Book Review

DENNIS J. BLOCK, NANCY E. BARTON, AND STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS (5th ed. 1998) ($195.00, Aspen Law & Business, Gaithesburg, Maryland 20878).

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In its purest form, the business judgment rule hardly justifies a book, much less a two-volume set. The substantive business judgment rule, like the procedural hearsay rule, is very simply stated. The richness of their exposition is in the discussion of their exceptions and permutations. Upon publication of the Fifth Edition of the foremost treatise on the subject, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, it is useful to reflect upon the origins of the rule and its role in the law.

The business judgment rule reflects a basic policy announced by the courts beginning nearly a century ago: assuming disinterest, good faith, and due diligence, courts generally will not interfere with business decisions by corporate directors. The business judgment rule quickly became a necessity to prevent laborious and intrusive judicial review of increasingly complex day-to-day decision making.

Despite a history that extends over a century, the most rapid development of the business judgment rule took place in the last two decades. The reasons are many, but the two principal factors were: (1) fact patterns that stretched the limits of the doctrine, and (2) litigants who were financially capable of bringing the matters to judicial resolution.

First, the advent of cash-out mergers thirty years ago allowed for the first time the involuntary elimination of minority stockholders, giving rise to claims that could not fully be accommodated by the statutory appraisal remedy. Management buyout proposals accelerated in the 1980s, placing self-interested buyers with inside information in conflict with their role as fiduciaries. Additionally, poison pill rights plans raised fiduciary issues even with respect to hostile third party tender offers. Second, and equally important, tenacious litigants came forward capable of seeing groundbreaking cases to fruition. Some were shareholder suits which achieved significant fee awards, others were injunctive actions brought by

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financial bidders seeking to stimulate corporate combinations or disaggregations.

It is, therefore, not surprising that one-third of the pages in the two volume Fifth Edition of *The Business Judgment Rule* are devoted to director conduct in control transactions. Hostile takeover bids, management buyouts, parent-subsidiary mergers, and similar transactions stretched the business judgment rule beyond its traditional limits, invoking and expanding the application of the "entire fairness" test and creating intermediate tests of conduct such as the *Unocal/Unitrin*[1] doctrine. In discussing these special variants of the business judgment doctrine, Block, Barton, and Radin draw upon a great wealth of experience. The authors have variously advised hostile bidders and targets, participated in the strategic business decision making itself, and defended the decisions made by directors in these pressured settings. The result is not a sterile recitation of rules, but rather an understandable and comprehensive explanation of the rules' application in a variety of dynamic settings.

The Business Judgment Rule gives similarly detailed treatment to the richly developed body of law defining stockholder derivative litigation. With the development of increasingly complex formulations, various gaps began to develop in what previously had been seen as seamless business judgment rule protection. This trend reached its zenith in 1985 with the decision of the Delaware Supreme Court in *Smith v. Van Gorkom*,[2] which held that directors violated their duty of care in approving a merger. A consequent lessening of the availability of directors' and officers' insurance led to further structural changes, including the reexamination of statutory authority for exonerating duty of care violations. *The Business Judgment Rule* covers these important areas and examines typical exclusions in directors' and officers' insurance policies.

The Business Judgment Rule appears for the first time in hard-bound form and is well organized into the traditional categories of cases dealing with business judgment rule issues. One difficulty with any attempt to organize the thousands of cases on the subject risks segregating important commonalities. For example, "disinterest" of directors is discussed in the disposition of derivative demand cases, takeover response cases, and affiliate entity transaction cases. While context dictates the nature of the requisite "disinterest," the concepts cannot be isolated by courts into logic-tight compartments. *The Business Judgment Rule* maintains the logic and

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[1]Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

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

organization, while bridging categories where necessary to make sense of the law.

The Business Judgment Rule is a comprehensive compilation of the important doctrines and standards applied by courts to the conduct of corporate directors. The treatise draws together information necessary to counsel directors in a variety of settings and is an indispensable work both for inside counsel and law firms. *The Business Judgment Rule* should prove to be a useful research tool for an organized overview of specific subject areas. It will also be an important tool for anyone attempting to view, in a unified construct, the patchwork of decisions that define what we refer to as the law of the business judgment rule.