TABLE OF CONTENTS

I. INTRODUCTION

In the United States, corporate law is largely regulated by the states.[1] Consequently, entities incorporate in states whose corporate law best serves their business needs.[2] Due to potentially large revenues that states can generate through corporate franchise taxes,[3] states compete with each other to create a corporate code that best matches the needs of corporations.[4] Therefore, the states with the most developed and responsive corporate law receive the largest revenues.

Since the 1920s, Delaware has dominated all other states in this competition for corporate charters.[5] More corporations listed on the national exchanges are incorporated in Delaware than any other state.[6] A majority of the publicly traded Fortune 500 companies are incorporated in Delaware.[7] Additionally, a large number of corporations that reincorporate choose Delaware as their new corporate domicile.[8] Delaware's unique ability to adapt its corporate code to rapidly changing business demands is one of the many reasons for the state's dominance

---

[1]ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1 (1993). Corporations are also regulated at the federal level where the securities laws control "the issuance and trading of securities and the continuing disclosure responsibilities to investors of public firms." *Id.* at 3.

[2]*Id.* at 1. The state of incorporation is a statutory domicile which may or may not coincide with physical presence. *Id.*

[3]*See id.* at 6-8. In 1990, Delaware collected over $200 million in franchise taxes, totaling 17.7% of the total tax collected for the state. *Id.* at 8. *See also infra* note 55 (showing the franchise tax revenues and the franchise tax as a percentage of total tax collected in Delaware between 1960 and 1990).

[4]Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 843 (1993).

[5]ROMANO, *supra* note 1, at 8.

[6]*Id.* at 6. Of the 1,958 corporations listed on the New York Stock Exchange (NYSE), 857 or 43.7% are incorporated in Delaware. NEW YORK STOCK EXCHANGE GUIDE (CCH) 715-800 (1992).

[7]Leo Herzel & Laura D. Richman, *Foreword* to R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS F-1 (2d ed. 1994).

[8]*Id.* A survey of corporations reincorporating between 1960 and 1982 found that 82% of the entire pool reincorporated in Delaware. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 265-73 (1985). *See also infra* App., Tables 2-3 (showing the number of reincorporations in Delaware and the other states).

of the corporate charter market.[9]

Delaware's ability to adapt its corporate code to the changing needs of corporations has been a popular topic of scholarly debate.[10] Commentators have advanced two basic theories to explain the interjurisdictional competition for corporate charters.[11] The "reformist theory," first argued by Professor William Cary, contends that states, in order to raise revenue from corporate franchise taxes, create corporate laws that benefit managers over shareholders.[12] Cary's theory, referred to as the "race for the bottom," maintains that this competition for revenue causes a "deterioration of corporate standards."[13]

The corporate federalists offer an alternative theory.[14] They agree

---

[9]*See* ROMANO, *supra* note 1, at 9. There are a number of other reasons why Delaware has dominated the competition for corporate charters. *See infra* notes 48-80 and accompanying text.

[10]*See infra* notes 41-47 and accompanying text.

[11]*See infra* notes 81-107 and accompanying text.

[12]William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974). Cary argued that the federal government should step in and regulate corporate law. *Id.* at 663. There have been a number of others who have addressed Cary's position. *See, e.g.*, RALPH NADER & JOEL SELIGMAN, TAMING THE GIANT CORPORATION (1976) (arguing that state corporation statutes were too permissive and proposing federal chartering of corporations); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1509-10 (1992) (concluding that the shortcomings of corporate law support expanded federal intervention into "self-dealing transactions, taking of corporate opportunities, freezeout mergers, all aspects of takeover bids and proxy contests, and limitations on dividends"); Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 60-63 (1993) (proposing a federal fiduciary cause of action); Alexander G. Simpson, *Shareholder Voting and the Chicago School: Now is the Winter of Our Discontent*, 43 DUKE L.J. 189, 202-15 (1993) (arguing that, although Cary's critics were correct in their misgivings concerning federal intervention, they have failed to apply their own theories to shareholder voting).

[13]Cary, *supra* note 12, at 666. Cary argued that although the "enabling acts" permit management to operate with minimum interference, they "have effected simplification and flexibility . . . they have watered the rights of shareholders vis-à-vis management down to a thin gruel." *Id.* Cary called this a "race for the bottom" because the states compete to create corporate codes that benefit management to the detriment of shareholders. *See id.* Cary coined the term "race for the bottom" which was derived from Justice Brandeis' dissenting opinion in Louis K. Liggett Co. v. Lee, 288 U.S. 517, 559 (1933) (referring to the competition for corporate charters as a race "not of diligence but of laxity"). Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group-Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 469 n.1. (1987).

[14]This group essentially argues that state competition for corporate charters is based on a law and economics approach. They are called the federalists because they believe in federalism, i.e., states should be free to create their own corporation codes. This group has also been referred to as the "free marketeers" or the "Chicago School" because many of them are or have been affiliated with the University of Chicago. Simpson, *supra* note 12, at 189 n.1. The proponents of this theory include Professor Ronald Coase, Judge Frank Easterbrook,

with Cary that state competition leads to laws that corporations demand. Unlike Cary, however, the federalists conclude that the race is for the top, not the bottom.[15] The corporate federalists argue that corporations seek to incorporate in the states with the most "optimal rules of corporate law."[16]

Recently, the Delaware Supreme Court rendered two decisions in favor of shareholders that could have an impact on a corporation's decision to incorporate in Delaware. In *Cede & Co. v. Technicolor, Inc.*[17] and *Paramount Communications Inc. v. QVC Network Inc.*,[18] the Delaware Supreme Court examined fiduciary obligations of corporate directors. These two cases clarify several aspects of a director's fiduciary responsibilities that could have an impact on Delaware's ability to compete for corporate charters.[19] Several corporate law experts have indicated that the two decisions may enlarge the potential liability of corporate directors for breaches of due care in merger and acquisition cases.[20]

Professor Richard Epstein, Professor Daniel Fischel, Judge Richard Posner, and Judge Ralph Winter. *Id.*

[15]ROMANO, *supra* note 1, at 14. The corporate federalists call it a "race to the top" because the states compete to produce a "value maximizing regime" for shareholders. *Id.* at 15.

[16]RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 14.9, at 392 (3d ed. 1986).

[17]634 A.2d 345 (Del. 1993) (*Cede II*).

[18]637 A.2d 34 (Del. 1993).

[19]In *Cede II*, the Delaware Supreme Court reaffirmed some existing law and overruled other aspects of existing Delaware corporate law crafted by the court of chancery. William Prickett & Ronald A. Brown, Cede v. Technicolor: *The Supreme Court Re-Illuminates Existing Lines of Delaware's Level Playing Field*, 19 DEL. J. CORP. L. 593, 594 (1994). Lawrence A. Cunningham and Charles M. Yablon argued that *Cede II* and *QVC* established a single intermediate standard of enhanced scrutiny for all management actions that significantly affect corporate control. Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After* QVC *and* Technicolor: *A Unified Standard (and the End of Revlon Duties?)*, 49 BUS. LAW. 1593, 1594 (1994).

[20]Barry R. Ostrager, Paramount's lawyer in *QVC*, "called the court's application of 'enhanced scrutiny' to the Paramount board in his case the 'most provocative' ruling of the term." Karen Donovan, *Corporate Directors Take Beating From Delaware Supreme Court*, NAT'L L.J., Dec. 27, 1993, at 17. Professor Michael P. Dooley stated that the *Technicolor* decision "create[s] director liability for 'negligence in the air' when the plaintiffs have in fact not suffered any damages. He calls it an 'open invitation to litigate these cases.'" *Id. See also* Richard B. Schmitt, *Court Holds Directors to Higher Standard*, WALL ST. J., Nov. 1, 1993, at B6 ("The Delaware Supreme Court has sent a tough new signal to corporate directors that they must provide shareholders maximum value when selling a public company."). *But see* Prickett & Brown, *supra* note 19, at 595 n.13 (arguing there was nothing new about the Delaware Supreme Court's opinion in *Cede*).

This note will examine the history of Delaware corporate law and the advantages of incorporating in Delaware. It will explain the debate between the corporate federalists and the reformists and give some background on the duty of care and loyalty under Delaware law. Next, the note will examine the law of Delaware and other states dealing with the duty of care to determine whether the laws in other states could have an effect on Delaware's ability to attract and retain its edge in the corporate charter market. Finally, this note surveys some empirical information to determine whether Delaware has maintained its lead in the corporate charter market.

II. DELAWARE'S RISE TO PROMINENCE

A. *History of Delaware Corporation Law*

The history of Delaware corporate law is highlighted by two distinct and significant events: (1) the enactment of Delaware's first general corporation code in 1899 and (2) the 1967 revision of the Delaware General Corporation Law.

1. The 1899 General Corporation Act

In 1896, New Jersey enacted its general corporation law which, at the time, was the most "liberal in existence."[21] Due to the success New Jersey experienced in attracting corporations and generating revenues from franchise taxes, the members of the 1897 Delaware Constitutional Convention sought to make incorporating in Delaware even easier.[22]

---

[21]Andrew G.T. Moore, *Preface* to R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS H-7 (2d ed. 1994). The New Jersey corporation code contained a number of attractive features. The code allowed (1) unlimited corporate size and market concentration, (2) ease of mergers and consolidations, and (3) classification of shareholders. Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 265-66 (1976).

[22]*See* Moore, *supra* note 21, at H-7. As one member of the constitutional convention stated:

> I imagine there is no state in the Union that has laws more favorable to corporations than the State of New Jersey — not only corporations which do business in the State of New Jersey go to Trenton for charters, but corporations all over the country are operating under New Jersey charters. . . .
>
> The direct result of this liberal policy of that State has been an increase in the revenues of the State derived from corporations taxes and franchise fees from $75,000 in 1875, to $957,000 in 1896.

Id. (quoting the statement of William Saulsbury at the 1897 Constitutional Debates).

Some changes made by the Constitutional Convention included no prior limitation of the duration of corporate existence and no restriction on corporate purpose.[23]

Modeling its code after New Jersey's statute, Delaware enacted its own general corporation law in 1899.[24] Wilmington attorneys formed the Corporation Service Company and touted that "[t]he state of Delaware has just adopted the most favorable existing general corporation laws."[25]

Although the Delaware statute was more liberal than the New Jersey statute, the number of corporations incorporating in Delaware did not increase significantly until 1913.[26] In 1913, Woodrow Wilson, then governor of New Jersey, proposed the "Seven Sisters Act," effectively outlawing the trust and holding company.[27] As a result of that Act, many corporations sought a new home of incorporation in Delaware. Since the enactment of the General Corporation Law of 1899, and the rapid incorporation activity which soon ensued, Delaware has continually revised its statute to accommodate changing business needs.[28]

2. The 1967 Revision

Following the stock market crash of 1929 and the subsequent Congressional enactment of the federal securities laws, fewer corporations found it advantageous to incorporate in Delaware.[29] After World War II, a number of states revised their corporation statute to compete with Delaware.[30]

By 1963, Delaware corporate filings had dropped significantly and the state faced serious challenges to its preeminence from New Jersey and Maryland, states that planned to "out Delaware" Delaware.[31] In that same year, the Delaware legislature passed special legislation, sponsored by the Secretary of State, appropriating $25,000 to review and study the Delaware corporation laws and to prepare a report recommending

---

[23]*Id.* at H-6.

[24]*Id.* at H-9. "A Wilmington attorney, Josiah A. Marvel, with the aid of a New York attorney and the financial editor of a New York newspaper, drafted and secured unanimous approval for the predecessor of Delaware's present General Corporation Law." Seligman, *supra* note 21, at 271.

[25]Seligman, *supra* note 21, at 271.

[26]Moore, *supra* note 21, at H-11.

[27]*Id.* New Jersey eventually repealed the "Seven Sisters Act" in 1917. *Id.* By then, however, most corporations had moved to more favorable jurisdictions, such as Delaware. *Id.*

[28]*Id.*

[29]*Id.* at H-12.

[30]Moore, *supra* note 21, at H-12.

[31]Seligman, *supra* note 21, at 279.

revisions to the corporation law.[32] The Secretary of State thereafter formed the Delaware Corporation Law Revision Committee to revise the Delaware corporation statute.[33] "The objectives of the Revision Committee . . . were to update and clarify the language of the existing corporate law, to simplify the mechanics for corporate action, and to make substantive changes where experience indicated that improvements could be made."[34] After considering numerous suggestions from Professor Ernest Folk,[35] corporate lawyers, members of large accounting firms, and general counsel to Delaware corporations, the Committee decided how the statute was to be changed.[36]

A drafting subcommittee put the Revision Committee's decisions into bill form.[37] The drafting subcommittee presented the final bill to the Revision Committee which approved the bill without change.[38] The legislature unanimously approved the bill and it became effective July 3, 1967.[39] The business community responded favorably and the state chartered new corporations at a record pace.[40]

Since 1967, the Delaware Bar Association's Section on General Corporation Law has retained responsibility for revising the General Corporation Law.[41] Members of the Section, along with lawyers from other cities, law professors, and corporations, make suggestions

---

[32]S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 14 (1976).

[33]*Id.* at 14-15. Prior to the 1967 revision, the Delaware Bar Association's Corporation Law Committee formulated most of the corporation law amendments. *Id.* at 13-14. The Delaware Corporation Law Revision Committee was chaired by Clarence A. Southerland (former Chief Justice of Delaware) and its members included: Daniel L. Herrmann, Richard F. Corroon, Henry M. Canby, Irving Morris, S. Samuel Arsht (Delaware attorneys in private practice); Alfred Jervis and David H. Jackman (representing two leading corporation service companies); Elisha C. Dukes (Secretary of State); and Margaret S. Story (director of the Corporation Department within the Secretary of State's office). *Id.* at 14.

[34]*Id.* at 15.

[35]Moore, *supra* note 21, at H-15. The Revision Committee retained Folk as the Revision Committee's reporter because he had also helped revise South Carolina's corporation law. *Id.*

[36]*Id.* at H-16. Before drafting the new statute, the committee decided to (1) retain as much of the existing statute in order to keep the well-developed precedents of the supreme and chancery court and (2) not to adopt the Model Business Corporation Act (MBCA) because Delaware wanted to be a leader, not a follower. *Id.* at H16-17.

[37]Arsht, *supra* note 32, at 16.

[38]*Id.*

[39]Seligman, *supra* note 21, at 282.

[40]*Id.* Before the 1967 revision, Delaware was granting corporate charters to approximately 300 corporations per month. *Id.* Two years after the revision, the rate was 800 new corporations per month. *Id.*

[41]Moore, *supra* note 21, at H-18.

concerning amendments to the Delaware General Corporation Law.[42] Proposed amendments are studied carefully by subcommittees.[43] The subcommittee then sends a report recommending adoption or rejection of the amendments to the Council of the Section.[44] If approved by the Council of the Section, the bill proceeds to the Executive Committee of the Bar Association and then to the General Assembly which usually adopts the amendments recommended by the Section.[45]

This speedy amendment process gives "corporate executives confidence that as soon as further 'liberalizations' of corporate law are conceived, Delaware will be among the first states — if not the first state — to promulgate them."[46] This amendment process also allows the Delaware General Assembly to keep ahead of legal developments, fix ambiguities in the law, and correct problems noted by judicial decisions.[47]

B. *Advantages of Incorporating in Delaware*

There are several advantages that allow Delaware to remain the leading state of incorporation. The primary advantages include the General Corporation Code, the expertise of the Delaware courts, and the state's highly developed case law.

1. The Statute

Businesses often incorporate in Delaware to take advantage of the state's substantive corporate laws.[48] Delaware law gives shareholders, managers, attorneys, and investment bankers great incentives to incorporate within the state.[49]

---

[42]*Id.*
[43]*Id.*
[44]*Id.*
[45]Moore, *supra* note 21, at H-19.
[46]Seligman, *supra* note 21, at 283.
[47]Moore, *supra* note 21, at H-18.
[48]Macey & Miller, *supra* note 13, at 484.
[49]*Id.* Explaining the advantages to these groups, Macey and Miller stated:

> [T]he structure of the Delaware Corporation Code encourages arrangements that enhance the value of the firm and, therefore, increase shareholder wealth.
> . . .
> . . . .
> Many provisions of Delaware law appear calculated to give corporate managers flexibility in obtaining desired personal benefits. Delaware is among the least restrictive of the states in second-guessing the amount of managers' compensation, rejecting insider contracts on grounds of self-dealing,

The Delaware statute is a liberal statute, giving corporations the needed flexibility to conduct their business affairs efficiently.[50] Although the corporate code does not regulate every corporate action, it does provide provisions dealing with practical problems that could have an effect on the efficient management of the corporation.[51]

Another advantage of Delaware's General Corporation Law is that the statute is continually amended by the Delaware Legislature and the Bar Association's Section on Corporate Law so that it remains responsive to corporate needs.[52] Due to the large number of corporations domiciled in Delaware, management can bring identified business problems and potential business problems to the attention of lawyers and lawmakers.[53] The close working relationship between Delaware corporate lawyers and the Delaware legislature allows for the expeditious solution of these business problems.[54]

Delaware also has virtually guaranteed that its General Corporation Law will remain responsive to corporations. Delaware obtains a significant portion of its total tax revenue from franchise fees, a source of revenue the state is unprepared to lose.[55] Additionally, Delaware

---

> or permitting corporations to indemnify officers and directors for liability incurred in connection with their services to the corporation.
>
> . . . .
>
> . . . [C]onsiderable evidence suggests that the Delaware Supreme Court has created an environment in which investment banks and other securities professionals may earn hefty profits as a result of Delaware incorporation.

