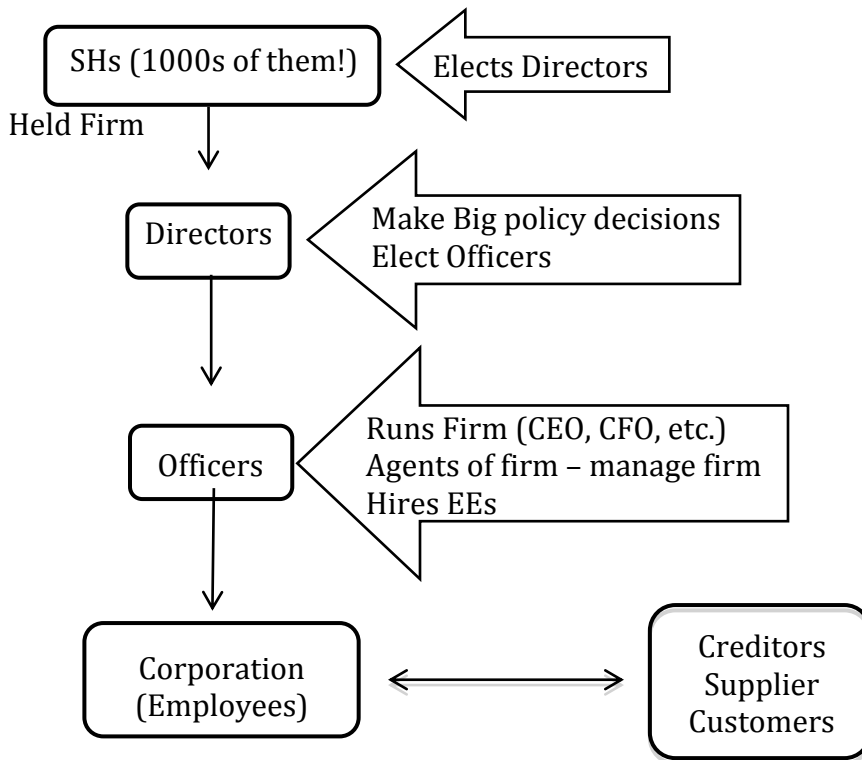
- a. Corporation
  - i. Artificial person or legal entity created by or under the authority of the laws of a state or nation.
  - ii. Corporate Form: formal creation as prescribed by state law; legal personality; separation of ownership & control; freely alienable ownership interests; indefinite duration; limited liability.
    1. Formal Creation
      - a. Articles of Incorporation
      - b. Certificate of Incorporation
      - c. Board hold mtg to adopt bylaws; appoint officers
    2. Legal Personality
      - a. Separate from the people who own/work for it.
      - b. Same powers as an individual to do all things necessary or convenient to carry out its business & affairs.
- b. **Steps to forming a corporation**
  - i. Promotional arrangements
  - ii. File Cert. of Incorp (DGCL § 102)
  - iii. Draft Bylaws (§ 109)
  - iv. Organizational. Mtg (§ 108)
  - v. Elect Bd. of Dir.
- c. **Certificate of Incorporation (like Constitution)**
  - i. Name of firm/address/purpose of firm
  - ii. Tells you about stock
    1. shares/classes; voting rights/pwr potential
  - iii. Par Value – firm can issue stock for any amt they want
    1. If stock is “no par” they’re entitled to issue as much as they want.
  - iv. # of shares a firm has tells you nothing about the financial health of the firm.
- d. **Bylaws (like Statutes)**
  - i. Any provision not inconsistent w/cert or laws of the state.
  - ii. Usually:

1. # of directors
  2. types of officers (CEO, CFO, etc)
  3. Duties of the officers
  4. quorum – how many shares have to be at the mtg. in order for the mtg. to be valid (in person or by proxy).
- iii. SHs can't adopt bylaws regulating substantive biz issues; only procedural.
- e. **Bylaws v. Cert**
- i. Some things can *only* go in the cert
  - ii. Bd has the pwr to amend the bylaws (makes sense b/c of fundamental shift in pwr)
  - iii. Classified bd, - fixing the # of directors in the Cert
  - iv. Classes of stock
  - v. Elimination of SH pwr to act by written consent.
  - vi. Cert can grant pwr to bd to amend the bylaws (usually does)
  - vii. SH have inherent pwr to amend bylaws
- f. **Amending a Cert**
- i. § 242(b) – bd votes + Majority SH approval
  - ii. Bd must 1<sup>st</sup> agree, adopted by majority vote
  - iii. THEN SH vote – approval by a maj. of shares
  - iv. Neither Bd. nor SH can amend unilaterally
  - v. REMEMBER!
    1. Put things in the cert that you want to be HARD to change
    2. Put things in bylaws if you want to give the SH or Bd. room to change.
- g. **Organizational Mtg**
- i. Mtg of incorporators (those who created the firm) if no initial directors named in the bylaws, or the original bd. of directors.
  - ii. Adopts bylaws
  - iii. Issues stock (SEC filings)
  - iv. Appoints officers

**IV. Agency Law**

- a. Agent: agrees to act on behalf of someone else & subject to that person’s control.
- b. Officers & Directors: act on behalf of the SH/corporation

- c. EEs are agents
- d. Structure of Publicly



| Benefits for Firms  | Benefits for SHs  |
|---|---|
| Allows firms to pool a lot of resources in a low risk form  | Limited liability – If invest in a firm, can lose your \$ but not lose in excess of that.   |
| Delayed payment, no interest  | Can share profits w/o having any biz knowledge of your own  |
| A lot of equity, little debt – if no \$ coming in & you have debt, have fixed interest payments to make. Debt is more risky in a cyclical environment | Can invest your \$, make profit, w/o having to develop expertise b/c you hired Dirs and Officers to have the expertise  |
|   | Don't have to worry about other investors interfering b/c they can't do much either   |
|   | Possible to invest in a variety of firms; less risky (things that could be bad for 1 firm might not be for another); can diversify against risk by investing across diff. industries. |

e. **Risks for P's**

- i. Shirking (moral hazard): A may not work as hard as P would if P were doing it for himself. (A doesn't need to work as hard as P would, just as hard as a reasonable A would)
- ii. Stealing/Misappropriation/Self-Dealing:
  1. Using pwr over P's contracts to send favorable contracts to entities A has stake in
  2. Misappropriate business deals that should go to P
  3. Embezzlement/Fraud/Insider Trading
- iii. Control of Liability created by A's

f. **Risks for A's**

- i. A needs to know *when* he can go out into the world & enter into a contract relying on P to be responsible for the contract.
- ii. Wants to know the law will give him protection if incurs reasonable obligations on behalf of P.

g. **Risks for 3<sup>rd</sup> Parties**

- i. If they enter into a contract w/A on behalf of P, needs to know when they can rely on P being bound on that contract & when they need to check directly w/P about whether P is bound.

V. **Definitions – P/A relationship**

- a. **§ 1.01** – relationship resulting from **manifestation of consent** by P to A that A shall:
  - i. Act on P's behalf &
  - ii. Subject to P's right of control
- b. P must consent but doesn't *have* to consent to *creating* an agency relationship; mere manifestation of consent as to the structure of the relationship needed, not its legal implications.
- c. Intend of P immaterial; P does not have to think they were asking A to act on their behalf; Instead if it looks at **reasonable expectations** of the A or 3<sup>rd</sup> party.
- d. Tests:
  - i. **Actual Authority**
    1. Protects *reasonable expectations of A*
    2. Reasonable person in A's position would think that P was consenting to an P/A relationship, such that A is under P's control.
    3. A can seek indemnification & P can't sue A for indemnification; A not liable to 3<sup>rd</sup> parties for contracts on behalf of a "disclosed" P – ex: Farmers can only go after C (**Cargill**)
      - a. **Expressed** – P & A explicitly agree that A has power to act on P's behalf & subject to P's control
      - b. **Implied** – Hire A w/o spelling out everything; job P gives A normally has a certain kind of authority & it's implicit that A can do all these things; implied duties
  - ii. **RST § 6.03** – liability of A to 3<sup>rd</sup> party if *Actual Authority*
    1. Disclosed P – if W contracting as a disclosed A, in its A capacity, then not liable.
    2. Undisclosed P – A contracts as if its his own contract & didn't tell 3<sup>rd</sup> party P existed
      - a. If, at time of transaction, A purported to act on own behalf, A is liable.

- b. If 3<sup>rd</sup> party thinks he's contracting w/A, then gets A on the contract
- 3. Partially Disclosed P
  - a. 3<sup>rd</sup> party knows A is acting on behalf of another but doesn't know who
  - b. RST: both P & A bound b/c 3<sup>rd</sup> party presumably relying on A's creditworthiness.
- iii. **Apparent Authority**
  - 1. P's actions/manifestations such that a Reasonable Prudent Person (RPP) in 3<sup>rd</sup> party's position would believe A was acting on P's behalf & subject to his control.
    - a. Actual or Apparent will bind P; even if 3<sup>rd</sup> party didn't know P existed, to protect A's reasonable expectations (actual authority)
    - b. P has to pay if he gave 3<sup>rd</sup> party reason to believe there was relationship, even if A not given authority to make contract.
  - 2. P can seek indemnification from A w/Apparent Authority if there was no actual authority.
- e. **CarGrain Hypo** – C hires W to purchase corn but doesn't explicitly say W is an A.
  - i. W purchases corn from J, C refuses to pay J → J sues C & W
  - ii. J could assert *Actual Authority* (not apparent b/c he didn't know about C).
  - iii. Implied Actual Authority
    - 1. Delivery fee covered?
      - a. If reasonable person in W's position hired to purchase corn would reasonably believed that he also had authority to get it delivered, b/c it's a natural part of the job, then W has actual authority to get corn delivered.
- f. **Cargill** – W sold most of C's grain to farmers (π)
  - i. W got a loan from C – letter of credit (like a credit card)
  - ii. W goes bankrupt, farmers sue C claiming C has to honor the contracts. – *Actual Authority (implied)*.
  - iii. Important facts that makes W an A and not just an Indep. Buyer
    - 1. C not just buyer (1<sup>st</sup> choice) but also lender
  - iv. **RST 2<sup>ND</sup> 14(O): Comment**
    - 1. A security holder who merely exercises veto pwr over biz acts preventing purchases or sales over a certain amt isn't a P.
    - 2. Creditor can become a P if he **takes over mgmt of the debtor's biz** in person or through an A and directs what contracts may or may not be made.
      - a. Central test is whether creditor assumes de facto control over debtor
  - v. Ct: W ceased to be an indep. biz – C could shut it down; W was so far underwater that no one else would loan it money
    - 1. All \$ W made went straight to C
    - 2. C gave daily recommendations to W
    - 3. W supplied C with grain (buyer/seller relationship)
  - vi. Even farmers who didn't know about C can get money from C b/c it's *actual* auth, not apparent.
  - vii. **You can accidentally become a P if the relationship changes over time (ex: exerting more control).**
- g. Goals of P/A relationships
  - i. Allow P to create relationships informally but protect reasonable expectations of people dealing with P (both A & 3<sup>rd</sup> parties) b/c they are so informal.
- h. **Mill St.** – H enlisted brother to help him paint church; brother injured after ½ hour.

