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Solely Beneficial: How Benefit Corporations May Change the Duty of Care Analysis for Traditional Corporate Directors in Delaware

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SOLELY BENEFICIAL: HOW BENEFIT CORPORATIONS MAY CHANGE THE DUTY OF CARE ANALYSIS FOR TRADITIONAL CORPORATE DIRECTORS IN DELAWARE

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INTRODUCTION

A new thing is happening in the settled landscape of corporate law, and a new type of entity has arisen to traverse those old grounds. These new entities are called "benefit corporations," and they are proliferating. Far from obscure, this type of corporation counts well-known businesses (like Patagonia and Kickstarter) among its ranks.[1] Further, benefit corporations are not confined to languishing without capital. For example, the first of these entities to go public, Laureate Education, raised nearly $500,000,000 in its initial public offering.[2]

* J.D. Candidate, May 2019, University of Michigan Law School. I am thankful for the love, support, and patience of my wife, Sara. I would also like to thank my colleagues on the MICHIGAN BUSINESS & ENTREPRENEURIAL LAW REVIEW for their assistance in the writing of this Note.

1. Joseph Pileri, *Uncharted Waters? Legal Ethics and the Benefit Corporation*, 8 SAINT MARY'S J. LEGAL MALPRAC. & ETHICS 180, 181–82 (2017).

2. *See id.* (citing Lauren Gensler, *The World's Biggest For-Profit College Company, Laureate Education, Raises $490 Million in Public Debut*, FORBES (Feb. 1, 2017, 11:29 AM), https://www.forbes.com/sites/laurengensler/2017/02/01/laureate-education-initial-public-offering/#346536f02b3d.

This new corporate form has the admirable aim of correcting a perceived lack of corporate directorial freedom attributed to the shareholder primacy norm.[3]

However, the advent of benefit corporations may be responsible for inadvertently limiting the freedom of traditional (non-benefit) corporate directors, hindering their ability to consider the public interest. Benefit corporations have classified themselves as the corporate form best suited to consider the interests of non-shareholders. In doing so, benefit corporations may have unintentionally appropriated the *exclusive* ability to consider those interests because of the complex interactions between a new corporate form with an avowed social purpose, traditional fiduciary duty doctrine, and freedom of contract. This mixture may result in a judicial determination that traditional corporate directors are now especially beholden to the shareholder primacy norm.

Rather than adding to the voluminous literature assessing the necessity of benefit corporations themselves or the possible liability of their directors, this Note concerns itself only with how benefit corporations will impact the fiduciary duty of care analysis for the directors of traditional corporations constituted in the state of Delaware.[4] Further, this Note is only concerned with liability arising from claims alleging that a day-to-day directorial decision resulted in a breach of the duty of care. As such, this Note does not address any other potential liability predicated on other situations or duties.[5] Finally, this Note provides general background information about the relevant legal issues discussed, but it assumes that the reader has a working familiarity with the general features of a corporate entity and the mechanics of how litigation might be brought against it.

I. FOUNDATIONAL CORPORATE PRINCIPLES

Judicial deference to directorial decision-making by Delaware courts is a poignant illustration of the freedom that traditional corporations have historically enjoyed.[6] There is probably no greater example of this deference than the

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3. *See* Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1011 (2013); *see also* Kristin A. Neubauer, *Benefit Corporations: Providing a New Shield for Corporations with Ideals Beyond Profits*, 11 J. BUS. & TECH. L. 109, 112–114 (2016).

4. I have chosen Delaware for two simple reasons: most corporations are based in Delaware, and Delaware has a robust and developed caselaw addressing traditional corporate fiduciary duty. *See* JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS 2014 ANNUAL REPORT 1 (2014) http://corp.delaware.gov/Corporations_2014%20Annual%20Report.pdf (noting that "[m]ore than 1,114,000 legal entities are incorporated in Delaware"); *see also* Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts*, 17 BUS. L. TODAY (Mar./Apr. 2008), https://apps.americanbar.org/buslaw/blt/2008-03-04/slights.shtml.

5. For example, this Note does not address lawsuits alleging breaches of the so-called fiduciary duty of loyalty.

6. *See, e.g.*, Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061 (2009) (analyzing judicial deference as expressed by the business judgment rule).

business judgment rule. Benefit corporations may have disturbed the application of this rule. To understand how, it is necessary to engage in a cursory examination of the oft-discussed context and underpinnings of Delaware corporate jurisprudence and the business judgment rule itself.

A. *Traditional Duty of Care Analysis and Corporate Waste Doctrine*

Delaware's General Corporation Law governs Delaware corporations, but the text offers little guidance to directors.[7] Despite the statute's failure to clarify the exact contours of a traditional director's duties, case law has filled the void and specified the applicable norms.[8]

This is not to say that the process of defining corporate purpose and directorial duties is easy. Indeed, the correct legal principle for guiding directors in their fulfillment of a corporation's purpose was the subject of considerable and protracted debate and remains so today.[9] Rather than explicitly adopting any proposed philosophy, Delaware courts have settled on mandating "shareholder primacy in the form of fiduciary duties . . . ."[10] The law counterbalances these requirements by providing "deference to director decisions," including those "that may be motivated by objectives other than profit."[11]

Fiduciary duties are, in turn, informed by the shareholder primacy norm. The Supreme Court of Michigan stated the most widely-accepted formulation of this doctrine a century ago.[12] The Michigan justices wrote that corporations are "organized and carried on primarily for the profit of the stockholders" and that directors are therefore charged with taking action commensurate with that purpose.[13] One of the common justifications for this focus is the belief that aligning directorial decision-making with shareholder profit incentivizes the best use of corporate resources because shareholders are residual claimants.[14] In other words, prioritizing shareholder wealth generation is meant to ensure the most efficient use of resources and to benefit society as a whole.[15] Regardless of the academic debate surrounding shareholder primacy,[16] the norm has weathered

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7. *See* Neubauer, *supra* note 3, at 112.

8. *See id.*

9. Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 123 (2016).

10. *Id.*

11. *Id.* at 123–24.

12. *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

13. *Id.* at 684.

14. *See* WILLIAM T. ALLEN & REINER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 286 (Erwin Chemerinsky et al. eds., 5th ed. 2016); *see also* Tu, *supra* note 9, at 130.