Id. at 484-87 (footnotes omitted).

[50]*See* LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 3 (1993).

[51]*Id.* An example of a section that allows for more efficient management of the corporation is § 102(b) of the Delaware Corporation Code. DEL. CODE ANN. tit. 8, § 102(b) (1991). This section allows corporations to place certain provisions in the articles of incorporation that are needed for the efficient operation of the business. Some of these optional provisions include: (1) a provision for the management of the business, DEL. CODE ANN. tit. 8, § 102(b)(1) (1991); (2) a provision imposing personal liability on the shareholders of the corporation for debts of the corporation, DEL. CODE ANN. tit. 8, § 102(b)(6) (1991); and (3) a provision eliminating or limiting personal liability of a director, DEL. CODE ANN. tit. 8, § 102(b)(7) (1991). Another example of this is section 141(c) which allows for committees of the board of directors to have alternate members in the event one member is unable to attend or is disqualified. DEL. CODE ANN. tit. 8, § 141(c) (1991). Section 141(c) also permits teleconference board of directors meetings. DEL. CODE ANN. tit. 8, § 141(i) (1991).

[52]*See supra* notes 41-47 and accompanying text.

[53]BLACK, *supra* note 50, at 4.

[54]*Id.*

[55]*See id.* at 5. From 1960 through 1990, Delaware has obtained, on average, 15.5% of the total tax collected in the state from franchise taxes. ROMANO, *supra* note 1, at 7-8.

citizens who provide legal services to non-Delaware corporations have their own incentive to make sure Delaware corporate law remains responsive to corporations.[56] Finally, the Delaware Constitution requires

TABLE 1-1
FINANCING DELAWARE'S CHARTERING BUSINESS, 1960-1990

Year	*Franchise Tax Revenues ($)*	*Franchise Tax as % of Total Tax Collected*
1960	9,864,000	13.7
1961	12,621,000	16.3
1962	13,579,000	14.9
1963	13,977,000	14.3
1964	15,635,000	15.5
1965	15,790,000	13.1
1966	14,091,000	10.9
1967	17,615,000	12.6
1968	21,414,000	14.8
1969	20,572,000	13.1
1970	43,924,000	22.5
1971	55,212,000	24.9
1972	49,129,000	19.1
1973	50,777,000	17.7
1974	57,073,000	18.5
1975	55,030,000	16.4
1976	67,887,000	18.9
1977	57,949,000	14.8
1978	60,509,000	13.5
1979	63,046,000	12.8
1980	66,738,000	12.9
1981	70,942,000	12.9
1982	76,591,000	12.9
1983	80,031,000	12.5
1984	92,270,000	12.9
1985	121,057,000	14.8
1986	132,816,000	15.0
1987	152,152,000	15.4
1988	180,583,000	17.7
1989	195,862,000	17.3
1990	200,201,000	17.7
Average		15.5

Id. at 7-8.

[56]Romano, *supra* note 8, at 276. "It is . . . in the interest of these individuals to make sure that Delaware remains responsive . . . so that the demand for their services does not

a supermajority vote of the legislature before the Delaware Corporation Code can be modified.[57] Accordingly, it is difficult for outside interests to change the corporation code, thereby insuring Delaware's commitment to corporate responsiveness.[58]

2. Judicial Advantages

a. *The Courts*

Delaware's Court of Chancery has developed a national reputation of expertise in dealing with corporate law matters.[59] The court of chancery has no jurisdiction over criminal or tort actions which often yield backlogs in the state and federal judicial systems.[60] This allows the court of chancery to hear cases and render decisions quickly.[61] The chancery court's reputation for excellence also has enabled it to attract some of the most experienced lawyers to serve as chancellors and vice-chancellors.[62] The appointment of judges in Delaware for twelve year terms (rather than for life) also insures that judges will remain sensitive to the state's policy of responsiveness to corporate law.[63] Any judge not remaining sensitive to corporate law issues may find reappointment considerably more difficult.[64]

---

diminish." *Id.*

[57]*Id.* at 276-77; Moore, *supra* note 21, at H-19. The Delaware Constitution provides that "[n]o general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two thirds of all the members elected to each House of the General Assembly." DEL. CONST., art. IX, § 1.

[58]Romano, *supra* note 8, at 276.

[59]BLACK, *supra* note 50, at 5. As Chief Justice Rehnquist stated at the 200th anniversary of the Delaware Court of Chancery:

> Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state can make such a claim. As one scholar has observed, "[t]he economies of scale created by the high volume of corporate litigation in Delaware contribute to an efficient and expert court system and bar."

Id. at 7.

[60]Herzel & Richman, *supra* note 7, at F-9.

[61]*Id.*

[62]BLACK, *supra* note 50, at 6.

[63]ROMANO, *supra* note 1, at 40.

[64]*Id.*

The Delaware Supreme Court is also an important element in making Delaware the preeminent state of incorporation.[65] Although most decisions of the court of chancery are not appealed,[66] the Supreme Court of Delaware has rendered a number of opinions cited in many other jurisdictions.[67] The supreme court is also able to deal with appeals in corporate cases very quickly.[68]

---

[65]*See* BLACK, *supra* note 50, at 8.

[66]*Id.*

[67]*Id.* For example, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), has been cited by the courts in: California, Katz v. Chevron Corp., 27 Cal. Rptr. 2d 681, 689 (Cal. Ct. App. 1994) (cited for the proposition that, under the business judgment rule, the standard for liability is gross negligence); Indiana, W&W Equip. Co. v. Mink, 568 N.E.2d 564, 575 (Ind. Ct. App. 1991) (cited for the proposition that a director has a duty to inform himself of the actions he is about to take); Iowa, Cookies Food Prods., Inc. v. Lakes Wharehouse Distrib., Inc., 430 N.W.2d 447, 453 (Iowa 1988) (cited for the proposition that the business judgment rule presumes directors' decisions are informed, in good faith, and honestly believed to be in the best interests of the corporation); North Carolina, IRA *ex rel.* Oppenheimer v. Brenner Cos., 419 S.E.2d 354, 359 (N.C. Ct. App. 1992) (cited for proposition that when a board fails properly to investigate the worth of the company, it renders a merger suspect); Texas, Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 808 (Tex. Ct. App. 1987) (cited for proposition that directors owe a fiduciary duty of care to shareholders and for the definition and standards of the business judgment rule).

Similarly, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), has been cited by the courts in: Illinois, Rosenstein v. CMC Real Estate Corp., 522 N.E.2d 221, 225 (Ill. App. Ct. 1988) (cited for the proposition that an appraisal constitutes the exclusive remedy for minority shareholders who claim that a merger was effectuated without corporate purpose and with the intent of freezing them out); New York, *In re* Seagroatt Floral Co., 583 N.E.2d 287, 290 (N.Y. 1991) (cited for the proposition that fair market value is a question of fact to be determined by the circumstances of each case); North Carolina, *IRA* ex rel. *Oppenheimer*, 419 S.E.2d at 358 (cited for the proposition that there are two aspects of fairness, fair dealing, and fair price); Ohio, Stepak v. Schey, 553 N.E.2d 1072, 1080 (Ohio 1990) (cited for the proposition that where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved, an appraisal remedy may not be an adequate remedy); Pennsylvania, Lamparski v. Sikov, Lamparski & Woncheck, 559 A.2d 544, 547 n.6 (Pa. Super. Ct. 1989) (agreeing with Weinberger's approach to valuation approvingly).

[68]An example of the Delaware Supreme Court's ability to render decisions quickly is Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989) (revised 3/9/90), where the supreme court issued its oral affirmation 10 days after the chancery court's opinion. Herzel & Richman, *supra* note 7, at F-9 n.24. In Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 36 n.1 (1993), the supreme court issued an order affirming the chancery court's opinion 15 days after the chancery court gave its opinion.

In a similar vein, Delaware recently enacted the Summary Procedures Act. *See* DEL. SUPER. CT. R. 124-131. The goal of the act is completion of commercial litigation within 10 to 12 months of the filing of the complaint. *Id. See also* Dan Fulco, Note, *Delaware's Response to Inefficient, Costly Court Systems and a Comparison to Federal Reform*, 20 DEL. J. CORP. L. 937, 950-56 (1995) (discussing Summary Procedures Act).

Limiting corporate litigation to these two courts provides more stability and predictability in the decisions.[69] In larger states with more people and more courts, corporate law cases are heard by a variety of judges in courts of general jurisdiction.[70]

b. *The Case Law*

One commentator has stated that Delaware's "highly developed body of case law, more than the statute, [constitutes] Delaware corporation law."[71] The court of chancery and the Delaware Supreme Court have created a wealth of precedent over the years that provide guidance and substantial certainty in corporate affairs.[72] Many corporations seeking to reincorporate in Delaware have indicated that the case law precedent provides "'greater predictability with respect to corporate legal affairs.'"[73] This legal precedent allows management to plan long-term business decisions with greater confidence.[74] Due to the large number of cases and decisions brought to the Delaware courts, there is a greater probability that the Delaware courts have addressed a particular issue or problem than have other state courts.[75]

c. *Other Advantages*

Delaware's responsiveness to corporations is also exemplified by the Secretary of State's Office and the corporation service companies located in Delaware. The Secretary of State's Office maintains the official records of all corporations, assesses and collects franchise taxes, registers foreign corporations to do business in Delaware, and, in some cases, receives service of process.[76] The office employs state of the art equipment to store and retrieve financial records.[77] Additionally, the office's technology allows corporations to file quickly and efficiently.[78]

---

[69]*See* Romano, *supra* note 8, at 277.

[70]*Id.*

[71]BLACK, *supra* note 50, at 8.

[72]Macey & Miller, *supra* note 13, at 484.

[73]*Id.* (quoting 1985 Proxy Statement of Atlantic Richfield Co.).

[74]*Id.*

[75]BLACK, *supra* note 50, at 9.

[76]*Id.* at 10.

[77]*Id.*

[78]*Id.* In Delaware, the process of incorporation takes 24 hours or, for an additional fee, incorporation can be completed on the same business day. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 901-02 (1990). In New York and Connecticut, it takes four to six weeks and three to four weeks, respectively,

The services provided by corporation service companies are also an advantage Delaware offers. These corporation service companies accept service of process, "prepare corporate formation papers, check proposed new corporate names for preemption, prepare certificates of incorporation, file incorporation papers with the Secretary of State, record those papers with the county recorder, prepare corporate name changes, and prepare certified copies of documents, including certificates of good standing."[79] The corporation service companies are able to perform these tasks quickly, thus giving Delaware a time advantage over other states, especially when dealing with corporate takeovers.[80]

III. THE DEBATE OVER JURISDICTIONAL COMPETITION

Two major theories have emerged concerning interstate competition for corporate charters.[81] The "race for the bottom" theorists argue that interstate competition for corporate charters results in corporate laws that are detrimental to shareholders. Conversely, the "race for the top" proponents argue that state competition leads to laws that are favorable to shareholders.

A. *"Race For the Bottom"*

The "race for the bottom" theory can be traced to the work of Adolph Berle and Gardiner Means.[82] In their work, *The Modern Corporation and Private Property*, Berle and Means observed that the business corporation is characterized by a "separation of ownership and control."[83] Because shareholders are dispersed, they are unable to

---

to process an incorporation. *Id.* at 901.

[79]Alva, *supra* note 78, at 901.

[80]*Id.*

[81]These two theories are not the only theories that commentators have advanced to explain the effects of state competition for corporate charters. Jonathan R. Macey and Geoffrey P. Miller have attempted to explain Delaware's dominance of the corporate charter market by using an interest group analysis. *See* Macey & Miller, *supra* note 13, at 498-522. They argue that the Delaware Bar, as one of the interest groups within the state, has a competitive advantage over other interest groups within the state because of their knowledge of the legal system and the low cost to them of making reforms. *Id.* at 473. This competitive advantage allows Delaware lawyers to create rules that increase the demand for their services and increase the total "profits" (which include lawyer fees) from corporate franchise taxes. *Id.* at 473, 503-04.

[82]*Id.* at 474.

[83]*Id.* (quoting ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932)).

exercise significant control over the corporation.[84] Consequently, the real power lies with the managers of the corporation.[85]

William Cary, who coined the term "race to the bottom," has been the most vocal proponent of this theory. Cary premised his argument on the hypothesis that "there is no public policy left in Delaware corporate law except the objective of raising revenue."[86] Cary examined substantive law issues and the Delaware courts.[87] He concluded that Delaware created a legal climate favorable to management and sometimes harmful to shareholders.[88] The underlying objective for the state is to encourage corporations to incorporate in Delaware.[89]

Cary examined a number of corporate issues that he considered potentially adverse to shareholders' interests. These issues include: (1) the fiduciary duty of care,[90] (2) proxy contests and takeovers,[91] (3) accrued dividends on preferred stock,[92] (4) *de facto* mergers,[93] and (5) fairness between parent and subsidiary.[94] Attacking the Delaware judiciary, Cary suggested that the Delaware courts "have contributed to shrinking the concept of fiduciary responsibility and fairness, and indeed have followed the lead of the Delaware legislature in watering down shareholders' rights."[95]

Cary maintained that Delaware's "race to the bottom" created laws which benefitted management and harmed shareholders in order to obtain revenue from corporate taxes.[96] Cary concluded that federal corporate legislation was necessary to eliminate the incentive to organize in states whose laws were detrimental to shareholders.[97]

---

[84]*Id.*

[85]Macey & Miller, *supra* note 13, at 474.

[86]Cary, *supra* note 12, at 684. Cary sharply criticized Delaware. He maintained that, in order to solve the problem, Congress should adopt "federal standards of corporate responsibility." *Id.* at 701. "The first step is to escape from the present predicament in which a pygmy among the 50 states prescribes, interprets and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders, thereby increasing its revenue." *Id.*

[87]*See id.* at 663-84.

[88]*See id.* at 668-70.

[89]*See id.* at 663.

[90]Cary, *supra* note 12, at 683-84.

[91]*Id.* at 673-75.

[92]*Id.* at 677-78.

[93]*Id.* at 679.

[94]Cary, *supra* note 12, at 679-83.

[95]*Id.* at 696.

[96]*See id.* at 700-01.

[97]*See id.* at 702.

B. *Race for the Top*

The corporate federalists employ a law and economics approach to explain Delaware's dominant position in the corporate charter market. The federalists argue "that Delaware has achieved its prominent position because its permissive corporation law maximizes, rather than minimizes, shareholders' welfare."[98]

Ralph Winter identified a flaw in the "race for the bottom" theory. Winter argued that Cary failed to consider capital, product, and corporate control markets that constrain management from choosing a corporate domicile adverse to shareholders' interests.[99]

Although corporate federalists agree that managers do not always act in the best interests of shareholders,[100] they argue that market forces limit management's ability to pursue interests that are detrimental to the shareholders.[101] Under Winter's theory, firms that incorporate in states with inefficient corporate laws would be outperformed by firms that incorporate in states with efficient corporate laws. As a result, a firm that incorporated in a state with inefficient corporate laws would have a lower stock price. A lower stock price could result in employment termination, because the cost of capital would be higher for that firm than for a firm operating in a more efficient legal environment or replacement by a takeover bidder that could reincorporate in a more efficient state and thereby increase the firm's value.[102] This threat of replacement leads managers to incorporate in the state with the most efficient corporate law.[103]

---

[98]Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 919-20 (1982).

[99]Winter stated, "It is not in the interest of Delaware corporate management or the Delaware treasury for corporations chartered there to be at a disadvantage in raising debt or equity capital in relation to corporations chartered in other states." RALPH K. WINTER, JR., GOVERNMENT AND THE CORPORATION 10 (1978).

[100]An example formulated by Macey and Miller illustrates this point. They stated:

> On any given day, a firm's managers might prefer to play golf, although its shareholders might prefer that they remain in the office, maximizing profits. Similarly, a management team faced with a hostile tender offer that may deprive them of their jobs if it succeeds may prefer that the offer be defeated, even though it is clearly in the best interest of the firm's shareholders that the offer succeed.