- i. H had **Implied Actual Authority** – implied out of the relationship (job naturally requires certain things; pwr's practically necessary to carry out delegated duties)
    1. Standard practice in the industry
      - a. Common for painters to have helpers
    2. Past practices
      - a. Church has previously said Brother was ok
      - b. If Church wanted to deviate from past behavior, they'd need to give a lot more notice that it was limiting Bill's auth.
    3. Church suggested another helper (Petty); in-turn suggested H would need help from someone else
      - a. H interpreted it as a suggestion, not a mandate that it be Petty to help
  - ii. H checked to see if he could hire someone – church gave him *express authority* to hire someone, but not his brother specifically.
- i. **Lind** – P&T's VP Sales Mngr (H) tells L he'll get a promotion, answer to K – K tells L he'll get commission, L never receives commission promised him by K.
    - i. **Actual Authority** of K?
      1. No – Firm has a policy that only the Pres. of the Co. can set salaries (not VPs); both H & K know about the policy.
      2. Irrelevant to issue of Apparent Auth though – reasonable jury could find an issue of fact so judge can't just not allow the claim.
    - ii. **Apparent Authority** of K?
      1. Yes – job title given to H is enough to give L a reasonable belief that he has auth.
      2. Turns on “was there auth. at the moment?” – requires reasonable belief & if salary exceeded scope of what someone “reasonably” believes then no apparent auth.
    - iii. Compare to **Gumpert v. Bon Ami Co** –
      1. Agent's own statement, “I have authority” doesn't count as manifestation.
      2. G was a member of the board of Dir's; confers no auth. to hire b/c indiv. bd. dirs can't hire on their own, they must act as a bd & in addition bd's don't usually hire people in that low of a position.
- j. **Inherent Authority (vicarious liability)**
    - i. Employer/Employee (Master/Servant) – tort & contract
      1. Master is liable for torts of his servant committed while acting in the scope of employment; some states require activity be for Master's benefit.
      2. Work on behalf of master & subject to his control/or right to control the physical conduct of the servant.
    - ii. Independent Contractor – contract
      1. One who has agreed to act on behalf of another (P) but not subject to P's control over *how* the result is accomplished.
- k. **Ratification**
    - i. A purported to act on P's behalf
    - ii. A doesn't have actual or apparent authority
    - iii. After the fact, P w/knowledge of the material facts either:
      1. Expressly affirmed A's conduct by manifesting an intent to treat A's conduct as authorized
      2. Engaged in conduct that was justifiable only if he had such an intention (implied ratification).
    - iv. If P does this, binding on him & binding on the 3<sup>rd</sup> party

- v. Ratification in effect transforms the contract into one that is treated as if there was actual authority at the time it was signed (related back to original claim of auth – so P would have been bound on everything).
- l. **3-70 Leasing** – Offer to make an offer; signature line for both 3-70 & Ampex, A doesn't sign; M (K's boss – “all communication would go thru K); K (Ampex salesman) confirms delivery.
  - i. Contract: Ampex made offer to 3-70 that w/b binding if he accepted BUT Ampex didn't sign conveys their intent wasn't to write an offer, but to make an offer.
  - ii. Corp: **K had authority** and t/f Ampex accepted when K called 3-70 and confirmed delivery.
- m. **Policy Arguments for making P liable:**
  - i. Incentive to hire right As
  - ii. Incentive to set right balance b/w productivity & care
  - iii. Incentive to provide good equipment
  - iv. Monitor/exert control where needed
  - v. Incentive to regulate risk
- n. **Murphy** – Holiday Inn; franchise
  - i. Not a lot of explicit control; no hand in day-to-day operations; not enough incentive to exert control b/c the risk isn't theirs.
  - ii. Agent bears risk.
  - iii. [RST 2A § 220](#)

|                       |  |
|-----------------------|--|
| Express Indicia       | Holiday Inn didn't have direct right to say what would be planted, who to hire, etc. (right to train people, though)   |
| Skill Required        | Need on-the-ground information; lots of discretion required (little decisions to be made) – not the same as being a surgeon, but enough on-site discretion that <u>it would be hard for someone to monitor you from afar and tell you what to do</u> or say in advance everything you have to do |
| Location              | Franchise is in distinct location  |
| Who Provides Supplies | Much of what the hotel is supplying needs to be purchased by agent   |
| Term of Relationship  | Long-term (cuts in favor of master-servant)  |
| Business Risk         | Betsy-Len bears the risk of operating costs, etc.; Holiday Inn's incentive to improve 1/1,000 hotel is fairly minimal; just incentive to make sure Betsy-Len doesn't denigrate brand (so no risk of “back-door” control)   |

- o. **Ostensible Authority** – created by actions rather than written doc.
  - i. If P holds himself out in a way that would cause a 3<sup>rd</sup> party to reasonably believe that master/servant relationship exists, P may be liable in tort.
  - ii. Most states require the  $\pi$  to show **reliance**.
  - iii. Convenience isn't the same as reliance – Emergency rooms are often separate entities from the hospital; requesting that emergency room v. it being the closest

- one. Someone using the hotel b/c it says Holiday Inn and there is reliance on the hotel name.
- iv. The minute you go to **reliance** you go out of the Master/Servant theory & into Ostensible Theory.
- v. **Test turns on the right of control.**
  - 1. Court in **Sun** notes that some people may come to Barone b/c they think station is owned by Sun.
- p. **Humble** – car parked at gas station; no break; hit kids
  - i. Negligence
  - ii. Δ - Independent Contractor! – not liable.
  - iii. CT – Capacity to exert control over physical conduct of job
    - 1. Periodic reports & right to dictate performance
    - 2. Retained title to oil
    - 3. Controlled hrs of operation
    - 4. Rent goes to incentive control
  - iv. H owns all products in gas station, **sharing profits/revenue & risk**
  - v. Contract explicitly says no Master/Servant relationship but H had a certain capacity for control.
- q. **Hoover v. Sun Oil** – fire in gas station
  - i. No direct right of control; A not required to listen to Δ(sun); A has title to products t/f he has:
    - 1. Control
    - 2. Takes on all risk b/c he buys & resells products
  - ii. Title isn't *always* a flag on who has control, but usually.
  - iii. Differs from **Humble** b/c of the share of risk.
- r. **Agent's- Fiduciary Duties**
  - i. **Protecting P**
    - 1. **Contractual Protections** – protections P's put in place themselves
      - a. Monitoring – expensive & hard to do
      - b. Incentive contracts – motivates As by giving them a share of the profit
    - 2. **Fiduciary Duties** – protections provided by law
      - a. Duty of Care
      - b. Duty of Loyalty
      - c. Duty of Obedience
    - 3. **Exit Rights** – ability to fire As
  - ii. **Duty of Care**
    - 1. Designed to deal with problem of *shirking*
    - 2. Default rule: assume supposed to exercise level of care of agent w/those set of special skills (i.e. similar agents)
    - 3. Note: A not req'd to work as hard/take as much care on behalf of P as P would take him/herself
  - iii. **Duty of Loyalty**
    - 1. See RST 2<sup>nd</sup> & 3<sup>rd</sup> for slightly diff standards
    - 2. General Principle: If hired to work for P, A has fiduciary duty to act loyally for P's benefit in all matters connected w/agency relationship.
      - a. Don't steal from firm
      - b. Don't use position at firm for own personal benefit or benefit of some 3<sup>rd</sup> party.
        - i. **Reading** – Got paid to wear military uniform & escort cargo.



1. Can't take advantage of his position by using info/property that came to him b/c of his agency position.
  2. Δ can argue 3<sup>rd</sup> party isn't an adverse party & army not losing profit from his actions.
  3. Counter: only able to get the job b/c of his affiliation w/army (uniform).
    - a. Concedes that it's not a transaction done for the P but arising out of the agency relationship.
  3. You *can* explicitly **contract out** of the **duty of care**; you *can't* contract out of the duty of loyalty – but you can **contract around DOL** by granting permission for A to compete w/P, etc.
    - a. A may compete w/me; may **self-deal**, may get a side benefit, etc.
  4. **Particular Duties of Loyalty**
    - a. § 388 – account for all profits arising out of agency relationship (your position) – idea is for P to set salary, and if you're getting other \$ while acting on behalf of P or arising out of relationship w/P, that \$ is really P's \$
    - b. §§ 389-92 –
      - i. Can't act as an adverse party (adverse = other side of a transaction)
      - ii. Can't act contrary to P; also can't act on behalf of an adverse party in connection w/your agency relationship (at least not w/o permission)
    - c. § 393 – Can't compete
    - d. § 394 – Can't act w/conflicting interest
    - e. §§ 395-96
      - i. Can't use confidential info or P's personal property that comes to you out of the agency relationship for your own benefit
      - ii. Can't disclose confidential info for your own benefit – that would be insider trading (i.e. given non-public info about a deal & you go to trade, using for your own benefit)
      - iii. Can't usurp a corporate opportunity/biz opportunity belonging to P.
        1. **General Automotive v. Singer** – Best guy in the biz hired but taking jobs for himself
          - a. Duty not to usurp biz opportunity of the principal
          - b. Δ not usurping an opportunity to broker if P says they don't want/intend to broker – but that's not the case.
          - c. **Where there is a conflict of interest, there is an obligation to disclose!**
          - d. Ct doesn't care what the profits are in relation to the damages to P. Ct takes away Δ's **unjust enrichment** as a restitutionary remedy.
  5. Duties bind as long as you are an agent (even if you plan to quit)
- iv. Restatements

1. Default Rules – applied when parties are silent
  - a. Can be contracted “around”; altered consensually.
- v. **Consent** - Consent can come from custom of the firm: Any gift under \$100 is A's.
  - a. Account for profits arising out of employment
  - b. Not to act as adverse party/can't act contrary to P or on behalf of adverse party
    - i. Adverse – on the other side of a transaction
  - c. Not to compete w/i subject matter of agency
  - d. Not to act w/conflicting interests
  - e. Not to disclose confidential information – insider trading
  - f. Not to usurp a big opportunity belonging to P
  - g. Can't use P's property for personal gain

## VI. VALUATION SUCKS!!!

- a. **Time Value of Money**
  - i. **Present Value** – the value today of money at some future point; payable/receivable
    1. Money you get today can be invested & worth more than a promised sum in the future.
  - ii. **Discount Rate** – tells us how to calculate present values  
Higher the discount rate = more money you'd have to earn in the future for present losses.
- b. **Net Present Value** – Value of earnings - \$ you put in/invested.
  - i. Adjust Discount Rate – Discounted expected net present value
    1. Calculate expected return in year 1
    2. Discount to the present year
    3. Subtract investment cost
  - ii. If Net Present Value of what you earn is less than the amt. you're being asked to invest – walk!
- c. **Risk & Return**
  - i. Risk – variance/difference in how much you're earning
  - ii. Risk Averse – Willing to take less money w/certainty in return for less variance.
  - iii. Risk Aversion
    1. Diminishing marginal utility of wealth
    2. The event of losing \$10k you already own isn't equivalent to getting an extra \$10k.
    3. Care about both expected return & variance
    4. Equivalent losses count more than gains so wouldn't take a fair bet.
  - iv. Risk Neutral
    1. Concerned only about expected return & not about variance of the return
    2. Indifferent to taking a “fair bet”
  - v. Risk Premium
    1. The amt investors require above the expected return to compensate them for unpleasantness of accepting risk
  - vi. Expected Return – Weighted average cash flow probability of winning x amt of \$\$ if won + probability of losing x \$\$ if lose.
  - vii. Risk Preferences – Risk – actual realized cash flow will deviate from expected cash flows.
  - viii. Diversification – the process of reducing risk by investing in many different projects.

1. To be fully diversifiable, it is not sufficient that any single investor isn't obligated to bear the risk; rather **no** investor must have to bear the risk.
2. Investors need to be compensated for risk **only if** there's a variance in expected returns.

**VII. Capital Structure** – Looking at the debt & equity in the firm (Firms can raise \$ thru equity or debt)

- a. **Equity** – the claim you have when you purchase a share of stock
  - i. Residual claim (what's left over) t/f taking most of the risk
  - ii. Most to gain from good news, & a lot to lose from bad news
  - iii. Equity interest gets the right to vote on who will manage the firm
  - iv. Equity will have right to decide on Cert. amendments, mergers, sales of assets, etc.
  - v. Residual claim leads to risk, risk gets you control
  - vi. Residual Claims – right to profits; the revenues after you paid all costs, including any obligations to debt
    1. Dividends
      - a. Annual payments that corps may make to SH out of profits they earn
    2. Capital Gain
      - a. Often firms retain most of their earnings, reinvest, & earn more profits so firm becomes more valuable → share price should rise to reflect not only cash value but also investment value of shares. As share price rises, SH gets capital gains
      - b. Difference b/w what SH paid & what she sells it for (could also have capital losses)
  - vii. **Common Stock** – basic core equity interest in the firm
    1. right to vote
    2. no fixed right to dividends
    3. ultimate residual claimant
  - viii. **Preferred Stock**
    1. Can be preferred as to dividends, liquidation, or both
      - a. May have a guaranteed right to certain amt of dividends per share
      - b. May guarantee a fixed return should the firm liquidate
    2. Can be voting or non-voting, or have less votes than common
    3. Often preferred doesn't vote, but is just guaranteed the amt specified.
  - ix. **Options!** – alt. to cash compensation
    1. IRS allows firms to deduct cost of options (limits amt you can deduct in cash - \$1 mill)
    2. SEC doesn't require you to disclose options
    3. \$1 mill in cash → lost \$1 mill
    4. \$1 mill in options → less taxes, like nothing ever happened b/c it was deductible
    5. Allows bds to basically pay w/free money – incentive pay (needs SH approval)
    6. Doesn't hurt bottom line of the firm.
- b. **Debt** – one person borrows from another & promises to repay, usually w/a certain interest rate & lump sum at the end.
  - i. **Secured**