15. *See* ALLEN & KRAAKMAN, *supra* note 14, at 286.

16. *See, e.g.*, *id.*; *see also* Robert Sprague & Aaron J. Lyttle, *Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy*, 16 STAN. J.L., BUS. & FIN. 1 (2010).

the storm of scrutiny well enough to command the respect of the Delaware judiciary[17] and is probably the "true" law governing Delaware corporations.[18]

Within that context, it becomes clear how fiduciary duties function: they are owed to shareholders and their substance flows directly from the shareholder primacy norm.[19] It is often argued that fiduciary duties are essentially contractual in nature,[20] and that the two primary duties of Delaware corporate directors are the duty of loyalty and the duty of care.[21] When judges are tasked with reviewing director actions for a breach of these obligations, the standard of review will change depending on the circumstances surrounding the director's action.[22] As mentioned, this Note is only concerned with judicial review predicated on a director's duty of care in the day-to-day context, leaving aside situations arising in takeover or sale-of-control contexts.

The duty of care has a remarkably broad scope, sweeping in every action a director takes with respect to the corporation.[23] Despite this sweeping reach, duty of care claims are not litigated often and are typically viewed as difficult cases to win.[24] In Delaware, to prevail on a duty of care claim against a director, a litigant must show that the defendant-director did not "[act] on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[25] This is the essence of the business judgment rule, and it is one of the reasons that there are "only a handful of cases" where directors were found liable for a breach of their duty of care.[26]

Although the business judgment rule is a nearly ever-present force, there is no "single canonical statement" of the rule.[27] The closest thing to a canonical statement is found in the American Bar Association's Corporate Director's

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17. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010).

18. *See, e.g.*, Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) (discussing, from the perspective of a member of the Delaware judiciary, the shareholder primacy debate).

19. *See, e.g.*, ALAN R. PALMITER, CORPORATIONS EXAMPLES AND EXPLANATIONS 189 (Vicki Been et al. eds., 5th ed. 2006).

20. *See* Steven J. Haymore, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1325 (2011).

21. ALLEN & KRAAKMAN, *supra* note 14, at 229; *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (noting Delaware directors owe a "triad" of fiduciary duties); *but see* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (suggesting the duty of good faith is not a standalone duty).

22. Haymore, *supra* note 20, at 1326.

23. *See* ALLEN & KRAAKMAN, *supra* note 14, at 229.

24. *Id.*; *see also* Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049 (Del. Ch. 1996) (discussing the duty of care and directorial risk management).

25. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citing Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971)).

26. PALMITER, *supra* note 19, at 203.

27. ALLEN & KRAAKMAN, *supra* note 14, at 243.

Guidebook.[28] There, the American Bar Association says that director decisions are protected by the business judgment rule when they are (1) made by financially disinterested directors, (2) who were appropriately informed before making the decision, and (3) acted in good faith in an attempt to advance the corporation's interests.[29]

The American Bar Association's test seems relatively clear and probably captures the "core idea" of the business judgment rule: jurists will not exercise their own independent judgment in order to "second-guess good-faith decisions made by independent and disinterested directors."[30] In practice, the business judgment rule serves as a rebuttable presumption that corporate directors acted appropriately and functions both to protect corporate directors from personal liability and to "insulate board *decisions* from judicial review."[31] Thus, a corporate director generally has some leeway when actually deciding something (as opposed to failing to make a decision), provided that said director's decisions are financially disinterested, informed, and made in the good-faith pursuit of the shareholder primacy norm's ideals.[32]

The doctrine of "corporate waste" allows litigants to defeat the presumptions of the business judgment rule[33] upon a showing that, when making their decision, directors "lacked a 'rational' business purpose."[34] In the context of excusing a shareholder from making demand on a board prior to litigating a waste claim, Delaware courts have stated the corporate waste doctrine requires "particularized allegations that 'overcome the general presumption of good faith by showing that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests.' "[35] If a litigant successfully makes such a showing, it logically follows that the presumption of good faith is rebutted because the absence of any rational business purpose serves as strong circumstantial evidence of bad faith decision-making.[36]

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28. *Id.*

29. *Id.* (citing AM. BAR ASSN., CORPORATE DIRECTOR'S GUIDEBOOK (2d ed. 1994)).

30. *Id.* at 240.

31. PALMITER, *supra* note 19, at 203; *see also* AM. L. INST., CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 (1994).

32. *See* ALLEN & KRAAKMAN, *supra* note 14, at 243 (citing AM. BAR ASS'N, CORPORATE DIRECTOR'S GUIDEBOOK (2d ed. 1994)).

33. As one might expect, fraud, conflicts of interest, and illegal actions are sufficient to overcome the business judgment rule. PALMITER, *supra* note 19, at 206–07.

34. *Id.* at 207.

35. *In re* The Goldman Sachs Group, Inc. S'holder Litig., No. CIV.A. 5215-VCG, 2011 WL 4826104, at *16 (Del. Ch. Oct. 12, 2011) (citing *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 136 (Del. Ch. 2009)).

36. *See* PALMITER, *supra* note 19, at 207.

B. *The Primary Difference Between Benefit and Traditional Corporations*

Without belaboring the point, a corporation's defining features are broadly considered to be: existence as a distinct legal entity with an "indefinite life," limited liability for shareholders, freely transferable shares, and a centralized management group appointed by the shareholders.[37]

In Delaware, a corporation may be constituted for "any lawful business or purposes."[38] The shareholder primacy norm is recognized by the American Law Institute ("ALI"), a dominant voice in corporate law,[39] as the principle most responsible for guiding corporate decisions and for influencing a jurist's review of those decisions.[40] Despite this emphasis, ALI does not suggest that the shareholder primacy norm is the only factor that traditional corporate directors consider when they make decisions. Instead, ALI suggests corporations should be free to ignore the norm in three situations.[41] First, corporations have a mandatory obligation to ignore contradictory norm-incentivized decisions; corporations must act lawfully, even if acting unlawfully would better generate shareholder wealth.[42] The next two situations afford corporate directors fairly broad discretion to ignore shareholder primacy in most other contexts; corporations may account for ethical concerns, and may "devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes."[43]

Practically, several legal theories—such as the business judgment rule and director primacy—support ALI's grant of broad discretion to traditional corporate directors, enabling them to consider a variety of interests when making decisions.[44] Thus, caselaw has approached an equilibrium for balancing shareholder rights and questioning directors' business judgment.[45]

Nevertheless, benefit corporations muddy the waters. B Lab, the group credited with originating the benefit corporation and helping to shepherd the

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37. *See* ALLEN & KRAAKMAN, *supra* note 14, at 75 ("All commercial jurisdictions have at least one statutory form with these five features as default options.").

