

2014

## Committing To Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations

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### Recommended Citation

Brett McDonnell, *Committing To Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 *FORDHAM J. CORP. & FIN. L.* 19 (2014), available at [https://scholarship.law.umn.edu/faculty\\_articles/163](https://scholarship.law.umn.edu/faculty_articles/163).

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# COMMITTING TO DOING GOOD AND DOING WELL: FIDUCIARY DUTY IN BENEFIT CORPORATIONS

*Brett H. McDonnell\**

## ABSTRACT

Can someone running a business do good while doing well? Can they benefit society and the environment while still making money? Supporters of social enterprises believe the answer is yes, as these companies aim at making money for shareholders, while also pursuing other social benefits. Since 2010, states have begun to enact statutes creating the “benefit corporation” as a new legal form, one designed to fit social enterprises. Benefit corporations proclaim to the world that they will pursue both social good and profits, and those who run them have a fiduciary duty to consider a broad range of social interests as they make their decisions, rather than a duty to focus solely on increasing shareholder value. Does this novel fiduciary duty effectively commit these businesses to doing good? How will courts actually apply this duty in practice? Will this new duty accomplish its goals without unduly high costs?

This article is among the first to analyze in detail the fiduciary duty provisions in several versions of these new benefit corporation statutes. It compares duties in benefit corporations to duties in traditional corporations in the leading categories of fiduciary duty cases. It argues that there is likely to be a modest “flattening” in the risk of liability for directors and officers of benefit corporations. That is, as compared to the level of risk in ordinary corporations, the risk of being held personally liable will be greater for decisions where that risk is smaller in ordinary corporations, while the risk of liability will be smaller for decisions where that risk is greatest in ordinary corporations.

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\* I thank Claire Hill, Dan Kleinberger, Paul Rubin, and Dan Schwarcz for helpful comments. I also thank the participants in the Minnesota State Bar Association working group which drafted the proposed Minnesota benefit corporation statute discussed in this article—their insights throughout that process have strongly informed my thinking here.

The article then asks whether the statutes strike the proper balance in holding directors and officers accountable. The statutes could be too strong if they scare off investors and managers. They could be too weak if they allow managers to proclaim their virtue while ignoring their duties with no fear of legal sanctions. Neither possibility can be dismissed, but this paper argues that the statutes have got it just right. They create enough risk of liability that managers must pay attention to their legal duties, allowing courts to help shape norms of appropriate behavior, while not imposing such high risk that this promising new business form becomes unattractive.

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### INTRODUCTION

Can someone running a business do good while doing well? Can they benefit society and their environment while still making money? Much of the time the answer is clearly yes. Since even before Adam

Smith,<sup>1</sup> we have known that under the right conditions, individuals seeking their own profit may be driven, as if by an invisible hand, to help society as a whole. But the conditions are not always right, and sometimes businesses which focus only on maximizing profits for their owners will seriously harm other persons or the environment.<sup>2</sup>

To help make the dilemma more concrete, consider a hypothetical ice cream company named Jen & Berry's which has developed a loyal following in part because its products are seen as environmentally friendly. However, the containers the company uses are non-biodegradable and significantly harmful to the environment. More environmentally-friendly containers are available, but at greater cost. Jen & Berry's customers have shown no concern about these containers, so switching to the less harmful product would significantly increase costs with no benefit in higher revenues. How should managers of a business faced with such a choice proceed?

Past answers have split between two extremes, embodied in two legal forms of business associations.<sup>3</sup> For-profit corporations focus on what their name suggests, making a profit, whereas non-profit corporations focus on doing some defined social good. But recently, some entrepreneurs and investors have become interested in developing businesses that have dual goals of making a profit for their investors while also pursuing social goods, sometimes narrowly and sometimes broadly defined. Businesses with this dual purpose have come to be called "social enterprises."

Lawyers and legislators have begun to invent hybrid legal forms to meet the needs of these hybrid businesses. The most important of these new forms is the benefit corporation. Benefit corporation statutes build on ordinary for-profit corporation statutes, with benefit corporations incorporated under ordinary corporation statutes, and corporate law rules largely governing benefit corporations. Benefit corporation statutes, however, add several new features. First, benefit corporations must have a purpose beyond simply pursuing profit. Second, they must

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1. Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776); *see also* Bernard Mandeville, *The Fable of the Bees, Or, Private Vices, Publick Benefits* (1714).

2. After World War II, economists formalized the precise conditions under which Smith's hypothesis held. Those conditions are highly unlikely to be met. *See* Kenneth J. Arrow & Frank H. Hahn, *General Competitive Analysis* (1971).

3. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*, 25 *Regent U. L. Rev.* 269, 280 (2012-2013).

regularly report how they have attempted to pursue that purpose. Finally, their officers and directors have a duty to consider and pursue the interests of a variety of stakeholders beyond just shareholders.<sup>4</sup>

This article is among the first to take an in-depth look at the last of those legal features, the creation of a new fiduciary duty for those who run benefit corporations. What do we hope that new duty will accomplish, how will it work in practice, and what are the chances this duty will accomplish what we want without creating unduly damaging unintended consequences? Those are the questions this article seeks to answer.

The exploration of these questions begins in Part II with an overview of social enterprise and of the various new legal forms that have been created in response, including low profit limited liability companies (L3Cs), flexible purpose corporations, and social purpose corporations, as well as benefit corporations. This part explores what the new fiduciary duty for benefit corporations is meant to accomplish. It can be seen as a response to two different problems which benefit corporations face. One is a standard problem of trust in the face of asymmetric information. Those who run benefit corporations want to attract investors and customers, and a number of investors and customers want to do business with companies pursuing the social benefits which benefit corporations say they are pursuing. However, outside investors and customers cannot necessarily tell whether those running any particular business are doing what they say they will do. The existence of a legally enforceable legal duty may act as a commitment device to assure investors and customers. A second problem is that in the face of a variety of competing interests, it is often not clear what managers acting in good faith should do to follow through on their commitments. The law may help provide some guidance. The law must try to accomplish these two aims, though, without providing such detailed and draconian standards that managers avoid becoming involved in benefit corporations (for fear of liability for violating their duty), or if they do become involved, they take unduly costly measures to protect against the risk of legal liability. Thus, the new fiduciary duties for benefit corporation directors and officers face a difficult balancing act.

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4. See *infra*, section I.C.

Part III presents a detailed analysis of the fiduciary duty provisions under three benefit corporation statutes: a Model Act which has been largely followed by most states which have adopted benefit corporation laws to date,<sup>5</sup> Delaware's new benefit corporation act,<sup>6</sup> and Minnesota's new benefit corporation act,<sup>7</sup> which has some interestingly different elements. It compares how these statutory provisions may be applied with the existing corporate law of fiduciary duties for three types of circumstances: ordinary operating decisions, transactions in which a director or officer has a conflicting interest, and changes of corporate control.<sup>8</sup> The analysis suggests a modest flattening of the risk of liability is likely to occur in benefit corporations relative to ordinary for-profit corporations. That is, in ordinary operating decisions where the risk of liability is very low for ordinary corporations, the risk will be slightly elevated in benefit corporations. In conflict transactions where the risk of liability is highest, the risk in benefit corporations may be slightly lowered (hopefully not much), or at least the damages that might be recovered are likely to be lowered relative to the level in ordinary corporations. In changes of control situations, the direction of the change in liability risk may vary by the circumstances of a proposed change in control. Shareholders of benefit corporations may find it harder to argue that they will receive too low a premium, but they may be able to claim that some proposed transactions will harm other stakeholders.

Part IV goes on to ask whether, in light of the legal analysis of Part III, the duty provisions are likely to achieve their desired goals without unduly bad unintended consequences. It suggests that there are some reasons to fear that the risk of liability may be too high (possibly scaring off managers), too low (failing to encourage appropriate behavior), or

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5. Model Benefit Corp. Legislation (2013) (hereinafter Model Act), *reprinted in* William H. Clark, Jr., et. al., *White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Need of Social Entrepreneurs, Investors, and, Ultimately, the Public at Appendix A* (2013).

6. Del. Code Ann. tit. 8, Subchapter XV (2013) (hereafter Delaware Act).

7. Minn. Stat. Ann. § 304A (West 2014) (hereafter Minnesota Act). Note that the Minnesota Act is currently under consideration by the Minnesota legislature and that passage appears likely this session. The author is a member of the state bar association that drafted the Minnesota Act.

8. See generally Claire A. Hill & Brett H. McDonnell, *Fiduciary Duties: The Emerging Jurisprudence*, in *Research Handbook on the Economics of Corporate Law* 133 (Claire A. Hill & Brett H. McDonnell eds., 2012) (outlining principles of corporate law fiduciary duty).

even both too high *and* too low (scaring off legitimate managers while failing to change the behavior of illegitimate ones). However, it goes on to argue that there is also reason to believe that the law, if applied sensitively by courts, will strike a proper balance. There are many protection devices in the statutes, along with existing law, to keep liability from getting out of hand and scaring off managers. But, there remains just enough risk of liability to get the attention of managers, given the bad consequences that could follow in the unlikely event that they are held liable. This risk of liability both offers some deterrence directly, but probably more importantly it also focuses attention on courts. In their fiduciary duty opinions, even if they rarely hold directors or officers liable, the courts will be able to draw upon emerging best practices to scold managers who have fallen short of those standards, and thereby help articulate and encourage conformity with emerging norms of conduct for those who run benefit corporations. The law of duty may thus both help discourage bad faith operators of benefit corporations and offer guidance to those acting in good faith who are unsure what their duty requires, while doing so without imposing the harsh penalties of the law too often. This sort of legislating by sermonizing is an important part of how courts, especially Delaware courts, do their job with ordinary for-profit corporations.<sup>9</sup> One hopes they will be able to perform a similar balancing act for benefit corporations.

## I. OVERVIEW OF SOCIAL ENTERPRISE AND BENEFIT CORPORATIONS

For many decades there has been debate over what freedom traditional corporations have to balance seeking profit with seeking other sorts of social values. In the thirties, Berle and Dodd engaged in a classic academic debate over whether the duty of corporate directors was owed only to shareholders or to other affected stakeholders as well.<sup>10</sup> A new version of the debate erupted in the eighties with the growth of first hostile takeovers and then defenses against such

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9. See *infra* notes 167-68 and accompanying text.

10. See Adolf A. Berle, *Corporate Powers As Powers In Trust*, 44 Harv. L. Rev. 1049 (1931); E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); see also Antony Page, *New Corporate Forms and Green Business*, 37 Wm. & Mary Env't'l L. & Pol'y Rev. 347, 355 (2013) (discussing Berle's and Dodd's debate in the context of social enterprise).

takeovers. One component of the debate was whether target company boards could use non-shareholder interests, especially those of employees, as a justification for guarding against takeovers that looked quite profitable for their shareholders.<sup>11</sup> During this period, many states adopted “constituency statutes,” which allow boards to consider non-shareholder interests.<sup>12</sup> More recently, there has been a growing corporate social responsibility movement as corporate management begins to see the long-term economic benefits of socially responsible investment.<sup>13</sup> Today’s social enterprises can be seen as the latest development in this ongoing history, a new way of thinking about the relationship between seeking profit and seeking other social goods.

A growing number of businesses, mostly start-ups but also including some more established companies, are engaged in what has come to be called “social enterprise.”<sup>14</sup> The defining characteristic of social enterprises is that they aim both to make a profit, though perhaps a reduced profit, for equity investors and also to do some social good. The kinds of social good that such businesses aim to achieve vary tremendously, from narrow and focused initiatives to quite broad and vague intentions of social betterment.<sup>15</sup> Sometimes it can be both, or in between. So for instance our ice cream maker, Jen & Berry’s, may want

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11. See Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 Ann. Surv. Am. L. 85, 102-08 (surveying academic debate).

12. Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 Wm. Mitchell L. Rev. 1227, 1231 (2004); Comm. on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 Bus. Law. 2253, 2263-66 (1990).

13. Ian B. Lee, *The Role of the Public Interest in Corporate Law*, in Research Handbook on the Economics of Corporate Law 106 (Claire A. Hill & Brett H. McDonnell eds., 2012); David Millon, *Two Models of Corporate Social Responsibility*, 46 Wake Forest L. Rev. 523, 530-31 (2011).

14. See generally Joseph W. Yockey, *Does Social Enterprise Law Matter?* 1, 4-10 (Univ. of Iowa Legal Studies Research Paper No. 14-06, 2014), available at <http://ssrn.com/abstra=2389024> (discussing social enterprise generally); see also Robert Katz & Antony Page, *The Role of Social Enterprise*, 35 Vt. L. Rev. 59, 65 (2010); Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 Wm. & Mary Bus. L. Rev. 639, 644-50 (2013); Social Enterprise: A Global Comparison 88 (Janelle A. Kerlin ed., 2009); Muhammad Yunus with Karl Weber, *Building Social Business: The New Kind of Capitalism That Serves Humanity’s Most Pressing Needs* xv-xvi (2010).