Macey & Miller, *supra* note 13, at 476-77.

[101]*Id.* at 477.

[102]ROMANO, *supra* note 1, at 15.

[103]*Id.* This theory is somewhat inadequate. As Macey and Miller explained:

> A "pure" corporate federalist approach presumably would hold that market competition eventually will force all corporations to incorporate in the

Several scholars have performed econometrics techniques known as "event studies"[104] to determine whether the choice of corporate domicile benefits or harms shareholders.[105] Of the five event studies of reincorporation that have been performed, several have found significant, positive effects (rise in stock price) on a firm's reincorporation in Delaware, while no study has found a negative price effect.[106] This suggests that choosing Delaware as the state of incorporation benefits shareholders.[107]

IV. THE DUTY OF LOYALTY AND CARE UNDER DELAWARE LAW

Directors owe the fiduciary duties of loyalty and care to the corporation while managing corporate business and affairs.[108] These duties are important because directors must act in accordance with their

---

> state providing the most efficient menu of legal rules. If reincorporating in Delaware produced gains for all firms, those that did not relocate to Delaware would be expected to disappear as investors transferred resources to Delaware firms. But this withering away of Delaware firms is not observed. Either Delaware reincorporation does not produce gains for all firms or firms refusing to relocate do not disappear, for although Delaware is successful in attracting and retaining corporate charters, many corporations continue to thrive under charters granted by other states — evidence that at least some firms may incorporate outside Delaware without incurring serious competitive disadvantage.

Macey & Miller, *supra* note 13, at 477-78.

[104]Event studies examine whether particular information events (public events where new information is introduced to the financial markets) such as a corporation reincorporating in a different state significantly affect a firm's stock price. ROMANO, *supra* note 1, at 17.

[105]*See id.* at 17 n.7 (listing five event studies of incorporation). "If an information event — in this instance, reincorporating in Delaware — is considered beneficial for shareholders . . . , then stock prices will rise significantly above their expected value." *Id.* at 17. If an information event is harmful to shareholders, the price of the stock will fall. *Id.*

[106]*Id.* at 18.

[107]Bebchuk, a supporter of national corporation laws, has indicated that event studies are not useful. Bebchuk, *supra* note 12, at 1449-51. In resolving the debate over the desirability of state competition, Bebchuk argues that stock price increases around the time of reincorporation may not be due to the reincorporation, but to other, favorable information about the company. *Id.* at 1449. Bebchuk also argues that the event studies fail to consider that the rules of the original state may be just as harmful to shareholders as the rules in the destination state. *Id.* Finally, Bebchuk argues that state competition produces "desirable results with respect to some corporate issues but not with respect to others." *Id.* at 1450. According to the federalists, however, "[i]t is . . . improbable that such information could swamp a reincorporation's otherwise significantly negative stock price effect." ROMANO, *supra* note 1, at 18.

[108]3A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 837.60 (perm. ed. rev. vol. 1994).

fiduciary duties of care and loyalty in order to obtain the benefit of the business judgment rule.[109] This section examines both the duty of loyalty and the duty of care under Delaware law.

A. *The Duty of Loyalty*

Directors of a corporation owe a duty of loyalty to the corporation and, ultimately, to the corporation's shareholders.[110] The duty of loyalty essentially involves a duty to avoid conflicting economic or other interests between the director and the corporation.[111] The Delaware Supreme Court described the duty of loyalty in the oft-cited case of *Guth v. Loft, Inc.*[112] The court explained:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . [This rule] demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.[113]

At common law, all interested director transactions were "voidable at the election of the corporation."[114] As the law evolved, interested

---

[109]*See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.*

[110]R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.9, at 4-204 (2d ed. 1990 & Supp. 1995). *See* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1988); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986).

[111]*See* FLETCHER, *supra* note 108, § 837.60.

[112]5 A.2d 503 (Del. 1939). *See also Mills Acquisition Co.*, 559 A.2d at 1280 ("Not only do these principles demand that corporate fiduciaries absolutely refrain from any act which breaches the trust reposed in them, but also to affirmatively protect and defend those interests entrusted to them.").

[113]*Guth*, 5 A.2d at 510.

[114]Cahall v. Lofland, 114 A. 224, 228 (Del. Ch. 1921). *But see* Norwood P. Beveridge, Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655, 659 (1992) (arguing that interested director transactions were not voidable without regard to fairness).

director transactions approved by a majority of disinterested directors were upheld if found to be fair.[115] Because this framework often proved unworkable, "safe harbor" statutes were enacted for directors.[116] Under these statutes, an interested director transaction would be sustained if: (1) it was approved by an informed majority of the directors or shareholders or (2) it was fair.[117]

---

[115]*See* Keenan v. Eshleman, 2 A.2d 904, 908 (Del. 1938).

[116]BALOTTI & FINKELSTEIN, *supra* note 110, § 4.9, at 4-206. The precursors to these safe harbor statutes were clauses in the certificate of incorporation of a corporation. *See, e.g.*, Martin Found. v. North Am. Rayon Corp., 68 A.2d 313, 314 (Del. Ch. 1949). In *Martin*, the defendant's articles of incorporation contained the following clause:

> "In the absence of fraud, no contract or other transaction between the Corporation and any other corporation or any individual or firm shall be in any way affected or invalidated by the fact that any of the directors of the Corporation is interested in such other corporation or firm or personally interested in such other contract or transaction; provided that such interest shall be fully disclosed or otherwise known to the Board of Directors or Executive Committee at the meeting at which such contract or transaction is authorized or confirmed; and provided further that at such meeting there is present a quorum of Directors not so interested and that such contract or transaction shall be approved by a majority of such quorum."

Id. at 314 (quoting paragraph 12 of Rayon's certificate of incorporation).

[117]*See* BALOTTI & FINKELSTEIN, *supra* note 110, § 4.9, at 4-206; *see also, e.g.*, Marciano v. Nakash, 535 A.2d 400, 407 (Del. 1987) (concluding that a loan between the corporation and the directors was fair); Oberly v. Kirby, 592 A.2d 445, 470 (Del. 1991) (finding a transaction between the directors of a charitable corporation and the charitable corporation fair).

The Delaware "safe harbor" statute is § 144. Section 144 states:

> (a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if:
>
> (1) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or
>
> (2) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or
>
> (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board or directors, a

In cases where an interested director transaction was not approved by a majority of disinterested directors or shareholders, the judicial review of the fairness[118] of the transaction becomes a complex question.[119] The Delaware courts look for a showing of fair dealing and fair price.[120]

Various business transactions raise duty of loyalty questions.[121] The issue of whether the director has fulfilled the duty of loyalty is to be determined by all of the facts and circumstances in each case.[122]

There are two basic reasons why loyalty issues are important in corporate transactions. As mentioned earlier, if a director is found to have breached the fiduciary duty of loyalty, the business judgment rule does not apply to the transaction.[123] Additionally, unlike with breaches of the duty of care, corporations cannot limit or eliminate the personal liability of directors.[124]

---

committee, or the shareholders.

DEL. CODE ANN. tit. 8, § 144(a) (1991). In interested merger transactions, compliance with § 144 by setting up an independent committee *may* only serve to shift the burden to the plaintiff to show that the transaction was unfair. *See* Kahn v. Lynch Communication Sys., Inc., 638 A.2d 1110, 1117-18 (Del. 1994).

[118]"Fairness" is also sometimes termed "intrinsic fairness" or "entire fairness" by the Delaware courts. BALOTTI & FINKELSTEIN, *supra* note 110, § 4.9, at 4-208.

[119]*Id.*

[120]*Id.* at 4-209. The Delaware Supreme Court described the concept of fairness in *Weinberger*, 457 A.2d at 711. The court stated:

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

Id. (citation omitted).

[121]BALOTTI & FINKELSTEIN, *supra* note 110, § 4.10, at 4-217. Examples given by Messrs. Balotti and Finkelstein included:

> sales to or purchases by the corporation from directors or entities in which the directors have an interest; dealings by a parent corporation with a subsidiary; disparate treatment by a majority shareholder of minority shareholders in corporate acquisitions and reorganization transactions; use of corporate funds to perpetuate control; sale of control; insider trading; usurpation of corporate opportunities; competition with the corporation by officers or directors; and improper use of corporate position, property, or information.

Id.

[122]FLETCHER, *supra* note 108, § 837.60, at 199.

[123]*See supra* text accompanying note 109.

[124]FLETCHER, *supra* note 108, § 837.60, at 199; *see also* DEL. CODE ANN. tit. 8,

B. *The Duty of Care*

Directors of a corporation also owe a duty of care to the corporation and to the corporation's shareholders.[125] There are two aspects to the duty of care. Directors must exercise the requisite degree of care in the decision-making process.[126] Directors must also exercise the requisite degree of care in "responsibilities other than decision-making — including the delegation and oversight functions."[127]

As with the duty of loyalty, the Delaware courts look to all the facts and circumstances of each case in order to determine whether the director has breached the duty of care.[128] A number of states have established a statutory standard of care for directors expressed in terms of the "ordinary prudent person . . . under similar circumstances."[129] Delaware, however, has established the standard of care through its common law.

Early Delaware case law established a general standard of care similar to that set forth by the Model Business Corporation Act (MBCA). In *Graham v. Allis-Chalmers Manufacturing Co.*,[130] the court explained that "directors of a corporation in managing the corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances."[131] More recent decisions by the Delaware courts, however, have concluded that the standard is "gross negligence." The Delaware Supreme Court, in *Aronson v. Lewis*,[132] explained that "[w]hile the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence."[133]

---

§ 102(b)(7) (expressly precluding the articles of incorporation from limiting a director's personal liability for a breach of the duty of loyalty).

[125]Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

[126]BALOTTI & FINKELSTEIN, *supra* note 110, § 4.7, at 4-167.

[127]*Id.* at 4-168.

[128]FLETCHER, *supra* note 108, § 1030, at 15.

[129]*Id.* at 14; BALOTTI & FINKELSTEIN, *supra* note 110, § 4.7, at 4-168. At least, 38 states have modeled their statutes after the MBCA which adopted the ordinary negligence standard. *See* MODEL BUSINESS CORP. ACT ANN. § 8.30 statutory comparison at 8-175 to 8-176 (1994). *See also infra* note 305 and accompanying text (listing states which have adopted the MBCA standard).

[130]188 A.2d 125 (Del. 1963).

[131]*Id.* at 130.

[132]473 A.2d 805 (Del. 1984).

[133]*Id.* at 812.

The supreme court has examined a number of duty of care cases since *Aronson*.[134] In perhaps the most controversial decision rendered by the Delaware Supreme Court, the court in *Smith v. Van Gorkom*[135] held that the board of directors were grossly negligent in approving the sale of the corporation at a significant premium over the market price.[136] This case makes it clear that the Delaware courts view with skepticism certain types of board action including: (1) haste in the decision-making process, (2) lack of board preparation, (3) lack of questioning or involvement by the board, (4) blind reliance on officers or experts, and (5) lack of care when dealing with documents.[137]

The duty of care has become less important in cases seeking monetary damages because of the enactment of section 102(b)(7)[138] which allows a corporation "to include in its certificate of incorporation a provision limiting or eliminating the personal financial liability of a director to the corporation or its stockholders for breaches of the duty of care."[139] The duty of care, however, is still important in injunction and rescission cases.[140]

---

[134]*See, e.g., Paramount Communications*, 571 A.2d at 1154 (holding that the Time directors were fully informed of the potential benefits of a merger with Paramount); Citron v. Fairchild Camera & Instruments Corp., 569 A.2d 53, 66 (Del. 1989) (concluding that the board of directors did not breach their duty of care because the board took an "active and direct role in the sale process").

[135]488 A.2d 858 (Del. 1985).

[136]*Id.* at 888.

[137]BALOTTI & FINKELSTEIN, *supra* note 110, § 4.7, at 4-179 to 4-187.

[138]Section 102(b)(7) states:

> (b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:
>
> . . . .
>
> (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.

DEL. CODE ANN. tit. 8, § 102(b)(7) (1991).

[139]BALOTTI & FINKELSTEIN, *supra* note 110, § 4.7 at 4-167.

[140]*Id.*

V. THE CASES

In *Cede & Co. v. Technicolor, Inc.*[141] and *Paramount Communications Inc. v. QVC Network Inc.*,[142] the court held that the directors had breached their fiduciary duties while selling the corporation. Cases in which courts find director liability could have a significant effect on corporations. In 1985, after the Delaware Supreme Court found the directors personally liable for deciding to accept a buyout offer in *Smith v. Van Gorkom*,[143] the number of shareholder derivative suits brought for a breach of the duty of care dramatically increased.[144] This, in turn, caused insurance rates for director and officer liability coverage to increase and, in some cases, corporations were unable to obtain insurance.[145] Many directors, concerned about the prospect of being found personally liable for astronomical amounts, resigned their positions.[146] Predictably, this has had an effect on corporations' ability to recruit qualified directors and officers.[147] *Technicolor* and *QVC* will be examined to determine whether any standards for evaluating board actions have changed, thus affecting a corporation's ability to attract qualified officers and plan long-term corporate strategy.

A. Cede & Co. v. Technicolor, Inc.

1. The Facts

Technicolor involved a cash-out merger of Technicolor, Inc. (Technicolor) by MacAndrews & Forbes Group (MAF).[148] Technicolor was in the film/audio visual business, its core business being the processing of film for Hollywood movies.[149] MAF was a much smaller company headed by Ronald A. Perelman.[150]

---

[141]634 A.2d 345 (Del. 1993).

[142]637 A.2d 34 (Del. 1993).

[143]488 A.2d 858 (Del. 1985).

[144]Lynne A. Whited, Note, *Corporate Directors — An Endangered Species? A More Reasonable Standard for Director and Officer Liability in Illinois*, 1987 U. ILL. L. REV. 495, 495.

[145]*Id.*

[146]*Id.* at 505.

[147]*Id.* at 504-05.

[148]*Technicolor*, 634 A.2d at 349.

[149]*Id.* at 351.

[150]*Id.* at 350, 352.

In the summer of 1982, Perelman and MAF targeted Technicolor for a possible takeover.[151] Perelman met with Fred Sullivan, a Technicolor director, to seek assistance in making contact with Technicolor's management.[152] Sullivan informed Morton Kamerman, Technicolor's chief executive officer, about the meeting with Perelman and MAF's interest in acquiring Technicolor.[153]

Kamerman met with Perelman and Sullivan to discuss a possible merger.[154] After negotiations at several meetings, Perelman and Kamerman agreed that, if the merger closed, Sullivan would receive a $150,000 "finders fee."[155] The two parties also agreed on an employment contract for Kamerman as CEO of Technicolor.[156]

Following a fairness opinion given by Goldman Sachs (Goldman), Technicolor's investment banker, that a price between $20 and $22 was worth pursuing, Perelman and Kamerman eventually agreed to a price of $23 per share.[157] Two days later, the board of directors of Technicolor held a special meeting to consider the proposed sale of Technicolor.[158] Of the remaining seven directors (excluding Kamerman and Sullivan), four had limited knowledge of the possible transaction and three had no previous knowledge of the possible sale.[159] Kamerman told the Technicolor Board about the previous negotiations between himself and Perelman and recommended that the $23 per share price be accepted.[160] Kamerman also explained the basic structure of the agreement and disclosed the terms of his employment contract with MAF and Sullivan's $150,000 "finders fee."[161]

Merideth M. Brown, Technicolor's outside legal counsel, explained the structure of the proposed merger and reviewed the key documents

---

[151] *Id.*

[152] *Technicolor*, 634 A.2d at 350, 352. Prior to the meeting, Sullivan placed a purchase order for 10,000 shares of Technicolor stock. *Id.* at 353. However, the order was only executed for 1,000 shares. *Id.* at 353 n.8. Sullivan's trading was examined by the Securities and Exchange Commission which ordered him to pay back $13,705.09 to Technicolor. *Id.*

[153] *Id.* at 353.

[154] *Id.*

[155] *Id.* at 355.

[156] *Technicolor*, 634 A.2d at 355.

[157] *Id.* at 356.

[158] *Id.*

[159] *Id.*

[160] *Technicolor*, 634 A.2d at 356.