38. DEL. CODE ANN. tit. 8, §101(b) (West 2006).

39. *See, e.g.*, Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 178 (2008) ("[ALI's] Principles of Corporate Governance . . . [is] considered a significant, if not controlling, source of doctrinal authority . . . .").

40. *See* AM. L. INST., *supra* note 31, § 2.01.

41. *Id.*

42. *Id.*

43. *Id.*; *see also* A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (1953) (applying New Jersey law but explaining emphatically how corporations possess charitable capacity).

44. *See* Joshua Fershee & Elaine Waterhouse Wilson, *March of the Benefit Corporation: So Why Bother? Isn't the Business Judgment Rule Alive and Well? (Part III)*, BUS. L. PROF BLOG (Sept. 23, 2014, 12:34 PM), http://lawprofessors.typepad.com/business_law/2014/09/march-of-the-benefit-corporation-so-why-bother-isnt-the-business-judgment-rule-alive-and-well-part-i.html. *But see* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (suggesting all corporate activity must generate shareholder wealth).

45. *See, e.g*, Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996) (suggesting that the business judgment rule appropriately balances the interests of investors who may wish to bring legitimate lawsuits with the interest of directors in taking certain corporate risks).

new corporate form into adoption by the various states,[46] indicates that benefit corporations were conceived as a response to two perceived problems with traditional corporations: the shareholder primacy norm itself, and an "absence of transparency" for consumers.[47] In keeping with these purposes, benefit corporations' biggest innovation and their largest difference from a traditional corporation is their complete rejection of the shareholder primacy norm.[48]

In Delaware, a benefit corporation is statutorily required to state at least one specific public benefit the business intends to promote within the corporation's statement of purpose.[49] The benefit corporations are then required to report to their stockholders regarding the corporation's pursuit of the identified goals.[50] These socially conscious corporate purposes are meant to function as the driving force of benefit corporations, focusing the entity's management and informing investors about what they are signing up for.[51] In practice, too, much of the benefit corporation's organization and daily operations hinge on the chosen corporate purpose.[52] Further, Delaware law requires benefit corporation directors to "balance" the identified goal with shareholder interests.[53] The exact meaning of "balance" is not clear and may entail weighing each factor equally, or may mean simply giving *some* weight to each factor.[54] In any event, litigation will likely be necessary before a definitive meaning of "balance" is determined.[55]

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46. Westaway & Sampselle, *supra* note 3, at 1010–11.

47. *Id.* at 1011 (citing *Introducing the B Corporation*, B REVOLUTION CONSULTING 4 (May 15, 2012), http://www.brevolutionconsulting.com/articles/introducing-the-b-corporation/).

48. *See* Ct. Corp. Staff, *Understanding Benefit Corporations*, WOLTERS KLUWER (Sept. 28, 2016), https://ct.wolterskluwer.com/resource-center/articles/understanding-benefit-corporations (suggesting that, in general, benefit corporations are "for-profit organizations that are required by law to create a material positive impact on society and the environment in addition to generating a profit . . . . Directors and shareholders define what it means to be good for society and the environment.").

49. DEL. CODE ANN. tit. 8, § 362(a)(1) (West 2016).

50. *See id.* § 366(b).

51. *See* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 645 (2017).

52. *Id.*

53. *See* DEL. CODE ANN. tit. 8 § 365(a) (West 2016) ("The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders . . . and the specific public benefit . . . identified in its certificate of incorporation.").

54. Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 119 (2015) (citing J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 355 (2014)).

55. *See id.*

C. *A Very Brief Summary of the Principle of "Freedom of Contract"*

Freedom of contract, sometimes described as an "abstract doctrine,"[56] is a liberty protected by the Due Process Clause of the Fifth and Fourteenth Amendments.[57] As such, freedom of contract is traditionally seen as being tied to individual liberty under the assumption that such liberty is maximized when a person may enter contracts "without fear of governmental sanctions for doing so" and, on the affirmative side, when the government will enforce the individual's contracts.[58] The concept of freedom of contract applies to business entities as well.[59]

The ability to freely enter contracts and to negotiate terms is classically supported by two different schools of thought: "economics and liberal theory."[60] Under an economic perspective, the transacting entity is usually considered the person best positioned to decide how their own transactions should unfold.[61] Meanwhile, under the liberal theory, "sovereignty of human will, sanctity of promise, and private autonomy against [state] intervention" are all important normative influences supporting freedom of contract.[62] As with shareholder primacy, the role of the judiciary in applying these norms in an effort to shape or control freedom of contract is hotly debated; in fact, it is sometimes difficult to even determine whether the theory of freedom of contract itself is waxing or waning.[63]

Regardless of the exact scope of individual autonomy and the courts' proper role, courts obviously *do* intervene in freely-negotiated contracts in several ways.[64] The most important court activities, for the purposes of this Note, are when "[i]n order to prevent the disappointment of expectations that the transaction aroused in one party, as the other had reason to know, the courts find and enforce promises that were not put into words, by interpretation when they can and by implication and construction when they must."[65] In other words, courts

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56. 16B GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE CONSTITUTIONAL LAW § 641 (2d ed. 2018) (citing People v. Perretta, 253 F.Y. 305 (1930)).

57. 16A GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE CONSTITUTIONAL LAW § 615 (2d ed. 2018) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972)); *see also* Behavioral Healthcare Partners, Inc. v. Gonzalez-Rivera, 392 F. Supp. 2d 191 (D.P.R. 2005).

58. Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 B.U. L. REV. 263, 287 (1999).

59. BLUM ET AL., *supra* note 56, § 641 (2d ed.) (citing Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001 (3d Cir. 1980)).