15. See *infra* notes 40-42, 55 and accompanying text (providing typical definitions of the social good to be pursued in benefit corporations).



to commit to products and processes which are environmentally sustainable, foods made from fair-trade ingredients produced by small-scale farms, or both.

Social enterprises have a lot of attractions. They allow entrepreneurs, investors, customers, and employees to do good while still doing well. That is, they can advance some objectives which they find morally attractive, while still earning a profit (entrepreneurs and investors), earning a decent wage (employees) and/or buying a useful good or service (customers). But social enterprises face serious challenges that neither pure for-profits nor pure non-profits have to worry about. The core problem is that for some decisions, increasing profit and advancing the enterprise's stated social goods may conflict. There are tradeoffs to be made, but who will make those tradeoffs, and how should they make them? In the first instance, a company's managers will presumably be the persons to make the hard choices, but how are they supposed to make them? And how are others, especially investors and customers, supposed to trust that the managers are making those decisions in a way that they find acceptable? If managers cannot credibly commit to a course of action that investors and customers find attractive, they may not be able to attract investors and customers.<sup>16</sup> Monitoring of management and punishment of behavior that violates the promised mix of profit and doing good may be too costly. Of course, the issue of monitoring managers is not new, and many mechanisms are available to address the problem.<sup>17</sup> Business association law is one such mechanism.

#### A. SOCIAL ENTERPRISE AND TRADITIONAL LEGAL FORMS OF BUSINESS

There has been concern that existing legal forms of business association do not fit well with the needs of social enterprises.<sup>18</sup> The non-profit corporation is clearly inappropriate, as it does not allow for equity investors to earn a profit. Cooperatives, under traditional legal rules, also restrict the ability to admit outside equity investors. Various

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16. Dana Brakman Reiser, *Theorizing Forms For Social Enterprise*, 62 *Emory L.J.* 681, 684 (2013).

17. Paul Milgrom & John Roberts, *Economics, Organization & Management* 126-203 (1992).

18. See, e.g., Yockey, *supra* note 14, at 12-13; Esposito, *supra* note 14, at 681-82; Reiser, *supra* note 16, at 685-89.

forms of unincorporated entities, of which the leading alternative is now the limited liability company (“LLC”), provide more promising flexibility. The LLC allows firms to pursue any legal purpose, with whatever mix of for-profit and non-profit goals they choose. They also provide great flexibility in management structure, scope of fiduciary duty, financial structure, and exit rights. Although I will not focus much attention on LLCs in this article, they do provide a viable alternative for social enterprises.

However, the very flexibility of LLCs presents some problems. Designing a detailed set of rules to fit the needs of a specific enterprise will typically require expensive legal representation, and much uncertainty is still likely to surround the resulting organization insofar as its lawyers have devised unique solutions which have not been tested by prior experience. Outside investors, customers, and employees will be hard-pressed to understand the complex details of a particularized legal structure.<sup>19</sup> One of the key benefits of having a variety of legal forms of business associations is that they provide a smorgasbord of standardized solutions to the problems of firms. Firms can choose the form that best fits their needs without having to engage in too much specialized lawyering, and various stakeholders will be able to infer much about the business from the organizational form it has chosen.<sup>20</sup> Insofar as social enterprises are a new kind of business with a distinctly new set of challenges, the flexible default rules of the LLC may not fit their needs well.<sup>21</sup>

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19. Reiser, *supra* note 15, at 689.

20. Of course, at first there will still be much uncertainty surrounding a new legal form like the benefit corporation. However, as experience accumulates in markets and courts, this uncertainty should decrease.

21. This discussion suggests that a desirable form might be a benefit LLC. Paralleling the benefit corporation, a benefit LLC would start with the legal base of an LLC, but would add specific features to meet the organizational needs of social enterprises. This would address the drawbacks of standard LLCs discussed in the text, and might well be more attractive than benefit corporations insofar as the LLC is proving more attractive than the corporate form for most newer businesses, as discussed in the following paragraphs, and most social enterprises tend to be start-up companies. So far, only Maryland has adopted a benefit LLC form, but others may well follow. Much of the analysis of benefit corporations in this paper may be relevant for benefit LLCs. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 Am. U. Bus. L. Rev. 1, 42-43 (2012). Another potential benefit of benefit LLCs might be that management by

The other main traditional legal form of business association is of course the for-profit corporation. Corporations still dominate among large public companies, and many smaller and newer businesses are still corporations as well, although LLCs are increasingly common outside the sphere of large publicly-traded companies.<sup>22</sup> Corporations have many advantages, including a well-developed body of law, which is well adapted to a business which wants to pool equity investments from a large number of sources and put that money to work in a relatively large, hierarchical business association. However, the corporate form also has significant disadvantages. Some of these are shared with all smaller businesses (insofar as social enterprises tend to be small).<sup>23</sup> The hierarchical structure does not fit small businesses well, and the corporate tax is typically less attractive than partnership taxation, to name two leading issues.<sup>24</sup>

Other problems with corporations are particular to social enterprises. Above all, current understanding among most in the U.S. is that the defining objective of corporations is to maximize profit or shareholder wealth. This understanding is less true in other countries, it may have been less true historically in the U.S.,<sup>25</sup> and it is disputed in the U.S. today.<sup>26</sup> The shareholder wealth maximization norm has little legal binding effect for most decisions, because the business judgment rule protects most decisions by boards and officers, even if in their heart of hearts those decision-makers are not pursuing shareholders' interests as single-mindedly as the legal norm suggests they should. Only in limited situations involving changes of control, or protections against involuntary changes of control, does the shareholder wealth maximization norm have some potential legal bite.<sup>27</sup> And even there, in

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members could be a way of ensuring that decisions are made by those who care about the goals of the organization. Reiser, *supra* note 16, at 712-13.

22. Larry E. Ribstein, *The Rise of the Uncorporation* (2010).

23. This is why the benefit LLC may prove useful.

24. Corporations can choose to be S corporations and thereby be taxed mostly like partnerships, but significant restrictions apply in order to be able to do that.

25. Johnson, *supra* note 3, at 276-77.

26. *See, e.g., id.* at 273-74; Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* 16 (2012).

27. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33-34 (Del. Ch. 2010).

the thirty or so states with constituency statutes, directors and officers are probably protected if they take other interests into consideration.<sup>28</sup>

Nonetheless, even if corporate managers *may* take into account the interests of non-shareholder constituencies, especially in states with constituency statutes, they certainly do not *have* to do so in any legally binding way (except insofar as looking out for the interests of other groups is itself necessary for increasing profit for shareholders). The founders of a social enterprise, though, may want to commit the business to pursuing the interests of others besides shareholders. They may want to commit in part because they care themselves, and they want the business to do so even after they have lost full control of it. They may also want to credibly commit in order to encourage the involvement of investors, customers, and employees who want to be involved in an enterprise which cares about more than just the interests of shareholders. Traditional corporation law provides little assistance in helping social enterprises create such a credible commitment.<sup>29</sup>

## B. SOCIAL ENTERPRISE AND NEW LEGAL FORMS OF BUSINESS

Given these gaps in all of the leading traditional legal forms of business association from the perspective of social enterprises, it is no great surprise that in recent years a number of states have experimented with new legal forms of business association. To date, at least, these new forms are all rooted in one of the existing forms, but they add new rules on top of existing rules to provide solutions for the special challenges facing social enterprises. Low-profit limited liability

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28. I say “probably” because although they have been around for several decades, constituency statutes have been little used in court and have received almost no judicial interpretation. Both legal and business practitioners seem wary of how much legal protection constituency protections would really give if push came to shove in court. A leading example is the sale of Ben & Jerry’s to a corporation focused on traditional profit maximization. The founders claimed they felt forced into the sale by the legal injunction to maximize shareholder wealth despite the fact that Vermont had a constituency statute that was called the Ben & Jerry’s statute and was enacted to protect companies from precisely that pressure to sell out. It is unclear, however, to what extent the claimed concern of the founders was a consequence of genuine legal uncertainty as opposed to a useful pretext. See Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 *Tenn. J. Bus. L.* 221, 237-39 (2012).

29. Founders of a company can, of course, try to structure the business to create a commitment on their own; the point, though, is that the law does little to help them.

companies (“L3Cs”) were an early version which saw much enthusiasm. L3Cs were created to help encourage “program related investments” by charities along with investments by for-profit investors. However, a number of lawyers and academics have raised serious questions as to whether the rules of L3Cs actually help achieve compliance with the restrictions surrounding program related investments.<sup>30</sup> One state so far, Maryland, has created benefit LLCs, which resemble benefit corporations (as described below), but grafted onto LLCs rather than corporations.

The leading legal response to date has probably been the benefit corporation. A number of states have adopted benefit corporation laws, with more considering them. Most states have based their laws on a Model Act created by lawyers working with B Lab, a non-profit which is the leading certifier of companies that hold themselves out as social enterprises.<sup>31</sup> The leading state for public corporations, Delaware, recently passed its own statute that diverges in significant ways from B Lab’s Model Act.<sup>32</sup> All benefit corporations on the general lines of the Model Act, including Delaware, must pursue “general public benefit,” which as we shall see is very broadly defined indeed, although they may also choose to identify one or more specific benefits which they will particularly pursue. Two states have enacted statutes that do not require the pursuit of a general public benefit broadly defined, but instead focus only on specific benefits defined by each company. These are called flexible purpose corporations in California and social purpose corporations in Washington.<sup>33</sup> Minnesota’s statutes<sup>34</sup> provide for both

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30. Daniel S. Kleinberger, *A Myth Deconstructed: The “Emperor’s New Clothes” on the Low-Profit Limited Liability Company*, 35 Del. J. Corp. L. 879, 896-97 (2010); Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 Ark. L. Rev. 243, 250 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 Vt. L. Rev. 273, 283-84 (2010).

31. B Lab, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Dec. 1, 2014).

32. Del. Code Ann. tit. 8 §§ 361-368.

33. See generally Dana Brakman Reiser, *The Next Big Thing: Flexible-Purpose Corporations*, 2 Am. U. Bus. L. Rev. 55, 57 (2012).

34. The author was involved in the bar association committee which drafted the Minnesota legislation.

the broad version, called general benefit corporations, and the more focused version, called specific benefit corporations.

Though there are significant variations in detail, all of these benefit corporation statutes have several main elements in common. These include a provision that corporate purpose must involve pursuing other interests beyond shareholder wealth maximization, promulgation of fiduciary duties and enforcement provisions to require pursuit of that broader purpose, and a requirement for a regular (generally annual) report on how the company has pursued that broader purpose. In the remainder of this section, I will briefly describe these defining features of benefit corporations, before turning in more detail to the competing fiduciary duty provisions of several statutes in the next section.

Benefit corporations must contain a provision in their articles or certificate of incorporation (“charter”) stating that they are a benefit corporation.<sup>35</sup> An amendment to the charter to convert a corporation into a benefit corporation must receive a super-majority vote, typically two thirds,<sup>36</sup> but ninety percent in Delaware.<sup>37</sup> Similarly, a charter amendment to eliminate benefit corporation status must receive a super-majority vote, typically two thirds.<sup>38</sup> In some states, dissidents to these votes receive dissenters’ rights, and thus can give up their shares in return for the fair value of the shares.<sup>39</sup>

As noted, a core feature of benefit corporations is that their corporate purpose extends beyond maximizing shareholder wealth created by the corporation. Under the Model Act, “[a] benefit corporation shall have a purpose of creating general public benefit.”<sup>40</sup> “General public benefit” is defined as a “material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”<sup>41</sup> Most statutes closely follow this Model Act provision. Delaware’s general benefit language is rather different, referring to “the

35. Model Act § 103; Del. Code Ann. tit. 8, § 362(a) (West 2013); Minn. Stat. Ann., § 304A.101 sub. 1 (West 2015).

36. Model Act § 104; Minn. Stat. Ann., § 304A.103 sub. 1.

37. Del. Code Ann. tit. 8, § 363(a).

38. Model Act § 105; Del. Code Ann. tit. 8, § 363(c); Minn. Stat. Ann., § 304A.104 sub. 1.

39. Del. Code Ann. tit. 8, § 363(b); Minn. Stat. Ann., § 304A.103 sub. 3, 104 sub. 3.

40. Model Act § 201(a).

41. Model Act § 102.

best interests of those materially affected by the corporation's conduct . . .<sup>42</sup> Under the Model Act, a benefit corporation may but need not provide that in addition to general public benefit it will also pursue a "specific public benefit."<sup>43</sup> Delaware is an exception, requiring companies to both pursue the general benefit just noted *plus* one or more specific public benefits identified in its certificate of incorporation.<sup>44</sup> Under the rather different flexible purpose corporation model, there is no requirement to pursue general public benefit. Rather, the corporation need only identify one or more specific benefits which it will pursue.<sup>45</sup> In our Jen & Berry's example, let us suppose that the company has committed itself (somewhat) specifically to products and processes that are environmentally sustainable. In a flexible or social purpose corporation (or in Minnesota a specific benefit corporation), that could be the extent of its commitment. If it were a benefit corporation under the Model Act or Delaware (or in Minnesota a general benefit corporation), in addition to this specific benefit Jen & Berry's would also be committed to pursuing general public benefit as defined above.