[161] *Id.* at 357.

involved.[162] Goldman then made an oral presentation indicating that the price of $23 per share was fair.[163]

Although some directors suggested trying to obtain a higher price from Perelman, they were advised that he would not pay more than $23 per share.[164] One director suggested that Technicolor solicit additional offers.[165] This suggestion was rejected because the remaining members thought that "a bird in the hand was better than a bigger one in the bush."[166] The Technicolor Board unanimously approved the agreement and plan of merger with MAF and recommended that the shareholders accept the offer of $23 per share.[167]

Cinerama, owning 4.405% of the total shares outstanding, dissented from the second stage merger and brought suit for an appraisal of its shares pursuant to section 262 of the Delaware General Corporation Law.[168] During pre-trial discovery, Cinerama discovered information leading it to believe the Technicolor Board had breached their fiduciary duties and brought suit against the Board for the breach of these duties.[169]

2. The Court's Reasoning

In *Technicolor*, the Delaware Supreme Court had the opportunity to examine the duty of loyalty and the duty of care with respect to the Technicolor Board's decision.

a. *The Duty of Loyalty*

The court first examined whether the chancellor correctly formulated the two part test used to determine whether a self-interest is significant enough to rebut the presumption of director and board independence.[170] The chancellor's two part test required that "a shareholder show: (1) the materiality of a director's self-interest to the given director's independence; and (2) the materiality of any such self-interest to the collective independence of the board."[171]

---

[162] *Id.*
[163] *Id.*
[164] *Technicolor*, 634 A.2d at 357.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Technicolor*, 634 A.2d at 349.
[169] *Id.* at 349-50.
[170] *Id.* at 361-66.
[171] *Id.* at 363.

Rejecting Cinerama's contention that "one director's receipt of *any* tangible benefit not shared by the stockholders generally is sufficient to overcome the . . . presumption of director and board independence,"[172] the court stated:

> Cinerama misunderstands *Pogostin.* Nothing we said there suggests that one director's self-interest, or even an act of disloyalty by that director, so infects the entire process that the board itself is deprived of the benefit of the business judgment rule. This Court has never held that one director's colorable interest in a challenged transaction is sufficient, without more, to deprive a *board* of the protection of the business judgment rule presumption of loyalty. Provided that the terms of 8 *Del.C.* § 144 are met, self-interest, alone, is not a disqualifying factor even for a director.[173]

The court rejected the "reasonable person standard" for determining whether a given director's self-interest is material.[174] The court concluded that the question was factual and needed to be determined in the trial court.[175]

The court then examined part two of the test articulated by the chancellor. The chancellor held that, in order to rebut the business judgment rule, "any found director self-interest affecting director independence must also be found to have tainted, influenced or otherwise undermined the *board's* deliberative process."[176] The chancellor stated:

> The preliminary or threshold question of independence is factual: is any differing financial interest sufficient to create a reasonable likelihood, considering all of the circumstances, that it actually affected the director*s*' actions to the corporation's detriment? In some instances an arguable or an established personal financial benefit may, when viewed in context, be found to be immaterial in fact to the exercise of a judgment motivated entirely to achieve the best

---

[172] *Technicolor*, 634 A.2d at 363.

[173] *Id.*

[174] *Id.* at 364. The court indicated that the "reasonable person standard" was unhelpful and confusing and that the case cited by the chancellor adopting the "reasonable person standard" was a duty of care case and not a duty of loyalty case. *Id.* at 364 n.31.

[175] *Id.* at 364.

[176] *Technicolor*, 634 A.2d at 364.

> available result for the corporation and (in the sale context) for its shareholders.[177]

The court stated that the chancellor's formulation was unclear as to what the shareholder would have to prove.[178]

The court, examining the second prong of the chancellor's materiality test, stated that "we find the Chancellor's requirement that a director's self-interest translate into board self-interest to be an apparent borrowing of precepts embodied in 8 *Del.C.* § 144(a)."[179]

Section 144(a) permits the approval of a corporate action even though one or more directors has an interest in the transaction.[180] The court pointed out that section 144(a) could arguably remove the taint from the board of directors' self-interest.[181] Neither the court nor the parties below, however, had addressed the issue.[182] The court, therefore, remanded the case for a finding on this issue.[183]

The court also pointed out that neither party nor the court below had addressed the relationship between Technicolor's charter provision that required unanimous approval of the board of directors for the sale of the company and Sullivan's self-interest in the transaction.[184] The court also remanded this issue to determine "the effect of the unanimity requirement in Technicolor's charter on the duty of loyalty standard controlling this case."[185]

b. *The Duty of Care*

The court in *Technicolor* also examined the duty of care. The court first adopted the chancellor's presumed findings that the Technicolor Board had failed to reach an informed decision and, thus, had breached their duty of care.[186] The court noted that *Smith v. Van*

---

[177]*Id.*

[178]*Id.*

[179]*Id.* at 365. *See supra* note 117.

[180]DEL. CODE ANN. tit. 8, § 144(a) (1991).

[181]*Technicolor*, 634 A.2d at 365.

[182]*Id.*

[183]*Id.* at 366.

[184]*Id.* at 365.

[185]*Technicolor*, 634 A.2d at 366.

[186]*Id.* The court noted the chancellor's reasons for finding that the board members had not exercised due care in approving the merger agreement. The court stated:

> The trial court's doubts were based on at least five explicit predicate findings on the issue of due care: (1) that the agreement was not preceded by a "prudent search for alternatives;" (2) that, given the terms of the merger and

Gorkom[187] presented essentially the same issue as presented in this case.[188]

The court rejected the chancellor's contention that "Cinerama was not entitled to relief because it had failed to present evidence of injury caused by the defendants' negligence."[189] The court, citing *Mills Acquisition Co. v. MacMillan, Inc.*[190] and *Van Gorkom*, stated: "This Court has consistently held that the breach of the duty of care, without any requirement of proof of injury, is sufficient to rebut the business judgment rule."[191]

3. Evaluation

The court in *Technicolor* considered two basic issues: the duty of loyalty and the duty of care. With respect to the duty of loyalty, the court did not change any existing law.

The court also examined the duty of care. This case was very similar to *Van Gorkom* in that it dealt with many of the same issues and facts. The facts in *Technicolor*, however, seem less egregious than the

---

> the circumstances, the directors had no reasonable basis to assume that a better offer from a third party could be expected to be made following the agreement's signing; (3) that, although Kamerman had discussed Perelman's "approach" with several of the directors before the meeting, most of the directors had little or no knowledge of an impending sale of the company until they arrived at the meeting and only a few of them had any knowledge of the terms of the sale and of the required side agreements; (4) that Perelman "did, probably, effectively lock-up the transaction on October 29 when he acquired rights to buy the Kamerman and Bjorkman shares (about eleven percent together) and acquired rights under the stock option agreement to purchase stock that would equal [eighteen] percent of the company's outstanding stock after exercise" given Technicolor's charter provision and Perelman's prior stock ownership of about five percent; and (5) that the board did not "satisfy its obligation [under *Revlon*] to take reasonable steps in the sale of the enterprise to be adequately informed before it authorized the execution of the merger agreement."

Id. at 369 (citations omitted).

[187]488 A.2d 858 (Del. 1985).

[188]*Technicolor*, 634 A.2d at 370. In *Van Gorkom*, the court examined the Trans Union Board's decision to approve a cash-out proposal at a substantial premium over the market price. *Van Gorkom*, 488 A.2d at 864-70. The *Van Gorkom* court, applying a gross negligence standard, held that the board breached its duty of care by not reaching an informed decision. *Id.* at 874.

[189]*Technicolor*, 634 A.2d at 370.

[190]559 A.2d 1261 (Del. 1988) (holding that the board had not breached its duty of loyalty or care and was, thus, entitled to the protection of the business judgment rule).

[191]*Technicolor*, 634 A.2d at 371.

facts in *Van Gorkom*.[192] In *Technicolor*, experienced counsel explained the terms of the agreement[193] and, unlike *Van Gorkom*, there was no indication that the directors failed to understand important aspects of the terms. In addition, the board was made aware of the negotiations which had taken place, and an investment banker had given a fairness opinion regarding the price of the shares.[194]

Although the court indicated that the decision was similar to *Van Gorkom*,[195] this case may provide less predictability in cases where the board of directors has decided to sell the corporation. The *Technicolor* case makes it clear that the directors must obtain the "highest value reasonably available under the circumstances."[196] The court, however, provided little guidance as to what corporate officers can do to assure that the price offered is the best price reasonably available.[197]

B. Paramount Communications Inc. v. QVC Network Inc.

1. The Facts

The three corporations involved in *QVC* were Paramount Communications Inc. (Paramount), Viacom Inc. (Viacom), and QVC Network Inc. (QVC).[198] Paramount operated a group of entertainment businesses including motion picture theaters, television studios, book

---

[192]Andrew E. Bogen, *The Technicolor Decision: The Delaware Supreme Court Revisits* Smith v. Van Gorkom, INSIGHTS, Jan. 1994, at 1, 11. When the Delaware Supreme Court handed down the *Van Gorkom* decision, many commentators were shocked that director liability could be imposed when the directors approved a merger at a substantial premium over the market price. *See generally* Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437 (1985) (arguing that the Delaware Supreme Court erred by not conferring the business judgment rule to Trans Union's directors); Leo Herzel et al., "Smith" *Brings Whip Down on Directors' Backs*, LEGAL TIMES 14 (May 13, 1985) (referring to the opinion as dumbfounding); William T. Quillen, Trans Union, *Business Judgment, and Neutral Principles*, 10 DEL. J. CORP. L. 465, 466 (1985) (stating "there is little lasting significance to the [*Van Gorkom*] case" because the case was so fact specific).

[193]*Technicolor*, 634 A.2d at 357.

[194]*Id.* at 356.

[195]*See id.* at 370.

[196]*Id.* at 361.

[197]*Technicolor* seems at odds with Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989), in which the court upheld the board's decision to reject an offer at approximately a 50% premium over the market price. Bogen, *supra* note 192, at 12. In *Technicolor*, the board approved a transaction at almost 100% premium over market price. *Id.* In some respects, this discrepancy has been cleared up by the Delaware Supreme Court. *See* Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1993).

[198]*QVC*, 637 A.2d at 36.

publishers, professional sports teams, and amusement parks.[199] Viacom, which was controlled by Summer M. Redstone, was also in the entertainment business and operated a number of cable television channels.[200] QVC sold a variety of merchandise through its television shopping network.[201]

Informal negotiations concerning a possible Paramount-Viacom merger began on April 20, 1993.[202] Although initial talks failed to yield substantial results, Paramount approved the Original Merger Agreement on September 12, 1993, between Paramount and Viacom.[203] This Original Merger Agreement contained a number of provisions that made a competitive bid unlikely.[204]

On September 20, 1993, QVC sent a letter to Paramount offering approximately $80 per share.[205] On October 11, 1993, the Paramount Board authorized management to meet with QVC.[206] On October 21, 1993, due to the slow pace of the merger discussions, QVC announced an $80 cash tender offer for fifty-one percent of Paramount's outstanding shares.[207]

Within hours of QVC's announcement, Viacom entered into negotiations with Paramount to revise the original transaction.[208] Viacom and Paramount agreed to revise the transaction through a series of amendments one of which included a new provision that increased the Viacom offer to $80 cash per share for fifty-one percent of Paramount's stock.[209] The Amended Merger Agreement, however, failed to remove any of the provisions that made a competing bid more difficult.[210]

On November 6, 1993, Viacom raised its tender offer price to $85 per share and also increased the value of the securities proposed in the second step merger.[211] On November 12, QVC responded by increasing its tender offer to $90 per share and also increasing the value of securities

---

[199] *Id.* at 37.

[200] *Id.* at 38. Redstone owned 85% of Viacom's voting Class A stock and about 69% of Viacom's nonvoting Class B stock through National Amusements, Inc., which was 92% owned by Redstone. *Id.*

[201] *Id.*

[202] *QVC*, 637 A.2d at 38.

[203] *Id.* at 39.

[204] *Id.*

[205] *Id.* The offer consisted of $30 in cash and .893 shares of QVC stock per share. *Id.*

[206] *QVC*, 637 A.2d at 40.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *QVC*, 637 A.2d at 40.

[211] *Id.* at 41.

in the second-step merger.[212] The value of the QVC offer was in excess of $1 billion over the Viacom offer.

In response to QVC's November 12 offer, Paramount scheduled a board meeting for November 15, 1993.[213] Prior to this meeting, board members received a document summarizing the "conditions and uncertainties" of the QVC offer.[214]

At the November 15, 1993 meeting, the Paramount Board concluded that the QVC offer was not in the best interests of Paramount.[215] The Paramount Board examined a large number of materials concerning the Viacom and QVC proposals.[216] Nevertheless, the only quantitative analysis of the "consideration to be received by the stockholders under each proposal was based on then-current market prices of the securities involved, not on the anticipated value of such securities at the time when the stockholders would receive them."[217] The Board stated that it based its decision on the fact that the bid was excessively conditional.[218] The Paramount Board, however, did not communicate its reason behind the decision to QVC because it believed that it would violate one of the "no-shop" provisions.[219]

2. The Court's Reasoning

The court first emphasized the significance of there being a controlling shareholder, Summer M. Redstone, following the transaction.[220] The court stated that unless the directors establish devices to protect the minority shareholders, "stockholder votes are likely to become mere formalities where there is a majority stockholder."[221] Further, the court indicated that once control has shifted, the shareholder should "receive[ ] a control premium and/or protective devices of significant value."[222] In this case, the shareholders did not receive any

---

[212] *Id.*

[213] *Id.*

[214] *QVC*, 637 A.2d at 41. "One director testified that this document gave him a very negative impression of the QVC bid." *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* The court stated, "The market prices of Viacom's and QVC's stock were poor measures of their actual values because such prices constantly fluctuated depending upon which company was perceived to be the more likely to acquire Paramount." *Id.* at 41 n.8.

[218] *QVC*, 637 A.2d at 41.

[219] *Id.*

[220] *Id.* at 38, 42.

[221] *Id.* at 42.

[222] *QVC*, 637 A.2d at 43.

protective provisions and, thus, the "Paramount directors had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available."[223]

The court then examined the obligations of the directors in a sale or change of control situation.[224] The court cited *Mills Acquisition Co. v. MacMillan, Inc.*[225] for the proposition that, in the sale of corporate control, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders.[226] The court reiterated that the directors have "one primary objective" in a sale of control context — "to secure the transaction offering the best value reasonably available for the stockholders."[227]

The court added that the directors, in pursuing the best value for the shareholders, were required to inform themselves of all the material reasonably available and relevant to making any final business decisions.[228] The methods by which the board of directors may secure the best value reasonably available for the stockholders are not limited.[229] Some possible methods given by the court included conducting an auction or canvassing the market.[230] Additionally, the board of directors could consider factors other than the amount of cash involved in determining which alternative provided the best value for the stockholders.[231]

Subjecting the transaction to strict scrutiny,[232] the court held that the Paramount Board, while attempting to obtain the best value reasonably available, failed to act reasonably.[233] The court criticized the defensive provisions contained in the Stock Option Agreement and indicated that the Paramount Board should have attempted to modify the defensive measures despite the fact that the measures prevented the

---

[223] *Id.*

[224] *Id.*

[225] 559 A.2d 1261, 1280 (Del. 1985).

[226] *QVC*, 637 A.2d at 43-44.

[227] *Id.* at 44.

[228] *Id.*

[229] *See id.*

[230] *QVC*, 637 A.2d at 44.

[231] *Id.*

[232] *Id.* at 45. The court subjected the transaction to strict scrutiny because of: (a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights.

Id.

[233] *Id.* at 49.

Paramount stockholders from obtaining the best value reasonably available.[234] The court was also concerned with the fact that the Paramount Board considered the QVC offer "conditional" and that the Board did not attempt to get additional information from QVC.[235]

The court also rejected the argument that the disparity between the Viacom and QVC proposals, over $1 billion, was justified on the basis of strategy.[236] The court stated:

> This significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current Paramount Board to continue to hold and implement their strategic vision in any meaningful way. Moreover, their uninformed process had deprived their strategic vision of much of its credibility.[237]

3. Evaluation

Although the court in *QVC* ruled against the board of directors,[238] the decision provided additional insight into the duties of directors in a change of control situation. This could, in turn, provide more predictability with respect to board action in future change of control situations.