60. *See* Yuval Feldman, *Control or Security: A Therapeutic Approach to the Freedom of Contract*, 18 TOURO L. REV. 503, 517 (2002).

61. *Id.*

62. *Id.* at 518.

63. *Id.*; *see also* Pettit, *supra* note 58, at 290 (1999).

64. Feldman, *supra* note 60, at 517.

65. *Id.* at 524 (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS 94, 97 (West 1960)).

are often willing to assess a contract's express and implied promises to enforce the parties' expectations.[66]

These notions about contractual liberty are important because one of the dominant theories of corporate governance asserts that fiduciary duties essentially provide default "contract terms" that the parties would have negotiated themselves if transaction costs weren't prohibitive.[67] Courts largely follow this contract-centered viewpoint, insofar as they justify the shareholder primacy norm and fiduciary duties.[68] Importantly, if a corporation's "default terms" are too burdensome for shareholders, corporate entities can alter those terms to be more appealing, essentially giving shareholders the ability to "choose" their corporation's goals via market pressure.[69]

II. HOW BENEFIT CORPORATIONS MAY IMPACT TRADITIONAL DUTY OF CARE CLAIMS

Before benefit corporations existed, corporate law simply called for a jurist to apply relatively concrete fiduciary duty principles.[70] Even though benefit corporations utilize traditional Delaware corporate law principles, innovative arguments predicated on freedom of contract complicate the fiduciary duty analysis moving forward.[71] Therefore, the newly created shareholder ability to choose an entity explicitly devoted to public benefit goals may undermine the liberty of traditional corporate directors to make day-to-day decisions aimed at supplying some public benefit.

With the shareholder primacy norm and freedom of contract looming large in the background,[72] traditional directors are wise to avoid focusing on public interests until the impact of benefit corporations on their liability is defined.[73] Courts must first learn to apply existing case law to these new entities, and practitioners must then take time to grasp the implications of the resultant holdings.[74] This slow dispensation of legal acumen can "take many years" and is

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66. *See id.*

67. *See* Justin Blount & Patricia Nunley, *Social Enterprise, Corporate Objectives, and the Corporate Governance Narrative*, 52 AM. BUS. L.J. 201, 224–25 (2015).

68. *See id*. at 226 (citing *In re* Trados Inc. Shareholder Litig., 73 A.3d 17, 37 (Del. Ch. 2013) ("A Delaware corporation, by default, has a perpetual existence. Equity capital, by default, is permanent capital. In terms of standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment.") (internal citations omitted).

69. *See id*. at 227.

70. *See* Jack B. Jacobs, *Entity Rationalization: A Judge's Perspective*, 58 BUS. LAW. 1043, 1044 (2003).

71. *See* Westaway & Sampselle, *supra* note 3, at 1033.

72. *See supra* Parts II.B, II.C.

73. *See* Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 KAN. L. REV. 573, 596 (2016).

74. *Id.*

"multiplied every time we adopt a new entity form."[75] In the interim, attorneys will be left to test their legal theories of liability in the crucible of litigation.[76] Therefore, this portion of the Note explores how benefit corporations (in conjunction with the legal principles previously mentioned[77]) may change the liability of traditional corporate directors in the context of daily decision-making.

A. *A New Analysis for the Duty of Care and Corporate Waste*

Given that the corporate duty of care is arguably contractual in nature[78] and courts try to give effect to the intentions of the parties,[79] a prospective shareholder's choice between a benefit corporation and a traditional corporation may change corporate waste litigation by locking a traditional corporation into an exclusive focus on wealth generation. This is so even though fiduciary duties themselves do not change,[80] because business trends and other contextual fluctuations may "raise new questions" about the exact application of directorial fiduciary duty.[81]

Unlike the regime in place when corporate waste doctrine was introduced, there now exists, arguably at least, a dichotomy of corporate forms.[82] Although some observers have called this dichotomy "false,"[83] what really matters is that shareholders *believe* in "the illusion that benefit corporations are automatically more socially and environmentally conscious than traditional corporations."[84] If this is the case, it becomes more likely that prospective shareholders will choose which corporations to invest in based off their legal status and their expressed corporate purposes.[85] Some commentators go so far as to suggest that investors making these types of choices are already more than hypothetical, and are in fact a surging population within the investment community.[86]

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75. *Id.*

76. *Id.* at 597.

77. *See supra* Part II.

78. *See* Haymore, *supra* note 20, at 1325.

79. *See* Feldman, *supra* note 60, at 524 (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS 94, 97 (West 1960)).

80. *See* E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can A Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 762–63 (2008) (citing *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006)).

81. *Id.* at 763 (citing E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1436–39 (2005)).

82. *See* Kennan Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 185 (2015).

83. *See id.*

84. *Id.*

85. *See id.*

86. *See, e.g.,* A CORPORATE PARADIGM SHIFT: PUBLIC BENEFIT CORPORATIONS, GIBSON DUNN (Aug. 9, 2016), https://www.gibsondunn.com/a-corporate-paradigm-shift-public-benefit-

In the system just described, it is not unrealistic to imagine a court finding that a traditional corporation is beholden to its shareholders' "choice" of a wealth-maximization entity. For instance, Professor Joshua Fershee writes "[n]ow that many states have alternative social enterprise entity structures, there is an increased risk that traditional entities will be viewed . . . as pure profit vehicles."[87] Likewise, Professor Kevin Tu observes that, "even though traditional corporate law is flexible enough to allow directors to pursue public and private benefits, corporate managers, shareholders, and the judiciary may construe Benefit Corporations as the only proper (or at least lowest risk) legal entity for pursuing a hybrid corporate purpose."[88]

1. Beneficial Corporate Action is Already Scrutinized

In Delaware, the court's pre-existing emphasis on the shareholder primacy norm lends considerable weight to these concerns. In fact, the most recent Delaware case with a serious focus on the norm arguably suggests courts may be doubling down on the theory, confirming the risk posed by the new entity dichotomy. The Delaware courts, in an opinion issued *before* benefit corporations became widespread, stated, "Promoting, protecting, or pursuing non-stockholder considerations *must lead at some point to value for stockholders*."[89] Although this case was concerned with a corporate takeover,[90] rather than a day-to-day decision, it is routinely cited for the proposition that the shareholder primacy norm is a powerful force.[91] After this pronouncement, the court immediately followed with the familiar reassurance of the business judgment rule,[92] but that invites the following question: in a world where benefit corporations exist, is it within a traditional corporation's valid business judgment to emphasize philanthropic concerns?