One of the main needs for social enterprises is to find ways to credibly commit to pursue goals beyond shareholder wealth maximization. Merely stating a broader purpose is not enough, a company must be able to credibly commit to actually pursuing that purpose. The benefit corporation statutes have two basic strategies for helping companies commit: reporting and duty. The first strategy uses public disclosure. The statutes require benefit corporations to regularly make reports on their pursuit of public benefit. In most states the report must be annual.<sup>46</sup> The statutes differ somewhat in the detail they impose concerning these reports, but they generally require that a company prepare its report in accord with standards promulgated by an

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42. Del. Code Ann. tit. 8, § 362(a).

43. Model Act § 102. The same is true for general benefit corporations in Minnesota, Minn. Stat. Ann., § 304A.101 sub. 1.

44. Del. Code Ann. tit. 8, § 362(a) (West 2013).

45. See Cal. Corp. Code §2602(b)(2) (West 2013); the same is true for specific benefit corporations in Minnesota, see Minn. Stat. Ann. § 304A.104 sub. 2 (West 2015).

46. Model Act § 401(a); Minn. Stat. Ann. § 304A.301 sub 1. In Delaware the requirement is only biennial, though corporations may provide for more frequent filing, see Del. Code Ann. tit. 8 § 366(b).

independent third party.<sup>47</sup> Delaware differs on this point—it allows companies to require a third-party standard in their certificate, but does not require it.<sup>48</sup> Moreover, corporations following a specific rather than general benefit purpose are not required to use a third-party standard,<sup>49</sup> because no such standard will be available for most of the various possible specific benefits one may imagine.

These public reports work as a commitment device within a reputational market-based strategy. A public report may help reveal whether a company is living up to its stated purpose. If it is not, investors, customers, or employees may decide not to do business with that company, or may want to push it to live up to its ideals.<sup>50</sup> Of course, the market alone could create incentives for companies to publish such reports anyway, and the market could also develop standards for such reports. Indeed, the statutes themselves rely upon such privately-developed standards.<sup>51</sup> However, as in disclosure-based securities law, there may be a coordination benefit to having the government help in standard-setting, since there is an externality present in having standards followed by many companies within a category, so that outside constituents can compare like with like.<sup>52</sup> An open question is whether the statutory strategy of relying on privately-generated standards will lead to adequate coordination and public standards which allow interested persons to compare performance across companies. Also, the creation of standards presents a quandary: excessive quantification may lead to gaming the numbers and ignoring important factors that are not counted in the numbers, while vague qualitative standards may not convey much credible information. To date, the statutes do not do much to address this dilemma. However, there is another, maybe greater, benefit of having a legal reporting requirement. Companies which commit fraud within such required reports will presumably open

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47. Model Act § 401(a); Minn. Stat. Ann. § 304A.301.

48. Del. Code Ann. tit. 8, § 366(b), (c) (West 2013).

49. Minn. Stat. Ann. § 304A.301 sub. 2 (West 2015).

50. See Reiser, *supra* note 16, at 707-08.

51. For example, B Lab is a private company that provides certification to social enterprises. See *supra* note 31 and accompanying text.

52. Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 303-04 (1991).



themselves up to anti-fraud suits, providing a potentially important way to police the accuracy of such disclosure.<sup>53</sup>

### C. AN OVERVIEW OF DUTY IN BENEFIT CORPORATIONS

The other statutory commitment strategy is fiduciary duty. As analyzed above, it is already largely true under most corporation statutes that in most circumstances directors and officers *may* pursue objectives beyond shareholder wealth maximization. However, under the benefit corporation statutes they *must* pursue the general or specific public benefits described above.<sup>54</sup> Failure to do so may constitute a violation of fiduciary duty and may leave the directors, officers, or corporation subject to a suit for violation of that duty. There is much uncertainty concerning the scope of the duties created and their judicial enforcement. The next two sections will explore that uncertainty. Here, I describe the basic features of the duty provisions under the Model Act, the Delaware Act, and the Minnesota Act.

The Model Act directs that “[i]n discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the [directors] (1) shall consider the effects of any action or inaction upon” a list of persons including the shareholders, employees, customers, “community and societal factors,” the environment, long-term interests, and “the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.”<sup>55</sup> The Act creates a “benefit enforcement proceeding” for violations of duties under the Act or for “failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its articles . . . .”<sup>56</sup> Only the corporation itself, a director, or shareholders owning more than 2% of shares in a class or series has standing to sue,<sup>57</sup> although the articles or bylaws may grant standing to others.

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53. None of the three statutes we consider here provide an explicit cause of action for fraud in a benefit report. However, other laws may create such a cause of action. In particular, it would seem that there is a good argument that Rule 10b-5 should apply.

54. *See supra* notes 40-42 and accompanying text.

55. Model Act § 301(a). Section 303(a) imposes the same duty upon officers.

56. Model Act § 102.

57. Model Act § 305(b).

The Model Act creates a variety of restrictions on suits to enforce this duty. Directors and officers are exonerated from personal liability for monetary damages (although the articles may allow for personal liability) for “any action or inaction in the course of performing the duties” under the Act if s/he “performed the duties of office in compliance with” the Act, or for “failure of the benefit corporation to pursue or create general public benefit or specific public benefit.”<sup>58</sup> The corporation itself is also “not liable for monetary damages . . . for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.”<sup>59</sup> Thus, benefit enforcement proceedings are largely limited to injunctive remedies (although we shall see some possible exceptions to this in the next section). The Model Act also explicitly makes the business judgment rule applicable to the duties created under it.<sup>60</sup> It does not explicitly make applicable director exculpation clauses<sup>61</sup> which have become standard for public corporations—we shall discuss these below.

Duties under the Delaware Act are defined rather differently. Delaware introduces a balancing requirement, which at first glance seems to set a tougher standard than the Model Act:

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, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.<sup>62</sup>

However, the Delaware Act then goes far in deflecting possible liability for failing to meet his balancing requirement, both by rejecting any standing for persons having an interest affected by the corporation’s conduct,<sup>63</sup> and also by specifying that a director “will be deemed to

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58. Model Act §§ 301(c), 303(c).

59. Model Act § 305(a)(2).

60. Model Act § 301(e).

61. These clauses waive the personal liability of directors for monetary damage, with exceptions to that waiver, including exceptions for violations of the duty of loyalty, illegal behavior, and action not in good faith. Del. Code Ann. tit. 8, § 102(b)(7) (West 2011). Such an exculpation clause may seem unnecessary given the exoneration of directors from monetary damages under the Model Act, although we shall see that there is reason to doubt that.

62. Del. Code Ann. tit. 8, § 365(a) (West 2013).

63. None of the acts provide standing to enforce the duties created to anyone other than shareholders. The concern is that more generous standing may lead to too many suits. Pragmatically that seems hard to avoid—the range of stakeholder interests is vast,

satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve."<sup>64</sup> Moreover, the statute goes on to recognize that a § 102(b)(7) exculpation clause may apply to this duty, and the certificate may further state "that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty."<sup>65</sup> This should protect directors against possible application of the evolving concept of good faith, which plaintiffs have tried to use to get around exculpation clauses.

The Minnesota Act has elements of both the Model and Delaware Acts, as well as its own unique provisions. Like the Model Act, it provides that directors shall consider the effects of proposed conduct on a list of persons and interests, including both general and any applicable specific public benefit.<sup>66</sup> Like both the Model and Delaware Acts, it limits standing only to shareholders.<sup>67</sup> Like the Model Act, it provides that the corporation itself is not liable for monetary damages for any failure to pursue or create a general or specific public benefit.<sup>68</sup> Unlike either of the other acts, Minnesota's Act creates a cause of action against directors if the corporation has "for an unreasonably long period of time failed to pursue" its general or specific benefit.<sup>69</sup> There is no limitation on monetary damages for directors or officers. However, it does make clear that the business judgment rule applies, that exculpation clauses, if present, apply, and borrows from Delaware in providing that

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and some of the stakeholder groups are quite large and ill-defined, so there would be almost no limit as to who could sue. However, this is actually a pretty big limitation, and shows that ultimately the benefit corporation concept does not stray all that far from the concept of for-profit corporations. If benefit corporations are to be run for the benefit of a range of stakeholders, why not give them the right to enforce what is owed to them? See Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 Bus. Law. 1007, 1021-22 (2013); Reiser, *supra* note 16, at 717-20; Johnson, *supra* note 3, at 292.

64. Del. Code Ann. tit. 8, § 365(b).

65. Del. Code Ann. tit. 8, §365(c).

66. Minn. Stat. Ann. § 304A.201 sub. 1 (West 2015).

67. Minn. Stat. Ann. § 304A.202 sub. 1(a).

68. Minn. Stat. Ann. § 304A.202 sub. 1(b).

69. Minn. Stat. Ann. § 304A.202 sub. 2.

exculpation clauses may state that “any disinterested failure” to satisfy duty under the Act shall not constitute a breach of the duty of loyalty.”<sup>70</sup>

These fiduciary duty provisions raise a number of questions as to how they may be applied if ever tested in court. We now turn to some of those questions.

## II. HOW MIGHT COURTS APPLY THE DUTY PROVISIONS?

We shall consider how the benefit corporation fiduciary duty provisions might affect the potential for legal liability in three sorts of situations, following the main classification of fiduciary duties for ordinary corporations: standard operating decisions, situations involving conflicts of interest, and potential changes of control. Let us start with an ultra-quick overview of how the law handles these situations for ordinary corporations, to establish a baseline for comparing the benefit corporation statutes.<sup>71</sup> In our analysis, we shall want to distinguish the potential for personal monetary liability for directors and officers,<sup>72</sup> for monetary liability for the corporation itself, and for injunctive relief. This distinction is important because the threat of personal monetary liability will generally be more effective in grabbing the attention of officers and directors. As we shall discuss in the next section, that attention-grabbing can be a good or a bad thing—it may help deter duty violations, but it may also scare away potential directors and officers from becoming involved with benefit corporations. That is why achieving the optimal balance under fiduciary duty law is so hard, and so crucial.

### A. DUTY IN ORDINARY CORPORATIONS

The baseline comparison for ordinary operating decisions is that director personal liability is *extremely* unlikely, and corporate liability or injunctive relief are not that much more likely. Non-conflicted ordinary decisions are protected by the business judgment rule, under which plaintiffs need to show either gross negligence in becoming informed before making a decision or the irrationality of the substance of the decision. These are deliberately very hard claims to make successfully,

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70. Minn. Stat. Ann. § 304A.201 subs. 4, 5.

71. See Hill & McDonnell, *supra* note 8.

72. I shall sometimes use “managers” or “management” to refer to directors and officers collectively.

and plaintiffs rarely win.<sup>73</sup> The duty of care has been understood to mainly create a focus on procedure, with the board expected to reasonably inform itself before making a decision. This duty to inform is protected by a gross negligence standard that makes liability quite unlikely, although the famous *Van Gorkom* decision in Delaware did open up the potential for plaintiff victories.<sup>74</sup> The business judgment rule also has a substantive component which makes liability quite unlikely. Defendants are protected from claims that a decision was a bad deal for the corporation as long as they could rationally believe that it was a good deal. This is essentially the waste standard, which sets a very low bar for defendants to justify their decisions, although in a significant post-financial crisis case involving Citigroup the Delaware Chancery Court did allow a waste claim to survive the initial motion to dismiss.<sup>75</sup> It is the weakness of this duty that has caused many to argue that ordinary corporations are already free to pursue social goods to their hearts' content, free from fear of suit.<sup>76</sup> Thus, even if *Jen & Berry's* was not a benefit corporation, its managers could still choose to use the environmentally-friendly but costly containers. If challenged, they could argue that they were earning customer good-will which could boost their sales. This could be total bunk, but courts are extremely unlikely to call them on it.

Moreover, directors can further protect themselves from personal liability if a corporation adopts an exculpation clause, under which plaintiffs will need to show that the directors did not act in good faith in order to pierce the protections of such a clause.<sup>77</sup> In Delaware, at least, the standard for determining what conduct is not in good faith has been set so as to make successful claims against directors protected by such a

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73. Bernard Black et al., *Outside Director Liability*, 58 Stan. L. Rev. 1055, 1091 (2006).

74. *Smith v. Van Gorkom*, 488 A.2d 858, 873-74 (Del. 1985).

75. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 137-39 (Del. 2009).

76. *See supra* note 26 and accompanying text.