1. Should the person who borrowed the \$ default, creditor has the right to sell certain assets of his to cover the debt before anyone else can touch them
  2. Default Rule: unless you have secured your debt, it is unsecured.
- ii. **Unsecured**
1. If you're an employee & not secured, if firm goes under you don't get your paycheck.
- iii. **Debt Financing** – As long as the interests rate is less than your rate of return, you get to keep the difference
1. Cons
    - a. Debt usually carries a fixed interest rate
    - b. Paying a risk premium – paying more to take less risk
  2. Advantages
    - a. Creditors don't vote → don't share any control (equity gets to vote)
    - b. w/debt you can deduct tax just like you can deduct wages.
      - i. w/equity investment, equity shares risk of downside (equity bears the risk) not the case w/debt.
    - c. No fiduciary duties to debt
  3. Leverage
    - a. Refers to how much debt you have (what portion of total capital is debt)
    - b. Increases risk & return
      - i. Expected return to equity
      - ii. Variance of returns to equity
      - iii. Reason: equity gets to take all the capital to make profit, profit will be some % of total capital, but equity only has to pay out a certain percent (payments to debt are capped)
  4. **Creditor Protective Measures**
    - a. Contractual Solutions
      - i. Covenants
        1. Debt could protect itself from abuse thru contractual clauses which prevent firm from doing certain things (limitations on new financing, limitations on debt you can take on, etc)
        2. *Cargill* – watch out for too much control! (creditor could become P)
      - ii. Secured Debt
        1. They guy first claim on certain assets
        2. Priority
          - a. Normally if a firm dissolves or liquidates, all creditors have **equal priority**
          - b. Would be divided pro-rata
          - c. Priority can be **secured** by particular assets – gets first right to those assets
          - d. Subordinated debt
    - b. Legal Solutions
      - i. Capital Regulation
        1. *Minimum Capital Requirements*
          - a. We don't impose min. capital requirements (other nations do)

- b. Doesn't *really* protect b/c firm can exceed min.
    - 2. *Distribution Constraints*
      - a. Firm can only give out so much money as dividends to its SHs, but constraints extremely weak
    - 3. *Capital Maintenance Requirements*
  - c. Fiduciary Duty Constraints
    - i. *Director Liability*
      - 1. If firm insolvent or close to it, dir's owe fid. duties to creditors.
  - d. Laws affecting pool of available assets
    - i. Fraudulent Conveyance – if corp. has FC then it allows the creditor to get the \$ back
    - ii. Equitable Subordination – If SH has loaned \$ to firm; SH can have an equal claim to regular creditors but not always.
    - iii. Piercing Veil – Claimant can go after corp. for full amount.
- iv. **Limited Liability**
  - 1. SHs of a corp. aren't personally liable for debts incurred or torts committed by the firm.
  - 2. SH's losses are limited to the amt the SHs invested in the firm – amt they paid to purchase their stock
  - 3. Exceptions:
    - a. Articles of incorporation may provide for personal liability
    - b. Personal liability may be assumed voluntarily or o/w
    - c. Guaranty – contract by which the guarantor is bound to perform in the event of a breach of contract by the party whose performance is guaranteed.
  - 4. Benefits
    - a. Risk limited by whatever you put in
    - b. Not a lot of monitoring; allows for centralized delegated mgmt
    - c. Promotes transferability of shares b/c investors are less concerned w/the identity of other SHs
    - d. w/ unlimited liab, if firm is insolent, creditors come after you for the whole amt – care about the financial health of co-owners as well
    - e. Allows diversification of investments b/c don't have to keep monitoring every single thing you buy.
    - f. SHs don't have to worry about the financial status of other SHs or about managerial actions, since they won't be held personally liable for the firm's costs/debts
    - g. Applies when the only SH is another corporation.
  - 5. Problems
    - a. Cost of debt will turn on the degree to which creditors will believe you're going to engage in risky behavior
    - b. Firms w/limited liability will be more willing to invest in riskier projects in order to benefit SHs, despite the fact that it may harm creditors
    - c. Riskier projects usually less valuable to society & inefficient since they involve lower expected returns

- d. Very costly to create laws & contractual clauses to prevent investments in risky projects
  - e. Very costly for creditors to monitor the investment decisions of firms & their SHs
  - f. Creditors will charge firms higher interest rates to compensate for increased risk.
- v. **Piercing the Corporate Veil**
1. SHs of public corp are immune from veil piercing claims b/c they follow **formalities** – many family owned firms, etc, tend to act very informally, no mtgs, etc.)
  2. Equitable remedy where personal liability may be involuntarily thrust upon a SH.
  3. Allows those injured by the corp to force the corp's SHs to internalize the harm committed by the firm.
  4. "When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the cts will draw aside the veil of entity, will regard the corporate company as an association of live, up-and-doing, men & women SHs, & will do justice b/w real persons."
  5. If corp acts as SH's alter ego; corp dummy; instrumentality – ok to pierce:
  6. **Critical Factors!**
    - a. **Nature of Claim** – Veil s/b pierced in contract cases if the corp or controlling SH misrepresented the firm's financial condition to a prospective creditor
    - b. **Nature of the  $\Delta$**  - Passive SHs of a close corp: SHs who neither control the corp nor are actively involved in its management are unlikely to be held liable on a veil piercing theory.
  7. **Fraudulent Conveyance v. PV**
    - a. PV – you get the whole thing
    - b. PV – Equitable remedy; gives the ct a lot of latitude to pierce when it thinks it's fair
    - c.  $\pi$  prefer PV over FC b/c they can get all debt satisfied regardless of the magnitude of the wrong (whereas FC can only get the amt of the wrong back)
  8. **Pleading** – wrong has to be attached in the direction that you're piercing.
    - a. If claim is that they're all one big entity – piercing sideways and can only get corp's assets.
    - b. Can only pierce & get personal assets if  $\pi$  can argue that he didn't respect the separateness *vertically*.
  9. **When to Pierce**
    - a. **Principal/Agent Grounded Approach**
      - i. Idea that SH should be liable if crosses the line from SH to P/A relationship w/firm
      - ii. **Respondeat Superior** – Was corp operating as a servant of SH (is SH master?)  $\pi$  entitled to hold the whole enterprise responsible for the acts of its agents.
      - iii. Liability can extend to tort if goes from P/A to M/S relationship
      - iv. **Walkovsky** –  $\pi$  struck by cab; combined assets of 10 cab co's wouldn't suffice.

1. A SH may be held personally liable for the corp's acts & debts on a **P/A theory** if the SH uses his control of the corp to further his own, rather than the corp's, interests.
  2. **Mere control isn't enough** – because every sole SH benefits and controls the co; we'd be getting rid of limited liab!
  3. Must show a specific way in which control manifested; injustice.
- v. **Zaist** – Sole SH of many separate firms; firm has no \$ when  $\pi$  goes to sue – basically same as *Walkobsky*
1. Court is looking for some **personal benefit** to the SH not a benefit to the firm – if firms were separately controlled, would they have given each other the same loan? NOPE!
    - a. **Instrumentality** – Idea that SH wasn't really operating as a fully independent corp, but was treating as an agent.
      - i. Control of the corp by  $\Delta$  that's so complete as to amount to total domination of finances, policy, & business practices such that the controlled corp has no separate mind, will, or existence.
      - ii. Such control is used to commit a fraud, wrong or other violation of  $\pi$ 's rights.
      - iii. Control & breach of duty owed to  $\pi$  was a proximate cause of the injury.
- b. **Alter Ego Approach** (CA/IL formulation)
- i. If you don't respect fact that corp is a separate person w/separate assets & separate needs, then court wont either
  - ii. **Test** – ***Sea Land***
    1. Corp was the controlling SH's alter ego/Unity of interest & ownership AND
      - a. **Lack of corp formalities**
      - b. **Commingling of funds & assets** (using corp assets for personal use)
      - c. **Severe undercapitalization** (by itself not enough; some wrong beyond a creditor's inability to collect must be shown b/f the veil will be pierced)
        - i. The funds put into the corp @ the outset were clearly insufficient to satisfy existing contractual & likely tort obligations.
        - ii. All profits are drained out of the firm in the form of dividends or salaries paid to the controlling SHs, leaving it w/insufficient reseraves to meet its likely obligations.
      - d. **Treating corp assets as one's own**

2. Refusing to allow PCV would either (1) sanction fraud *or* (2) promote injustice
    - a. It's not enough that corp can't pay its debts.
  3. **Sea-Land** – hired to ship pepper, didn't pay bill,  $\Delta$  dissolved.
    - a. lack of formalities
      - i. Failure to keep separate corp books & records
      - ii. Failure to hold periodic bd or SH mtgs.
      - iii. Failure to appoint a bd of directors
      - iv. Failure to formally issue stock to SHs in the form of share certs.
- c. **Alter Ego Approach** (VA law)
- i. **Test**
    1. Undue domination & control of the corp by the  $\Delta$
    2. Corp was a device or sham used to disguise wrongs, perpetuate fraud, or conceal crime.
      - a. Appears to look for some element of **active or intentional misconduct** by  $\Delta$ .
- d. **General Guidelines**
- i. **Limited Liability**
    1. SH isn't liable for debts of corp even if foreseeable that corp can't pay & SH is
      - a. sole SH, dir, officer, or
      - b. parent corp
    2. SH can form corp & have that corp form a subsidiary to protect assets from liability – not a problem even if he owns the whole thing
    3. If sole SH is a corp it still enjoys limited liability as long as it's separately incorporated, adheres to formalities, etc.
  - ii. **Multiple Corporations**
    1. SH can own separate corps which do the same thing – not liable for each others' debts (as long as adhere to formalities & treat as separate entities)
  - iii. **Formalities/Money**
    1. Huge Deal – no piercing unless SH has failed to follow formalities & respect separate \$ of the firm.
- e. **Reverse Piercing**
- i. Must pierce b/f you can reverse pierce
  - ii. Claim: just as a failure to respect formalities should mean SH is liable, the failure to respect formalities b/w the SH and other corps should allow  $\pi$  to pierce the other corps.
  - iii. **Reasons to reverse pierce**
    1. He gets SH's shares in other corps
    2.  $\pi$  gets priority in liquidation; turns  $\pi$  into creditor & is then equal w/other unsecured creditors.
  - iv.  **$\Delta$ 's arguments!**



Aguero – Arlen Corp.

1. Probably taking \$ *out* of the firm that  $\Delta$  owns half of (if not sole SH in other firms) & putting *into* the firms that he owns all of
2. Unjust to pierce unless they have good evidence that the \$ was going *into* the other firms.

## VIII. Centralized MGMT

- a. **Centralized MGMT** – Standard governance model that structures the corporation’s internal relationship among SHs, directors, & officers
- b. **Pwr to Amend Bylaws - § 109**
  - i. Default - Shs have the pwr to amend bylaws if no provisions.
  - ii. Allows cert. provision that board can amend too.
  - iii. Can’t remove SH pwr to amend & give bd exclusive pwr
- c. **Special Meetings** – pwr from cert
  - i. What are they for?
    1. Something other than the annual mtg (dir’s elected at annual meeting)
    2. Mergers, SH approval, etc.
  - ii. Who can call them?
    1. § 211(d) – Default on who can call a special mtg: Bd or Dirs
    2. § 211(a) – annual mtgs held at time & place designated by cert or bylaws or, if not so determined, by the bd.
- d. **Removing Directors**
  - i. § 141(k) – SH may remove w/or w/o cause
    1. If removal w/cause, bd member must be provided notice & an opportunity to be heard.
  - ii. SH entitled to elect the bd members
  - iii. Removed by a maj. vote (unless cumulative voting)
- e. **Replacing Directors**
  - i. § 223 – vacancies may be filled by the board
  - ii. SH have inherent power to replace.
- f. **Electing Directors**
  - i. **Standard** –
    1. 3 options: (1) vote for all nominees for director; (2) withhold support fo all of them; (3) withhold support from specified directors.
    2. Typically elected annually
    3. **Plurality** – Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the mtg & entitled to vote on the election of directors.
      - a. **Plurality** – The individuals w/the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election.
    4. **Majority** – Directors who received a maj. of withhold “votes” are req’d to submit their resignation to the board.
    5. § 216 – A bylaw amendment adopted by SHs which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the bd of directors.
  - ii. **Cumulative Voting** – An alternative mechanism for electing the bd of Dirs that can assure board representation for the minority

1. The number of votes each SH may cast is determined by multiplying the number of shares owned by the number of director positions up for election.
2. Each SH may concentrate his votes by casting all of his votes for one candidate (or distributing his votes among 2 or 3 candidates).
3. The directors receiving the highest number of votes will be elected.

