

Aguero – Arlen Corp (attack)

Agency Relationships

- Actual Authority
 - Protects reasonable expectations of A
 - Expressed
 - Implied (Cargill)
 - Reliance on Past Practices (Mill St.)
- Apparent Authority (Lind)
 - 3rd party believed A was acting on P's behalf
- Inherent Authority (vicarious)
- Ratification (3-70 Leasing)
- Ostensible Authority (Humble/Hoover)
 - Right of Control
- **Fiduciary Duties**
 - Duty of Care
 - Duty of Loyalty (Reading/Singer)
 - Consent

Valuation

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

$$\frac{\text{Payable Amt}}{(1 + \text{Discount Rate})^n} = \text{Present Value}$$

n = # of years in the future

$$\text{Future Value} = X(1+r)$$

X = Value Today

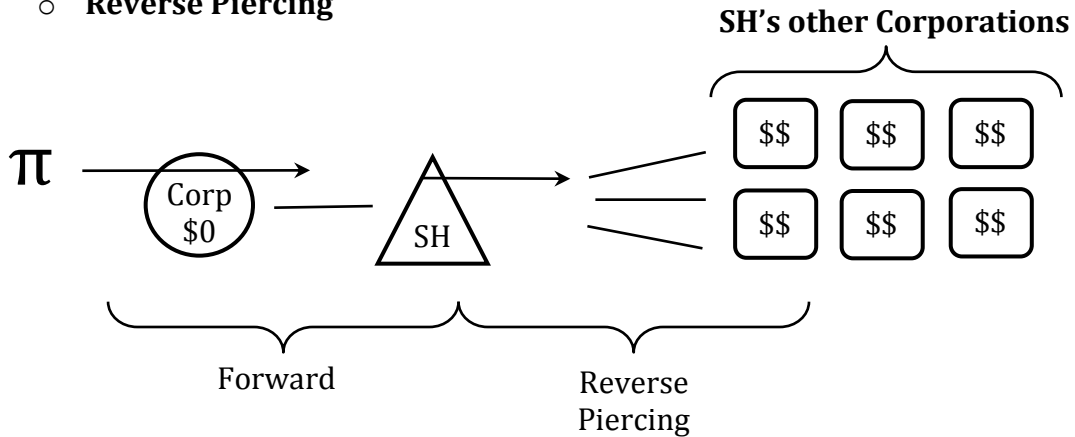
r = Interest Rate (i.e. .03 = 3%)

Centralized MGMT

- Amending bylaws § 109
- Special Meetings
- Removing Dirs
- Replacing Dirs
- Electing Dirs
 - Standard
 - Cumulative Voting
- Classified Boards
- SH Powers (Manson)
 - §§ 242 & 251 & 271

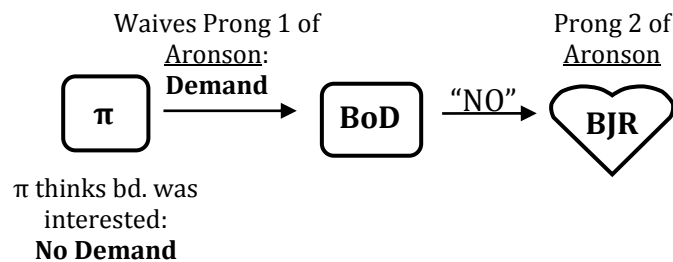
Capital Structure

- Options
- Debt
- Limited Liability
- **Piercing the Corp. Veil**
 - Respondeat Superior (Walkovsky/Zaist)
 - Alter Ego Approach
 - Standard of Review - Sea Land
 - Lack of Formalities
 - Commingling of funds & assets
 - Sever undercapitalization
 - Treating corp assets as one's own
 - Standard of Review – VA Law
 - Undue Domination & control of the corp by Δ
 - Corp was a device or sham used to disguise wrongs, perpetuate fraud, or conceal crime.
 - **Reverse Piercing**



Direct v. Derivative

- Standard of Review:
 - Nature of wrong alleged
 - To SHs or Firm
 - Relief sought
 - Who would benefit? SHs? Firm?
- **Demand Requirement**
 - (1) Must make demand on entire board
 - OR
 - (2) Demand must be Excused.
 - **Demand Excused Test**
 - π must please particularized facts creating reasonable doubt that:
 - 1 – Maj. of bd. is interested either in the underlying trans or
 - 2 – Maj. of bd. is interested in the lawsuit (test: does BJR apply to the underlying trans?)
 - Aronson – suing *current* BoD (i.e. a maj. or the current bd is the same bd that did whatever you’re suing about)
 - (1) Maj. of Dirs are Independent & disinterested? **OR**
 - (2) Challenged trans was product of a valid exercise of BJR?
 - Rules – When different BoD members comprise current BoD.
 - (1) Maj dominated & (2) BJR doesn’t insulate demand req’t **OR**
 - (3) Maj. of BoD has interest