77. Carl Samuel Bjerre, *Evaluating the New Director Exculpation Statutes*, 73 Cornell L. Rev. 786, 795-96 (1988).

clause extraordinarily unlikely.<sup>78</sup> Most Delaware corporations have adopted such a clause.<sup>79</sup>

Where a conflict of interest exists, such that a director or officer is benefiting at the corporation's expense, the analysis is different. Here the duty of loyalty applies, and the defendants lose the protection of both the business judgment rule and any applicable exculpation clause. A conflicted transaction is presumptively invalid, and can give rise to both damages and injunctive relief. However, such consequences can be avoided if the conflict is cleansed in one of three ways: approval by informed and disinterested directors, approval by informed shareholders, or a demonstration to the court that the transaction was fair to the corporation. Plaintiffs have more chance of prevailing in loyalty cases, although in most circumstances disinterested director approval will generally protect the corporation and directors from suit.<sup>80</sup>

The third major category of duty cases involves potential changes of control of the corporation. This may either be the board adopting defenses against hostile takeovers, or the board deciding to sell control to outsiders. In Delaware, adoption of anti-takeover defenses receives scrutiny under the *Unocal* standard,<sup>81</sup> in which a court will ask whether the defense adopted is reasonable in relation to the threat posed to the corporation. Non-shareholder interests may be considered in evaluating the threat to the corporation. In practice, the *Unocal* standard has not had much strength—defendant boards are generally able to justify their defenses. In Delaware, sales of control to outsiders get rather more searching scrutiny under the *Revlon* standard.<sup>82</sup> Under the *Revlon* standard, once a sale of control is determined to be inevitable, the board is bound to maximize the return to shareholders without regard for other interests the company may have. The court will take a relatively hard look at the board's efforts and results in maximizing shareholder value. However, the *Revlon* standard only applies when the sale of control is

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78. See Hill & McDonnell, *supra* note 8, at 141-42, 145-47.

79. Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 Emory L.J. 1155, 1160-61 (1990).

80. See Claire A. Hill & Brett H. McDonnell, *Sanitizing Interested Transactions*, 36 Del. J. Corp. L. 903, 908-14 (2011). An exception to this general protection is in freeze-outs of minority shareholders where even disinterested director approval will still get searching judicial scrutiny.

81. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

82. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

inevitable, which is in a limited set of circumstances. Moreover, directors will only be held personally liable if plaintiffs can show that they violated their *Revlon* duty in bad faith—a hard burden for plaintiffs to prove.<sup>83</sup>

Now, we turn to ask how being a benefit corporation might change the legal analysis in each of these three categories. We will look how each of the just-noted three categories of duty cases might be modified under each of the three benefit corporation statutes we are considering. The analysis is based upon the statutory texts understood in the context of case law for standard corporations, as just summarized. We do not yet have case law interpreting the new benefit corporation fiduciary duty provisions.

## B. DUTY FOR ORDINARY OPERATING DECISIONS

We start with ordinary operating decisions. Suppose that Jen & Berry's has chosen to be a benefit corporation, and in addition to its commitment to pursuing general public benefit it has also specified environmental sustainability in its products and processes as a specific public benefit. Some Jen & Berry's shareholders argue that the company should shift to the more environmentally-friendly but expensive containers. Are there any conditions under which the managers' ongoing decision to use the cheaper, more harmful containers might constitute a violation of fiduciary duty?

The three statutes we are considering differ somewhat in their basic statements of what a benefit corporation fiduciary duty requires and the extent to which directors and officers may be liable for monetary damages for violating that duty.<sup>84</sup> The Model Act requires directors and officers to consider a wide range of potentially affected groups. For instance, in the Jen & Berry's example the environment is included as a potentially affected group. However, the Model Act seems to absolve both directors and officers individually as well as the corporation from monetary damages for failure to pursue those interests.<sup>85</sup> Indeed, the White Paper, which accompanies the Model Act and was written to

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83. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009); Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 Wash. & Lee L. Rev. 167, 192 (2014).

84. *See supra* section I.C.

85. *See supra* notes 58-59 and accompanying text.

explain the Act, states that “[i]n an effort to restrict potential liability, the Model Legislation specifically excludes director, officer and corporate liability for monetary damages.”<sup>86</sup> It goes on to say that excluding director, officer, and corporate liability will “focus courts on the exclusive remedy of awarding injunctive relief requiring the benefit corporation to simply live up to the commitments it voluntarily undertook.”<sup>87</sup>

However, on closer inspection, the Model Act may not quite so conclusively protect against monetary liability for either managers or the corporation. The provisions of the Model Act disclaim liability for “failure of the benefit corporation to pursue or create general public benefit or specific public benefit.”<sup>88</sup> However, the key standard of conduct states that directors and officers “shall consider” the effects of an action on the listed groups.<sup>89</sup> *Pursuing* and *creating* are different from *considering*. The limits on liability provide that plaintiffs may not collect monetary damages by showing that a company did not try to advance any particular interest. But what if plaintiffs can show that the management never even *thought* about the impact a decision would have on some stakeholder they were required to consider? In our example, suppose that there is no sign that Jen & Berry’s has ever considered the non-biodegradability of its containers as an issue or even considered the impact on the environment of its choice of containers at all. That may give rise to a claim under the Model Act.

A further feature of the structure of the Model Act reinforces this interpretation. The Model Act section on rights of action gives shareholders standing to pursue claims against the corporation and its managers on two grounds: (1) failures to pursue or create a public benefit, and (2) violations of obligations, duties, and standards of conduct under the Act.<sup>90</sup> The exoneration from liability section mirrors the right of action section in saying that directors and officers are not personally liable for monetary damages for: (1) failure to pursue or

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86. William H. Clark, Jr. et. al., White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Need of Social Entrepreneurs, Investors, and, Ultimately, the Public 20 (January 2013), *available at* [http://www.benefitcorp.net/storage/documents/Benecit\\_Corporation\\_White\\_Paper\\_1\\_18\\_2013.pdf](http://www.benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf).

87. *Id.*

88. Model Act §§ 301(c)(2), 303(c)(2) and 305(a)(1) (2013).

89. Model Act §§ 301(a), 303(a).

90. Compare Model Act § 305(a)(1), with § 305(a)(2).



create public benefit,<sup>91</sup> and (2) actions in performing their duties under the Act *if* they “performed the duties of office in compliance with . . . this section”.<sup>92</sup> Thus, the seemingly broad exoneration from liability for failure to follow the duty would seem to be the latter-mentioned parts of the provisions. But these only apply if the managers have complied with their duties. So if they have not complied with their duties, i.e. if they have failed to consider the listed stakeholder interests, then the exoneration provisions would seem to not apply.

The Minnesota Act has some notable differences in its statement of the core duty and its limitations on liability for damages. As with the Model Act, the core duty is to consider a variety of stakeholder interests.<sup>93</sup> For a general benefit corporation, the enumerated list of interests to consider is quite similar to that in the Model Act. For a specific benefit corporation, however, the only interests the corporation must consider (it may consider others) are those of shareholders and the specific benefit to which the corporation has committed to pursuing.<sup>94</sup> Thus, for specific benefit corporations in Minnesota, the scope of what must be considered is much narrower than benefit corporations under the Model Act or Delaware Act, or general benefit corporations in Minnesota.

There is, however, at least one way in which the potential for liability is greater under the Minnesota Act. Although there is an exoneration of *corporate* liability for failure to pursue or create public benefit,<sup>95</sup> there is no exoneration of director or officer liability, as we see under the Model Act. Moreover, the duties of a benefit corporation director in Minnesota include not just the duty to consider non-shareholder interests,<sup>96</sup> but also a duty to “not give regular, presumptive, or permanent priority to the pecuniary interests of shareholders.”<sup>97</sup>

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91. Model Act §§ 301(c)(2) and 305(a)(1).

92. Model Act §§ 301(c)(1) and 305(c)(1) (2013).

93. Minn. Stat. Ann., § 304A.201 (West 2015).

94. Minn. Stat. Ann., § 304A.201 sub. 2.

95. Minn. Stat. Ann., § 304A.202 sub. 1(b).

96. Minn. Stat. Ann., § 304A.201 sub. 1(1).

97. Minn. Stat. Ann., § 304A.201 sub. 1(2). The second of these two grounds for relief does not refer to directors, but since the directors are responsible for the actions of a corporation, if the board has caused a corporation to fail to pursue its general or specific benefit, the relief granted in such circumstances could appropriately be applied against directors as well as the corporations.

Furthermore, the Minnesota section on rights of action has two basic grounds for relief: (1) if those in control breach their duties under the Act, and (2) if the corporation has “for an unreasonably long period of time failed to pursue” its general or specific benefit.<sup>98</sup> Thus, while (absent exculpation provisions, at least) under all three acts managers face potential monetary liability for failures to *consider* the mandated stakeholder interests, only in Minnesota do they also face liability for giving excessive priority to shareholder pecuniary interests or failing to pursue non-shareholder interests. The Minnesota Act thus directs courts to not only examine what factors managers paid attention to in making their decisions, but also to ask whether the managers actually made some attempt to advance the mandated interests. Judicial review backed by monetary damages potentially moves beyond process to the substance of manager decisions. This is limited, though, by the requirement that the failure to pursue public benefit is actionable only if it is sustained “for an unreasonably long period of time.” Thus, one-time decisions would not be affected. However, the scope of this time requirement is vague, and may not provide managers that much comfort. For instance, in our Jen & Berry’s example, if the company has used the harmful containers for many years, that might well fall within this prohibition.

One might think of the “consider” versus “pursue or create” provisions as reflecting the procedural versus substantive dimensions of the business judgment rule in traditional corporations.<sup>99</sup> The duty to consider non-shareholder interests strengthens the procedural requirements of the duty of care for benefit corporations, modestly expanding the risk of liability. The substantive side of the duty of care is embodied in the extremely weak waste standard: managers may be held liable for actions which are so irrational that they amount to giving away corporate assets. Waste claims almost never succeed, although occasionally they survive motions to dismiss early in a case.<sup>100</sup> Even without the exoneration provisions, for a benefit corporation the waste standard may, if possible, become even weaker because managers can legitimately point to non-shareholder interests to justify their decisions.

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98. Minn. Stat. Ann., § 304A.202 sub. 2.

99. See *supra* notes 88-89 and accompanying text.

100. Jamie L. Kastler, *The Problem With Waste: Delaware’s Lenient Treatment of Waste Claims at the Demand Stage of Derivative Litigation*, 95 Minn. L. Rev. 1899, 1911 (2011).

Thus, if Jen & Berry's had instead chosen to use the more expensive containers and faced suit for that choice arguing that it was a waste of corporate resources, the board could defend itself by pointing to the environmental benefits.<sup>101</sup>

However, there is a flip side to this that could conceivably strengthen the waste standard: an action that substantively seems to benefit shareholders could be attacked for failing to pursue or create other benefits. For instance, in the original Jen & Berry's example, using the cheap containers could be attacked for harming the environment. The Model Act exoneration of liability for such a claim forecloses such an argument. However, the argument is available in Minnesota. The net effect for review of the substance of operating decisions as compared with ordinary corporations is thus mixed in Minnesota. It should be even harder for plaintiffs in benefit corporations to complain that a decision hurts shareholders financially, since defendants can point to other interests to justify their decisions. However, plaintiffs have a new argument under the benefit corporation statute, arguing that the corporation has failed to pursue those other interests. The chances of success for such claims should be quite low, but they are a claim that one cannot make at all for ordinary corporations, and that one cannot make as a basis for claims to monetary damages under the Model Act or Delaware benefit corporation statutes either.

Delaware's statement of the core duty is rather different from the Model Act and Minnesota. In those statutes, the board is merely directed to consider the interests of a number of affected stakeholders. In Delaware, the board is told it must *balance* the pecuniary interest of those materially affected by the corporation's actions.<sup>102</sup> It is not merely enough to try to analyze the effects an action will have on different groups, the board must attempt to weigh and balance those effects in deciding what to do. That would seem to point courts to an inquiry as to what choice might best balance the competing interests, moving from merely a focus on the process followed by the board in informing itself to an actual consideration of what choice is best under the broad balancing mandate. A court faced with our Jen & Berry's case would

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101. Though if the state has a constituency statute, the board could already defend themselves. Furthermore, even without such a statute, the posited waste claim would be extremely unlikely to succeed.

102. Del. Code Ann. tit. 8 § 365(a).

thus have to (somehow) decide whether the higher monetary cost of the less harmful containers is on balance worth paying. As in Minnesota, I would expect a Delaware court to follow the example of its waste jurisprudence and apply a very deferential standard of review to such a decision should it ever have to engage in such an analysis,<sup>103</sup> but it does create an opportunity for plaintiffs.