**g. Classified Boards**

- i. Cert or Bylaws may provide for a “classified” or “staggered” board of directors
  - ii. **Classes** – (serve 2 years) only half the bd is up for election in any given year; (serve 3 years) only 1/3 of the bd is up for election annually.
  - iii. Can delay a change of control – could take several years before maj. of bd can be replaced.
  - iv. Typically coupled w/add'l terms reserving to the bd the sole right to determine the number of directors & fill vacancies; limit or abolish right of SHs to call a special SH mtg or to remove directors w/o cause.
- h. Manson** – 2 SHs, one will become gen. mgr for a year; renders bd powerless in terms of mgmt decisions for the company
- i. SH attempting to exercise managerial power is **not** appropriate. SH can't remove that pwr from the dir's.
  - i. § 141(a) – gives bd ultimate managing auth (*experts*)/ **separation of ownership & control**
  - j. § 141(c) – allows bd to delegate certain decision making auth to a committee of the bd.
  - k. § 142 – officers duties are provided for in bylaws or in bd resolution (not inconsistent w/bylaws)
  - l. § 351 – allows closely held firms to put in their cert. that SHs manage.

**m. SH Powers**

- i. **Amendments to Cert - § 242**
  1. Veto right – not a right to recommend in the 1<sup>st</sup> place
  2. Bd must first approve amendment
  3. Need maj. outstanding shares (**§ 242(b)**)
  4. SH can't unilaterally propose an amendment of the cert – the bd *has* to propose it, o/w the SH can't get it done.
- ii. **Approve Mergers - § 251 / Sale of substantially all assets - § 271**
  1. SH can't unilaterally suggest merger – no bd vote, no merger.

| <b>Having Bd Manage</b>   |  |
|---|--|
| <b>Pro</b>  | <b>Con</b>   |
| Experts (board) run the firm – SHs don't need to know how to manage a firm<br><hr/> Bd has fiduciary duties to the firm as a whole, not just any one SH | Agency Cost – Bd may not be doing what's in the best interest of the SH; particularly bd members who are also officers of the firm <ul style="list-style-type: none"> <li>- Bd sets officer salaries</li> <li>- Officers more likely to do things in their own interest than an outside director</li> <li>- Officer has a greater financial stake in job than outside directors b/c ODs have another job.</li> </ul> |

## IX. BJR!

- a. Creates a legal presumption that the bd acted w/due care & reasonable belief in benefit of corp, etc.
  - i. Procedural Rule – puts burden of proof on  $\pi$  to rebut that everything bd did is okay.
- b.  $\pi$  challenging an action by the board faces the presumption that the bd was:
  - i. Disinterested (Duty of Loyalty)
    - 1. Has to show – there was self-dealing or domination by someone w/a financial interest
    - 2. Has to show – not in good faith: fraud, illegality, or conflict of interest.
  - ii. Acted w/due care in that they made an informed decision (Due Care) and...
  - iii. Acted in the rational good faith belief that action is in best interests of corporation
    - 1. Has to show – waste
- c. **Disciplining Mgrs**
- d. Outside Corp. Law
  - i. **Market for Mgrs**
    - 1. Want to do a good job b/c makes it more likely they'll get hired elsewhere, they have reputations, etc.
  - ii. **“Carrots” – Incentive Pay**
    - 1. I.E. options – incredibly valuable if stock price goes up, but not valuable if stock goes down or stays same.
  - iii. **Market for Corp. Control – rt to sell**
    - 1. Right to sell shares to friendly/hostile suitor (takeover battle)
    - 2. If not managing well & the markets are reasonably accurate, share price will be lower than value of the firm
      - a. Creates opportunity for someone else who has figured this out – acts as pressure on mgrs not to undermanage, b/c know if don't do a good job, a raider will buy the firm
- e. Within Corp. Law
  - i. **“Sticks” – threat of liability**
    - 1. If breach of duties (DOL/DOC) can be sued for dmgs.
  - ii. **Rt to Vote** the bums out of office (proxy battle)
- f. **Fiduciary Duties**
  - i. **Duty of Care**
    - 1. Regulates thoroughness & diligence in deliberations
  - ii. **Duty of Loyalty**
    - 1. Regulates self-dealing transactions by mgmt
  - iii. **Duty of Good Faith**
    - 1. Regulates indifference toward corporate welfare
    - 2. Currently component of Duty of Loyalty (*Stone*)
  - iv. **Duty not to Waste**
    - 1. Regulates decisions that destroy corp. assets
- g. **Statutory Manifestations of BJR**
  - i. **§ 141(a)** – Powers of the board to manage corp.
  - ii. **§ 141(c)** – Powers of delegation to committees/experts
  - iii. **§ 141(e)** – Board members are “fully protected” in relying on opinions & information generated by committees or others competent to render such opinions/info.
- h. **Waste & Due Care**

- i. Prongs #1 & #2 preclude ct from looking at merits of the underlying decision unless there's a defect in process
  1. Lack of disinterestedness
  2. Gross negligence in *how* decision is made
- ii. Prong #3: ct can review merits
  1. Was this decision in best interests of corporation
- iii. **Barlow** – Mfr co. made a donation to Princeton & SHs not happy
  1. SH: “not a business venture in the best interest of the biz”
  2. § 141(a) – gives auth. to manage → make a profit → best interests of the firm.
  3. **Ultra Vires** – limits on the bd's pwr to act; no auth.
  4. § 122(9) – grants firms the pwr to make charitable donations
    - a. Power ≠ Right
      - i. Although you can make contributions, this one itself isn't w/i the bounds of a bd's fiduciary duties.
      - ii. Power still constrained by your fiduciary duties to benefit the firm.
- iv. **Dodge** – Ford spending lots of \$\$
  1. Firm is designed to make money, & giving money to employees is **Ultra Vires**. Ford, “too much \$ being made”
  2. Ford had huge turnover b/c the job was boring, so he gave them raises so EEs wouldn't leave.
- v. **Wrigley** - Δ felt baseball s/b played during the day – didn't install lights.
  1. Not a profit decision; SH doesn't win b/c ct wont question reasons
- vi. **Kamin** – π thought it would be more beneficial if Amex took tax write off if they sold the DLJ shares.
  1. Bd doesn't make an uninformed decision
  2. Shows **strong presumption**

#### X. Challenges to Disinterested Bd Actions

- a. Derivative Action – SH brings action as the corp. Dmgs go to corp.
- b. Direct Action – Harm to particular SH.
- c. BJR narrows substantive claims – largely insulates bd for bad jment.
  - i. Directors protected if an *informed* decision
- d. **Van Gorkem** – Board not **fully informed**
  - i. Test – Bd must get all material information reasonably available to them as a standard.
  - ii. Standard of review – Gross negligence
  - iii. “Market Test” wasn't thorough b/c of the “no shop” clauses
  - iv. A fully informed SH vote could extinguish a due care claim; not the case here.
  - v. **Directors are liable unless they can show the deal was intrinsically fair.**
  - vi. Merger is a collective decision; When Maj. of SHs decide to sell, the rest of them(min. SHs) are req'd to sell.
  - vii. When you're selling the firm, the board needs to be negotiating the deals, not just the CEO.
  - viii. **π must prove price was unfair & it's b/c of dir's conduct that we got this unfair price.**
- e. **Cinerama** –
  - i. Once you show a breach of due care the **burden shifts** & dir's then have the burden of proving the deal *was* fair.
- f. **Disney** – new CEO; no fault termination; bd doesn't object.

- i. **Waste** – test for waste is “Gift” – Term. fee (\$101 mill) looks like a gift
- ii. Did bd. have all the information reasonably available?
  1. Where bd shows they relied on an expert,  $\pi$  can only win if:
    - a. Directors didn’t rely on expert
    - b. Reliance wasn’t in good faith
    - c. No reasonable belief that advice was w/i expert’s competence
    - d. Expert not selected w/reasonable care or on behalf of the corp.
    - e. Material/reasonably available fact was so obvious that board’s failure to consider was GN regardless of experts advice.
- iii.  $\pi$  has to amend their complaint b/c
  1. Ct, “there’s no substantive due care claim in DE. Can’t claim bd breached by making a bonehead decision – waste standard not met. Not a gift, CEO said he wouldn’t come to Disney *unless* he had that term. protection.
  2. SH can seek corp. records as long as they have a proper purpose (i.e. fiduciary duty breach claim)
  3. **102(b)(7)** provision – Bad Faith
  4. Bd is entitled & had delegated the decision to the committee & rely on their decision.
  5. Compensation committee exercised informed jment b/c they made the decision. The *whole* board didn’t have to be informed.
  6. Best Practices – figures cost of the difference scenarios.
  7. **Legal requirement isn’t “best”** – the board met the min. Their breach is that they were **Grossly Negligent**”
  8.  $\pi$  can proceed w/a cause of action for bad faith even if there’s no self-dealing or illegality – subjective bad intent; bad faith can’t be used as a backdoor way around **§ 102(b)(7)**
    - a. **Bad Faith** – Only bad faith when you fail to act & you have a *duty* to.

#### XI. Director Inaction; Failure to Supervise

- a. **Francis** – Depressed wife inherited biz from husband & 2 sons ran it
  - i. **Nonfeasance** – BJR applies to action sby the be of directors; biz decisions by the bd, t/f BJR doesn’t apply, this is a pure inaction case – when’s there’s something out of the ordinary, you have a duty to ask!
  - ii.  $\Delta$  - wife only owed a duty to her SHs & the wrongdoers were the SHs; The  $\pi$ s are creditors & she didn’t breach a duty to them b/c she had no duty to them.
  - iii. Ct, “must show that if she said ‘stop’ to sons they would have.”
  - iv. Directors have a basic duty of oversight & if they get notice of wrong doing, they have a duty to inquire.
- b. **Graham** – (Allis Chalmers) bd on notice of crime; compliance program
  - i. No reason to spend \$ to detect & deter wrong-doing that they have no reason to think will happen.
  - ii. CT – No Notice
    1. Most of Bd. not members at time of original consent decree & one bd. member who did know did an independent investigation & concluded that firm hadn’t committed a crime.
    2. Not req’d to adopt a compliance program – entitled to rely on integrity & honesty of subordinates until something occurs to put them on notice of a problem.

- iii. **After Graham** – DOJ would refrain from prosecuting corps that have good compliance program – mitigates. Also mitigates if firm reports wrong, cooperates, & accepts responsibility.
- c. **Caremark** – **failure to oversee compliance program**
  - i. Standard of Review – Systemic Failure to Exercise Oversight
    - 1. Assumes most directors want to do the right thing. If the Directors are systemically exerting no oversight & failing to attend to their duty – they are liable.
    - 2. Looks at DOJ policies – more effective.
- d. **Stone** – **Dirs have a duty to adopt an info. reporting sys. & oversee its operations.**
  - i. π must show a **conscious disregard** for their duties.
  - ii. Good Faith → Duty of Loyalty; knowing failure to serve the firm, not just a bad decision.
  - iii. **Failure to serve your P counts as being disloyal**

## XII. Leaving the BJR – DE § 144

- a. Once out of BJR transaction can be voided *unless*:
  - i. “Cleansed”
  - ii. Deal is fair to the firm.
- b. **DE § 144** – Burden on Dir to show “Cleansed”
  - i. (1) Transaction was approved by a vote of fully informed disinterested Dirs
    - 1. Material Facts!
    - 2. Doesn’t require disinterested Dirs be a maj. or the board (one Disint. Dir enough)
  - ii. (2) Majority of fully informed SHs
- c. Fair Deal
  - i.
- d. (1) Is corp entitled to void/enjoin transaction on the grounds that it’s the product of a duty of loyalty violation.
- e. (2) Which directors can SH sue for dmgs? A director who didn’t violate a fid. duty (and wasn’t informed of other Dir’s interest) will not be liable.
  - i. Any transaction b/c corp & an interested director (self-dealing) was voidable b/c of **ultra vires**.
  - ii. Corp is entitled to the disinterested judgment of every board member. The minute one has an interest – VOID!
    - 1. Can survey the rest of the board
    - 2. Concern they won’t exercise true independent judgment.
- f. Voidable **unless** conflict is **disclosed** & board can show it’s fair to the firm.