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

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

Challenges to Disinterested Bd. Actions

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

Director Inaction – compliance programs/failure to supervise

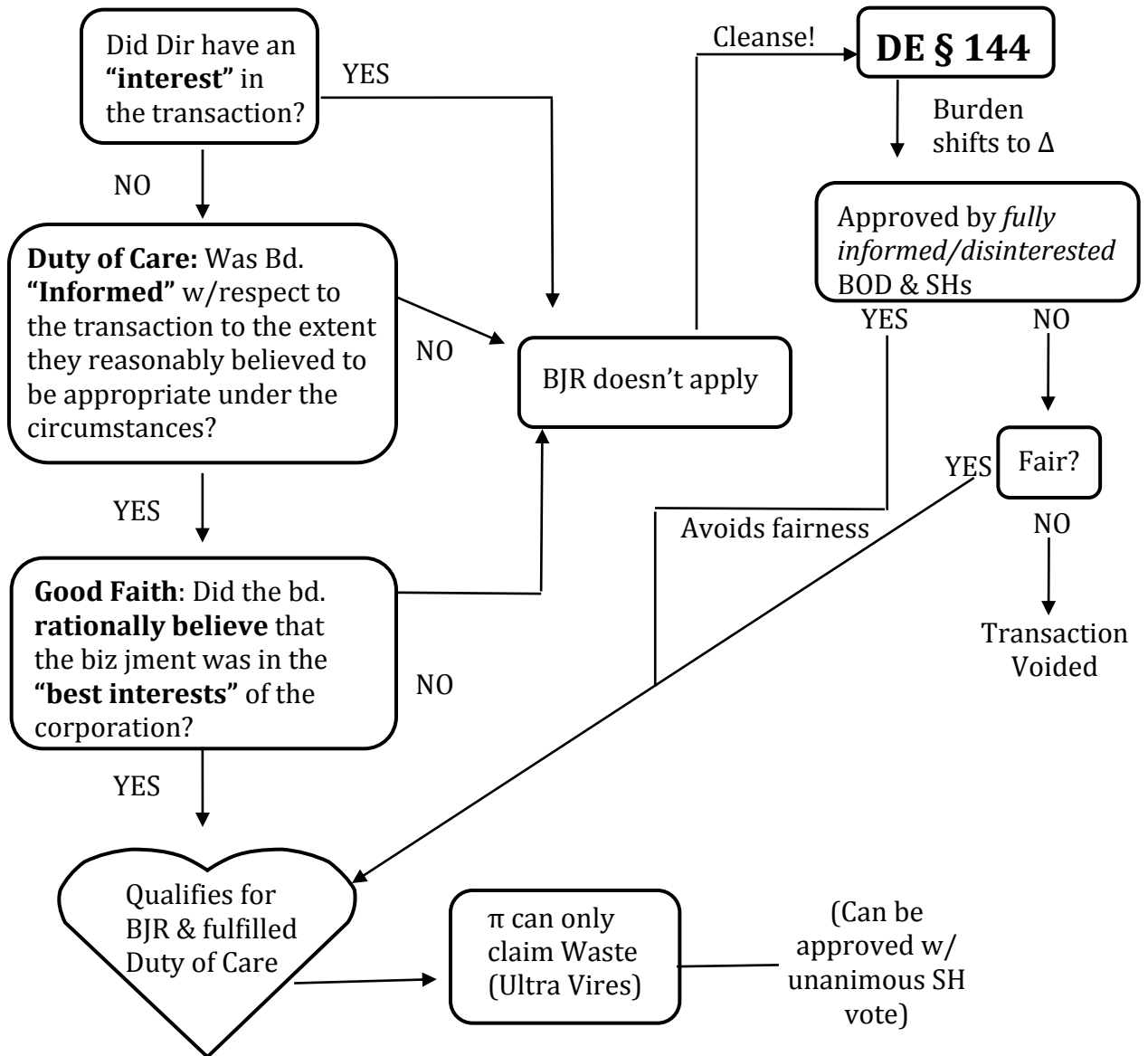
- Nonfeasance (Francis)
- Compliance Programs (Caremark/Stone)
 - Standard of Review – Systemic Failure to Exercise Oversight (Caremark)
 - If Director's are **actively** looking the other way – easy case of deliberate sustained neglect. (DOL)
 - Standard of Review – Lack of Good faith (Stone)
 - Have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