To be sure, under the single-corporate-form regime, the shareholder primacy norm allowed traditional directors to account for philanthropic concerns so long as those concerns could be painted as "consistent with the 'long-term' in-

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corporations/ (citing Jeff Benjamin, *Socially Responsible Investing is Coming of Age*, INVESTMENT NEWS (Mar. 6, 2016, 12:01 AM), http://www.investmentnews.com/article/20160306/FREE/160309960/socially-responsible-investing-is-coming-of-age).

87. Joshua Fershee, *Long Live Director Primacy*: *Social Benefit Entities and the Downfall of Social Responsibility*, BUS. L. PROF. BLOG (July 18, 2017), http://lawprofessors.typepad.com/business_law/2017/07/long-live-director-primacy-social-benefit-entities-and-the-downfall-of-social-responsibility.html (concluding that traditional corporate directors will experience limited freedom because of the rise of benefit corporations).

88. Tu, *supra* note 9, at 173; *see also* Daryl Koehn, *Are Benefit Corporations Truly Beneficial?*, 35 BUS. & PROF. ETHICS J. 17, 35 (2016).

89. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (emphasis added).

90. *See id.*

91. Jonathan Brown, *When Social Enterprises Fail*, 62 VILL. L. REV. 27, 33 (2017) (summarizing the discussion of eBay Domestic Holdings, Inc., 16 A.3d 1).

92. *See* eBay Domestic Holdings, Inc., 16 A.3d at 33.

terest of shareholders."[93] This would usually pass muster because, among other things, philanthropy plausibly made a corporation appear more attractive by virtue-signaling,[94] increasing long-term investor value.

Despite this, the Chief Justice of the Delaware Supreme Court, Leo Strine Jr.,[95] authored an article implying Delaware courts might not be so forgiving moving forward.[96] In an essay discussing shareholder wealth maximization in traditional corporations, Chief Justice Strine wrote: "[I]t is ultimately the equity market that is the primary accountability system for public firms."[97] Because of this, he concludes that efforts to "tinker around with the margins of corporate law" via "constituency statutes," "Corporate Social Responsibility movement[s]," and "antitakeover provisions" have historically been ineffective at protecting corporate directors who want to consider non-shareholder interests.[98] Importantly, the failure to protect traditional directors who pursue the public benefit is not so troubling to Chief Justice Strine. To him, trusting traditional corporate decision-makers to pursue "the good" after accepting shareholder money is unwise.[99] Instead, he argues the public interest is ultimately only properly defended via elected representatives acting through the law.[100] These remarks are enlightening because they demonstrate that benefit corporations themselves are likely to be met with a degree of skepticism,[101] and directorial efforts to consider stakeholders may face even greater scrutiny.

Furthermore, this critical perspective is not limited to Chief Justice Strine. Delaware's benefit corporation statute seemingly discloses a critical view of corporate social responsibility. One commentator points out that Delaware's statute not only requires the enumeration of a specific public benefit purpose but also requires directors to *balance that purpose with the interests of stockholders*.[102] In other words, Delaware benefit corporations are *still* beholden to at

93. Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 687 (2006); *see also* Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1202 (1999) ("Moreover, it is certainly easy to come up with profit-maximizing or value-maximizing rationales that deflect legal challenges to corporate giving.").

94. *See* Fairfax, *supra* note 93, at 687.

95. *Judicial Officers*, DEL. CTS., http://courts.delaware.gov/supreme/justices.aspx (last visited Nov. 21, 2018).

96. *See* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012).

97. *Id.* at 153.

98. *Id.*

99. *Id.* at 154–55.

100. *Id.* at 155.

101. *But see* Strine, *supra* note 18, at 792–93 (mentioning benefit corporations approvingly, though noting they are marginal steps in the right direction).

102. *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 355 (2014) (citing DEL. CODE ANN. tit. 8 § 365(a) (2013)).

least some version of the shareholder primacy norm. Given that the shareholder primacy norm still maintains some influence over even Delaware *benefit* corporations, it seems especially likely that the norm will lend itself to the enhanced scrutiny implied by Chief Justice Strine's remarks in the context of traditional corporations. If so, it is equally likely that traditional directors will no longer be as free as they once were to make decisions that don't generate profit.

2. One Theory Supporting a New Analysis

It seems obvious, but the addition of every new entity type works a change to the current entity landscape and therefore presents an opportunity for new liability.[103] In keeping with that principle, the impact of benefit corporations on existing law may change the traditional corporate fiduciary duty of care. Instead, traditional corporations may become subject to stricter enforcement of the corporate waste doctrine as their decisions may be seen as "irrational" and not "based on a valid assessment of the corporation's best interests"[104] in a post-benefit corporation world.

Scholars, practitioners, and courts have grappled with striking the right balance between shareholder and other stakeholder concerns for decades.[105] Arguably, the general consensus that emerged from the dispute was that the world is separated into two types of entities: those that focus on profit and those that focus on purpose,[106] creating a dichotomy classifying entities according to their primary objective. Perhaps sensing discontent with that resolution, traditional corporations themselves began to grapple with their place in society, distancing themselves from the shareholder primacy norm and focusing instead on stakeholder concerns, or at least claiming to.[107] This type of corporate rhetoric is:

> [an important] mechanism designed to persuade relevant audiences regarding the validity of the corporate enterprise and its agents' behaviors. From this viewpoint, the fact that corporations adopt rhetoric embracing stakeholder concepts suggests that corporations do not believe that shareholder primacy rhetoric is as persuasive a justification for their behavior as stakeholder rhetoric.[108]

One conceivable purpose of incorporating as a benefit corporation is to adopt stakeholder rhetoric, as this variety of rhetoric is more consistent with the

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103. Franklin, *supra* note 73, at 597.

104. *In re* The Goldman Sachs Group, Inc. S'holder Litig., No. 5215-VCG, 2011 WL 4826104, at *16 (Del. Ch. Oct. 12, 2011) (citing *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 136 (Del. Ch. 2009)).