## Fiduciary Duties: Duty of Loyalty

### XIII. Self-Dealing Transactions (No Controlling SH)

- a. Rebutts Prong 1 (disinterested) of BJR.
- b. Bd. member obtains financial gain disproportionate to whatever gain gets as SH.
  - i. Member is “dominated” by someone who gets a gain (i.e. they could fire them)
  - ii. Member owed fid. duty to someone w/a material stake (i.e. dir. of firm on OTHER side of transaction)
    1. **Once you leave BJR → DOL analysis!**
  - iii. (1) – Voidability – can corp thru a SH deriv. suite void out or enjoin transaction?
  - iv. (2) – Which Dirs can be sued? – look at each individual dir and discuss whether they each violated fid. duties
    1. Dir who didn’t violate fid. duty wont be liable.
- c. **Lewis** – Lease ends; change of ownership
  - i. **Fully Informed** =
    1. Material Facts of Transaction &
    2. Director’s Interest in the Transaction
  - ii. If Directors can show **Fair Deal** despite not being fully informed of Director’s interest (Fair Deal/Fair Price) – avoid voiding.
    1. Fairness Review – ct will make a biz decision based on experts.
      - a. CON – Dirs afraid of hindsight bias & Cts don’t want to be making these decisions.
  - iii. **How to Cleanse!**
    1. It is approved by maj. of disinterested Dirs **after** disclosure to Dirs of the material facts of the conflict & the transaction **OR**
    2. Disclosure to the SHs & approval **O/W**
    3. Statute says Dirs can show the transaction was “fair to the firm”
- d. **Bayer** – Rayon v. “Celanese”
  - i. Ct – looks at fair deal & fair price. Deal not all that great (not taken up at formal bd. mtg) but price looks good – she can sing just as well as the next singer.
  - ii. DE § 144 wouldn’t have let this go.
- e. **Benihana** – Family firm case
  - i. Rocky controlling SH → transfers stock to Trust for kids & atty → remarries & leaves corp to new wife
  - ii. Kids sell more stock to dilute wife’s shares
  - iii. Material Facts – a member of the bd. of the negotiating corp knows Benihana’s bottom lines & Ben. not fully informed of this → Deal still fair
  - iv. DE shows it wont be excessively aggressive in imposing liability.
  - v. Ct recognizes  $\pi$  (Rocky) not objective; sues so he can maintain control not to act on behalf of the firm.
    1. **Bad Faith** – nope, you need \$ to renovate, too speculative that the real reason they’re doing this is entrenchment.
    2. **Fully Informed** – in a non-controlling SH case, maj approval of fully-informed disinterested dirs puts you back in BJR.

### XIV. Corporate Opportunity

- a. Officer of Dir has a business opportunity presented to her & she pursues it on her own & firm feels she took their opportunity.



- i. Firm not entering into a transaction – **NEVER UNDER BJR.**
- ii. Interest; necessity; expectancy of the firm.
- b. **Guth v. Loft** –
  - i. DE § 144(a) –
  - ii. As a CEO – technically anything that comes to him comes to the firm
  - iii. Is the opportunity presented to the CEO or the firm?
  - iv. Where a corp. is engaged in a certain biz, & an opp. is presented to it embracing **an activity as to which it has fundamental knowledge, practical experience & ability to pursue**, which, logically & naturally, **is adaptable to its biz** having regard for its financial position, **and** is one that is **constant w/its reasonable needs & aspirations for expansion**, it may be properly said that the opp. is in the line of the corp’s biz
- c. **Broz** – “Nature of Rejection”
  - i. Δ learned about the opportunity in his OTHER capacity.
  - ii. CIS not interested in expanding & financially incapable of buying the license & Loan agreement blocks them from taking on more debt.
  - iii. Cts reluctant on letting Δ off on financial incapacity grounds → want Δ to **ask** b/c if it’s a great deal, firm can usually get \$\$ for it.
  - iv. π – pre-cellular: wanted to expand & had financial capacity to.
- d. **eBay** – IPOs underpriced but more people want to buy them than there are shares.
  - i. **Line of Business test**
  - ii. “Give us your firm’s biz & we’ll give you IPO shares”
  - iii. If the CEOs weren’t w/eBay they wouldn’t be given the deal on the IPOs.
  - iv. Duty to account for profits arising out of agency relationship.
  - v. Looks like a kickback – you give us biz & we’ll give you something in return.
  - vi. Coming to them in their fiduciary capacity; not their individual capacity.

## XV. Self-Dealing by a Controlling SH

- a. **Sinclair** –
  - i. If you file a fid. duty suit, you better specify what the claim is:
    1. Sinven is harmed by payment/draws it of case & Sinclair is doing it for an improper motive – just ‘cause it needs the cash
    2. Sinclair usurping corp. opportunity from Sinven
    3. Contracts gave Sinven certain rights – the rights were worth \$ & when Int’l breached it cost Sinven \$ & Sinclair owed Sinven a Fid. Duty to enforce the contract rights & they didn’t for bad motives.
- b. π – Sinclair has the burden of showing fairness
- c. Δ - not attempting to contest “fairness”; just saying you’re under wrong rule; s/b BJR.
- d. **When there’s a controlling SH ct limits the use of “fairness” to self-dealing transaction. Absent self-dealing we’ll BJR it.**
  - i. **Test of Self-Dealing** – if parent getting something that’s different on a pro-rata basis than the other SHs – SD likely.
- e. Sinclair WAS getting more on a per share basis BUT:
  - i. It’s not what the corp. “gives”, it’s what the SH “gets” b/c of taxes, etc.
  - ii. If the same going out → BJR it
    1. Informed, waste, etc.
- f. π: bad motive!
  - i. Can’t be proven up to the point of waste
  - ii. As long as you say it’s for the firm, then you’ll be fine (it can’t expense the firm)

- g. Corp. Opportunity Claim – other oil ventures.
  - i. Sinclair took opp. away from Sinven & gave it to other subsidiaries
  - ii. **Line of Biz Test:**
    - 1. Opportunity didn't come to  $\pi$
    - 2. Not consistent w/plans for Aspiration b/c Sinven only Venezuelan Co.
      - a. NOT a corp. opp.
- h. Contract Claim – issue of enforcement
  - i. Sinclair shifting \$ to Int'l from Sinven by not enforcing & other Sinven SHs don't get benefit b/c Sinclair sole SH of Int'l.
  - ii. Burden Shifts → Sinclair has to show decision not to enforce was fair to min. SHs of Sinven
  - iii. **Controlling SHs can be subject to same Fid. Duties as bd. members when they are controlling the bd.**
    - 1. Test: **Duty of Loyalty**
      - a. Benefit measured by amt leaves firm
        - i. If Benefit → issue; burden shift.
        - ii. If No Benefit → Rest of BJR (2) duty of care; (3) waste, etc.; burden on  $\pi$  to show fairness.
    - 2. Need 2 conditions to go to **fairness**
      - a. (1) Controlling SH &
      - b. (2) Self-dealing transaction as to that controlling SH
    - 3. **If controlling SH & not self-dealing – apply BJR.**

## SH Enforcement of Fid. Duties

### XVI. Direct v. Derivative Suits

- a. Derivative Suits (more common)
  - i. Sues on behalf of firm
  - ii. Sues firm to induce them to sue the bad guy.
- b. Direct Suits
  - i. Often Class Actions
- c. Distinctions:
  - i. Remedy goes to firm in Derivative, not SH
  - ii. Procedural Impediments in Derivative
  - iii. Firm pays atty fees of successful Derivative suits
- d. Bd. decides when to bring suits & are disinclined to sue themselves.
  - i. Because remedy goes to firm & not SH, firm gets \$, then SH won't sue a lot if they bring suit & pay the expenses b/c no one SH benefits from bringing suit if they have to pay the cost.
  - ii. Claims that the firm is harmed should properly come from the bd.
- e. **Cohen** – Diversity claim filed in fed court
  - i. uses NJ law
- f. **Advantages of deriv suits:**
  - i. *Possibly* more attractive damages
  - ii. Undoubtedly more attractive fee allocation:
    1. Default: one-way fee shifting (if SH wins)
    2. Let you get your atty fees paid if you win.
- g. **Disadvantages of deriv suits:**
  - i. Bonding/security (many states)
  - ii. Contemporaneous holder rule
  - iii. Demand req – can't sue unless you can show that board can't make this decision in the firm's best interest
  - iv. Trumping power of special litigation committees
  - v. Damages go to corp. & not directly to SHs
    1. But see Perlmann (we will get to this)
  - vi. Ct approval of any settlement
- h. **Eisenberg** – SH of FT → forms FTC which forms FTL (FTL & FTC merge) → SH of FTC.
  - i.  $\pi$  – restructure deprived him & other SHs of their voting rights.
    1. He can no longer vote on FTL's decisions (that's done by its BoD + SHs)
    2. He CAN elect bd. of FTC which elects bd of FTL but he CAN'T vote if FTL is merging w/another co (only FTC)
  - ii. Ct. rejected **Gordon** test – designed to pull things under deriv. action
    1. Looks at whether remedy sought is to compel performance of corp (derivative).
  - iii. Ct. uses **Lazar** test
    1. Direct Action – if SH asserting claim that right to participate in governance is impaired.
    2. Must ask, “what kind of harm is being asserted?”
- i. **Test in DE (Tooley)**
  - i. (1) – Nature of the alleged wrong
    1. Who suffered the alleged harm (corp or SH individually)
    2. Can SH show an injury to himself w/o showing a wrong to the corp?

- ii. (2) – Who would receive the benefit of any recovery or other remedy (the corp or the SH individually)?
  - 1. Monetary v non-monetary recovery
  - 2. If Dmgs paid to corp → Derivative
  - 3. If Dmgs paid to SHs → Direct
- j. **Grimes** – An **abdication claim** can be stated by a SH as a direct claim, as distinct from a derivative claim.
  - i. When a SH demands the bd. of dir. take action on a claim allegedly belonging to the corp. & demand is refused, the SH may not thereafter assert that demand is excused w/respect to other legal theories in support of the same claim, although the SH may have a remedy for wrongful refusal or may submit further demands which aren't repetitious.
  - ii.  $\pi$  argues abdication claim is not derivative but direct b/c
    - 1. Relief sought doesn't benefit corp.
      - a.  $\pi$  seeks a declaration of the invalidity of K, not money for the firm.
    - 2. Wrong alleged is that abdication violated contractual duty to SHs to mng Corp.
      - a.  $\pi$  says K meant dirs weren't managing the firm, which they were obligated to do → direct action.
  - iii. Ct – NOT direct
    - 1. BoD didn't technically agree not to mng
    - 2. BoD didn't abdicate K obligation to mng
    - 3. BoD can make it expensive for it to act.
      - a. Falls under BJR.

## XVII. Derivative Suits: Demand Requirements

### a. Procedural Hurdles

#### i. Standing Requirement

1.  $\pi$  must be at least a beneficial SH for the duration of the suit (continuous ownership rule)
  - a. At time of wrong & time of suit
2.  $\pi$  must fairly represent the corp.
  - a. Contemporaneous ownership rule:
    - i. SH must have been SH at time of wrong
    - ii. Don't want  $\pi$ 's buying into litigation

#### ii. Bond Requirement

1. In some states (not DE), deriv. claimant w/"low stakes" must post security for corp's legal expenses.
2. Deter frivolous suits
3. Bond may apply to a DE corp if SH sues in a jurisdiction that has a bond in fed ct.

#### iii. Demand Requirement

1. Has to file a written request w/bd. to sue.
2. DE: if you make a demand on bd. you are conceding demand was required & if board says "no" you have to file an inappropriate refusal claim.
3. Unless you show demand requirement doesn't apply to you – excused.
  - a. Turns on does a maj. of the bd face a conflict of interest?

### b. **Aronson** – **FUTILITY TEST** – used when bd. sued same as BoD that made challenged decision.

- i.  $\pi$  must plead w/**particularity** that they were justified in not making demand b/c it would have been **futile** & there's **reasonable doubt** that BoD can make independent decision.
  1. (a) Majority of BoD interested
  2. (b) Majority of BoD dominated/controlled by someone who gets personal benefit from transaction
    - a. Look for evidence that could threaten directors.

### OR

3. (c) Challenged transaction isn't a product of a valid exercise of biz Jment when it was decided upon..

#### ii. **Reasonable Doubt** – akin to concept that $\pi$ has a reasonable doubt that BoD lacks independence or that transaction not protected by BJR.

### c. **Rales** – When maj of current BoD NOT same BoD that made challenged decision.

- i. (1) Majority interested in underlying trans. or dominated by someone who is &
- ii. (2) BJR doesn't insulate demand requirement

### OR

#### iii. (3) Majority of BoD vulnerable to the lawsuit or dominated by someone who is ( $\Delta$ in the lawsuit to which the BJR doesn't apply)

### d. **Marx** – NY

- i.  $\pi$ : Claims
  1. Outside director compensation excessive

2. Inside director compensation excessive
- ii. (1) – Maj. was self-interested → Demand Excused → Ct. find  $\pi$  fails to allege w/Particularity that company was interested so failed to state cause of action.
- iii. (2) – Maj. was not self-interested → Demand Required
  1. NY **Demand Excused Test**
    - a. (1) Maj. interested/controlled
    - b. (2) BoD didn't fully inform themselves
    - c. (3) Challenged transaction wasn't product of BJR
      - i. Diff. from DE test – got rid of “reasonable doubt” standard.
      - ii. Case would come out the same in DE though.