Under any of the statutes, even if one can state a claim for a duty violation and directors and/or officers are not exonerated from personal liability under the relevant statute, another serious obstacle to holding anyone liable for damages exists. Defendants must still show that the duty violation caused harm to them,<sup>104</sup> and must quantify that harm in order to set a specific amount for damages. This raises a puzzle: if the managers have ignored non-shareholder interests to focus on making a profit, how has that harmed shareholders, who after all are earning higher returns as a result? Actually, I do not think it is that hard to argue conceptually that such actions have caused harm to shareholders. Investors in a benefit corporation have chosen to receive a potentially lower financial return in order to support a company that does good in other ways. If the company fails to follow through on its promise to act that way, that hurts shareholders even if they come out better financially. Other things besides money matter, and their decision to invest in such a company reveals what matters most to these investors. The much harder problem is quantifying that harm, which courts must do if they are to award damages. If courts feel they cannot do this, it could undermine efforts to hold officers and directors personally liable. The problem is quite hard and deep, and discussion would take us too far afield.<sup>105</sup> I do note that in a variety of contexts both courts and economists have tried to quantify intangible interests, with varying results. In this instance, perhaps headway could be made by thinking about the discount benefit corporation shareholders have accepted in their share valuations (relative to comparable non-benefit corporations) as a measure of the strength of their commitment to other interests.<sup>106</sup>

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103. As we shall see, Delaware benefit corporations can conclusively protect their directors from suits for damages through their exculpation clauses. *See supra* notes 8, 74 and accompanying text. *See infra* notes 102-06 and accompanying text.

104. Actually, in Delaware, the causation requirement does not seem to apply. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367-70 (Del. 1994).

105. A very convenient yet true cop-out.

106. *See* Craig R. Everett, *Measuring the Social Responsibility Discount for the Cost of Equity Capital: Evidence from Benefit Corporations*, 3 J. Behav. Fin. & Econ.

Under all three statutes, the claims at issue in this section would explicitly be protected by the deferential business judgment rule.<sup>107</sup> However, under the business judgment rule a director or officer must be reasonably informed before deciding, and a failure to even consider stakeholders to whom they owe a duty would seem to show a failure to inform oneself. Thus, for failure to consider cases, probably the leading avenue to personal liability in our analysis, the business judgment rule does not protect defendants. However, for failure to pursue cases in Minnesota or failure to balance cases in Delaware, the business judgment rule would apply, as it would in injunctive relief cases under all three statutes. Thus, for such cases plaintiffs would need to show that the defendants were grossly negligent in informing themselves about the impacts of the disputed decisions on the mandated interests.

A further barrier to damage claims against directors is exculpation clauses. As noted above, corporations may include in their charters clauses which provide that directors are not to be held personally liable for violations of their duty to the corporation.<sup>108</sup> The Delaware and Minnesota statutes explicitly allow such provisions in benefit corporations, and one assumes the same is implicitly true for the Model Act as well.<sup>109</sup> Thus, in a benefit corporation with such a clause, directors will try to dismiss a suit seeking damages by pointing to the clause.

However, there are a variety of limitations to such clauses, the most important being that corporations may not waive liability for violations of the duty of loyalty or for actions that are not in good faith. In Delaware, the good faith provision has given rise to significant case law as plaintiffs have tried to circumvent exculpation clauses by arguing that

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55, (2013), available at <http://ssrn.com/abstract=2143414> (attempting to quantify benefit corporation investment discounts). I am suggesting a two-step analysis here. The first step involves quantifying in dollars the impact of a decision on the relevant non-shareholder constituency, using methods already developed in other contexts. The second step involves allowing shareholder plaintiffs to collect a proportion of this dollar amount, with the proportion depending upon the calculated investment discount—the higher the discount, the higher the proportion received.

107. Model Act §§ 301(e), 303(e) (2013); Del. Code Ann. tit. 8, § 365(b) (2013); Minn. Stat. Ann. § 304A.201 sub. 4 (2015); see *Smith v. Van Gorkham*, 488 A.2d 858, 872 (Del. 1985); *supra* note 71 and accompanying text.

108. See *supra* note 74, at 795 and accompanying text.

109. Del. Code Ann. tit. 8, § 365(c); Minn. Stat. Ann. § 304A.201 sub. 5.

the conduct in question was not in good faith. After some vacillation, the courts have announced a very pro-defendant standard: plaintiffs must show a “conscious disregard” of their duties, which they parse as occurring “[o]nly if they knowingly and completely failed to undertake their responsibilities....”<sup>110</sup> It would be extraordinarily hard for plaintiffs to succeed under such a standard in a failure to pursue or failure to balance case where defendants can point to any legitimate interest that justifies their decision. Plaintiffs might still succeed under this standard in a failure to consider case, in which plaintiffs could argue that directors knew that control of a benefit corporation includes a commitment to pursuing public benefits, and a complete failure to even consider such benefits is a knowing and complete failure to undertake their responsibilities.

Apparently anticipating this opportunity for plaintiffs, Delaware makes an additional protection available to benefit corporations. The exculpation clause of a Delaware benefit corporation may provide that “any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.”<sup>111</sup> If a corporation adopts the provision suggested by this section of the benefit corporation statute, the good faith avenue to liability will be foreclosed. The Model Act has no parallel provision, and so the good faith argument remains potentially open there, albeit the opening is very, very narrow. Minnesota follows Delaware, but not to the same extent. In Minnesota, corporations can include a provision that a disinterested failure to satisfy the standard of conduct does not constitute a breach of the duty of loyalty, but that provision is silent on good faith.<sup>112</sup> Since a lack of good faith in a claimed duty of care violation is the main concern here, it is not clear this provision actually reduces potential manager liability.<sup>113</sup>

The bottom line is that suits against the directors or officers of benefit corporations seeking liability for damages face many obstacles, as is the case with ordinary corporations. The extra duties that come into play for a benefit corporation probably do slightly increase the risk of

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110. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009).

111. Del. Code Ann. tit. 8, § 365(c).

112. Minn. Stat. Ann. § 304A.201 sub. 5 (2014).

113. However, note that in Minnesota’s corporation statute, “good faith” is narrowly defined as “honesty in fact in the conduct of the act or transaction concerned,” so the concern about liability through that avenue may be less than in Delaware. Minn. Stat. Ann. § 302A.001 sub. 13.

liability as compared with the almost non-existent risk in other corporations.<sup>114</sup> The risk is lowest for Delaware benefit corporation directors whose companies have adopted the strongest allowed protection in their exculpation clause; for them, the chances of being held personally liable for the types of action discussed here seem vanishingly small. The risk for Model Act benefit corporation managers is also low given the exoneration from personal liability (unless their company has opted out of the exoneration provisions) However, there is a narrow opening for liability in acting without good faith, specifically a complete failure to consider non-shareholder interests that is not exonerated and is not covered by an exculpation clause. The risk of liability for managers is highest in Minnesota, where there is not only some risk from a failure to consider claim, but also the possibility of a claim for failure to pursue for an unreasonably long period of time. Nonetheless, even in Minnesota the chances of manager liability are small. For instance, the directors and officers of Jen & Berry's would almost certainly win a suit concerning the ice cream containers absent much more damning evidence than we have seen so far. Although, if the record shows absolutely no consideration whatsoever of the environmental impact of the containers, a small possibility of liability might exist.

There is some chance, though, of facing injunctive remedies for failing to pursue or create public benefit. Neither the statutory exonerations of personal liability nor the charter exculpation clauses apply to claims for non-monetary remedies, such as ordering Jen & Berry's to switch to the more expensive containers. However, it is not clear that possible injunctions will strike all that much fear into the hearts of managers (although if potential remedies were to include their removal as directors or officers, that might get their attention; the Model Act and Delaware are mute on the nature of potential injunctive relief, but Minnesota provides a non-exclusive list of relief available, including director removal<sup>115</sup>). The chances of remedies actually being ordered seem slim. The business judgment rule applies and is hard to overcome. Courts would face a tough decision: what actions would they order to appropriately balance the competing interests (although as just noted, Minnesota does provide some guidance for possible relief)? The wide

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114. Black et al., *supra* note 73.

115. Minn. Stat. Ann., § 304A.202 sub. 3 (2014).

range of interests that makes the decisions of managers difficult would affect judges too. And on top of all that, for cases to even be brought, one would need either determined plaintiffs or plaintiffs' lawyers, and the latter may find it hard to see any profit in a case where no monetary damages are possible. Although, if courts are willing to award attorney's fees in cases where injunctive relief is obtained, that could limit this obstacle.<sup>116</sup>

Especially if there is some risk of monetary liability, it is worth noting the incredible breadth of the duty at issue. Managers must consider the effects of their decisions on shareholders, employees, customers, the community and social factors, the environment, and "general public benefit," which would seem to cover everything that any decision may impact, positively or negatively (remember though, in Minnesota specific benefit corporations the purpose is more limited). That's a lot to consider, although of course even in a corporation dedicated to maximizing profit, one must consider all of these stakeholders insofar as their behavior affects profits. Some commentators worry that this "many masters" problem leaves managers with a mess of interests, all of which they must somehow consider and balance before making a decision.<sup>117</sup> It is certainly true that the statutes provide no guidance as to how to balance these interests—that is a daunting task, and some have argued that without further guidance, it could actually hurt the quality of decision-making as managers are overwhelmed by competing factors to consider.<sup>118</sup> This "many masters" problem is also at the heart of much concern that there will be less accountability in benefit corporations, as it becomes harder to measure performance by any one standard.<sup>119</sup> However, as we have seen, a fear of monetary liability, either personal or corporate, should not be an additional source of stress when it comes to balancing competing interests—the Model Act and Delaware do seem to preclusively foreclose liability for failing to pursue or create public benefit, although Minnesota leaves open the possibility.

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116. Murray, *supra* note 21, at 39.

117. Loewenstein, *supra* note 63, at 1028-34; J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 Am. U. Bus. L. Rev. 85, 107-09 (2012).

118. Loewenstein, *supra* note 63, at 1031-33.

119. Callison, *supra* note 117, at 110; Murray, *supra* note 21, at 33-35; Reiser, *supra* note 16, at 697-98; Page, *supra* note 10, at 364.



## C. DUTY IN CONFLICTED TRANSACTIONS

At the opposite end of the fiduciary duty spectrum from ordinary operating decisions are cases involving conflicts of interest for managers, which implicate the duty of loyalty. As above, consider an example to help fix our thinking. Suppose that in the Jen & Berry's case, the CEO owns the company from which Jen & Berry's purchases its containers. We might imagine alternatively either that Jen & Berry's buys cheap but harmful containers as above, or that it buys expensive but sustainable containers. There is a clear conflict of interest here; how if at all will Jen & Berry's status as a benefit corporation potentially affect the legal analysis of this conflict?

In ordinary corporations, as discussed above,<sup>120</sup> managers face significantly more risk of facing personal liability, as well as injunctive remedies. I doubt there will be much difference in benefit corporations. Presumably, plaintiffs bringing a loyalty case will probably not also bring a benefit enforcement proceeding,<sup>121</sup> nor will they invoke the duty to consider stakeholder interests created under the Model Act. Rather, they will bring a standard derivative or direct action (depending upon the nature of the alleged injury) that invokes the traditional duty of loyalty claim, i.e. the duty not to benefit at the expense of the corporation. Thus, being a manager of a benefit corporation would not seem to expand the scope for liability under the traditional duty of loyalty.

But, might being a benefit corporation limit the effective scope of the duty of loyalty? It might conceivably do so by allowing defendants to justify their seemingly self-interested action by referring to the interests of others who are not shareholders but are still constituencies to whom they owe a duty. For Jen & Berry's, if the company buys expensive but sustainable containers from its CEO, he could justify the additional expense as contributing to the company's goal of sustainability. This explanation may affect how a court reviews the decision. The potential impact of this type of argument appears to be greatest in cases where defendants justify their actions through fairness.<sup>122</sup> In such cases, the defendants must show that their decision

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120. See *supra*, note 80 and accompanying text.

121. See *supra*, note 56 and accompanying text.

122. See *supra*, note 80 and accompanying text.

was entirely fair to the corporation, that both the process by which the decision was made was objective and that the result was at least equal to that of an arms-length transaction.<sup>123</sup> The existence of multiple legitimate constituencies may allow defendants to craft more arguments justifying their actions, as in the Jen & Berry's example. In other words, "fair price" in a benefit corporation may not focus on financial return alone, reflecting the bargain shareholders make in investing in a social enterprise. However, for truly self-serving behavior, courts may and should remain skeptical, and scrutinize such rationalizations closely. For instance, if cheaper but still environmentally-friendly containers are available elsewhere, the Jen & Berry's CEO should not be able to defend his conflict by pointing to the environmental justification.

There are times the benefit corporation status may actually make the justification harder—in our Jen & Berry's case, suppose the company buys cheap but harmful containers from the CEO. The CEO's attempt to justify this as profit-maximizing will be *weaker* in a benefit corporation than an ordinary for-profit. Moreover, defendants will usually rely upon the director or shareholder approval prong rather than the fairness prong to defend themselves.<sup>124</sup> Even these prongs involve some degree of judicial review of the conflicted transaction. However, the standard of review for duty of care claims is quite weak (business judgment review or waste). Once a court determines that level of review is appropriate, defendants generally do not need to point to non-shareholder interests as justification. So, although benefit corporation status may reduce the chances of liability in situations involving conflicting interests, the reduction is likely quite small given the deferential standard of review that is used for all corporations.