The court carefully discussed many of the previous change of control cases and how *QVC* fit within the framework of these previous decisions.[239] The court also set forth a clear framework for determining the board's duty in a change of control situation. In sale of control situations, "enhanced scrutiny" is applicable and the court will examine the "adequacy of the decisionmaking [sic] process employed by the directors" and the "reasonableness of the directors' action in light of the circumstances then existing."[240]

The enhanced scrutiny standard articulated by the court also allows directors additional flexibility during a change of control situation. Under *Revlon*, the board had the duty to sell "the company at the highest price

---

[234] *QVC*, 637 A.2d at 50.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *See QVC*, 637 A.2d at 49.
[239] *Id.* at 43-45.
[240] *Id.* at 45.

attainable for the stockholders' benefit."[241] Under *QVC*, "the directors must focus on one primary objective — to secure the transaction offering the best value reasonably available for the stockholders."[242] This objective seems to allow the board of directors to take a number of factors into consideration. The *QVC* court even stated that "[i]n determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance."[243]

Lawrence A. Cunningham and Charles M. Yablon have argued that *QVC* has unified *Revlon* and *Unocal* under the "enhanced scrutiny" standard.[244] They argue that "enhanced scrutiny" would apply to "all managerial decisions that significantly alter or affect shareholder interests."[245] They also argue that the "duty to seek the best value reasonably available to stockholders" could be applied to a number of managerial decisions.[246] Cunningham and Yablon go on to state, "[T]he QVC standard, broadly applied, makes possible precisely the kind of flexible, fact-based, case by case inquiry so characteristic of Delaware corporate law opinions."[247] This could suggest, however, that the standard provides very little predictability because the decision of whether the board has breached its fiduciary duties depends on the particular facts of each case.

VI. ARE FIRMS LEAVING DELAWARE?

This section examines empirical information that indicates that Delaware is still a haven for incorporation. Additionally, this section discusses some of the reasons why Delaware remains the leader in granting corporate charters.

A. *Empirical Information*

Three basic areas were examined to compile the empirical information in this article. First, the number of domestic Delaware

---

[241] *Revlon*, 506 A.2d at 184 n.16.

[242] *QVC*, 637 A.2d at 44.

[243] *Id.*

[244] Cunningham & Yablon, *supra* note 19, at 1607.

[245] *Id.* Cunningham and Yablon point out that the court indicated it had applied "enhanced scrutiny" to managerial decisions that interfered with stockholder voting rights. *Id.*

[246] *Id.*

[247] *Id.*

corporations was examined in order to determine whether Delaware still leads the corporate charter market. A survey of over-the-counter (OTC) corporations was conducted to obtain information concerning corporations' decisions to reincorporate. A similar study was performed on corporations listed on the New York Stock Exchange (NYSE) and the American Stock Exchange (ASE).[248]

1. New Delaware Corporations

The information concerning the number of new Delaware firms (year ending December 31) showed no trend away from Delaware. Since 1985, the total number of domestic corporations reincorporating in Delaware or incorporating in Delaware for the first time (New Corporations) has increased by over forty-seven percent.[249] The total number of New Corporations decreased slightly between 1988 and 1990.[250] This decrease could be due to the then-existing recession in the United States, instead of an exodus of corporations from Delaware. Since 1990, the number of New Corporations has increased by 9,337 corporations or thirty-one percent.[251]

2. OTC Reincorporations

A survey of corporations listed in Moody's OTC Industrial Manual was also conducted to determine whether a particular corporation changed its corporate domicile since 1982. Of the 255 surveyed corporations that changed corporate domicile between 1982 and 1994, 226 reincorporated in Delaware.[252] This eighty-nine percent reincorporation rate is slightly

---

[248]For simplicity, the firms will be designated as those sold OTC and those sold on the NYSE, even though some of the NYSE corporations are also listed on the ASE.

[249]Telephone Interview with Sandy Miller, Corporation Department of the Secretary of State (Oct. 14, 1993). The total number of domestic corporations reincorporating in Delaware or incorporating in Delaware for the first time was obtained for the years 1985 through 1993. The information is given in Table 1 of the appendix and graphed in Figure 1, also in the appendix.

[250]*See infra* App., Table 1.

[251]*See infra* App., Table 1.

[252]MOODY'S OTC INDUSTRIAL MANUAL (1994). The number of corporations reincorporating in Delaware is shown in Table 2. The number of corporations reincorporating in a particular state along with the number of corporations leaving a particular state is shown in Table 4. Figure 2 shows the number of Delaware reincorporations in relation to the total number of reincorporations between 1982 and 1984. Figure 3 represents the percentage of corporations reincorporating in Delaware between 1982 and 1994. Table 6 shows the 255 OTC corporations surveyed along with the date of reincorporation, the new corporate domicile (In),

higher than the eighty-two percent reincorporation rate reported by Romano between 1961 and 1981, but is lower than the ninety percent reincorporation rate of NYSE corporations reported by Peter Dodd and Richard Leftwich between 1927 and 1977.[253]

Romano indicated that the difference between her findings and the Dodd and Leftwich findings was consistent with the Posner and Scott hypothesis that "Delaware laws are tailored to the needs of large corporations."[254] Romano's study included firms on the NYSE, OTC, ASE, and regional exchanges.[255] The corporations traded on the OTC, ASE, and regional exchanges were usually smaller than the corporations listed on the NYSE.[256]

The group surveyed in the present study were all OTC firms and, thus, would tend to be smaller firms. The reincorporation rate of these firms was almost as high as the percentage rate reported by Dodd and Leftwich.[257] This suggests that Delaware is no longer more favorable only to large corporations, but is just as favorable to all corporations listed on the exchanges.[258]

Another interesting finding in the survey was that eighty percent of the corporations leaving Delaware reincorporated in the state of their principal place of business.[259] Out of the entire survey, only eight percent (21 out of 255) of the corporations reincorporated in their home state.[260] When the corporations not reincorporating in or out of Delaware were removed from the survey, sixty-eight percent reincorporated in their home state.[261] This indicates that for most of the firms leaving Delaware and

---

former corporate domicile (From) and the principal place of business (PPB). The list does not represent the total number of corporations reincorporating in those years but only represents a statistical sample of 255 corporations. The statistical information for 1994 is incomplete because Moody's OTC Industrial Manual is printed prior to the end of the year.

[253]Romano, *supra* note 8, at 244.

[254]*Id.* at 244 n.32.

[255]*Id.*

[256]*Id.*

[257]*See infra* App., Table 2.

[258]The fact that many of the corporations traded OTC are no longer smaller than the firms traded on the NYSE could also explain this difference.

[259]*See infra* App., Table 6. The 10 OTC corporations leaving Delaware were Abrams Industries, Inc.; Allegheny & Western Energy Corporation; Ameriwood Industries International Corporation; Comstock Resources, Inc.; Conso Products Company; Egghead, Inc.; Executone Information Systems, Inc.; Genzyme Corporation; Johnson Worldwide Associates, Inc.; and Linium Technology, Inc. *Id.* Only two of these corporations, Comstock Resources, Inc. and Executone Information Systems, Inc., reincorporated in a state other than the state of their principal place of business. *Id.*

[260]*Id.*

[261]*Id.* Of the 19 corporations that did not reincorporate in Delaware or leave Delaware,

for most of the firms which are leaving a state other than Delaware and not reincorporating in Delaware, the principal place of business is the most likely state of reincorporation.[262] Some commentators have indicated that corporations seeking to reincorporate do so because the cost of operating under more efficient state laws is worth the added expense of franchise taxes.[263] Assuming this is true, the statistical survey indicates that corporations perceive Delaware as the state with the most efficient laws;[264] corporations then generally perceive the state in which their principal place of business is located as the state with the second most efficient state laws.[265]

A question of some importance is: why are these firms leaving Delaware? In some cases, corporations perceive the laws of another state or their home state as more efficient than Delaware. In other cases, the high franchise taxes in Delaware are a primary reason for firms reincorporating in another state.[266]

3. NYSE Reincorporations

A survey of corporations between 1982 and 1994 was conducted in order to determine migration patterns of corporations listed on the NYSE and ASE.[267] The results were similar to those obtained in the OTC survey.

Of the 150 corporations surveyed that reincorporated, 121 or eighty-one percent, chose Delaware as their new corporate domicile.[268]

---

13 reincorporated in the state of the principal place of business.

[262]*Id.*

[263]*See infra* App., Table 6. Of the 255 corporations on the survey, only 21 reincorporated in the same state as their principal place of business. *Id.* Corporations pay Delaware a premium to obtain laws of a particular quality and to make sure that quality is maintained. Romano, *supra* note 8, at 258.

[264]*See supra* text accompanying note 253.

[265]Of the 29 corporations that did not reincorporate in Delaware, 21 corporations (72%) incorporated in the same state as the principal place of business. *See infra* App., Table 6.

[266]*See, e.g.*, Abrams Industries, Inc., Proxy Statement, at 4 (1984) ("[R]eincorporation in Georgia will eliminate the payment of franchise fees in Delaware."); GENZYME, INC., 10K, at 12 (1992) ("The reincorporation was effected in order to achieve state tax savings.").

[267]MOODY'S INDUSTRIAL MANUAL (1994). The number and percentage of NYSE corporations reincorporating in Delaware in the survey years is listed in Table 3 of the Appendix. This information is graphed in Figures 4 and 5. The number of corporations reincorporating to and from a particular state is shown in Table 5. A list of the 150 NYSE corporations surveyed is listed in Table 7 along with the date of reincorporation (Date), new corporate domicile (In), former corporate domicile (From), and principal place of business (PPB).

[268]*See infra* App., Table 3.

This number is slightly lower than the percentages reported by Romano between 1961 and 1981 — in fact, these findings are almost reversed with respect to the OTC and NYSE corporations.[269]

Although NYSE corporations are reincorporating in Delaware at a high rate, the percentage of corporations reincorporating in Delaware has dropped to below the eighty-six percent reported by Romano[270] and the eighty-eight percent reincorporation rate for OTC corporations reported in Table 2.[271] This trend is not unexplainable.

Romano had indicated the "diffusion process" could explain the difference between her eighty-six percent reincorporation rate and the ninety percent reincorporation rate reported by Dodd and Leftwich.[272] Romano explained that "[a]s corporate law innovations spread throughout the states, the impetus for relocating in Delaware may diminish, particularly if the pace of innovation slows and no major corporate law reforms are introduced."[273] The "diffusion process" could also be responsible for the difference between reincorporation rates reported by Romano and those reported in this survey.

The fact that the percentage of reincorporations to Delaware from OTC corporations is higher than the percentage from NYSE corporations can be explained by the Posner and Scott hypothesis that Delaware law is tailored to the needs of large corporations.[274] Since the firms of the NYSE are larger, there is a greater probability that they would have incorporated or reincorporated in Delaware to take advantage of the

---

[269]Romano, *supra* note 8, at 244. Romano had reported an 86% reincorporation rate for the NYSE firms.

[270]*Id.*

[271]*See infra* App., Table 2.

[272]Romano, *supra* note 8, at 244.

[273]*Id.* (footnotes omitted). Romano also indicated the difference could be due to market conditions making reincorporation in Delaware less profitable. *Id.* at 244-46.

The findings in this survey also show the effect of the diffusion process. Between 1985 and 1988, 56% (84 out of 150) of the corporations in this survey reincorporated in Delaware. *See infra* App., Table 3. Between 1989 and 1994, only 18% (27 out of 150) of the corporations in this survey reincorporated in Delaware. *See infra* App., Table 3. In 1986, the Delaware legislature passed a law which permitted corporations to include in the articles of incorporation a provision eliminating or limiting director liability for a breach of the duty of care. *See* 65 Del. Laws 289 (1986) (codified in DEL. CODE ANN. tit. 8, § 102(b)(7) (1991)). Since 1986, numerous states have adopted similar provisions. *See* NEV. REV. STAT. ANN. § 78.037(1) (Michie 1991); VA. CODE ANN. § 13.1-692.1 (Michie 1993); WASH. REV. CODE ANN. § 23B.08.320 (West 1994); WIS. STAT. ANN. § 180.0828 (West 1992). The diffusion process could explain why fewer corporations incorporated in Delaware between 1989 and 1994. As other jurisdictions adopted provisions similar to § 102(b)(7), the percentage of corporations incorporating in Delaware fell.

[274]Romano, *supra* note 8, at 244 n.32.

favorable laws.[275] OTC firms, which tend to be smaller,[276] would not find it efficient to reincorporate in Delaware until they became "large" corporations. At that point, they would also reincorporate in Delaware. The difference between reincorporation rates for OTC and NYSE corporations can also be explained by the pool of potential Delaware corporations being larger for the OTC corporations than for NYSE corporations.[277]

As with the OTC corporations, most NYSE-listed corporations leaving Delaware reincorporate in their home state.[278] Of the seventeen corporations leaving Delaware, thirteen reincorporated in their home state.[279] Of the remaining NYSE-listed corporations, only 5.3% (7 out of 133) relocated in their home state.[280] Even when the corporations not reincorporating in Delaware or moving from Delaware are removed from the survey, fifty-eight percent (7 out of 12) reincorporated in their home state.

As with the OTC corporations, the franchise tax seems to be an important element in a corporation's choice to leave Delaware and reincorporate in its home state. Many of the NYSE firms leaving Delaware to reincorporate in their principal place of business cited the state's franchise tax as a major reason.[281]

---

[275]Dodd and Leftwich found a 90% reincorporation rate in Delaware from 1927 through 1977. *Id.*

[276]*Id.* at 244 n.32.

[277]Assume there are 1000 NYSE corporations and 1000 OTC corporations. According to Romano's study, one would expect 860 of the NYSE corporations to reincorporate in Delaware and only 810 of the OTC firms to reincorporate in Delaware. Assuming there are a fixed number of corporations, there would only be 140 NYSE firms which could potentially reincorporate in Delaware while there would be 190 OTC corporations which could potentially reincorporate in Delaware.

[278]*See infra* App., Table 7.

[279]*Id.*

[280]*Id.*

[281]*See, e.g.*, AMERICAN BUSINESS PRODUCTS, INC., PROXY STATEMENT 14 (1986) (stating that "reincorporation has the additional benefit of potentially reducing state franchise taxes paid by the Company"); BRIGGS & STRATTON CORPORATION, PROXY STATEMENT 9 (1992) (noting a savings of $149,975 created by the corporation's reincorporation in Wisconsin); OSMONICS, INC., PROXY STATEMENT (1992) (noting that "[a]nother significant reason why the Board of Directors has made the Reincorporation Proposal is the significant cost saving to be achieved by reincorporating in Minnesota. Delaware corporations must pay a substantial annual franchise fee . . . . Minnesota does not have a franchise fee at the present time."). *But see* R.G. BARRY CORPORATION, PROXY STATEMENT 4 (1984) (stating that "the Reincorporation Proposal will allow the Company to utilize the protection afforded by the recently enacted Ohio Control Share Acquisition Statute which is designed to establish procedures for shareholder approval of any proposed acquisition of a significant ownership interest in an Ohio corporation").

B. *Why Delaware Remains Preeminent*

There are a number of reasons why Delaware remains home to more corporations than any other state.[282] Some of these same reasons explain Delaware's dominance of the corporate charter market. Delaware has a responsive legislature,[283] a flexible statute,[284] specialized courts,[285] a wealth of precedents,[286] an efficient Secretary of State's Office,[287] and efficient corporation service companies.[288]

Of all the factors that make and keep Delaware the leader in corporate chartering, probably the least important factor is the Delaware General Corporation Law. This is the one advantage that other states can easily duplicate.[289] Even though many states have adopted the same provisions as Delaware, they are unable to mount a serious threat to Delaware's charter dominance.[290]

Delaware's precedents are also one reason corporations decide to stay in Delaware. Like the statute, however, state legislatures can instruct their respective state courts to follow the decisions of the Delaware courts on corporate law issues.[291] Courts themselves also can elect to follow Delaware precedents, and have often done so.[292] What cannot be guaranteed is "how well the courts in other states will be able to follow [the Delaware] precedents."[293]

The court system of Delaware is also an advantage which is difficult for other states to duplicate. The state has to have enough corporate business before it can create a specialized court system and a knowledgeable corporate bar.[294] Even in large states, such as California, New York, and Texas, where corporate lawyers abound and where there

---

[282]Sixty percent of the Fortune 500 companies and over 50% of the corporations included on the Dow Jones Industrial Average are Delaware corporations. BLACK, *supra* note 50, at 1. In addition, over 40% of the corporations listed on the NYSE are Delaware corporations. NEW YORK STOCK EXCHANGE GUIDE, *supra* note 6, at 715-800.

[283]*See supra* notes 41-47 and accompanying text.

[284]*See supra* notes 48-58 and accompanying text.

[285]*See supra* notes 59-70 and accompanying text.

[286]*See supra* notes 71-75 and accompanying text.

[287]*See supra* notes 76-78 and accompanying text.

[288]*See supra* notes 79-80 and accompanying text.

[289]Macey & Miller, *supra* note 13, at 488.

[290]*Id.* Nevada has adopted many of the same provisions as Delaware but the state has not been nearly as successful in attracting corporations as Delaware. *Id.*

[291]Macey & Miller, *supra* note 13, at 488.

[292]Herzel & Richman, *supra* note 7, at F-22.

[293]*Id.* at F-22 to -23.