#### XVIII. Role of Special Committees

- a. Special Litigation Committees (SLC)
  - i. Response to demand requirement
  - ii. Only need to show reasonable doubt that the BJR doesn't apply.
  - iii.  $\pi$  doesn't make a demand on the theory that demand is excused → untainted members of the bd (members can resign & get new members)
  - iv. **DE § 141(c)** – allows bd. to delegate to a subset committee of the bd.
  - v. If SLC violates BJR, interested, uninformed, etc, ct. will ignore their decision.
    - 1.
- b. **Auerbach** – NY – Allegations coming out of the Foreign Corrupt Practices Act
  - i. Criminalizing something in the US even though the act takes place abroad.
  - ii. Corp did an internal audit. Provision that requires bribery be reported.
  - iii. SH files derivative suit for breach of fid. duty against wrong doers & oversight.
  - iv. Committee decides not to sue after investigation & hiring outside counsel.
  - v. Reasons ct. might ignore:
    1. Bd. selects SLC
      - a. Maj. of bd is interested & demand is excused
  - vi. SLC not put on until suit is happening & put on by those being sued.
- c. **Zapata** – SLC fully vested w/auth. - **DEMAND**
  - i. Court recognizes committee is selected by the bd. being sued, about to pass Jment on guys sitting on bd. w/, & **it's personal** – might be inclined to dismiss the der. suit.
  - ii. Must look at bd. when complaint was filed to determine if bd. disinterested.
    1. Whether  $\pi$  can plead particularized facts creating a **reasonable doubt** that a maj. of the bd. interested in transaction or lawsuit.
    2. BJR wont apply to underlined transaction if bd. not fully informed.
  - iii. **Test** – Bifurcates Demand Excused & Demand Required
    1. Demand Excused:
      - a. Shifts burden to bd.
      - b. Bd. can get out if they can show BJR attaches.
      - c. Ct. scrutinizes reasonableness of bd's investigation.
- d. **Oracle** – sued for breach of duty by insider trading
  - i. SLC moves to dismiss complaint.
  - ii. 2 pronged **Zapata** test.
  - iii. There were omitted facts – failure to disclose look *bad*; makes judge mad.
  - iv. **Judge Strine Test** – Whether a director is for any material reason incapable of making a decision w/the best interests of the corp. in mind.
    1. Not limited to material financial interest
    2. Both SLC members run in the same circles as the bd.
- e. **Beam** – Martha Stuart sold her own shares.

- i. Ct – not a corp. opportunity.
- ii. **Individual Capacity** – Opp came to HER in her indiv. capacity as SH; not in her corp. capacity as director.
  1. Compare to **eBay** – coming to these guys in their fid. capacity
- iii. **Line of Biz** – Incidental to MSOs line of biz; not core to what they do.
  1. Compare to **eBay** – eBay heavily involved in investing; core activity of the firm
- iv. **Competition** – not coming to Martha w/an opp. NATURALLY belonging to firm; not coming w/the only opp to sell stock (firm could sell stock on the market). MSO didn't NEED to raise \$\$ - not competing w/something firm really wanted to do.
  1. Compare to **eBay** – Narrow situation b/c of relationship w/firm. It's the kind of thing firm would do; part of its Line of Biz; & it's a usually profitable & unique opp. not o/w available.

XIX. **Challenges to Board Action Revisited: Good Faith & Loyalty.**

- a. **Tyson** – “Spring Loaded” options; “at the money”
  - i. Fed. Law – “insider trading” – benefiting from your position 10(b)(5)
  - ii. State Law – failing to acct. for profits arising out of agency relationship to the firm.
    1. Dirs have right to share info. w/execs – if bd. is truly disinterested they can approve a benefit like this. (Fed law says NO but State law says OK)
  - iii. DE reads the **letter** of the SH approval **and** the **spirit**.
    1. SHs said “in the money” okay so technically Dirs allowed, but it was a half-truth which constitutes a fraudulent statement.
- b. **Duty to Report** – hypo w/crime & 2 companies; who gets to report & retain fewer costs?
  - i. Duty of Care Claim – notice of crime & had a duty to stop it. Waiver in Cert. – duty to stop damage is all harm that happens after you have notice.
    1. Wrong from when you notice crim & fail to intervene is different from reporting crime for other company.
      - a. No evidence wrong keeps going after notice.
    2. Failure to report looks like **Corp. Opportunity**.
      - a. Had a valuable right to report & instead of giving it to firm gave it to someone else who got the \$\$ from it. – other firm unjustly enriched.
      - b. Took something valuable & gave it to someone else.
        - i. t/f if claimed as a corp. opportunity, entire amt. is the amt. you s/b getting back.
- c. **Ryan** – π pleading backdating on circumstantial evidence
  - i. **Backdating**
    1. Structure & form of the compensation & failure to disclose to SHs
    2. At its core – a disclosure wrong.
  - ii. **Derivative** b/c firm is being forced to pay more \$ than what they in actuality thought they should've paid – Directors are circumventing SH oversight, but remedy sought by SHs is \$ back to the firm.
    1. **Aronson Test** – compensation committee (approving Dirs) is ½ (or more) of the entire board. – BD THAT MADE THE DECISION THE SAME.
      - a. Use if current bd isn't disinterested (50/50); attribute to full bd. of committee.
      - b. **(Rales Test – NEW BOARD)**
  - iii. Compensation Committee informed & not backdating their *own* options (no financial benefit). Not waste b/c incentives for hard work.

1. CT: BJR doesn't apply b/c Ultra Vires act – SH granted auth. to approve options.
2. “Bad Faith”; one thing to not have auth. to do it, another to have bad faith. Bad faith is a breach of fid. duty.
  - a. Knowing & intended act that's contrary to the duty they have to the firm.
3.  $\pi$  has alleged facts that would raise a reasonable doubt the bd. made a valid exercise of biz. Jment.
4. ALL circumstantial evidence but stats so overwhelming there's **reasonable doubt**
  - a. Once  $\pi$  gets passed demand they can get discovery & likely prove their claim.



### Proxy Contests: Purposes & Reimbursement

Proxy Contest – A strategy that involves using SH’s proxy votes to replace the existing members of a corp’s BoD. By removing existing Bd members, the person or company launching the proxy contest can establish a new BoD that’s better aligned w/their objectives.

- (1) – Acquiring company &/or grp of major SHs launch proxy contest against target company.
- (2) – These investors threaten to use their proxy votes to make target co. comply w/their wishes.
- (3) – If successful in gathering enough proxy votes, the acquiring co. can then elect new BoD using proxy ballots.
- (4) – The newly installed bd. members will be much more agreeable to the takeover or merger, & eventually the deal is finalized.

### XX. The Voting System

- a. Proxy Voting – allows SHs who have confidence in the Jment of others to “stand-in” & vote for them on corp. governace matters such as the election of bd. members.
- b. **Levin** – PR firm hired to fight against take over
  - i. Ct: you can spend corp \$ to keep your job – defend corp policies to the SH – as long as it’s a **policy issue** & not purely personal.
    1. Strong policy in favor of SHs being fully informed – corp s/b able to spend resources to do this.
    2. Indiv bd members might not have incentive & funds to do this on their own..
    3. o/w good bd members might not run
    4. Bd can decide what’s right for the firm until ousted
  - ii. Must be a contest for **corporate policy**
    1. Can be pretty much anything unless they say “they plan to pursue *exact* policies as current guys but i don’t like them”
  - iii. Must be a **reasonable amount**
    1. Mgmt gets to spend SH \$ up to a limit that court deems reasonable – bigger firm = more \$ b/c bigger stakes, more SHs, etc.
- c. **Rosenfeld** – Insurgents want to reimburse old bd then get compensation for their own expenses. New dirs not happy.
  - i.  $\pi$ : 2 problems when looking at bd seeking to reimburse itself
    1. Self-dealing – solved w/SH vote
      - a. 144(a)(2) – suggest that Maj. of disinterested SH can approve
    2. Ultra Vires – need unanimous SH approval.
      - a. No consideration – already got gift!
  - ii. Ct: nope, just needs maj. vote.
  - iii. **When an incumbent bd compensates itself for expenses in a proxy fight challenge:**
    1. Expenditures are reasonable, proper, good faith
    2. Contest concerned **corp policy**, not **personal fight**
  - iv. Rule for **Challengers/insurgents**
    1. Challengers must be successful
    2. Need approval by Maj. of disinterested SHs

### XXI. SH Inspection Rights

- a. Governed by **DGCL §§ 219 & 220**
  - i. **Federal Rules**
    1. Securities laws have mandatory disclosure for publicly held firms; so can get basic finances of the firm.

2. 14a-7

- a. Can get list of SH (SH entitled to vote at the mtg)
- b. Entitled to ask mgmt for it, mgmt req'd to give it unless they want to mail mat'l themselves at SH expense.

ii. State Rules

1. § 219 – SH List

- a. At least 10 days b/f a mtg, firm req'd to post list of SH open to any SH “for any purpose germane to the mtg”
- b. BUT 10 days b/f the mtg isn't enough time to communicate

2. § 220 – SH Inspection

- a. Any SH shall have the rt. to inspect & copy “for any proper purpose” the corp's stock ledger, a list of SH & other books & records.
- b. Gives SH the rt. to inspect the stock ledger (ongoing list of who owns stock), the SH list (the list of record holders), & any other books & records – broad grant of inspection rts.
  - i. DE allows any SH to inspect (no min. SH req. or time req.)

ii. Limitations:

1. Has to be for purpose “properly related to such person's interest as a SH”
2. § 220 distinguishes b/w demands for SH list (which would allow to communicate w/other SH), & other corp. records.
  - a. Bd bears **Burden of Proof** to claim that SH doesn't have proper purpose to get SH list.
  - b. SH bears **Burden of Proof** to show that has proper purpose for other docs
    - i. Firm need to be able to protect itself.

- b. **Crane** – C wants to do a tender offer for A, but first wants to do a proxy contest for the bd to communicate w/SH why they should accept C's offer.
  - i. 11% of the SH tender so it satisfies the more than 5% req'd but A wont give C the damn list!
  - ii. Fed law says you can mail it but not St. law.
  - iii. C: we have right under St. Law! b/c we satisfied eligibility req. (5%)
  - iv. A: not a proper purpose for the company – not about corp. policy (C not changing how the corp is run, just getting rid of classified bd) – talking about something that benefits SHs t/f **private purpose**
  - v. Ct – Since this would affect the value of the firm (change in mgmt) SH decision will have material affect on the firm.
    1. Things that go to SH economic value (benefit for their shares) are a **proper purpose**.
    2. Don't want rule on SH lists to make takeovers hard – for purposes of communicating about tender offer, allows raiders to have access to the SH list. – **proper purpose**
- c. **Honeywell** – Pillsbury not happy about H's involvement in war; bought shares of H; wants to communicate w/SHs to tell them to stop being involved in war.
  - i. H – that's totally improper.
  - ii. P – SH that disagrees w/how the firm is being run has absolute rt to inspect corp. records for purpose of soliciting proxies.
  - iii. CT – **No proper purpose**

1. **Proper Purpose – economic**; not purely moral. Want to limit SH lists to ppl who have economic interest in the firm.
- iv. If framed as communication about the negative impact on H's stock then purpose.
- d. **Seinfeld** – SH wants books to see what execs getting paid b/c they think it's more than what their contract said.
  - i. Δ - excessive & wasteful
  - ii. Ct – while DE grants broad access to list of SHs for communication, it DOES NOT open doors to SH going thru **corp. records**.
    1. DE doesn't want to allow SHs to go on fishing expeditions.
      - a. It's expensive to produce info!
      - b. Once one SH gets info they ALL want the info.
      - c. SH can't be like, "It's my \$, i want to know!" they have to say, "I want to know b/c i think there's a wrong going on"
    - iii. SH doesn't have burden of proving waste, just showing a credible basis to think waste occurred.
      1. SH can't get discovery until they've crossed the **demand** threshold.
      2. § 220 is a way for SH to get what they need in order to show reasonable basis to file a complaint.
        - a. DE – in order to get records you **need** to cross the demand threshold – need reasonable basis. Sucks for getting what you need for a SH deriv. suit.
        - b. Still strong for proxy contests.