There is one significant exception to the point just made about conflicted transactions: minority shareholder freeze-outs.<sup>125</sup> These cases are perhaps the one place where plaintiffs in corporate fiduciary duty cases have a pretty good chance of success, and as a result, they play a

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123. See Hill & McDonnell, *supra* note 80, at 922-23.

124. See *supra*, note 80 and accompanying text.

125. In a minority freeze-out, a controlling shareholder has the corporation buy out the shares of the minority shareholders. The controlling shareholder has the power to approve the transaction on its own, and so the minority shareholders are forced to accept whatever terms the controller sets.

big role in the corporate law caseload.<sup>126</sup> In minority shareholder freeze-outs, Delaware courts, and courts that follow Delaware's lead, have imposed fairness review (though perhaps with a burden shift) even where there is disinterested director or shareholder approval.<sup>127</sup> Thus, if benefit corporation status significantly affects the arguments defendants can make within a fairness review standard, it could also be important in the freeze-out context. The issue is likely to boil down to how courts value minority shares in benefit corporations—whether or not shareholders are receiving a fair price is, after all, the core issue in such cases. The question of share value in benefit corporations is quite tricky—how does one put a dollar value on how shareholders care about goals other than profit?<sup>128</sup> Courts will have to answer that question when valuing the fairness of the price shareholders receive in a freeze-out. How courts will answer that question remains quite unclear—the courts will be facing a truly difficult problem. It may well be reasonable to apply a discount to the value of shares in a benefit corporation, since that is the tradeoff involved in investing in such a company.

The analysis of conflicted transactions would seem to be quite similar for our three statutes. One possible difference may occur in Minnesota specific benefit corporations, which only have one or a few specified interests they must consider, rather than the vast range found in other benefit corporations. With fewer specified interests, managers may find it harder to point to anything that justifies their self-interested actions.

The bottom line for conflicted transactions under all three statutes is that the core legal landscape should not change much from that of other non-benefit corporations. The range of arguments defendants may

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126. Randall S. Thomas & Robert B. Thompson, *Empirical Studies of Representative Litigation*, in *Research Handbook on the Economics of Corporate Law* 152, 157 (Claire A. Hill & Brett H. McDonnell eds., 2012).

127. The effect of shareholder approval has now been questioned by the Delaware Chancery Court, and corporations have been able to evade fairness review by first buying out most minority interests through a tender offer, though judicial review of that maneuver is also now in flux. For an overview of Delaware law in this area, and empirical evidence on its effect, see Fernan Restrepo & Guham Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure and Outcomes: Evidence on the Unified Approach*, (Rock Center for Corporate Governance at Stanford University Working Paper No. 153, 2013), available at <http://ssrn.com/abstract=2297707>.

128. See Everett, *supra* note 106.

use to justify their conflicts under a fairness analysis could shift, leading to an overall slightly lower risk of liability, but the change is unlikely to be large. A larger reduction in the expected value of what successful plaintiffs receive may result if courts apply a discount to the value of shares in benefit corporations. This could somewhat reduce the deterrent effect of loyalty cases, but seems to appropriately reflect the deal implicitly struck by benefit corporation investors, who, after all, chose to receive a lower return on their investment.

#### D. DUTY IN CHANGES OF CONTROL

Benefit corporation status may also have a notable effect in situations implicating changes in control, particularly sales of control. As is the case with conflicted transactions, the main issue here seems to be whether or not consideration of non-shareholder interests may weaken the heightened judicial scrutiny that applies in these situations. For defenses against hostile takeovers, where the *Unocal* standard applies,<sup>129</sup> the answer would seem to be that benefit corporation status is likely to have little effect. Under *Unocal*, defendants can already invoke non-shareholder interests to some extent, although benefit corporation defendants may find it easier to do so insofar as they need not make any showing that pursuing the non-shareholder interest will not hurt shareholders.<sup>130</sup> As a result, benefit corporation status would expand the justificatory arguments for defendants somewhat, but not tremendously so. More importantly, defendants already prevail in cases applying the *Unocal* standard most of the time, and they usually do not need any additional arguments that benefit corporation status may make available to them.

Matters differ in sales of control in which the *Revlon* standard applies (assuming the state courts in question follow Delaware's approach).<sup>131</sup> Courts do apply more searching scrutiny under *Revlon*, and defendants face notably more chance of losing their argument and facing some sort of judicial remedy. One important part of that heightened scrutiny is that courts impose a quite precise objective on managers: managers must use reasonable efforts to get the best price available for

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129. See *supra* section II.A for a discussion of the *Unocal* and *Revlon* standards.

130. The effect of benefit corporation status should be even weaker in states with constituency statutes, as in such states reference to non-shareholder interests as a defense has been even more explicitly allowed in ordinary corporations.

131. See *supra* section II.A.

their shareholders. That precise objective is inappropriate for a benefit corporation. It remains to be seen how courts faced with a benefit corporation in a situation that triggers *Revlon* duties will define the objective that managers must pursue. One scholar has plausibly suggested that courts should look to how the proposed sale will affect the blended profit and social purpose of the benefit corporation.<sup>132</sup> She suggests courts primarily engage in heightened scrutiny of the process that a board followed in approving a sale and that in this process the board should refer to social accounting metrics to try to give some substance and precision to that inquiry.<sup>133</sup> That makes sense logically, but inevitably the goal will be less defined than it is under *Revlon*, which gives defendant managers more room to justify the sale to a preferred buyer or at a lower price. Thus, judicial scrutiny of sales of control appears likely to be weaker for benefit corporations.

There is a contradictory possibility, though. Some shareholders might use this blended purpose standard in a revised *Revlon* situation to oppose a sale that might benefit shareholders but hurt other stakeholders. Imagine minority shareholders in our fictional Jen & Berry's who bought into the company because they believed in its social commitments and were upset to see it selling itself to a traditional for-profit corporation, Trash-the-Earth Monster Corp. How would a court evaluate a suit claiming that the sale was a violation of the board's duty to the company? I suspect such a claim would not succeed, as courts are unlikely to second-guess the judgment of management in such a situation, at least outside of truly extreme situations where the sale involves a complete abandonment of a company's social mission (perhaps the name of the acquirer in this instance suggests such a case?). But benefit corporation status does create a new theory for liability in such circumstances, which increases, at least a bit, the risk of courts granting relief under a modified *Revlon* approach. This potential increase in liability mirrors a point we have already seen in waste review of operating decisions and fairness review of conflicted decisions.<sup>134</sup> In some circumstances, benefit corporation status expands the ability of

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132. Plerhoples, *supra* note 28, at 262-63; *but cf.* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 *Hastings Bus. L.J.* 485, 511-12 (2013) (arguing that once directors have decided to sell their company they should be required to sell to the highest bidder).

133. Plerhoples, *supra* note 28, at 263.

134. *See supra*, notes 101, 124 and accompanying text.

defendants to justify their actions by referring to non-shareholder interests, but in other circumstances that status may expand the ability of plaintiffs to argue that an action was harmful by pointing to those same interests. My guess is that in all of these cases, the net effect favors defendants across the broad range of possible circumstances, as courts will be unwilling to allow plaintiffs to use benefit corporation status to push outcomes that actively harm shareholders. However, a deep ambiguity does exist.

It is even possible that the direction of the net effect differs for different types of remedies. For modest injunctive remedies, such as providing more information to shareholders before voting on an acquisition, perhaps courts will be willing to expand the reach of *Revlon* duties a bit for benefit corporations. However, for personal liability of managers, where one must show bad faith (at least under Delaware's current approach),<sup>135</sup> the increased vagueness of the corporate goal seems to make liability even less likely than it is for ordinary corporations. Since monetary liability has a much stronger deterrent effect than injunctive remedies, especially compared to the modest injunctions one might see under any sort of expanded *Revlon* analysis, such a split outcome for different types of remedies would still on balance seem to lead to a weakening of the impact of *Revlon* on managers.

However, that weakening should be understood against the already weakening power of *Revlon* for ordinary corporations. As noted above,<sup>136</sup> the scope of circumstances in which *Revlon* applies is quite limited. Excluding many circumstances which would appear to involve real changes in control, and even where *Revlon* does apply, directors will only face personal liability if they fail to act in good faith in while pursuing their duty. Such a strict standard is unlikely to lead to liability. So, a further weakening of an already weak *Revlon* is not all that significant a change for benefit corporations.

The analysis in change of control cases would also seem to be very similar for each of the Delaware, Minnesota, and Model Acts. Perhaps the suggestion that personal liability would be even more unlikely under a good faith standard given the less precise goal of benefit corporation directors<sup>137</sup> becomes a stronger conclusion for Delaware companies that

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135. See *supra* note 83 and accompanying text.

136. See *supra* section II.A.

137. See *supra* note 135 and accompanying text.

choose to adopt the suggested provision absolving directors of good faith liability. The *Revlon* analysis may be a bit different for specific benefit corporations in Minnesota. Where shareholders invoke *Revlon* duties on a claim that a sale is being made at too low a price, the board of a specific benefit corporation will have fewer alternative interests to point to in justifying itself than a general benefit corporation would, so the weakening of judicial review may be less. Where shareholders instead try to use benefit corporation status to block a deal that has a good price but hurts other stakeholders, specific benefit corporations differ more ambivalently: there are fewer alternative stakeholders to which a board may point, but if the specific benefit purpose is indeed hurt by the deal, that may get a closer hearing from a court precisely because of the greater focus of the duty.

#### E. SUMMARY OF THE ANALYSIS

Pulling together our analysis of the duty provisions, the effect of benefit corporation status on fiduciary duty cases, as compared with what we observe for other corporations, is mixed. For cases involving ordinary operating decisions, benefit corporation status may slightly increase the chances of liability, although that increase comes from a very low starting point. The increased risk of liability is greatest under the Minnesota Act and smallest for Delaware benefit corporations that choose the maximum allowed protection under exculpation clauses. For cases involving conflicted transactions, there may be a slight decrease in the chances of liability, and a greater decrease in expected damages where liability does occur. For cases involving a sale of control, there may be a rather small decrease in the chances of liability in some circumstances and an increase in others. Thus, benefit corporation status may bring about a modest flattening of the chances of fiduciary duty liability. For causes of action where the odds of liability are traditionally low, benefit corporation status raises the chances of liability, while for causes of action where the odds of liability are traditionally higher, benefit corporation status lowers those odds. The effects are probably quite modest, but serious uncertainty exists regarding the size and perhaps even direction of those effects and in the limited but important context of minority freeze-outs, the size of the reduced expected value of damages may be greater.

A final issue to ponder in this section is the effect on the availability and expense of directors' and officers' ("D & O") liability

insurance for benefit corporations.<sup>138</sup> If the overall effects of benefit corporation status are quite limited, then one should expect that ultimately D & O insurance should be available on similar terms for benefit corporations. However, two factors cause some concern that insurance will be more expensive, at least initially. One is the simple fact of uncertainty—the net effects may turn out to be limited, but that will not be fully clear until we have some experience with how courts handle cases involving benefit corporations. Until then, the existence of uncertainty may cause insurers to charge higher premiums to compensate for that risk. A second factor pointing to higher premiums comes from considering the flattening of the risk of liability. Liability will be slightly more likely for ordinary operating decisions, but slightly less likely (or at least with lower expected damages) in conflict cases. But note that D & O policies exclude claims involving fraud or personal enrichment.<sup>139</sup> Thus, it may be that there is a greater risk of liability in benefit corporations for those classes of cases covered by the policies.

None of these changes in the chances of liability are likely to be extreme. The broad picture is that directors and officers are roughly as likely to face successful suits claiming a violation of fiduciary duty within benefit corporations as they are within other corporations, and most of the suits are likely to fail. Still, we do see some flattening of the probability of liability for benefit corporations, with suits having the lowest probability of success becoming a bit more hopeful for plaintiffs, and those having the highest probability of success becoming a bit less hopeful. There is also some risk that, especially at first, D & O insurance may become more expensive. Now we must ask what this legal analysis, if correct, implies for how benefit corporations are likely to function.

#### IV. ARE THE DUTY PROVISIONS TOO STRONG, TOO WEAK, OR JUST RIGHT?

Having gone through a detailed legal analysis of how the benefit corporation duty provisions might be applied in the leading categories of fiduciary duty cases, we move on to ask what that analysis suggests for how benefit corporations are likely to fare in practice. Will the duty

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138. Sean J. Griffith, *D&O Insurance and the Ability of Shareholder Litigation to Deter*, in *Research Handbook on the Economics of Corporate Law* 337 (Claire A. Hill & Brett H. McDonnell eds., 2012); Tom Baker & Sean J. Griffith, *Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation* (2010).

139. Griffith, *supra* note 138, at 339.



provisions encourage or discourage the creation of this new type of entity? Will directors and officers be scared off by the prospects of liability? Will investors, consumers, and employees believe the duty rules create a credible commitment to interests other than maximizing shareholder wealth? Will the rules help push managers to consider the broad range of interests mandated legally, and will those rules be of any help in providing guidance as to how to balance all of those interests?