[294]*Id.* at F-23.

is a wealth of legal precedent, the states have not created court systems which can handle complex corporate matters quickly and efficiently.[295]

Delaware's small size also allows it to remain the leader in the corporate charter market.[296] Many of the legislative pressures, which could disrupt the development of corporate law, from environmental groups, unions, and local communities, are not present in Delaware.[297] Corporate managers know that, in Delaware, they will have a greater influence over the legislature than other, competing groups.[298] Due to the Delaware legislature's responsiveness, the state's corporate laws will remain more favorable to corporations.[299]

The "first mover" advantage also helps keep Delaware on top of the corporate charter market.[300] Because Delaware has a dominant lead over other states, it is cheaper to maintain its advantage over other states, i.e., there is "value or security in numbers."[301] Delaware, because it has much more to lose than other states, is very responsive to corporations.[302] Due to the large number of corporations in Delaware, there is a greater probability that the courts have decided certain issues, thus providing a stable basis for corporate planning.[303] Corporations, thus, move to, and stay in, Delaware because it is cheaper for them to operate under the laws of the state.[304]

VII. COMPETING STATUTES

In both the *Technicolor*[305] and *QVC*[305] decisions, the Delaware

---

[295]*Id.* Herzel and Richman explain that

> because of the nature of their legislatures, much of the difficulty in these large states appears to be with their statutes. For political reasons, instead of treating corporations laws as highly technical devices to facilitate corporate transactions which increase stockholder and national wealth, these states' legislatures frequently turn corporation law matters into complex moral and political problems. If a state's corporation statute is inferior, its court system and lawyers never even have a chance.

Id.

[296]*Id.* at F-24.

[297]Macey & Miller, *supra* note 13, at 490.

[298]*Id.*

[299]*Id.*

[300]Romano, *supra* note 8, at 277.

[301]*Id.*

[302]*Id.*

[303]*Id.* at 277-78.

[304]Romano, *supra* note 8, at 278.

[305]*Technicolor*, 634 A.2d at 366.

[305]*QVC*, 637 A.2d at 44.

Supreme Court used the duty of care to invalidate the respective transactions. This section compares the standard of care provisions of the Model Business Corporation Act (MBCA),[307] the Nevada General Corporation Law,[308] the Texas statute,[309] and the Illinois[310] statute with the judicially created standard of care under Delaware law.

A. *The Model Business Corporation Act*

Section 8.30 of the MBCA states:

> (a) A director shall discharge his duties as a director including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner he reasonably believes to be in the best interests of the corporation.[311]

---

[307]The MBCA was chosen for this comparison because at least 39 jurisdictions have adopted provisions almost identical to § 8.30 of the MBCA. MODEL BUSINESS CORP. ACT ANN. § 8.30 (1994). The states adopting an "ordinarily prudent person standard" are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Washington, Wisconsin, and Wyoming. *Id.* at 8-176.

[308]Nevada was chosen because of its statute's potentially liberal interpretation and because, in the survey, the state had the greatest number of reincorporations other than Delaware. *See infra* App., Tables 4-5.

[309]The nine states, other than Delaware and Nevada, which had not adopted the "ordinarily prudent person standard" were Arizona, Illinois, Kansas, Missouri, South Dakota, Texas, Vermont, Virginia, and West Virginia. *See* MODEL BUSINESS CORP. ACT ANN. § 8.60, at 8-175 to -176 (1994). Texas was chosen out of these states because the state had a large number of corporations reincorporating out of the state. *See infra* App., Tables 4-5.

[310]The Illinois statute was also chosen for comparison because of the large number of corporations reincorporating out of the state. *See infra* App., Tables 4-5.

[311]MODEL BUSINESS CORP. ACT § 8.30(a) (1994). The remaining portion of § 8.30 states:

> (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional

The standard employed by the MBCA, the "ordinarily prudent person," suggests that the standard of care is negligence. The MBCA comment rejects any notion that the directors must exercise some degree of expertise.[312]

The comment also acknowledges that the business judgment rule is developing in a number of states.[313] Because of this judicial development, section 8.30 does not try to "delineate the differences, if any, between that rule and the standards of director conduct set forth in this section."[314] When this statement is read in conjunction with section 8.30(d), which states that a director is not liable if he performs his duties in compliance with this section, it suggests that the standard imposed by the MBCA is a minimum at which liability will not be imposed. In other words, if the director complies with section 8.30(a), then the director will not be held liable.[315] If a director does not meet the standard set forth by section 8.30(a), then the director may or may not be held liable, depending on the application of a given state's business judgment rule.[316]

B. *The Nevada Statute*

Under the Nevada General Corporation Law, directors "shall exercise their powers in good faith and with a view to the interests of the corporation."[317] Unlike the MBCA, there is no objective standard of care mentioned in the statute. This omission suggests that a director could be grossly negligent and still meet the standard of care set forth by the statute.[318]

---

or expert competence; or

(3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

Id.

[312]*See id.* cmt., at 8-168. "The phrase recognizes the need for innovation, essential to profit orientation, and focuses on the basic director attributes of common sense, practical wisdom, and informed judgment." *Id.*

[313]*See id.* at 8-167.

[314]*Id.*

[315]MODEL BUSINESS CORP. ACT at 8-166.

[316]*Id.* at 8-171.

[317]NEV. REV. STAT. § 78.138(1) (1991).

[318]Keith Paul Bishop, *Does Nevada Offer Better Treatment for Directors Than*

The Nevada Supreme Court has yet to examine the statute and determine whether a negligent or grossly negligent standard applies.[319] In *Buchanan v. Henderson*,[320] however, a federal district court upheld a bankruptcy court's finding that two directors had breached their duty of care by transferring funds to another corporation without obtaining assurances that the funds would be utilized properly.[321] The bankruptcy court examined Nevada's statutory standard of care and stated that "a reasonably prudent person would have made more substantial inquiries."[322]

Although Nevada's statute does not mention an objective standard, the courts that have applied the statute have read into the statute an objective standard.[323] Until decided by the Nevada Supreme Court, it is difficult to determine if a different standard applies.

C. *The Texas Statute*

The Texas statute does not impose a standard of care on all director actions. Instead, the statute imposes liability on a director who assents to certain types of unlawful transactions, such as illegal dividend declarations or share repurchases.[324] The director will not be found liable under the statute if he relies in good faith on information provided by officers and employees of the corporation and other specified professionals.[325]

In areas not covered by the statute, Texas has established a common law duty of care.[326] It is unclear, however, what standard of care the courts will apply.[327] In *McCollum v. Dollar*,[328] the leading Texas case, the court indicated an "ordinarily prudent man" standard would be used to evaluate directors actions.[329] More recently, however, the standard of care seems to be moving toward gross negligence.

Delaware?, INSIGHTS, Mar. 1993, at 20.

[319] *Id.*

[320] 131 B.R. 859 (Bankr. D. Nev. 1990).

[321] *Id.* at 868-69.

[322] *Id.* at 868.

[323] *See supra* notes 315-20 and accompanying text.

[324] TEX. BUS. CORP. ACT ANN. art. 2.41(A)(1)-(2) (West 1980).

[325] *Id.* at 2.41(C)-(D).

[326] Michele H. Ubelaker, *Director Liability Under the Business Judgement Rule: Fact or Fiction?*, 35 SW. L.J. 775, 781 (1981).

[327] *See id.* at 786-87.

[328] 213 S.W. 259 (Tex. Ct. App. 1919).

[329] *Id.* at 261; Ubelaker, *supra* note 324, at 788.

The Fifth Circuit, finding a director and sole shareholder personally liable, seemed to apply a gross negligence standard in *Meyers v. Moody*.[330] Additionally, the court in *Texaco, Inc. v. Pennzoil Co.*[331] cited to *Smith v. Van Gorkom*,[332] while evaluating the board's action to approve the sale of a corporation.[333] Like the Nevada statute, it is unclear which standard of care the Texas courts will apply.

D. *The Illinois Statute*

Like Texas, Illinois imposes a statutory standard of care on directors in certain cases.[334] In other cases, the Illinois courts apply an ordinary negligence standard to director transactions.[335]

E. *Delaware's Standard*

Examination of the state and common law codes of the respective states shows why Delaware has remained on top of the corporate charter market. In *Aronson v. Lewis*,[336] the Delaware Supreme Court indicated the standard of care under Delaware law is "gross negligence."[337] Thus, Delaware has adopted the least restrictive standard of care of all the above states.

The MBCA imposes a more stringent standard than the Delaware common law.[338] Due to the statutory language, however, section 8.30 could be interpreted as creating a standard at which liability will not be imposed. The problem with the MBCA is that, until a state decides whether to impose an "ordinary negligence" standard to director

---

[330]693 F.2d 1196 (5th Cir. 1982). In this case, the defendant contributed a life interest in a trust to the company and artificially valued the trust. Robert W. Hamilton, *Corporations and Partnerships*, 38 SW. L.J. 235, 268 (1984). This created additional corporate assets so that he could acquire other insurance companies. *Id.* The defendant's aggressive expansion program eventually led the company to go into bankruptcy. *Id.* The court found the director was liable and indicated his actions amounted to "gross negligence." *Id.*

[331]729 S.W.2d 768 (Tex. Ct. App. 1987).

[332]488 A.2d 858 (Del. 1985). In this case, the Delaware Supreme Court held that the director standard of care was "gross negligence." *See supra* notes 131-37 and accompanying text.

[333]*Texaco*, 729 S.W.2d at 808.

[334]ILL. ANN. STAT. ch. 805, ¶ 8.65 (1993).

[335]Whited, *supra* note 144, at 509 n.97. The Illinois legislature has not only failed to adopt a gross negligence standard, but it has also refused to enact a statute allowing corporations to adopt a provision limiting or eliminating director liability. *Id.* at 508-09.

[336]473 A.2d 805 (Del. 1984).

[337]*Id.* at 812.

[338]*See* MODEL BUSINESS CORP. ACT ANN. § 8.30(a) (1994).

transaction or "gross negligence," director transactions are unpredictable. Delaware has the advantage over these states due to its wealth of precedent and established standard of care.

The Nevada statute, which could be interpreted to create a gross negligence standard, has been interpreted by federal courts to impose an ordinary negligence standard.[339] Although the Nevada Supreme Court could interpret the statute to impose a gross negligence standard, the limited number of corporations domiciled in Nevada[340] make it unlikely that a case will be taken to the court any time soon. This creates unpredictability for corporations because of the need for stable laws that allow directors to plan for future events and to run the corporation efficiently.

The Texas and Illinois statutes seem to be the least attractive of the group. These statutes establish a standard of care in certain cases but leave other director actions reviewable under the common law.[341] Again, this leads to unpredictability for corporate directors and limits the implementation of long-term strategies.

The Illinois common law has established an ordinary negligence standard of care.[342] Not only is the standard more stringent than Delaware, the Illinois legislature has not adopted a statute allowing for provisions in the articles of incorporation limiting or eliminating personal liability of directors.[343] This makes it more likely that a director will be held personally liable for a breach of the duty of care. The fear of personal liability on directors makes it difficult for directors of Illinois corporations to implement aggressive, novel corporate strategies.

VIII. CONCLUSION

Although the Delaware Supreme Court ruled against the directors in both *Cede & Co. v. Technicolor, Inc.*[344] and *Paramount Communications Inc. v. QVC Network Inc.*,[345] Delaware remains the preeminent state for incorporation. The two decisions did not change

---

[339]*See supra* text accompanying note 320.

[340]Of the 1958 corporations listed on the NYSE, only 20 are incorporated in Nevada. NEW YORK STOCK EXCHANGE GUIDE, *supra* note 6, at 715-800.

[341]*See supra* text accompanying notes 324-33.

[342]*See supra* text accompanying note 333.

[343]*Cf.* DEL. CODE ANN. tit. 8, § 102(b)(7) (1991) (stating that the certificate of incorporation shall include a provision eliminating or limiting the personal liability of a director under certain circumstances).

[344]634 A.2d 345 (Del. 1993).

[345]637 A.2d 34 (Del. 1993).

existing law or adopt new standards for director conduct. The decisions, in fact, clarified some previously confusing areas of the law that will provide further predictability and stability for corporate directors seeking to sell control of the corporation.

The empirical evidence also indicates that Delaware remains the preeminent state of incorporation. The number of total domestic corporations has increased dramatically within the past few years. Additionally, over eighty percent of the corporations seeking to reincorporate chose Delaware as their new corporate domicile.

There is no one, specific factor or reason that gives Delaware its edge over other states in the corporate charter market. It is the combination of its flexible corporate code, the responsiveness of its legislature, the wealth of legal precedent, its efficient and knowledgeable court system, and its business-like Secretary of State's Office that allows Delaware to remain the leader in the corporate charter market.

Demetrios G. Kaouris

APPENDIX

NEW DELAWARE CORPORATIONS
1985 - 1993

YEAR	NUMBER OF CORPORATIONS
1985	26,603
1986	31,169
1987	31,415
1988	31,486
1989	30,935
1990	29,861
1991	29,920
1992	33,585
1993	39,198

Table - 1

OTC CORPORATIONS
Delaware Reincorporations

YEAR	DELAWARE REINCORP.	TOTAL REINCORP.	PERCENT DE REINCORP.
1982	4	5	80
1983	10	13	77
1984	3	6	50
1985	10	11	90
1986	23	24	95
1987	56	57	98
1988	12	16	75
1989	23	28	82
1990	12	14	86
1991	21	24	88
1992	18	18	100
1993	28	33	85
1994	6	6	100
TOTAL	226	255	
PERCENT	89		

Table - 2

NYSE CORPORATIONS
Delaware Reincorporations

YEAR	DELAWARE REINCORP.	TOTAL REINCORP.	PERCENT DE REINCORP.
1982	1	1	100
1983	6	6	100
1984	4	6	67
1985	14	16	88
1986	20	25	80
1987	35	38	92
1988	14	15	93
1989	6	8	75
1990	4	7	57
1991	7	8	88
1992	3	7	43
1993	4	7	57
1994	3	6	50
TOTAL	121	150	
PERCENT	81		

Table - 3

OTC CORPORATIONS
NET REINCORPORATIONS PER STATE

STATE	# REINCORP. IN STATE	# REINCORP. FROM STATE	NET REINCORP.
AL	0	1	-1
AR	0	1	-1
AZ	0	3	-3
CA	4	90	-86
CO	1	9	-8
CT	0	3	-3
DE	226	10	216
FL	1	4	-3
GA	3	0	3
IA	0	1	-1
IL	0	10	-10
IO	0	1	-1
KS	1	1	0
MA	2	17	-15
MD	0	4	-4
MI	1	8	-7
MN	0	8	-8
MO	0	3	-3
NB	0	2	-2
NC	0	3	-3
NJ	0	9	-9
NM	0	2	-2
NV	5	6	-1
NY	0	17	-17
OH	0	7	-7
OK	2	1	1
OR	0	1	-1
PA	1	0	1
RI	0	1	-1
SC	1	0	1
SD	1	1	0
TN	0	2	-2
TX	2	16	-14
UT	0	7	-7
VA	1	1	0
WA	1	3	-2
WI	1	0	1
WV	1	1	0
WY	0	1	-1
TOTAL	255	255	

Table - 4

NYSE CORPORATIONS
NET REINCORPORATIONS PER STATE

STATE	# REINCORP. IN STATE	# REINCORP. FROM STATE	NET REINCORP.
AL	0	1	-1
AZ	0	4	-4
CA	1	39	-38
CO	0	3	-3
CT	0	3	-3
DE	121	17	104
FL	1	6	-5
GA	2	1	1
ID	0	1	-1
IL	0	6	-6
LA	1	1	0
MA	1	4	-3
MD	0	2	-2
MI	0	1	-1
MN	1	1	0
MO	0	3	-3
NC	3	1	2
NJ	1	2	-1
NV	5	7	-2
NY	0	18	-18
OH	3	7	-4
PA	3	4	-1
RI	0	1	-1
TN	0	1	-1
TX	4	14	-10
VA	1	2	-1
WI	2	0	2
TOTAL	150	150	

Table - 5


New Delaware Corporations
Year Ending December 31
No. of New Corps.
40000
35000
30000
25000
20000
15000
10000
5000
0
1985
1987
1989
1991
1993
Year