## XXII. Federal Law: SH Proposals

- a. Federal Regulation: Proxy Rules
- b. **Loveheim** – Geese hurting b/c of how pâté is made.
  - i. SHs requested study
    1. Uses mechanisms to announce to 1000s of people the awful way geese are being treated → gets attention.
  - ii. Directors don't want publicity so they seek to exclude under sml. stakes.
  - iii. SHs argue → even if they make less than 5% the "sml. stakes" clause states, "anything less than 5% **or** not o/w significantly related to the issuer's biz."
    1. Must be a *significant* policy issue that has a *NEXUS* w/firm's biz.
- c. **AFSCME** – Proposal submitted by SH for a bylaw amendment
  - i. CA says "No" b/c
    1. Violates state law
    2. Not proper subject for action by SH
      - a. b/c requiring bd. to take action that spends \$, not recommending.
      - b. AFSCME: we're just binding the bd. thru a bylaw!
    3. **SHs can amend bylaws but DE 141(a) limits**
      - a. Focus on if the bylaw requires bd. to take an action that might make it go against its fid. duty.
      - b. Bd's power to manage circumscribes SHs pwr to amend bylaw.
      - c. 141(a) doesn't keep SHs from amending all bylaws that would require \$\$.
    4. **Fiduciary Out Clause** – Dir. allowed to NOT take action if Dir. concludes it would go against their fid. duty.
      - a. **Bylaws can't regulate substantive biz issues; only procedural.**
- d. Exchange Act (**14a-8**)

- i. There're a lot of things SHs might want to communicate about that St. Law makes difficult.
- ii. Fed. law reduces collective action problem by allowing low cost communication w/the other SHs
- iii. Own at least 1%, etc. → Eligibility Requirements
  1. To prevent those who don't have a substantial stake in the firm.
- iv. Mgmt can include a reply to your 500 wd. proposal that's any length & has the right to exclude certain proposals.
  1. Mgmt has a BIG advantage.
- v. **14a-8(i)** – Bases for Exclusion
  1. Not proper subject for action by SHs under St. Law.
    - a. Are SHs seeking to do something they're not entitled to do?
  2. EXAMPLE: - **DE 141(a)** – gives bd pwr to mng & SHs are seeking to make a mgmt decision
    - a. Recommendations to bd. are okay
    - b. As long as bd. is fully informed & acts in good faith they are free to say “no” to the SHs.
  3. Re-frame as a bylaw (**DE 109**)
    - a. Still limited by **DE 141(a)** – circumvents **DE 109**
  4. Relates to ordinary biz operations
  5. Relates to election to office
    - a. Prevents you from putting in a slate of directors in the CO's proxy & mailing it out. **You can't nominate yourself or anyone else.**

### XXIII. Federal Law: Fraud Provisions

- a. Fraud causes harm via **reliance**
- b. Securities fraud prohibits people from lying on a Proxy – SEC could grant an injunction if violated.
- c. **Test** – was this a materially misleading statement & was proxy a significant factor in the SH decision-making?
- d. **Borak** –
  - i. S. Ct. says there's an implied right of action – default rule if there's congressional silence.
- e. **Mills** – **Transaction Causation Test**
  - i. (1) Materiality
    1. Something significant to the SHs; lower threshold of importance than if a SH would've voted o/w.
    2. Kind of fraud that induced the vote.
  - ii. (2) “Essential Link”
    1.  $\Delta$  needed the proxy in order to get the deal approved (usually b/c don't have quorum w/o it, w/o proxy couldn't be guaranteed get quorum = can't get deal done w/o it)
    2. **Not essential link if**  $\Delta$ s have enough votes to satisfy the vote requirement they can unilaterally get the deal thru
    3.  $\pi$  can recover dmgs if they can show merger caused a loss
      - a. Has to show merger itself was at an unfair price.
  - iii. Ct – Mgmt shouldn't be allowed to lie to its SHs. The person who wasn't fooled; the one who didn't have a belief is the one likely to bring the suit.
    1. If you require proof of individual reliance then there goes class action!
    2. There's a valid claim that the lie “hurt”  $\pi$  even though they didn't believe it.

- a. Variety of Corp. trans → once maj. decides to do it, everyone else is along for the ride & in the cases of a merger, must sell.
3. When  $\pi$  is suing in proxy fraud case – individual reliance no longer necessary b/c it has nothing to do with “did the lie cause the harm alleged”
  - a.  $\pi$  would have to testify on what they would've done if facts were different.
- f. **VA Bankshares** – Dirs solicited proxies but weren't req'd to
  - i. Mtg wont matter w/o proxies b/c no one will show up o/w & you wont satisfy the Quorum requirement
  - ii. Securities fraud based on misleading statements.
  - iii.  $\Delta$  - Can't sue on opinions that are non-specific (vague & confusing)
  - iv. Ct – There *are* situations where opinions aren't actionable, *but* this isn't one of them.
  - v. Bd didn't actually think it was a high price – their subjective intent is different.
    1.  $\pi$ 's cause of action is based on affect.
    2. They did it for some other reason all-together (high price v. keeping job).
  - vi. Not really hurt if lied about believed it was a high value, but it actually was a high value
  - vii. So if suing about a belief:
    1. Has to be material
    2. Defendant had to NOT believe it, AND
    3. There had to be something false or materially misleading about the subject matter (i.e. here, if could show that the firm was actually worth \$60)
- g. Exchange Act, Rule (10b-5; 14a-9)

## Controlling SHs

### XXIV. Sale of Control

- a. **Zetlin** –
  - i. Rejects **Equal Opportunity Rule** – Min. SHs are not entitled to be part of the deal.
  - ii. In the absence of an allegation that a SH is (a) looting corp. assets, or (b) has committed fraud or other acts of bad faith – **a controlling SH is entitled to obtain a premium price for the sale of a controlling block of shares**
- b. **Perlman** – Wait, what about the Feldman Plan?!
  - i. How does  $\pi$  argue that  $\Delta$  (SH) is liable, b/c if  $\Delta$  does something SHs believe is a good biz decision they can't be held liable.
  - ii. If W gets control of the bd. they may not follow the current biz plan; but  $\pi$  can't challenge W's decision.
  - iii. W will be selling to itself @ market price; could show price was fair BUT market price doesn't reflect Feldman Plan to require itself to provide interest free loans & prepay t/f self-dealing.
    1. W: by buying steel @ a lower price than what N. would've made using Feldman Plan = **looting**
    2. Feldman can't look the firm in his bd member capacity but he **can't knowingly profit from selling to someone he knows will use their managerial power to loot the firm.**
  - iv. Claim: Price – consistent w/**Zetlin**
    1. Feldman getting unjustly enriched b/c of his knowledge; he rec'd extra premium as a result of allowing someone else to loot the firm.
    2. Once you show this is the type of thing the firm had the ability to do & w/i line of biz it becomes  $\Delta$ 's problem to rebut.
  - v. Ct gives dmgs to  $\pi$ s not firm so W doesn't benefit.
  - vi. If controlling SHs know or are recklessly indifferent to whether looting will occur they are bound by a Fid. Duty; but absent that they are free to sell/buy & keep \$\$.
  - vii. **Damages** – this is a Deriv. Action but ct treats it as a Direct Action – lets SH recover individually, b/c if Feldmann pays the firm, he would disproportionately be paying W, which would be unjust.

### XXV. Freeze Out Mergers (& Appraisal Rights)

- a. Controlling SHs & their use of their pwr in a particular context.
  - i. Parent causes subsidiary to combine w/itself. Instead of offering Min. Shs shares in new combined firm they get cash & go away.
- b. **DE 262** gives SH a private action where he can send notice to the firm that he is going to object & seek **appraisal**.
  - i. SH values his shares & requests value of his shares.
- c. **Appraisal Action** → designed to protect SHs from the fact that other people might make a bad decision.
  - i. Requires each SH to file in advance, get their own lawyer, & pay their own costs.
  - ii.  $\pi$  to prove it wasn't fair; doesn't allow an injunction.
  - iii. **CLASS ACTION** – each indiv. class member doesn't have to be proactive. More likely that enough of them will be brought so that it'll/might discourage bad behavior.
  - iv. **Exceptions**
    1. If Shares are traded on a market exchange
      - a. Start w/premise that you don't get appraisal

2. Statute does allow appraisal if you're being cashed-out
  - a. Shares are publicly traded then you're "going along for the ride," but if you're being cashed out it kicks in.
- d. Min. SHs not entitled to the synergies coming from the merger or any share of/from them.
- e. **DGCL § 251** – Board approval and then SH vote.
  - i. Merger can go thru if approved by majority of outstanding shares (including interested SH)
  - ii. If merger approved, all SH must turn in their shares under terms of the merger (unless prior to vote they elected appraisal and voted no)
  - iii. Note: some situations where SH don't get protection by voting
    1. **Short form merger**
      - a. A short form merger is available if parent owns 90% or more of company's stock
      - b. Can merge w/o getting approval of SH vote
- f. **Appraisal remedy** – gives you value of firm w/o any benefits of the merger
  - i. \*\*If appraisal price is less than price offered in merger, you're stuck with the appraisal price.
  - ii. **Key:** gives fair value of stock as minority SH – NOT giving fair value of the benefits from the merger. You get the fair value of the share you gave up – i.e. value of the firm as if it didn't merge.
- g. **Appraisal rights (§ 262)** – statutory protection
  - i. When SH get proposal saying there is a merger, 2 choices: can vote yes or no
    1. If vote yes on merger → it's all over (can't vote yes and then say unfair deal)
    2. If vote no on merger → can file action seeking appraisal rights
  - ii. Gives SH who thinks the price is bad a private action – SH can send notice to firm that going to object and seek appraisal, and so long as holds his shares and does not vote yes on the deal, then if deal goes thru he can file an action in state court asking the court to give him the value of his shares.
  - iii. Appraisal action in theory is designed to protect SH from idea that other SH may make a bad decision
  - iv. Limitations:
    1. **Eligibility** –
      - a. Must hold shares on day you make the demand (can't buy into appraisal action)
      - b. Can't sell shares until merger becomes effective
    2. **Perfecting appraisal rights**
      - a. Must file notice of dissent from merger during 20 day window before SH vote merger
      - b. Must not vote for the merger
      - c. [SEE SLIDE FOR REST]
- h. **Weinberger** – Standard of review to govern controlling SHs ability to approve freeze-out mergers
  - i. **2-step Merger**
    1. Look at the subsequent decision to do FO Merger from the position SH is in *at the moment*, not at step one.

- ii. **DOL**
  - iii. Puts burden on interested parties to show entire fairness
    - 1. **Fair Dealing**
      - a. How transaction is timed, initiated, structured, negotiated, disclosed to dirs, & how dir & SH approval was obtained.
      - b. It's not the case that a controlling SH has a duty to share; **2 Hats Problem**
        - i. You're supposed to be truly honoring your duties to the firm if you're a director → Negotiation over price is *key*.
    - 2. **Fair Price**
      - a. Economic factors that go to whether price is fair
      - b. Fair value of the firm as going-concern – allows rescissory dmgs at discretion of ct.
        - i. Going Concern – Includes non speculative future prospects
  - iv. **Controlling SHs** start out at arms length; the moment you decide to do a freeze-out merger you're not in control & no longer at arms length
  - v. Rejects “block price” method formerly used in DE cts; uses appraisal method
    - 1. Fair value of the firm as a going-concern, excluding synergies of merger (ct has discretion to allow rescissory dmgs)
  - vi. DE – ct will **not** allow controlling SH FO mergers w/o fairness analysis; Firms want to get back BJR or burden shift.
- b. **Andra** – Breach of fid. duty; only remedy sought was appraisal
  - i. We want  $\pi$  to be able to sue for lack/failure of fid. duties to **deter** bad guys from being bad
    - a. Class Action – important deterrent
      - a. Gets lawyer in the door to get larger dmgs
      - b. Larger dmgs deter
    - b. **Breach of Fid Duty – BJR doesn't apply**
  - c. What types of Breaches of Fid. duty count & don't count:
    - a. *Weinberger* – no longer a requirement to show there's a biz purpose
      - i. *Whether deal is fair to min.* SHs (fair price)
        - 1. OK for SH to merge sub. into it largely for parents' own purposes & cash out the minority
        - 2. Focus will be on what Min. SHs care about; ultimately getting a fair price for the shares.
        - 3. Min. SHs will have to argue a breach of fid. duty running to them.
- c. **Kahn** – Bully Min. SH (Alcatel)
  - i. **Test** governing whether a parent is controlling SH
    - 1. Majority Stock ownership
    - 2. *De Facto* control of firm (bd control, etc.)
  - ii. **Test** – approval by Bd. Committee?
    - 1. Committee disinterested & fully informed?
    - 2. Did Committee exercise bargaining power at arm's length?
      - a. Maj. SH didn't dictate terms of merger
      - b. Special Committee had *real* bargaining pwr which it can exercise on an arms length basis.
    - 3. If passes → **burden** shift to  $\pi$  to show deal not fair.
- iii. This case:



1. 43.3% ownership
2. Historic evidence of bd deference b/c of Alcatel's position, even when it disagrees w/Alcatel
3. Veto Pwr blocks firm from pursuing alternatives.

d. **In re Cox Communications**

- i. Ct wants to be able to exert oversight thru look @ fairness b/c controlling SH going to have a much better idea of what sub. is worth.
- ii. Level playing field by saying we're not just going to give you BJR
- iii. No matter what you've done procedurally right, there's no way to cleanse it.
- iv. **Shifts burden of proof** – [DE 144\(a\)\(1\)](#)
  1. What we need to show to get back under BJR:
    - a. Committee that made decision was disinterested & fully informed of material facts & b/c of concern about pressure we want you to prove comm.. exercised tru arms length bargaining power (harder burden)
      - i. A truly indep. comm. truly bargaining at arms length is better than ct's fairness analysis.
  - v. When a controlling SH makes a tender offer, is there any basis for the SH to challenge this based on [Wein](#)?
  - vi. Fair Price – Appraisal
    1. Dmgs fairness
- e. Controlling SH 2-step Mergers  
[262\(h\)](#)

## TAKEOVERS! - Board Duties During a Contest for Control

2 ways to acquire a firm

- Friendly – Negotiate w/mgmt
- Hostile – Purchase shares
  - Bidder wants to acquire firm for least amt as possible. Mgmt want the acquisition to be friendly if it is to be bought at all – gets to negotiate things it cares about.
  - If we assume acquirer will pay same amt for firm either way –
    - \$\$: shares (hostile deal) or \$: shares + \$: consulting contracts.
  - Majority are friendly transactions
    - Lower litigation costs
    - Lower delay
    - Regulations on tender offers → encourages bidder to increase cost of tender offer.
- **14(d)(7)** – Fairness Rule; have to pay same to everyone.