The duty provisions could go wrong in at least two opposing directions. If the duty provisions are too demanding, they could make directors and officers loathe to become involved in such corporations, and could result in few companies choosing to adopt the form. Even for those that do adopt the form, overly strong duties could lead to sub-optimal risk aversion or to costly legalistic check-the-box procedures that protect against liability while accomplishing little of any real worth. On the other hand, if the duty provisions are too weak, they could lead to greenwashing.<sup>140</sup> Although corporations which adopt the form would seem to be committing to considering public benefits, in fact the commitment would be legally empty. If investors and customers do not catch on to the reality, the form would be perpetuating a kind of fraud, in essence. If they do catch on, the form would come to have no branding value, and there would be little point to adopting it. Many academic commentators to date fear that the duties will be too weak.<sup>141</sup> However, the structure of benefit corporation statutes combined with my own experience serving on a committee drafting such a statute suggests that many practicing lawyers, at least those on the transactional and corporate defendant side of the bar, fear that the duties could be too strong.

In this section I will explore each possibility, that the duty provisions may be too strong or too weak (or maybe even both simultaneously—there's a cheery thought). Given the newness and uncertainty surrounding the statutes, both are real possibilities. It is also possible, though, that the statutes (or at least some of them) have struck a sensible balance which largely manages to avoid being either too strong or too weak, and thus gives benefit corporations a way to commit

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140. In other words, causing it to seem as if a company is pursuing environmental and other social interests, when in fact it is doing nothing of the sort.

141. Callison, *supra* note 117, at 110; Murray, *supra* note 21, at 33-35; Reiser, *supra* note 16, at 697-98; Page, *supra* note 10, at 364.

to pursuing public benefits while still not scaring off managers and entrepreneurs with the threat of ruinous lawsuits. For now, I am giving these new statutes the benefit of the doubt, and suggesting that they have succeeded in finding this sweet spot.

#### A. TOO STRONG

First consider the possibility that the duty provisions are too strong. As just noted, in a worst-case scenario this could lead to complete failure of this new form of business association. Directors and officers may refuse to join benefit corporations out of fear of potential liability, or insist on unrealistically high pay to compensate for that threat, or the costs of obtaining D & O liability insurance may be too high. Their reluctance to become involved could in turn lead to few companies choosing to become benefit corporations, and those who do try the form may terminate the experiment if they find it hard to attract directors and officers. Or, overly threatening duties could have a more limited but still negative effect. Companies could respond to the threat of liability with cumbersome, check-the-box procedures that ensure they have kept a paper record of considering all relevant stakeholder interests, which they can readily produce should they ever get sued. The fear is that such procedures may add monetary costs and time to decisions while doing little to actually improve decision-making in the intended direction. Perhaps even worse, fear of liability could lead managers to choose less risky options, which are less likely to provoke lawsuits.<sup>142</sup> Such an outcome would be a less obvious failure than no one adopting the benefit corporation form at all, but might actually create a net negative effect from creation of the form. At least if no one adopts the form, no harm is done.

It is probably fear of monetary damages, and particularly damages felt personally by directors or officers, which would be most likely to create such problems. Even a relatively small expected increase in expected liability could cause trouble if there is much uncertainty surrounding the statutes—insofar as the amounts at stake can be quite large, even quite small chances of liability could cause corporate managers to beware. Furthermore, legal advisors may exacerbate the

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142. All of the arguments given here are also arguments given to justify weak judicial scrutiny of boards in ordinary corporations. See Stephen M. Bainbridge, *Corporation Law and Economics*, 253-69 (2002).

situation with cautious advice in the face of novel statutes which have not yet been interpreted.<sup>143</sup> Does anything in the legal analysis above suggest such an outcome?

Perhaps. All three benefit corporation statutes that we have considered seem to increase the probability of liability in duty of care cases involving ordinary operating decisions. The increased probability appears quite modest indeed, particularly for corporations that protect themselves with exculpation clauses.<sup>144</sup> However, there is uncertainty surrounding the analysis, and as just noted even small chances of liability in a quite uncertain environment could cause problems. The uncertainty may also lead to high D & O liability insurance premiums. Though not all approve, states have adopted the business judgment rule and exculpation clauses for ordinary operating decisions in order to give managers plenty of room to take calculated risks and to encourage qualified persons to become officers and directors.<sup>145</sup> Ordinary operating decisions are pervasive (particularly when one takes into account that duty applies to failures to act as well as acts taken) and present less risk of opportunism than conflicted transactions and changes of control. We do not want managers constantly acting in fear. So increasing the risk of liability for such decisions, as benefit corporation statutes seem to do, is a concern.

The risk is lowest for Delaware, at least for corporations which adopt exculpation clauses to the fullest extent allowed. Indeed, for such corporations we saw that the risk of director personal liability may not be any greater for benefit corporations than for other corporations, i.e. almost no risk at all.<sup>146</sup> This risk is somewhat greater under the Model Act, and highest in Minnesota.<sup>147</sup> However, one should not exaggerate: the business judgment rule and exculpation clauses make personal liability in duty of care cases almost impossible,<sup>148</sup> and the increases under any of the benefit corporation statutes are all extremely modest, it would seem. Thus, unless one believes that it is critical to essentially rule out all possibility of liability for ordinary operating decisions, I find

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143. *Id.* at 259-63.

144. *See supra* notes 108-113 and accompanying text.

145. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 *Vand. L. Rev.* 83, 109-29 (2004).

146. *See supra* note 111 and accompanying text.

147. *See supra* note 114 and accompanying text.

148. Black et al., *supra* note 73, at 1089-1093.

it rather hard to believe that the benefit corporation statutes will scare everyone away from being a director or officer in a benefit corporation.

This point is strengthened by the fact that we have seen that the benefit corporation statutes would actually appear to decrease the chances of liability in conflicted transaction or change of control cases.<sup>149</sup> For ordinary corporations, these are the cases where defendants have a real chance of being held liable, so even relatively small decreases in liability for these types of cases may swamp the effect of increased liability in the duty of care context. Note, though, that the effect on liability in change of control cases was actually ambivalent. Although it may prove harder for shareholders of benefit corporations to claim that they will receive an overly low price in an acquisition under a *Revlon* analysis, there may be new room to sue claiming that an acquisition will hurt other affected stakeholders.<sup>150</sup> That may discourage some acquisitions that would be good for the shareholders of the company to be acquired. However, protecting other stakeholders in such circumstances is one of the main selling points of benefit corporations—shareholders who have chosen to buy into a benefit corporation will have little cause to complain. There is a long debate in the scholarly literature on acquisitions as to whether the benefits to target shareholders in a number of instances come at the expense of other stakeholders, but there is at least a reputable case to be made that such harm to stakeholders is indeed a common problem in acquisitions.<sup>151</sup> The revised *Revlon* analysis in benefit corporations should protect stakeholders from such harm.

For these reasons, I suspect that the concern that the threat of liability will scare away managers and stop anyone from forming benefit corporations will not be borne out.<sup>152</sup> The net effect of benefit corporation status on potential personal liability is unclear—it could well *decrease* the probability of being held liable once one takes into account all possible classes of claims. A more plausible concern, though, is that benefit corporation status could distort board or officer behavior in the ordinary operating decision context, where an increased

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149. See *supra* sections II.C and II.D.

150. See *supra* note 134 and accompanying text.

151. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in *Corporate Takeovers: Causes and Consequences* 33-35 (Alan J. Auerbach ed., 1988).

152. Of course, people may refrain from forming benefit corporations for other reasons.

chance of liability does exist. I would expect that at least for decisions made at the board level, counsel will advise creating a record that the company has considered the effect of its decisions on the mandated stakeholders—quite a number of them, one recalls.<sup>153</sup> It will be interesting to see how they do this, and how much inquiry boards make as to the effects of their actions. These procedures will certainly have some costs, at least monetary and time costs, and possibly in some instances a cost of leading to more risk risk-averse behavior (though it may be disputed whether this is a cost or a benefit). A major issue then becomes whether the new procedures have any benefits. The hope is that they will. The checklists will at least force managers to pay *some* attention to the effect of their decisions on the interests of various constituencies. Particularly if they have any motivation at all to actually give those interests some weight (and assumedly most will), the constant reminder may be useful.

#### B. TOO WEAK

An opposing possibility is that the benefit corporation fiduciary duty provisions will turn out to be too weak. This could happen if the chances of being held liable for ignoring the commitment to pursue non-shareholder interests are so low that managers feel they can safely ignore the risk. This could play out in at least two different ways. One would occur if investors and customers are unaware that the duties are so weak. That would be a case of successful greenwashing, successful at least from the perspective of managers who would essentially be perpetuating a fraud.<sup>154</sup> They would be making a show of committing to pursuing public benefit in order to attract investors and customers, but would have no intent of actually following through on that commitment, and the law would not punish them for it.<sup>155</sup> The other way in which overly weak duties might play out would occur if investors and

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153. See *supra* note 55 and accompanying text.

154. Callison, *supra* note 117, at 109-10; Murray, *supra* note 21, at 33; Page, *supra* note 10, at 364.

155. Of course, other mechanisms besides the threat of fiduciary duty suits may protect against such greenwashing. Of most relevance for the benefit corporation statutes, the required reports may keep managers honest. There are doubts about the effectiveness of those mechanisms, but those other mechanisms are not the focus of this article.

customers became aware of the weakness. In that case, the legal commitment to pursuing public benefit would have ceased to be credible. Insofar as making such a commitment is a, maybe the, key benefit of being a benefit corporation, such a development may well undermine the whole point of the new legal form, giving organizers little reason to adopt it. If investors and customers see benefit corporation status as mere greenwashing, they will not be any more eager to invest in benefit corporations than in ordinary for-profits. Benefit corporation status would then give no brand value. If that is the case, then why would anyone want to form a benefit corporation?

Our legal analysis also leaves this open as a possibility. Even if benefit corporation status does increase the chances of liability for ordinary operating decisions, we have seen that such increases may be very small and increase from a starting point of almost no chance of being held liable in ordinary corporations.<sup>156</sup> The result may be that liability for ordinary operating decisions remains so unlikely even in a benefit corporation that managers can safely ignore it. That would be particularly true if they are able to obtain directors and officers liability insurance at a reasonable cost, so that they would be able to avoid paying out on judgments even in the unlikely event that a court held them personally liable for failing to consider or pursue a non-stakeholder interest.<sup>157</sup> The risk of under-deterrence is greatest in Delaware corporations with exculpation clauses that extend as far as allowed, and least in Minnesota, but the possibility is present for benefit corporations under all three statutes considered here. Those who are skeptical about the evasion of liability and responsibility in fiduciary duty in ordinary corporations<sup>158</sup> may be particularly inclined to believe that the same situation is replicated in benefit corporation statutes, which as we have seen draw heavily upon the same protections against liability one finds in traditional corporate law.

How much should we worry about the risk that the statutory duty provisions will be too weak? Although I cannot dismiss the possibility, there are reasons to doubt it will turn out to be true. One can start to see this by simply looking back at the reasons why one might fear that the

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156. See *supra* section II.B.

157. See Griffith, *supra* note 138, at 348-49.

158. See, e.g., Daniel S. Kleinberger, *Delaware Dissolves the Glue of Capitalism: Exonerating from Claims of Incompetence Those Who Manage Other People's Money*, 38 Wm. Mitchell L. Rev. 737, 764-65 (2012).

duty provisions will be too strong. Given the pervasiveness of ordinary operating decisions, the potential for high losses if liability does occur, and the serious uncertainty that surrounds the new statutes, even quite modest increases in the chances of liability may be enough to strike fear into the hearts of managers. And note that the duty provisions will not be operating in a vacuum. Other mechanisms will be working to help commit managers to pursuing public benefits, including both reputational concerns (aided by the required benefit reports) and corporate cultures which one hopes will take hold in benefit corporations, which after all are not being forced on anyone. The duty provisions do not have to create a credible commitment all on their own; rather, they should be seen as a complementary part of a package of strategies which will guide and constrain the directors and officers of benefit corporations.<sup>159</sup>

The risk of too little deterrence may look greater for conflicted transactions and change of control circumstances. After all, this is where the law has for good reasons chosen to impose tougher scrutiny, and we have seen that the benefit corporation duty provisions may weaken that scrutiny. How big a concern is this? For conflicted transactions, if benefit corporation managers find it notably easier to evade liability by pointing to benefits to other stakeholders in interested transactions, that would indeed be a real concern. It is a point that bears watching, but as noted above,<sup>160</sup> the more likely effect in conflicted transactions will be that courts will find a somewhat lower fair price for shareholders in benefit corporations than in other comparable corporations. That just reflects the bargain that shareholders make by investing in benefit corporations, so should not be a source of alarm.

In changes of control, we have seen that there are effects in opposing directions. The weakening of liability comes in circumstances where managers get a lower price for shareholders than they could have but can justify it by pointing to the interests of other stakeholders.<sup>161</sup> However, protecting other stakeholders from harmful acquisitions is one of the main points of benefit corporations, so those who choose to invest in the form should not complain about this effect.

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159. See Yockey, *supra* note 14, at 28-42.