Figure - 1

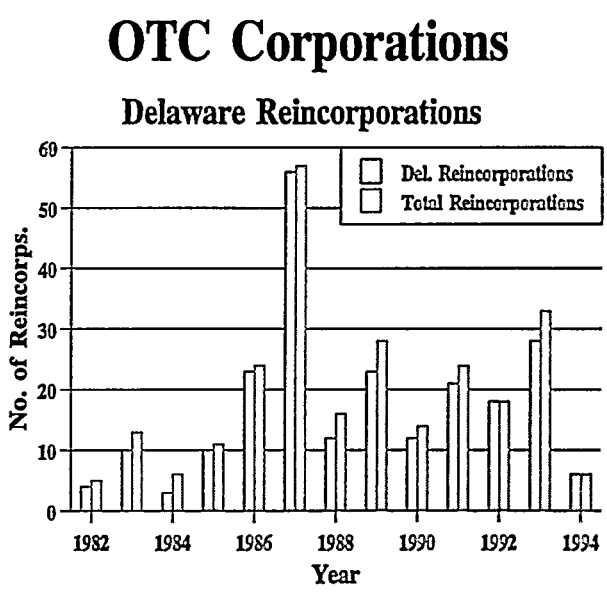

Figure - 2

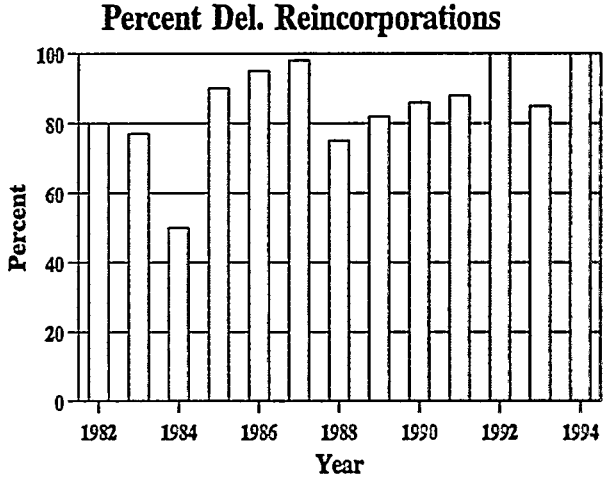

Figure - 3

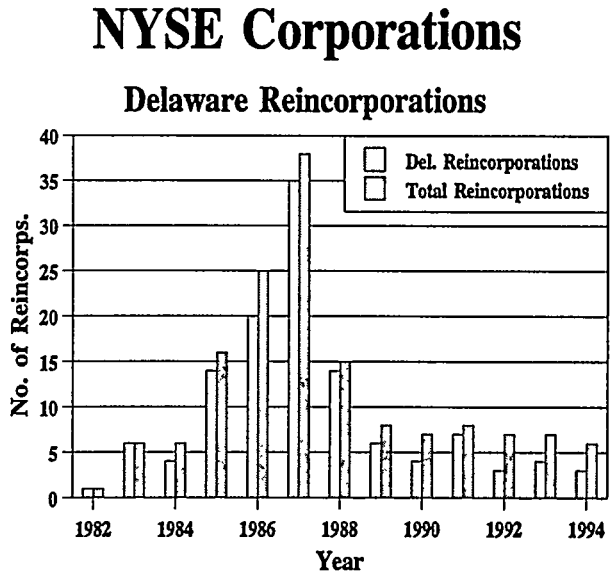

Figure - 4

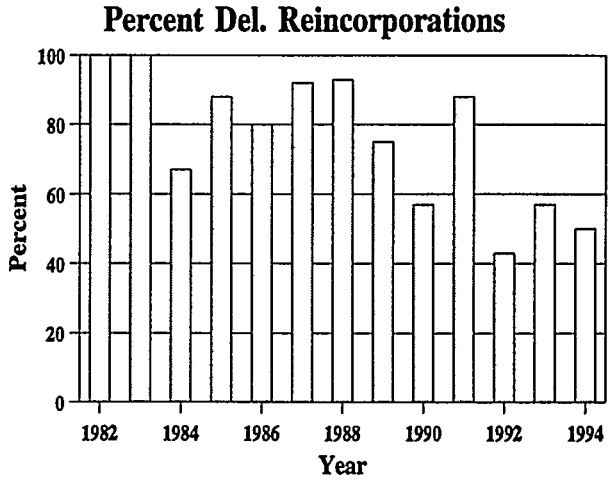

Figure - 5

OTC CORPORATIONS

Corporation Name	Date	In	From	PPB
ABRAMS INDUSTRIES, INC.	1984	GA	DE	GA
ACC CORP.	1987	DE	NY	NY
ACCESS HEALTH MARKETING, INC.	1992	DE	CA	CA
ACCLAIM ENTERTAINMENT, INC.	1989	DE	CO	NY
ACTV, INC.	1989	DE	CA	NY
ACXIOM CORP.	1983	DE	AR	AR
ADAGE, INC.	1991	PA	MA	PA
ADIA SERVICES, INC.	1983	DE	CA	CA
ADVANCED LOGIC RESEARCH, INC.	1990	DE	CA	CA
ADVANCED MARKETING SERVICES, INC.	1987	DE	CA	CA
ADVANCED POLYMER SYSTEMS, INC.	1987	DE	CA	CA
ADVANCED TECHNOLOGY MATERIALS, INC.	1987	DE	CT	CT
ADVANTAGE HEALTH CORP.	1990	DE	MA	MA
AEP INDUSTRIES INC.	1985	DE	NJ	NJ
AER ENERGY RESOURCES, INC.	1989	GA	OH	GA

Corporation Name	Date	In	From	PPB
AGRIDYNE TECHNOLOGIES INC.	1986	DE	UT	UT
AIRSENSORS, INC.	1985	DE	WA	WA
ALAMO GROUP, INC.	1987	DE	TX	TX
ALANTEC CORP.	1994	DE	CA	CA
ALL AMERICAN SEMI-CONDUCTOR, INC.	1987	DE	FL	FL
ALLEGHENY & WESTERN ENERGY CORP.	1984	WV	DE	WV
ALLIANCE SEMICONDUCTOR CORP.	1993	DE	CA	CA
ALLIED WASTE INDUSTRIES, INC.	1989	DE	TX	AZ
AMERICAN BUSINESS INFORMATION, INC.	1992	DE	NE	NE
AMERICAN CONSUMER PRODUCTS INC.	1993	DE	OH	OH
AMERICAN DENTAL TECHNOLOGIES, INC.	1989	DE	MI	MI
AMERICAN ECOLOGY CORP.	1987	DE	CA	TX
AMERICAN HOLDINGS INC. (NJ)	1986	DE	CA	NJ
AMERICAN MOBILE SYSTEMS INC.	1987	DE	NJ	CA
AMERIWOOD INDUSTRIES INTERNATIONAL CORP.	1985	MI	DE	MI

Corporation Name	Date	In	From	PPB
AMGEN INC.	1988	DE	CA	CA
AMSERVE HEALTHCARE, INC.	1983	DE	CA	NV
AMTECH CORP.	1988	TX	NM	TX
ANDREW CORP.	1987	DE	IL	IL
ANESTA CORP.	1993	DE	UT	UT
APPIAN TECHNOLOGY INC.	1987	DE	CA	CA
APPLIED INNOVATION, INC.	1986	DE	OH	OH
APPLIED MATERIALS, INC.	1987	DE	CA	CA
ARCH PETROLEUM INC.	1983	NV	WY	TX
ARTISOFT, INC.	1991	DE	AZ	AZ
ARTISTIC GREETINGS INC.	1987	DE	NY	NY
ART'S-WAY MANUFACTURING CO. INC.	1989	DE	IA	IA
ASANTE' TECHNOLOGIES INC.	1993	DE	CA	CA
ASCEND COMMUNICATIONS, INC.	1994	DE	CA	CA
AST RESEARCH, INC.	1987	DE	CA	CA
ASTROSYSTEMS, INC.	1987	DE	NY	NY
ATHEY PRODUCTS CORP.	1988	DE	IL	NC
ATLANTIC BEVERAGE CO., INC.	1993	DE	MD	MD

Corporation Name	Date	In	From	PPB
AU BON PAIN CO., INC.	1988	DE	MA	MA
AUSPEX SYSTEMS, INC.	1991	DE	CA	CA
AUTOINFO INC.	1987	DE	NY	NJ
AZCO MINING, INC. (DE)	1991	DE	CO	AZ
BACK BAY RESTAURANT GROUP, INC.	1991	DE	MA	MA
BACK YARD BURGERS, INC.	1991	DE	MI	TN
BALDWIN PIANO & ORGAN CO.	1983	DE	OH	OH
BAREFOOT, INC.	1989	DE	MN	OH
BARRETT RESOURCES CORP.	1987	DE	CO	CO
BASIN EXPLORATION, INC.	1992	DE	CO	CO
BEAUTICONTROL COSMETICS, INC.	1986	DE	TX	TX
BETA PHASE, INC.	1987	DE	CA	CA
BIO-DENTAL TECHNOLOGIES CORP.	1991	CA	CO	CA
BIOCRYST PHARMACEUTI-CALS, INC.	1991	DE	NV	AL
BLOC DEVELOPMENT CORPORATION	1989	DE	NY	FL
BMC SOFTWARE, INC.	1988	DE	TX	TX
BOB EVANS FARMS, INC.	1985	DE	OH	OH

Corporation Name	Date	In	From	PPB
BOLLINGER INDUSTRIES, INC.	1993	DE	TX	TX
BOOKS-A-MILLION, INC.	1992	DE	AL	AL
BORLAND INTERNATIONAL, INC.	1989	DE	CA	CA
BOSTON CHICKEN, INC.	1993	DE	MA	IL
BROADBAND TECHNOLOGIES, INC.	1988	DE	NC	NC
BRODERBOUND SOFTWARE, INC.	1987	DE	CA	CA
BROWN (TOM), INC.	1987	DE	NV	TX
BURR-BROWN CORP.	1983	DE	AZ	AZ
C-CUBE MICROSYSTEMS, INC.	1994	DE	CA	CA
CAERE CORP.	1989	DE	CA	CA
CALGENE, INC.	1986	DE	CA	CA
CALIFORNIA AMPLIFIER INC.	1987	DE	CA	CA
CALIFORNIA MICROWAVE, INC.	1987	DE	CA	CA
CANDELA LASER CORP.	1985	DE	MA	MA
CANONIE ENVIRONMENTAL SERVICE CORP.	1986	DE	MI	TX
CANTON INDUSTRIAL CORP. (THE)	1993	NV	OH	UT
CARE GROUP, INC. (THE)	1989	DE	NY	NY

Corporation Name	Date	In	From	PPB
CATALYST SEMI-CONDUCTOR, INC.	1993	DE	CA	CA
CDW COMPUTER CENTERS, INC.	1993	DE	IL	IL
CENTEX TELEMANAGEMENT, INC.	1987	DE	CA	CA
CENTIGRAM COMMUNICA-TIONS CORP.	1991	DE	CA	CA
CENTRAL GARDEN & PET CO.	1992	DE	CA	CA
CERNER CORP.	1987	DE	MO	MO
CERPLEX GROUP, INC.	1993	DE	CA	CA
CHASE CORP.	1988	MA	NY	MA
CHECKERS DRIVE-IN RESTAURANTS, INC.	1991	DE	NV	FL
CHECKMATE ELECTRONICS, INC.	1993	GA	NV	GA
CHEMTRAK INC.	1992	DE	CA	CA
CHIPS AND TECHNOLOGIES, INC.	1986	DE	CA	CA
CHIRON CORP.	1987	DE	CA	CA
CIBER, INC.	1994	DE	MI	CO
CIMCO INC.	1987	DE	CA	CA
CIPRICO INC.	1988	DE	MN	MN

Corporation Name	Date	In	From	PPB
CIRCON CORP.	1987	DE	CA	CA
CIRRUS LOGIC, INC.	1984	CA	UT	CA
CLINICOM, INC.	1986	DE	MN	CO
CLOTHESTIME, INC. (THE)	1991	DE	CA	CA
COHERENT, INC.	1990	DE	CA	CA
COHO ENERGY, INC.	1993	TX	NV	TX
COLLAGEN CORP.	1987	DE	CA	CA
COMCOA INC.	1983	KS	CO	KS
COMDIAL CORP.	1982	DE	OR	VA
COMMUNICATION INTELLIGENCE CORP.	1986	DE	CA	CA
COMMUNITY HEALTH COMPUTING CORP.	1989	DE	TX	TX
COMNET CORP.	1987	DE	MD	MD
COMPRESSION LABS INC.	1987	DE	CA	CA
COMPUCOM SYSTEMS INC.	1989	DE	MI	TX
COMSTOCK RESOURCES, INC.	1983	NV	DE	TX
COMTECH TELECOMMUNICATIONS CORP.	1987	DE	NY	NY
CONCORD EFS, INC.	1990	DE	MA	TN
CONSILIUM, INC.	1991	DE	CA	CA
CONSO PRODUCTS CO.	1993	SC	DE	SC

Corporation Name	Date	In	From	PPB
CONTINENTAL WASTE INDUSTRIES, INC.	1993	DE	NY	NJ
CONVERGENT SOLUTIONS, INC.	1989	DE	NY	NJ
COPLEY PHARMACEUTICAL, INC.	1987	DE	MA	MA
CORNERSTONE IMAGING, INC.	1993	DE	CA	CA
CORRECTIONS CORPORATION OF AMERICA	1986	DE	TN	TN
CORTECH, INC.	1991	DE	CO	CO
CORVAS INTERNATIONAL, INC.	1993	DE	CA	CA
CORVEL CORP.	1991	DE	MN	CA
COSMETIC CENTER, INC. (THE)	1986	DE	MD	MD
CREDENCE SYSTEMS CORP.	1993	DE	CA	CA
CSL LIGHTING MANUFACTURING, INC.	1993	DE	CA	CA
CUSTOM CHROME, INC.	1990	DE	CA	CA
DATASCOPE CORP.	1989	DE	NY	NJ
DATASOUTH COMPUTER CORP.	1993	DE	NC	NC
DATRON SYSTEMS, INC.	1987	DE	CA	CA
DATUM INC.	1987	DE	CA	CA

Corporation Name	Date	In	From	PPB
DAVOX CORP.	1982	DE	MA	MA
DECKERS OUTDOOR CORP.	1993	DE	CA	CA
DECOM SYSTEMS, INC.	1987	DE	CA	CA
DELL COMPUTER CORP.	1987	DE	TX	TX
DELPHIA INFORMATION SYSTEMS INC.	1983	DE	CA	IL
DEP CORPORATION	1988	DE	CA	CA
DEVRY INC.	1987	DE	IL	IL
DICEON ELECTRONICS INC.	1987	DE	CA	CA
DICK CLARK PRODUCTION, INC.	1986	DE	CA	CA
DIGI INTERNATIONAL, INC.	1989	DE	MN	MN
DIGIDESIGN, INC.	1993	DE	CA	CA
DIGITAL MICROWAVE CORP.	1987	DE	CA	CA
DISCOVERY ZONE, INC.	1993	DE	MI	IL
DOCUCON, INC.	1988	DE	TX	TX
DREXLER TECHNOLOGY CORP.	1987	DE	CA	CA
DREYER'S GRAND ICE CREAM INC.	1985	DE	CA	CA
DSP GROUP, INC.	1994	DE	CA	CA
EA ENGINEERING SCIENCE AND TECHNOLOGY, INC.	1986	DE	MD	MD

Corporation Name	Date	In	From	PPB
EARTH TECHNOLOGY CORPORATION (USA) (THE)	1987	DE	CA	CA
ECOSCIENCE CORP.	1988	DE	MA	MA
EGGHEAD, INC.	1988	WA	DE	WA
EIP MICROWAVE, INC.	1987	DE	CA	CA
ELCOTEL, INC.	1986	DE	FL	FL
ELECTRONIC RETAILING SYSTEMS INTERNATIONAL, INC.	1993	DE	CT	CT
ELECTRONIC INFORMATION SYSTEMS, INC.	1988	DE	CT	CT
ELEK-TEK, INC.	1993	DE	IL	IL
EMISPHERE TECHNOLOGIES, INC.	1986	DE	NY	NY
EMULEX CORPORATION	1987	DE	CA	CA
ENCON SYSTEMS, INC.	1992	DE	RI	MA
ENDOSONICS CORP.	1992	DE	CA	CA
ENEX RESOURCES CORP.	1992	DE	CO	TX
ENSYS ENVIRONMENTAL PRODUCTS INC.	1991	DE	NC	NC
ENVIROSOURCE, INC.	1987	DE	OH	CT
ENVOY CORP.	1987	DE	TN	TN
ENZON, INC.	1983	DE	NJ	NJ

Corporation Name	Date	In	From PPB
EP TECHNOLOGIES	1993	DE	CA CA
EVEREX SYSTEMS, INC.	1987	DE	CA CA
EXCALIBUR TECHNOLOGIES CORP.	1989	DE	NM CA
EXECUTONE INFORMATION SYSTEMS, INC.	1989	VA	DE CT
EXPRESS SCRIPTS, INC.	1992	DE	MO MO
FAIR, ISAAC & CO., INC.	1987	DE	CA CA
FARR CO.	1987	DE	CA CA
FHP INTERNATIONAL CORP.	1984	DE	CA CA
FILENET CORPORATION	1987	DE	CA CA
FIRST CASH, INC.	1991	DE	TX TX
FIRST SEISMIC CORP.	1990	DE	TX TX
FISCHER IMAGING CORP.	1991	DE	MN CO
FLOW INTERNATIONAL CORP.	1983	DE	WA WA
FOCUS ENHANCEMENTS, INC.	1993	DE	MA MA
FRESH CHOICE, INC.	1992	DE	CA CA
FRONTEER DIRECTORY CO., INC.	1988	CO	ND ND
G-III APPAREL GROUP, LTD.	1989	DE	MN NY