### XXVI. Duties: Two Standards

- a. **Unocal** – Risky b/c saying “no” could lead to \$60/share long-term or everyone else says “yes” and you’ll end up at back end w/\$44/share. Deal encourages you to tender.
  - i. **Two-Tiered Tender Offer**
  - ii. **Coercion**
    1. (1) Is response itself coercive or does it preclude a change of control from ever happening? Yes – problem!
    2. No – (2) Is measure w/i range of reasonableness & give ct. a lot of deference?
      - a. Doesn’t have to be most reasonable – if you’re in the Unocal world you have enormous discretion.
  - iii. **Issue** – How should ct evaluate decision by board to adopt a measure that it claims is a defensive measure which discriminates against one of the SHs, but arguably counts as among SHs that mgmt is supposed to protect.
    1. **BJR** – leans towards more board deference
      - a. **§ 141(a)j - board shall manage**
        - i. Mgrs supposed to make day-to-day decisions & plan long-term strategy
        - ii. Fid. Duties → Firm; Dir’s might think SH are going to sell to someone who is going to harm the corp. If board is in place and believes this will harm the firm, bd has right & obligation by trying to block this harmful thing.
        - iii. SH are often uninformed
        - iv. Mgrs in a better position to bargain – could get more if bargains collectively
        - v. Bd may know true value of the firm that it can’t disclose to the market.
      - b. **Fairness** – leans towards favor of SHs; strict scrutiny of Dir’s
        - i. Mgt’s self-interest in telling bidder to go away (keep their jobs)  
Role of institutional SHs undercuts the uninformed SH argument
          1. many institutional SHs are informed & in the know
- iv. At end of day ct. decided when bd. is managing firm & seeking to take control of firm our policies favoring mgmt discretion will trump our concerns as long as mgmt can tell some story & if SHs are upset about it then they can just throw them out.
- v. **2-Prong Test**

1. “Threat” prong
    - a. Board acted in good faith: after reasonable investigation concludes that a danger exists to corp policy & effectiveness
  2. “Proportionality” prong
    - a. Action must be reasonable in relationship to the threat posed
- b. **Make bid less likely**
- i. Put in killer **golden parachutes**
  - ii. **Debt covenant** - Debt securities paid a premium to debt holders upon take of control; wouldn’t stick something nasty in debt covenant in case of friendly deal; but if you’re blocked debt covenant looks good.
  - iii. **License the label** that makes the firm so lucrative (DKNY – if anyone buys more than 30% of the firm the license explodes & you don’t get to DKNY, etc t/f you can’t buy firm w/o Donna’s permission o/w you don’t get her label.
- c. **Revlon** – Offer made that’s higher what what shares are trading at & plans to break-up firm.
- i. **Poison Pill**
    1. If anyone buys over certain amt of firm (“triggering amt”) everyone *other than that person* gets to turn in their right for something worth more than just their share.
    2. Taking the value & giving it to show SH at the exclusion of the person who went over “triggering amt”.
  - ii. Ct used *Unocal 2-prong test*
    1. #1 Dir acted in good faith & conducted reasonable investigation that there was a threat
    2. #2 Defense was reasonable in relation to the threat
  - iii. **Directors don’t get BJR until they have satisfied the 2-Prong Unocal test.**

Directors bear the burden – need to show:

    1. Prong #1: reasonable grounds for believing danger to corp policy & effectiveness
      - a. Can articulate reasonable belief for a **threat** – can show good faith investigation
    2. Prong #2: Was defense reasonable? **Proportional?**
      - a. Coercive or Preclusive?
      - b. Very deferential reasonable relationship standard.
  - iv. **Once Break up of the firm is inevitable, the board’s duty shifts to maximizing SH value.**
    1. Can’t focus on preserving the firm as an entity; no threat possible to corp policy & effectiveness b/c not preserving the firm.
    2. Focus on maximizing SH value, *not* the other constituencies
    3. Directors charged w/getting best price for SH. **Heightened duty to SHs.**
- \*\*Once REVLON is triggered, duty becomes a duty to maximize profits for SHs\*\***

## XXVII. Determining When Each Standard Applies

- a. **Time** – Dealing w/Warner Bros – Paramount wants in
  - i. Paramount – initial T agreement effectively put T “up for sale” or made it inevitable t/f Revlon should apply & T’s directors *have* to take the highest bid; which would’ve been Paramount.
  - ii. Time not trying to break up the firm & no evidence dissolution was inevitable.

- iii. **SHs care about selling control** – Revlon triggered when you sell voting control of the firm b/c that's the thing people pay the premium for. (Not the case b/c Warner held by dispersed SHs)
    - 1. **Revlon Invoked When...**
      - a. (1) Corp invites/initiates a bidding war for itself; or
      - b. (2) In response to hostile bidder, firm abandons long-term strategy, seeking alternative breakup transaction
  - iv. If deal **not a takeover defense** *Revlon* not triggered & **under BJR**.
  - v. Deal #2 – T decides to BUY Warner in response to P's bid in order to fend it off (if you want me, you're going to have to have T & W)
    - 1. **Unocal applies b/c it's a takeover defense. No longer under BJR.**
    - 2. Threat in this case – not that the price was too low; threat is that it had a long-run strategy emerging w/Warner, which already determined was better than Paramount, & the Paramount bid threatens to prevent them from accomplishing that goal b/c afraid of the uncertainty it would create, might confuse SH, & they might go w/the wrong deal.
  - b. **QVC** – Paramount just doesn't learn!
    - i. P doesn't negotiate w/QVC in order to pursue long run plan to combine w/Viacom.
    - ii. **Revlon triggered when...**
      - 1. (1) A corp initiates an active bidding process involving break-up of the company
      - 2. (2) In response to bidder's offer a target abandons long-term strategy & seeks an alternative transaction involving break-up of the company
      - 3. (3) The board sells voting control\*\*
    - iii. Viacom has a controlling SH (#3!!!) – Redstone
      - 1. Viacom SHs will end up with most of the shares of the new firm & Redstone has enough Viacom shares that he'll end up being the controlling SH of the new firm.
    - iv. **Selling control mutes deference given to the board**
      - 1. Disposing of the SH potential property – value of that voting right
      - 2. DE distinguishes decisions board makes about future of firm & decisions the board might make that raise or lower value of SH right to vote.
- \*\* Reasons to have a different standard when you are selling control of the firm to someone\*\***
- v. Court recognizes that SH in firms w/a Controlling SH are at a disadvantage
    - 1. Want to make sure they're compensated for this or get protections
    - 2. Want to exercise increased scrutiny to make sure really taken the decision seriously
  - vi. S. Ct now recognizing that when the board alienates the control premium it is selling something of value that really belongs to SH. NOT just managing the firms assets – so it has to act in the SH's best interests, not the firm's.
  - vii. **Once Revlon is triggered it is the director's duty to get the best value reasonably available for SHs...** Then use *Unocal* test giving bd the burden of proof.
- c. **Unitrin** – Post Unocal
    - i. **3 Threats**
      - 1. Opportunity Loss – hostile offer might deprive SHs of superior alternative
      - 2. Structural Coercion – deal is structured in a coercive way
      - 3. Substantive Coercion – risk that SH might mistakenly take low offer b/c don't believe mgmt's claims re intrinsic value

ii. **Proportionality**

1. 2-step analysis
  - a. #1 – Is the response itself coercive or does it preclude a change of control from ever happening?
    - i. Yes → Problem (this response not ok)
    - ii. No → move on to step #2
  - b. #2 – Is measure w/i the “range of reasonableness”; don’t have to show that it was the least damaging option, just that it was in the zone or range.
    - i. Yes → huge amt of deference
2. \*\* This case put serious limitations on how much the court will review the bd’s decision\*\*
  - a. Just have to...
    - i. Form independent committee of outside directors
    - ii. Hire an investment banker
    - iii. Get an opinion that the price is inadequate

XXVIII. **Extension to Negotiated Transactions**

a. **Omnicare** –

1. NCS almost insolvent
  2. Dual-class stock that allows founding family to maintain control (designed to protect original founders but no perm. protection)
  3. NCS starts to look at transactions where they’ll be bought up (Omnicare & Genesis)
    - a. Deal – creditors mostly get paid back & equity recovers.
  4. Genesis – do it but wants to be 100% sure deal goes thru
    - a. Wants bd to promise the deal goes to SHs no matter what, even if someone else comes along.
    - b. Want an agreement from execs that they’ll vote for the agreement.
  5. NCS doing better! – when insolvent bd’s duty goes to debtors not equity but NCS doing so much better they have a duty to equity.
- ii. CT – both coercive & preclusive b/c prevents min. SHs from voting & G deal inevitable regardless of better offers.
1. Combination of requirement bd. submitted to SHs plus w/o voting agreement SHs get a choice & they’re free to say no to Omnicare all on their own.
  2. Lang. of Fiduciary Outs suggests you can’t do an absolute lock-up.
- iii. Bd could pass deal along to controlling SHs and say not to vote for it, but by the controlling SHs pre-committing, they are making the Bd’s fid. out useless (ineffective).
- b. **Coercive & Preclusive**
- i. DE S. Ct doesn’t want a controlling SH pre-committing on deals b/c you must retain rt. to say no until the very end.
    1. No matter how informed you are, you’re never as informed as you are at the end of the day when you go to vote.
  - ii. 251 – Mergers; supposed to be done w/a Bd vote & a SH vote.

XXIX. **SH Voting Control & Blasius Duty**

- a. **Schnell** – injunctive relief to prevent Bd from moving up annual mtg date.
- i. Bd. wants date moved so SHs get less time for proxy solicitation b/c they’re attempting to takeover the Bd.
    1. Designed to keep themselves in office – Bylaws give Bd pwr to move date.

- ii. CT – not really BJR:
  - 1. Not in self-interest, Due Care, etc.
  - 2. Even though the Bd can set mtg date per bylaws there's a specter of self-interest so we're scrutinizing more closely.
- b. **Blasius** – B brought in to induce A to restructure; A not having it; B, "if A doesn't GET receptive, we're doing a Tender Offer!"
  - i. The best way to restructure or TO is to control the Bd.
  - ii. A has a classified Bd – only 1/3 replaced at a time.
  - iii. B – fine, we'll expand from 7 members to 15 w/extra 8 guys being ours!
  - iv. A – (stupid to leave # of dirs in bylaws) – increased Bd. to 9 members & added 2 of their own to make 9.
    - 1. 223 – Directors can fill vacancies.
    - 2. 228 – written consent
      - a. SH have to seek votes by other SHs. The proposal that says 15 pretty much fixed so Bd. relying on fact that they can't change vote quickly.
  - v. Standard of Review
    - 1. BJR – No
    - 2. Self-Dealing – No
      - a. 144 on both sides of the transaction
    - 3. Entrenchment Issue b/c Bd. is on both sides (**Unical, Revlon**) – YES!
      - a. b/c of Ent. Issue – ct gives heightened scrutiny to BJR
  - vi. Firm not making a decision about mgmt of assets, they're trying to interfere w/the only thing the SHs can really do all on their own → kicking out Bd. members.
    - 1. Bd. action primarily intended to thwart SH action?
    - 2. Bd has burden of presenting justification for their action.
  - vii. Different than **Time** b/c in Time there's no requirement to ask SHs to do deals and Bd. blocks a SH vote on something SHs aren't allowed to vote on – an acquisition.