105. *See generally* Fairfax, *supra* note 93, at 690–91.

106. Peter Schmitt, *Public Benefit Corporations: Pushing the Social Venture Discussion*, HUMPHREY PUB. AFFAIRS REV., http://humphreyreview.umn.edu/public-benefit-corporations-pushing-social-venture-discussion (last visited Jan. 1, 2018).

107. *See, e.g.,* Fairfax, *supra* note 93, at 691–96 (examining a variety of corporate documents and reaching this conclusion).

108. *Id.* at 699.

benefit corporation's purpose.[109] Some commentators even go so far as to claim the benefit corporation represents a "fundamental change in directors' duties and offers an alternative to the prevailing corporate paradigm of shareholder primacy."[110] One of the reasons given for adopting benefit corporations is that it "empowers investors" and gives them "the power to protect and enforce [their] mission."[111]

This phrasing, that of alternatives and dichotomy, lends itself to a change in liability because, when dealing with "alternative entities," freedom of contract is a powerful force.[112] Thus, this rhetoric would arguably justify a court's decision to hold that a traditional corporate director is bound to the shareholder norm more powerfully than they historically have been. The traditional corporate shareholder's choice to "opt-out" of stakeholder rhetoric could serve as an appealing temptation to jurists that they no longer need to try to balance shareholder and stakeholder interests and can instead defer to the "decision" of shareholders on whether to make themselves coequal with stakeholders or not.[113]

The theory for such a stance is readily available: "It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept."[114] One of the primary purposes of contracting is to make certain that the parties are of one mind about the terms of their arrangement.[115] These considerations lend themselves to the contractarian theory of the firm, which posits that the firm itself is a nexus of express and implied contracts.[116] Under that philosophy, it is the contractual nature undergirding the corporate endeavor that gives rise to directorial fiduciary duty.[117]

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109. *See* WOLTERS KLUWER, *supra* note 48.

110. John Montgomery, *An Innovative Option: The Professional Benefit Corporation A Professional Corporation Directed to A Beneficial Cause Can Align Client Goals with Attorney Interests*, 43 L. PRAC. 32, 35 (2017); *see also* Dirk Sampselle, *An Examination of the Delaware Public Benefit Corporation Legislation*, STOUT (Sept. 01, 2014), https://www.stoutadvisory.com/insights/article/examination-delaware-public-benefit-corporation-legislation.

111. Westaway & Sampselle, *supra* note 3, at 1084.

112. *See* Franklin, *supra* note 73, at 598 (discussing this policy with respect to LLCs and other alternative entities, though not specifying that a benefit corporation *is* an alternative entity).

113. *See* McKenzie Holden Granum, *With the Emergence of Public Benefit Corporations, Directors of Traditional For-Profit Companies Should Tread Cautiously, but Welcome the Opportunity to Invest in Social Enterprise*, 38 SEATTLE U. L. REV. 765, 773 (2015) ("The often shifting expectations and debates about the proper goals of corporate activity may finally come to rest; two different models provide for a separation between corporations solely driven by profits and those taking a more holistic and social approach to business.").

114. BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 27 (3d ed. 2012) (quoting Laborers Combined Funds v. Mattei, 518 A.2d 1296, 1300 n.4 (Pa. Super. 1986).

115. *See* FRIER & WHITE, *supra* note 114, at 30.

116. Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 SAINT MARY'S L.J. 617, 642 (2013).

117. *See id.*

If that is the case, it is reasonable that a traditional director ought to be bound by the implicit contract that a shareholder made upon investing in a traditional corporation in the post-benefit corporation world: namely, that the shareholder invested their money in consideration of the promise that a traditional corporate director will focus on generating shareholder wealth to the exclusion of the interests of other stakeholders. Even setting aside party motives, objectively the new dichotomy suggests that entity choice is a " 'signal[]' that drive[s] the strategic behavior of market participants and act[s] as potential catalysts in the creation *or destruction of operational norms*."[118]

Thus, subjective and objective principles would support a judicial holding that a traditional director's contractual duty of care constrains him to the corporation's wealth-maximization purpose in the post-benefit corporation world. Shareholders will, arguably at least, make their entity choice based on their understanding of that entity's purpose.[119] Indeed, Delaware's requirements for transitioning from a traditional corporation to a benefit corporation strongly suggest the state's interest in holding a corporation to what it promises to be.[120] A transitioning corporation must have the approval of "90% of the outstanding shares of each class of stock" and must also amend its certificate of incorporation to include compliant provisions.[121] Ostensibly, these requirements are designed to protect the shareholder's choice of a traditional entity and to prevent those shareholders from "being forced into an entity with a different governance architecture."[122] Here again, a jurist could find support for a holding that traditional corporate directors are more bound to the shareholder primacy norm than ever.

The increased emphasis may specifically work to change the duty of care. The fiduciary duty of care is applicable to every act a director takes in their official capacity,[123] and it obligates directors to advance shareholder interests—in the absence of an explicit contract—in the way that "the *parties would have provided* by contract had they been able to negotiate without transactions costs."[124] As discussed, corporations are aware that their rhetoric about shareholder primacy has an impact on shareholders' investment decisions,[125] and shareholders have a choice between benefit corporations (considering stakeholder concerns) and traditional corporations (focusing on pure wealth maximi-

118. Regina Robson, *A New Look at Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 502 (2015) (emphasis added).

119. *See* Schmitt, *supra* note 106 (discussing various investors that may be interested in benefit corporations and their reasons for eschewing traditional corporations).

120. *See* Sampselle, *supra* note 110.

121. *Id.*

122. *Id.*

123. ALLEN & KRAAKMAN, *supra* note 14, at 229.

124. *See* Haymore, *supra* note 20, at 1325 (emphasis added) (citing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 110 (1991)).