Corporation Name	Date	In	From	PPB
GASONICS INTERNATIONAL CORP.	1994	DE	CA	CA
GATEWAY 2000 INC.	1989	SD	IO	SD
GATEWAY 2000 INC.	1991	DE	SD	SD
GENERAL PARAMETRICS CORP.	1986	DE	CA	CA
GENZYME CORP.	1991	MA	DE	MA
GIBRALTAR PACKAGING GROUP, INC.	1991	DE	NB	NC
GLOBAL VILLAGE COMMUNICATIONS INC.	1994	DE	CA	CA
GNI GROUP, INC (THE)	1987	DE	TX	TX
GOOD GUYS, INC. (THE)	1992	DE	CA	CA
GOOD IDEAS ENTERPRISES, INC.	1993	DE	TX	TX
GOULDS PUMPS, INC.	1984	DE	NV	NY
GOVERNMENT TECHNOLOGY SERVICES, INC.	1986	DE	NY	VA
GULF SOUTH MEDICAL SUPPLY, INC.	1993	DE	MI	MI
GYMBOREE CORP.	1992	DE	CA	CA
H&H OIL TOOL CO., INC.	1987	DE	CA	CA
HANDEX ENVIRONMENTAL RECOVERY, INC.	1986	DE	NJ	NJ

Corporation Name	Date	In	From	PPB
HARDING ASSOCIATES, INC.	1987	DE	CA	CA
HARRIER, INC.	1990	DE	UT	CA
HEMAGEN DIAGNOSTICS, INC.	1992	DE	MA	MA
HERLEY INDUSTRIES, INC.	1987	DE	NY	PA
HOGAN SYSTEMS, INC.	1982	CA	TX	TX
HOGAN SYSTEMS, INC.	1985	DE	CA	TX
HOLOGIC, INC.	1990	DE	MA	MA
HOLOPAK TECHNOLOGIES, INC.	1989	DE	NJ	NJ
ICU MEDICAL, INC.	1992	DE	CA	CA
IDB COMMUNICATIONS GROUP, INC.	1986	DE	CA	CA
IFR SYSTEMS, INC.	1985	DE	KS	KS
IKOS SYSTEMS, INC.	1990	DE	CA	CA
ILLINOIS SUPERCONDUCTOR CORP.	1993	DE	IL	IL
IMAGE ENTERTAINMENT, INC.	1990	CA	CO	CA
IMP, INC.	1987	DE	CA	CA
IMRS INC.	1991	DE	NY	CT
INFORMATION INTERNATIONAL, INC.	1989	DE	MA	CA

Corporation Name	Date	In	From	PPB
INFORMATION RESOURCES, INC.	1982	DE	IL	IL
INFORMIX CORP.	1986	DE	CA	CA
INNERDYNE, INC.	1992	DE	UT	UT
INOTEK TECHNOLOGIES CORP.	1987	DE	TX	TX
INSILCO CORP.	1993	DE	NJ	OH
INTEGRATED DEVICE TECHNOLOGY, INC.	1987	DE	CA	CA
INTEL CORP.	1989	DE	CA	CA
INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.	1987	DE	FL	FL
INTERMETRICS, INC.	1990	DE	MA	MA
INTERNATIONAL AIRLINE SUPPORT GROUP, INC.	1989	DE	FL	FL
INTERNATIONAL FOOD AND BEVERAGE INC.	1988	DE	UT	CA
INTERNATIONAL IMAGING MATERIALS, INC.	1985	DE	NY	NY
INTERNEURON PHARMACEUTICALS, INC.	1990	DE	NY	MA
IRG TECHNOLOGIES, INC.	1989	NV	TX	TX
ISIS PHARMACEUTICALS, INC.	1991	DE	CA	CA

Corporation Name	Date	In	From	PPB
IWERKS ENTERTAINMENT INC.	1993	DE	CA	CA
JABIL CIRCUIT, INC.	1992	DE	MI	FL
JACK HENRY & ASSOCIATES, INC.	1985	DE	MO	MO
JB'S RESTAURANTS INC.	1985	DE	CA	UT
JOHNSON WORLDWIDE ASSOCIATES, INC.	1987	WI	DE	WI
JUNO LIGHTING, INC.	1983	DE	IL	IL
K-SWISS, INC.	1990	DE	MA	CA
LAWSON PRODUCTS, INC.	1982	DE	IL	IL
LINIUM TECHNOLOGY, INC.	1993	FL	DE	FL
LUND INTERNATIONAL HOLDINGS, INC.	1986	DE	MN	MN
MEGAMATION INC.	1989	DE	NJ	NJ
MERISEL, INC.	1988	DE	CA	CA
MOTO PHOTO, INC.	1983	DE	OK	OH
NETWORK IMAGING CORP.	1991	DE	VA	VA
PHARMACEUTICAL LABORATORIES, INC.	1989	NV	TX	TX
POWER OIL COMPANY	1992	DE	WV	TX
PURE TECH INTERNATIONAL, INC.	1986	DE	NJ	NJ

Corporation Name	Date	In	From	PPB
SIERRA TUCSON COMPANIES, INC.	1989	DE	AZ	AZ
TMS, INC.	1990	OK	WA	OK
TOTAL RESEARCH CORP.	1986	DE	NJ	NJ
UNITED DENTAL CARE, INC.	1986	OK	UT	OK
ZEBRA TECHNOLOGIES CORP.	1991	DE	IL	IL

Table - 6

NYSE CORPORATIONS

Corporation Name	Date	In	From	PPB
ABM INDUSTRIES, INC.	1985	DE	CA	CA
ALBANY INTERNATIONAL CORP.	1983	DE	NY	NY
ALLIED SIGNAL INC.	1985	DE	NY	NJ
ALPINE GROUP, INC.	1987	DE	NJ	NY
ALTA ENERGY CORP.	1993	DE	TX	CO
ALZA CORP.	1987	DE	CA	CA
AMERICAN BUSINESS PRODUCTS, INC.	1986	GA	DE	GA
AMERICAN MEDICAL RESPONSE, INC.	1992	DE	MA	MA
AMERICAN OIL AND GAS CORPORATION	1986	DE	TX	TX
AMERIHEALTH, INC.	1985	DE	FL	GA
AMERON, INC.	1986	DE	CA	CA
AMRE INC.	1987	DE	TX	TX
ANTHEM ELECTRONICS INC.	1983	DE	CA	CA
APPLIED MAGNETICS CORP.	1987	DE	CA	CA
ATLANTIC RICHFIELD COMPANY	1985	DE	PA	CA
ATLANTIS PLASTICS, INC.	1994	FL	DE	FL
AUTOZONE, INC.	1991	NV	DE	TN

Corporation Name	Date	In	From	PPB
AZCO MINING, INC.	1991	DE	CO	AZ
BAIRNCO CORP.	1991	DE	NY	FL
BANNER AEROSPACE, INC.	1990	DE	CA	OH
BARRY (R.G.) CORP.	1984	OH	DE	OH
BAYOU STEEL CORP.	1988	DE	LA	LA
BEARINGS, INC.	1988	OH	DE	OH
BECKMAN INSTRUMENTS, INC.	1988	DE	CA	CA
BELO (A.H.) CORP.	1987	DE	TX	TX
BEVERLY ENTERPRISES, INC.	1987	DE	CA	AR
BIOCRAFT LABORATORIES, INC.	1985	DE	NJ	NJ
BIOPHARMACEUTICS INC.	1988	DE	NV	NY
BRADLEES, INC.	1992	MA	DE	MA
BRIGGS & STRATTON CORP.	1992	WI	DE	WI
BRINKER INTERNATIONAL, INC.	1983	DE	TX	TX
BROADWAY STORES, INC.	1984	DE	CA	CA
BUSH INDUSTRIES, INC.	1985	DE	NY	NY
CAPSURE HOLDINGS CORP.	1988	DE	OH	IL
CATALINA MARKETING CORP.	1992	DE	CA	FL

Corporation Name	Date	In	From	PPB
CATERPILLAR INC.	1986	DE	CA	IL
CAVALIER HOMES, INC.	1985	DE	AL	TX
CELUTEL, INC.	1988	DE	AZ	MD
CENTENNIAL TECHNOLOGIES, INC.	1994	DE	MA	MA
CENTEX CONSTRUCTION PRODUCTS, INC.	1994	DE	NV	TX
CENTURY COMMUNICATIONS CORP.	1985	NJ	TX	CT
CINCINNATI MILACRON INC.	1983	DE	OH	OH
CLOROX CO.	1986	DE	OH	CA
CONCORD FABRICS, INC.	1988	DE	NY	NY
CONNER PERIPHERALS, INC.	1992	DE	CA	CA
CONTINENTAL HOMES HOLDING CORP.	1986	DE	AZ	AZ
CONTINUUM CO., INC.	1987	DE	TX	TX
CORNERSTONE NATURAL GAS, INC.	1988	DE	TX	TX
CRANE CO.	1985	DE	IL	CT
CROWN CORK & SEAL CO., INC.	1989	PA	NY	PA
CRYSTAL OIL CO.	1984	LA	MD	LA
CUBIC CORP.	1984	DE	CA	CA

Corporation Name	Date	In	From	PPB
CYPRESS SEMICONDUCTOR CORP.	1987	DE	CA	CA
DANIEL INDUSTRIES, INC.	1988	DE	TX	TX
DATAMETRICS CORP.	1987	DE	CA	CA
DDL ELECTRONICS, INC.	1986	DE	CA	OR
DEVON ENERGY CORP.	1988	DE	NV	OK
DIAL CORP. (THE)	1991	DE	AZ	AZ
DISNEY (WALT) CO. (THE)	1987	DE	CA	CA
DRCA MEDICAL CORP.	1990	TX	NV	TX
EDITEK	1986	DE	CA	NC
ELECTROCOM AUTOMATION INC.	1991	DE	TX	TX
ENTERRA CORP.	1987	DE	PA	TX
EVEREST & JENNINGS INTERNATIONAL LTD.	1987	DE	CA	MO
FAIRCHILD CORP. (THE)	1990	DE	MO	VA
FEDDERS CORP.	1985	DE	NY	NJ
FEDERAL PAPER BOARD CO., INC.	1994	NC	NY	NJ
FISCHER & PORTER CO.	1990	PA	DE	PA
FLOWERS INDUSTRIES, INC.	1987	GA	DE	GA
GENENTECH, INC.	1987	DE	CA	CA

Corporation Name	Date	In	From	PPB
GENERAL AUTOMATION, INC.	1986	DE	CA	CA
GENOVESE DRUG STORES, INC.	1986	DE	NY	NY
GO-VIDEO, INC.	1987	DE	AZ	AZ
GREINER ENGINEERING, INC.	1986	NV	CA	TX
HEALTH IMAGES, INC.	1989	DE	FL	GA
JAN BELL MARKETING, INC.	1987	DE	FL	FL
JOHNSTON INDUSTRIES, INC.	1987	DE	NY	NY
LANDS' END, INC.	1986	DE	IL	WI
LEWIS GALOOB TOYS, INC.	1987	DE	CA	CA
LIFETIME PRODUCTS, INC.	1987	PA	DE	TX
LILLIAN VERNON CORP.	1987	DE	NY	NY
LIMITED, INC. (THE)	1982	DE	OH	OH
LIVE ENTERTAINMENT INC.	1988	DE	CA	CA
LOCKHEED CORP.	1986	DE	CA	CA
LOCTITE CORPORATION	1988	DE	CT	CT
LUBY'S CAFETERIAS, INC.	1991	DE	TX	TX
LUKENS, INC.	1987	DE	PA	PA
LYDALL, INC.	1987	DE	CT	CT

Corporation Name	Date	In	From	PPB
MARCUS CORP. (THE)	1992	WI	DE	WI
MARTIN LAWRENCE LIMITED EDITIONS, INC.	1987	DE	NV	CA
MATEC CORP.	1987	DE	NY	MA
MAVERICK TUBE CORPORATION	1987	DE	MO	MO
MAXXIM MEDICAL, INC.	1989	TX	DE	TX
MCCLATCHY NEWSPAPERS, INC.	1987	DE	CA	CA
MCRAE INDUSTRIES, INC.	1983	DE	NC	NC
MEASUREX CORP.	1984	DE	CA	CA
MEI DIVERSIFIED INC.	1986	DE	MN	MN
MENTAL HEALTH MANAGEMENT, INC.	1993	DE	VA	VA
M/I SCHOTTENSTEIN HOMES, INC.	1993	OH	DE	OH
MICRON TECHNOLOGY, INC.	1984	DE	ID	ID
MID-AMERICAN WASTE SYSTEMS, INC.	1989	DE	OH	OH
MIDDLEBY CORP.	1985	DE	MA	IL
MIKASA, INC.	1994	DE	CA	CA
MORRISON RESTAURANTS, INC.	1988	DE	FL	AL

Corporation Name	Date	In	From	PPB
NATURAL ALTERNATIVES INTERNATIONAL, INC.	1989	DE	CO	CA
NORTECK INC.	1987	DE	RI	RI
NORTHROP GRUMMAN CORP.	1985	DE	CA	CA
NVR INC.	1993	VA	PA	VA
OCCIDENTAL PETROLEUM CORPORATION	1986	DE	CA	CA
OEC MEDICAL SYSTEMS, INC.	1988	DE	CA	UT
OFFICE DEPOT, INC.	1986	DE	FL	FL
ONEITA INDUSTRIES, INC.	1987	DE	NY	SC
OSMONICS, INC.	1992	MN	DE	MN
OWENS-ILLINOIS, INC.	1987	DE	OH	OH
PATHE COMMUNICATIONS CORP.	1985	DE	NY	CA
PEPSICO, INC.	1986	NC	DE	NY
PETERS (J.M. CO., INC.)	1987	NV	CA	CA
PETERS (J.M. CO., INC.)	1993	DE	NV	CA
PHOENIX NETWORK, INC.	1989	DE	CO	CA
PIER 1 IMPORTS INC.	1986	TX	GA	TX
PILLOWTEX CORP.	1986	TX	IL	TX

Corporation Name	Date	In	From	PPB
PULITZER PUBLISHING CO.	1986	DE	MO	MO
RAYCHEM CORPORATION	1987	DE	CA	CA
RAYONIER, INC.	1993	NC	DE	CT
READICARE, INC.	1987	DE	CA	CA
REVCO D.S., INC.	1986	DE	MI	OH
ROBERT HALF INTERNATIONAL, INC.	1987	DE	CA	CA
ROTONICS MANUFACTURING, INC.	1986	DE	IL	CA
ROWE FURNITURE CORP.	1985	NV	VA	VA
S.O.I. INDUSTRIES, INC.	1987	DE	FL	TX
SANFILL, INC.	1991	DE	TX	TX
SBM INDUSTRIES, INC.	1985	DE	IL	NY
SILICON GRAPHICS, INC.	1990	DE	CA	CA
SLOANS SUPERMARKETS, INC.	1985	DE	NY	NY
SMART & FINAL INC.	1991	DE	CA	CA
SMITH (A.O.) CORP.	1986	DE	NY	WI
SMITH INTERNATIONAL, INC.	1983	DE	CA	TX
STANDARD BRANDS PAINT CO.	1987	DE	MD	CA
STARTER CORP.	1989	DE	CT	CT

Corporation Name	Date	In	From	PPB
STEVENS GRAPHICS CORP. CORP.	1986	DE	TX	TX
STONE CONTAINER CORP.	1987	DE	IL	IL
STOP & SHOP COMPANIES, INC. (NEW)	1988	DE	MA	MA
STYLES ON VIDEO, INC.	1993	DE	CA	CA
SUNDOWNER OFFSHORE SERVICES, INC.	1990	NV	TX	TX
SUPERIOR INDUSTRIES INTERNATIONAL, INC.	1994	CA	DE	CA
SURGICAL CARE AFFILIATES, INC.	1986	DE	TN	TN
SYMBOL TECHNOLOGIES, INC.	1987	DE	NY	NY
U.S. SURGICAL CORPORATION	1990	DE	NY	CT
WAXMAN INDUSTRIES	1989	DE	OH	OH
WILLIAMS COMPANIES, INC. (THE)	1987	DE	NV	OK

Table - 7