BJR – Duty of Care

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

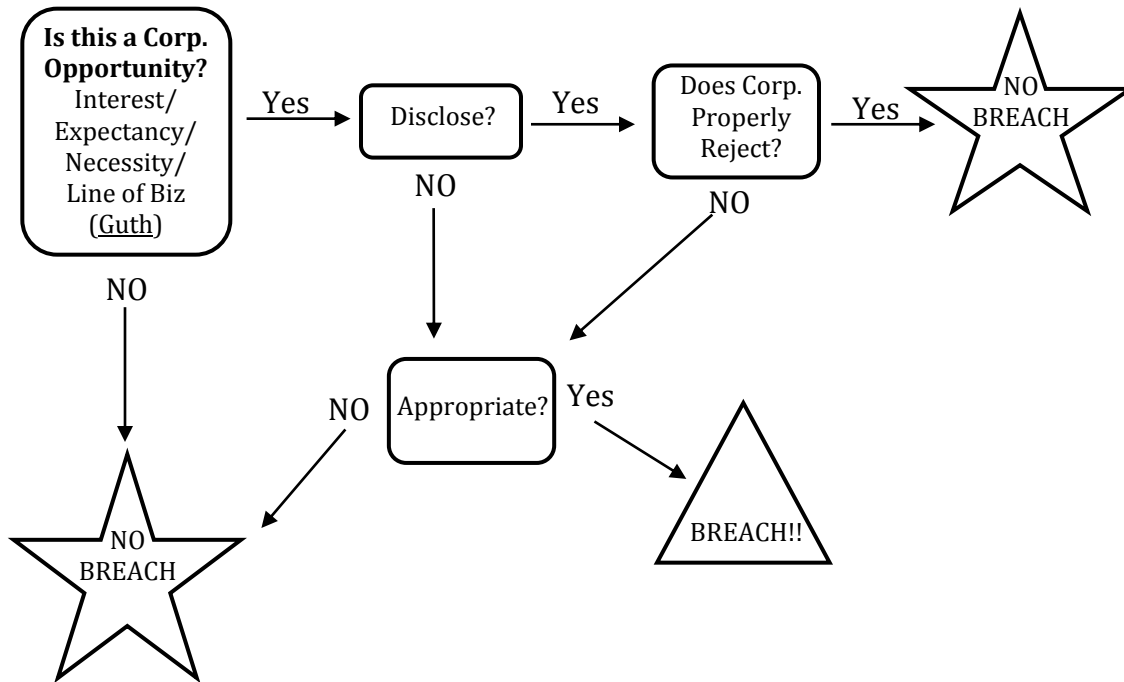
Leaving the BJR – DE 144

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



DOL

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



- **Self-Dealing by a Controlling SH** (Sinclair)
 - BJR applies to controlling SH if NO self-dealing
 - **Test** – Does Controlling SH benefit disproportionately from the benefit to min. SH on a per/share basis.

Proxy Contests

- **Voting System**
 - Must be a **policy issue** not purely personal (Levin)
 - Compensation (Rosenfeld)
 - **Steps**
 - 1 - § 213 Record Date
 - 2 – Proxy Solicitation
 - 3 – SHs return proxies
 - 4 – Annual/Special Mtg
- **SH Inspection Rights - § 219-20**
 - SH Lists
 - Proper purpose (Crane/Honeywell)
 - Moral v. Economic Purpose (Lovenheim)
 - Corp Records (Seinfeld)
 - Fiduciary Out (AFSCME)
- **14(a) – 8 – Exchange Act**
- **Fraud Provisions**
 - **Transaction Causation Test (Mills)**
 - (1) Materiality
 - fraud induced the vote and
 - (2) “Essential Link”
 - the vote **mattered**
 - Individual reliance not necessary
 - **Opinions/Beliefs (VA Bankshares)**
 - Has to be material
 - Δ had to NOT believe it &
 - There had to be something false or materially misleading about the subject matter.

Sale of Control

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

Freeze Out Mergers & Appraisal Rights

- Standard of Review – Fairness (DOL)
 - Fair Dealing
 - Duty to Disclose
 - Fair Price
 - Going Concern (Weinberger)
 - Appraisal (Emerging Communications)
- DeFacto Control (Kahn)

Take Overs!

- Break-up OR Change of Control (Revlon)
 - Look out for *De Facto* control!
 - Duty → maximizing SH value
- Defensive Measures used (Unocal) – No Longer Under BJR
 - 1 – “Threat” prong
 - 2 – “Proportionality” prong
 - 2 – step analysis (Unitrin)
 - 1 – Is response itself coercive or preclusive?
 - Yes → problem!
 - No → move on to step 2
 - 2 – Is measure w/i the “range of reasonableness”?
 - Coercive/Preclusive (Omnicare)

Entrenchment Issue (making a company less attractive to outside bidders)

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