125. Fairfax, *supra* note 93, at 691–96.

zation). Some commentators believe that investors may already be making similar choices, observing that institutional investors traditionally avoid alternative entities and will presumably avoid benefit corporations as well.[126] The fact that investors are making these decisions works in conjunction with the contractarian model to support an inference that "parties would have provided"[127] that traditional corporate directors be bound *only* to generate shareholder wealth. Given this, it is plausible that benefit corporations have robbed traditional directors of the discretion to consider anything beyond profit in their day-to-day decision making.[128]

This could manifest as a stricter application of the usually forgiving business judgment rule. The essential reasoning behind the lax standard "is to protect good-faith board decisions from judicial second-guessing."[129] However, the risk of judicial second-guessing is less serious when the shareholders have spoken through their choice of entity, signaling that they did not grant directors the discretion to pursue philanthropic concerns. If they had desired to grant this discretion, the argument might go, they would have chosen to invest in a benefit corporation. Put another way, the business judgment rule might be inapplicable in this context because a traditional director engaging in stakeholder consideration in a post-benefit corporation world might be seen as acting in bad faith.[130] Or, put still another way, the traditional director's decision to pursue something not obviously addressed to shareholder wealth might be seen as "irrational" in this new world and not protected by the business judgment rule.[131]

When applying the business judgment rule, courts are often implicitly asking whether a director's actions were "not so extreme, unconsidered, or inexplicable as not to be an exercise of good-faith judgment."[132] In the post-benefit corporation world, a hypothetical plaintiff-shareholder could allege that a traditional corporation's pursuit of a other stakeholder interests is a board choice *not* to maximize shareholder wealth, but *instead* to act like a benefit corporation, something the hypothetical plaintiff did not sign up for.

As early as 2012, a commentator suggested the very legislative history of benefit corporation statutes created a "false dichotomy" between good and bad

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126. Haymore, *supra* note 20, at 1343; *but see,* Montgomery, *supra* note 110, at 37 (contending Wall Street has endorsed the benefit corporation form).

127. Haymore, *supra* note 20, at 1325 (citing EASTERBROOK & FISCHEL, *supra* note 124).

128. *See* Regina Robson, *supra* note 118, at 552–53 ("Moreover, the creation of a specialized entity, with a statutorily defined purpose of creating a general public benefit suggests that the responsibility for such a benefit is equally 'specialized' and outside the purview of traditional for-profits.").

129. PALMITER, *supra* note 19, at 208.

130. Haymore, *supra* note 20, at 1327.

131. *See* Sampselle, *supra* note 110 (explaining that "court doctrine [] implies that the decision-making process directors and officers implement must seek shareholder value maximization if it is to be considered rational. To do otherwise would be to implement an irrational decision-making process").

132. ALLEN & KRAAKMAN, *supra* note 14, at 244.

corporations that could have unintended consequences for the scope of traditional directorial fiduciary obligations.[133] Proponents of benefit corporations authored an essay indicating that the day-to-day decisions of traditional directors may enjoy the business judgment rule, but those decisions that intentionally pursue social benefits by embracing actions that diminish shareholder value may not be allowed under Delaware law.[134] This, the proponents argued, made the availability of a benefit corporation as an alternative entity necessary.[135]

Agostino v. Hicks serves as a possible example of how this dichotomy might play out in practice. In that case, the Delaware courts ultimately found for the corporate defendants because there was *not* an alternative wealth-maximizing option, but the court did entertain the notion that shareholders were injured by a financing deal that "precluded the pursuit of other value-maximizing transactions."[136] Analogizing that case to the current context, a Delaware Court could be amenable to a complaint alleging that a traditional corporation injured them by pursuing a public benefit when a more profitable option existed, *and* the court might feel more comfortable with that result because of the availability of benefit corporations. Coupling that comfort with Delaware's emphasis on the shareholder primacy norm and the State's lack of any statutory constituency provision,[137] traditional corporate directors may find that courts are suddenly no longer tolerant when shareholders complain their needs are being placed second to concerns that don't obviously generate long-term wealth.

3. Reasons Traditional Director Liability May Not Change, Despite Benefit Corporations

Directors have been well within the bounds of their authority when choosing to pursue many avenues of philanthropic concerns for a long time,[138] and,

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133. *See* Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/; *see also* James T. Burns, *Are All Corporations Evil? Enter the Benefit Corporation*, ALBUQUERQUE BUS. LAW, P.C. (Jan. 12, 2015), http://www.albuquerquebusinesslaw.com/business-planning/benefit-corporations/ (demonstrating a more recent view on the dichotomy); Tu, *supra* note 9, at 174 ("In sum, the existence of Benefit Corporation statutes may have the unintended consequence of being construed as a legislative mandate that, under corporate law, considering broader stakeholder interest and creating a public benefit is wholly prohibited unless a business has opted to organize or reincorporate as a Benefit Corporation.").

134. *See* William H. Clark et al., *Benefit Corp., White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* (2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf .

135. *See id.*

136. Agostino v. Hicks, 845 A.2d 1110, 1115 (Del. Ch. 2004).

137. *See* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 833 (2012).

138. *See* ALLEN & KRAAKMAN, *supra* note 14, at 240.

despite the existence of benefit corporations, Delaware courts may continue as if nothing has changed.

Most importantly, traditional directors may find themselves sheltered from this Note's concerns if their corporation's charter has implemented a 102(b)(7) provision, which would insulate the traditional director from liability for duty of care claims.[139] However, this Note assumes that this statutory defense has not been adopted, and the issue of potential liability has not been rendered moot.

Corporations have long been free to limit their Purposes of Incorporation, thus giving them the freedom to include unique and idiosyncratic corporate purposes.[140] Therefore, under the analysis discussed above, a corporation choosing a general statement of purpose has theoretically rejected a strict wealth-maximization mission in favor of a more flexible purpose.[141] In the case of a general corporate purpose statement, a reasonable shareholder would be hard-pressed to claim her corporation's director is expressly obligated to only generate profit. Thus, traditional corporate directors have always existed as part of a dichotomy because of the ability to limit corporate purpose. Therefore, the addition of benefit corporations and their supposed dichotomy may not change the existing landscape much, if it all. On the other hand, provisions along the lines of "the 'corporation is organized and carried on primarily for the profit of the stockholders' "[142] are as "rare as unicorns."[143] Thus, the existing "dichotomy" between general purpose and wealth-maximization corporations may not be as strong as the one between benefit corporations and their traditional counterparts.

There are ample policy reasons to eschew changing the liability of traditional directors despite the advent of benefit corporations. First, benefit corporation statutes have usually attempted to nip any negative impact on traditional corporations in the bud by emphasizing that they are not meant to effect any change on traditional corporate forms.[144] Second, the rationale behind application of the business judgment rule is not materially impacted by the rise of benefit corporations. "[B]luntly stated" the reason for the business judgment rule is that, "corporate directors . . . invest other people's money,"[145] which means that traditional directors risk considerable liability for errors in judgment, but are offered relatively little in the way of a reward if the risks pay off.[146] Courts bal-

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139. *See id.* at 246.

140. Jessica Chu, *Filling A Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 170 (2012).

141. *See id.*

142. *Id.* (quoting Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 169 (2008)).

143. *Id.* (quoting LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 28 (2012)).

144. *See* Tu, *supra* note 9, at 173–74 (citing MODEL BENEFIT CORP. LEGIS. § 101, cmt. (2013)).

145. ALLEN & KRAAKMAN, *supra* note 14, at 231.

146. *See id.*

anced these incentives via the business judgment rule,[147] and it is difficult to see how the rise of benefit corporations materially changes the force of this business judgment rule justification. This is especially true given that some Delaware courts seem to jealously guard traditional directorial freedom.[148]

There is also anecdotal evidence that Delaware intends to carry on with a "business as usual attitude." During November 2016, corporate professionals (including current members of the Delaware judiciary) convened in Delaware to discuss the public policy implications of current Delaware law.[149] During the symposium's discussion, participants mostly agreed that traditional corporate directors enjoy wide latitude to consider social initiatives "to the extent they benefit the corporation."[150] The recency of this announcement seems to suggest that benefit corporations have not yet had an impact on the substantial deference afforded to traditional director decisions under the business judgment rule.[151] However, this lack of impact may be because of a general lack of benefit corporation litigation so far, and "most participants" at the conference "lacked significant experience with Delaware public benefit corporations."[152] In fact, the lack of litigation concerning benefit corporations seemed to be on participants' minds as, "there appeared to be some hesitation to fully embrace the public benefit corporation until there [was] further development of relevant case law."[153]

CONCLUSION AND RECOMMENDATIONS

Benefit corporations have a commendable goal and seem well-suited to addressing a situation that many feel is alarming: namely, that traditional corporations seem to be driven solely by the pursuit of profit even at the expense of non-shareholders. Whatever the truth of those concerns, the complex interaction between freedom of contract, corporate duties, the business judgment rule, and litigation risk-assessment may make benefit corporations responsible for a net decline in corporate social responsibility,[154] at least until litigation outcomes

147. *See id.*

148. *See, e.g.*, Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996) ("Given this disjunction, only a very small probability of director liability based on 'negligence', 'inattention', 'waste', etc., could induce a board to avoid authorizing risky investment projects to any extent! Obviously, it is in the shareholders' economic interest to offer sufficient protection to directors from liability for negligence . . . .").

149. Claudia H. Allen et al., *Proceedings of the 2016 Delaware Business Law Forum: A Review and Debate of the Public Policy Implications of Delaware Law*, 72 BUS. LAW. 755 (2017).

150. *See id.* at 757.

151. *See supra*, Part II(A).

152. Allen et. al, *supra* note 149, at 759.

153. *Id.*

154. *See* Tu, *supra* note 9, at 174 ("The increased public benefit generated by Benefit Corporations, however, may be more than offset by a corresponding decline in the efforts of traditional for-profit corporations if the Benefit Corporation form is not widely adopted and the managers of for-profit corporations elect to curtail the pursuit of social missions.").

clarify the rules moving forward. As it stands now, benefit corporations are mostly untested.[155]

Much of the traditional corporate directorial liability will depend on the resolution of "sister questions" posed in suits against benefit corporations. For instance, if benefit corporations ultimately serve only as a convenient means for a corporation to appear socially responsible without sincerely earning that accolade, the movement may well be of no consequence.[156]

Confusion about the impact of benefit corporations on traditional corporate directors' liability will most likely lead to litigation at some point,[157] resolving these issues piecemeal over time. In the meantime, if nothing else, the addition of benefit corporations has caused some uncertainty about "the difference[s] in scope of permissible activities" between the traditional corporate form and the newer entity.[158] Similarly, shareholders may feel confusion as to why traditional directors and benefit corporation directors are subject to different standards, given the flexibility of the business judgment rule.[159] This is another cause for traditional directors to expect litigation at some point.

It will take considerable time before a traditional director can comfortably say what impact benefit corporations will have on traditional corporate fiduciary duties because courts require time "to provide guidance on novel issues presented by the new statutes."[160] Further, even after courts reach these rulings it takes still more time for practitioners to grasp the implications of the law, a process which can take years.[161] Indeed, "it may take over three decades for practitioners to feel comfortable with, for example, the benefit corporation."[162]

Until litigation tests the impact of benefit corporations on the fiduciary duties of traditional corporations, the dichotomy that seems to exist between the sister entity forms is a tempting lure for a jurist looking to escape the debate about a corporation's proper role in society, and the contractual nature of fiduciary duties provides the avenue necessary for the courts to reach that result. Given that the result of litigation against traditional directors alleging a lack of shareholder profit is murky even with the business judgment rule,[163] traditional

155. *See* Heminway, *supra* note 51, at 634.

156. *See* Jonathan Storper, *Is Benefit Corporation Legislation Really Necessary?*, MEDIUM: B THE CHANGE (Aug. 2, 2017) https://bthechange.com/is-benefit-corporation-legislation-really-necessary-2672e89c0b64.

157. Franklin, *supra* note 73, at 597 ("The difficulty of lawyers to suss out the attributes of numerous legal entities has a predictable outcome: litigation.").

158. Tu, *supra* note 9, at 167.

159. *See id.* at 171.

160. Franklin, *supra* note 73, at 596.

161. *Id.*

162. *Id.*

163. *See* Clark & Babson, *supra* note 137, at 835–36 ("In this instance, the resolution of litigation by a shareholder seeking maximized financial return against the directors of such a mission-driven company, even under this level of scrutiny, would be uncertain at best from the perspective of the mission-driven company and its directors.").

corporations may feel insecure when relying on the business judgment rule to take actions beyond generating shareholder wealth in the post-benefit corporation world. This chilling effect is also a plausible result.[164]

164. *Id.*