160. See *supra* section II.C.

161. See *supra* section II.D.

C. TOO STRONG AND TOO WEAK

We have thus considered the possibility that benefit corporation duty provisions will be too strong and that they will be too weak. There are arguments for each possibility, but also some good arguments against each. It is also possible that the duty provisions are simultaneously both too strong *and* too weak. They could be so in several ways. For one, the increased chances of liability may be enough to deter entrepreneurs, directors, and officers who would be inclined to honestly try to follow the rules, while not deterring those who want to use benefit corporation status to greenwash. The latter may be focused on ill-gotten short term gains with the intent to have disappeared before the law might catch them, may be less risk averse or less guided by prudent legal counsel, or may simply be less constrained by internal moral considerations. For another, the flattening of the chances of liability we have observed could be seen to be wrong-headed. Traditional corporate law has made ordinary operating decisions safe from the risk of liability while making liability more of a threat in conflict transactions and changes of control for a reason,<sup>162</sup> and weakening those tendencies in benefit corporations may not be a good idea. Finally, insofar as benefit corporations lead to formalistic compliance procedures which come at a cost but with little benefit, the rules could be seen as being simultaneously too strong (imposing costly procedure) and too weak (not changing behavior as desired).

## D. JUST RIGHT

I cannot rule out any of the aforementioned possibilities. Indeed, they are all real risks for the benefit corporation statutes as written. The exact distribution of the risks varies by statute (risk of being overly weak greatest for Delaware, risk of being overly strong greatest for Minnesota), but each statute considered here is subject to all of the risks just discussed. And yet, there is also reason to hope that the statutes have struck a proper balance.

To start to see why, consider that the situation for ordinary operating decisions in benefit corporations rather closely resembles the status of the duty to monitor risk within standard corporate law. Directors may (the point remains murky) have a duty to put in place and

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162. Hill & McDonnell, *supra* note 8, at 134-38.



oversee a plan or system for monitoring the risks to which their company is exposing itself.<sup>163</sup> Because this duty, to the extent that it exists, falls under the good faith extension of the duty of loyalty, the chances of liability are slightly higher than under the duty of care. And yet, the chances of liability are still very slight.<sup>164</sup> I have argued elsewhere that this combination may be optimal for the duty to monitor risk,<sup>165</sup> and the same may well be true for the duty to consider non-shareholder stakeholders of benefit corporations.

The risk of liability should be slight because there is little reason to suspect managerial decision-making in the context of ordinary decisions where no director or officer has a conflicting interest, and the risk should not be so great as to scare off managers or make them overly risk averse. We have already discussed the latter points under the risks of overly likely liability. As for why we do not have strong reason to be suspicious of managers, in part that is because for these kinds of decisions managers do not have strong self-interested incentives to ignore their duties. Moreover, those attracted to become involved in benefit corporations are likely to be persons with a normative commitment to doing good. Non-legal mechanisms will help constrain them to follow such a commitment through their interactions with investors, customers, and employees. Benefit corporation managers who are visibly shirking their duties to do good will most likely find themselves not doing well either, as the various stakeholders withdraw their support from the company.

Why then have any sort of a risk of liability at all? First, the difficulty for outsiders in monitoring many decisions means some bad apples may be able to hide within the benefit corporation form. Those who genuinely want to advance public benefit hope to signal that intent by adopting the form. For that signal to be credible, there must be some cost to those who adopt the form under false pretenses.<sup>166</sup> The risk of liability for ignoring stakeholder interests creates such a cost. Those who plan to abide by their duty hopefully face less risk of liability than those who do not.

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163. Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties after the Financial Crisis*, 2013 U. Ill. L. Rev. 859, 861-64 (2013).

164. *Id.*

165. *Id.* at 872-77.

166. Milgrom & Roberts, *supra* note 17, at 155.

But that signaling effect is probably modest given the low risk of liability. For fiduciary duties to be helpful, something more needs to be in play. That something more may be the norm-shaping role of courts deciding duty cases. Even in a case where the defendants escape liability, the court may lecture them as to how they could have done a better job. That dicta can help shape the norms of corporate directors and officers, instructing them as to how to best perform their jobs. Many have posited that this is a leading function of Delaware fiduciary duty cases.<sup>167</sup> There is a dialogue over time between boards and officers, lawyers, other gatekeepers in the corporate world, and the courts. Courts look to companies and communities for emerging best practices, and articulate them in their opinions. At least where a court has become salient to the relevant community, those opinions in turn help shape behavior in companies that lag in adopting best practices.<sup>168</sup>

It may well be, though, that a residual chance of liability is needed for the courts to play this role. Why, after all, should highly experienced and knowledgeable professionals pay attention to the opinions of judges, even judges with the extensive knowledge of corporate reality that one finds in Delaware? A big part of the answer to that question may be that if you ignore the judges, there's a chance, albeit a very small chance, that you might find yourself losing a long and nasty court battle. Even a whiff of that threat may be enough to grab the attention of most directors and officers.

Even assuming that is a good picture of how Delaware law works for ordinary corporations, will it work for benefit corporations? The legal structure of duties analyzed in the previous section is consistent with this norm-shaping story. However, there could be a problem with

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167. Claire A. Hill & Brett H. McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 Va. L. & Bus. Rev. 333, 355-57 (2009); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 Mich. St. L. Rev. 847, 865-73 (2009); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009, 1068-72 (1997); Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 Fordham L. Rev. 437, 465-67 (1993).

168. Daniel Kleinberger has argued that the “plethora of ‘best practices’ documents . . . provide a starting point to return the duty of care to Delaware law.” See Kleinberger, *supra* note 158, at 768. Joseph Yockey has a strong analysis, drawing on new governance theories, of how this process might work for benefit corporations. See Yockey, *supra* note 14, at 32-35. For an analysis of the role of industry customs and social norms in helping courts define fiduciary duties, see generally D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 Ohio St. L.J. 609 (2014).

courts playing the sermonizing role for benefit corporations. For ordinary corporations, Delaware courts do the sermonizing. The dominant role of Delaware in the market for incorporation for public corporations makes that possible.<sup>169</sup> Will Delaware dominate the scene for benefit corporations? If most benefit corporations are privately held, it would seem unlikely. Most privately held corporations incorporate in their home states, not Delaware.<sup>170</sup> There is no apparent reason to expect any difference for privately held benefit corporations. Even for benefit corporations which are public, it remains to be seen whether Delaware becomes a desirable state of incorporation. Delaware courts are part of the dominant milieu which emphasizes the interests of shareholders, after all.<sup>171</sup> How enthusiastically will those courts embrace a new form with a different goal? Will the founders of benefit corporations trust Delaware, whose culture may not fit their own? There are reasons for skepticism. On the other hand, the ability of Delaware to somewhat extend its strong position among corporations to larger limited liability companies<sup>172</sup> does suggest that Delaware's dominance can be extended to new legal forms.

If Delaware does not attract many benefit corporations, and hence Delaware courts do not hear many benefit corporation cases, who will pick up the slack in articulating standards of behavior? If one state establishes a particularly strong reputation for benefit corporations, it might start attracting them, and eventually enough cases from that state's courts could build up a useful body of law.<sup>173</sup> However, for now there seem no obvious candidates for such a state, and the process of building up precedents and expertise would in any event take quite a while. Thus, courts are going to have to share the job, with case law slowly accreting among a number of states. The fact that most statutes are based upon the Model Act should help give more continuity to that body of law across states. Will the resulting dialogue between

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169. Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 Yale L.J. 553, 590-99 (2002).

170. *Id.* at 568-72.

171. *See supra* note 27 and accompanying text.

172. Franklin A. Gevurtz, *Why Delaware LLCs?*, 91 Ore. L. Rev. 57, 59 (2012).

173. For more on this process of a state's court building up a reputation for expertise and thereby attracting more corporations to it, *see* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va. L. Rev. 757 (1995).

corporations and courts be enough to help articulate widely-shared and useful norms of proper behavior for the directors and officers of benefit corporations? Time will tell—a cop out, but one cannot really say more at this early stage.

The above argument that the benefit corporation duty provisions have struck a proper balance focuses on ordinary operating decisions. It should also be considered whether the balance looks proper for conflicted transactions and changes of control. As previously argued,<sup>174</sup> it is a concern that managers will be able to defend themselves in conflict situations by pointing to the interests of other stakeholders to justify their decisions. Courts should be wary of such arguments—conflicted transactions trigger heightened judicial scrutiny for a reason, and courts should be skeptical of attempted justifications. One major change that may well be noticeable is that shareholders in minority freeze-outs will receive lower prices, reflecting a benefit corporation discount. That, as noted above,<sup>175</sup> seems an appropriate reflection of the implicit initial deal struck with investors in this new form.

We have seen that the risk of liability in changes of control has countervailing shifts. It will be harder for shareholders of benefit corporations to make a successful *Revlon* claim that they have received too low a price, but in other circumstances they will be able to make a claim that other stakeholders have been hurt by a sale of control.<sup>176</sup> Again, this shift seems appropriate given the differing priorities of benefit corporations.

Finally, most of our discussion of the effects of the fiduciary duty provisions has focused on the probability of directors and officers being held personally liable for duty violations. That is because the prospect of personal liability is the type of relief which is most likely to dramatically affect managerial behavior, for better and for worse. However, we should also briefly consider the possibility of injunctive relief for violation of the duty owed to non-shareholder constituencies. After all, such relief is rather more likely to occur than monetary damages. Both the statutory exonerations of monetary damages and the exculpation clauses, which are the main sources of limits on the availability of damages, do not apply to injunctive relief. The business judgment rule does still apply, so injunctive relief will still be quite unlikely for

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174. See *supra* notes 123-124 and accompanying text.

175. See *supra* section II.C.

176. See *supra* section II.D.

ordinary operating decisions, though it will be more likely than monetary damages. Injunctive relief is a more important consideration in changes of control. As noted above, at least in the Delaware *Revlon* jurisprudence, damages have become quite unlikely, so that the main relief in *Revlon* cases is injunctive.<sup>177</sup> Courts may enjoin an acquisition completely, but more frequently they delay the shareholder vote on an acquisition until more complete disclosure concerning the alleged defect can be made.<sup>178</sup> Such modest relief may do some good by highlighting the effects a proposed sale of a benefit corporation would have on non-shareholder constituencies, and at least it is unlikely to do harm.

### CONCLUSION

Although our focus has been on fiduciary duty within benefit corporations, the law of fiduciary duty is not ultimately what will make or break the benefit corporation as a new way of doing business. Indeed, the new benefit corporation statutes themselves are not the critical element in the success or failure of this new form of business association. The critical element is the thousands of entrepreneurs, investors, employees, and consumers who want to achieve personal success while also benefiting the world and society. They face both new challenges and new versions of old challenges that all forms of business association must face. They must come up with new institutions, practices, and strategies to meet these challenges. How well those solutions are designed will ultimately determine the fate of benefit corporations, both individually and collectively.

The law of benefit corporations, including fiduciary duty law, is subordinate in importance and purpose to these individual and social actions. The point of the law is to help address some of the challenges which face benefit corporations, but the law will not do so on its own. It will function as one tool among many, and will work to supplement rather than replace the market-based institutions which are developing.<sup>179</sup>

The core challenge at which the law is aimed is helping ensure that the managers (directors and officers) of benefit corporations actually

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177. See *supra* note 83 and accompanying text.

178. Johnson & Ricca, *supra* note 83, at 211-14.

179. See Yockey, *supra* note 14, at 28-42.

follow through on their commitment to pursue public benefit along with profit. That challenge can in turn be broken down into two parts: deterring and punishing managers who do not honestly intend to abide by their commitments, and guiding managers who do intend to do so by articulating standards of behavior and best practices. Both the reporting requirements and the new fiduciary duties, the two main elements of the benefit corporation statutes, may help to address these two challenges. This article has focused on the role of fiduciary duty.

The existence of the two parts of this challenge points to a core dilemma for the law. If its only goal were to deter and punish those acting in bad faith when they commit to this new form, then the law could afford to be more aggressive and harsh in its treatment of perceived wrongdoers. And yet, the difficulty of telling how to best pursue the multi-pronged goals of a benefit corporation suggests that if courts are more aggressive, they will often punish those acting in good faith, and the risk of that happening may keep persons of good faith from becoming involved in benefit corporations, or may cause them to be overly cautious or to take costly and wasteful self-protective actions.

The duty provisions of benefit corporation statutes attempt to square this circle in a way that, unsurprisingly, closely resembles the strategy of fiduciary duty law in all corporations. Most decisions create very little risk of liability, but that risk is just slightly higher within benefit corporations. Managers who completely ignore their non-shareholder constituencies do create a risk for themselves. It should not be terribly hard to alleviate that risk by showing that one has considered the effects of a decision on all mandated interests, but one hopes that the need to keep all those interests in mind at some level will be easier to bear for those who genuinely want to do so than those who do not, so that the existence of duties will help screen out bad faith managers.

In benefit corporations, as with all corporations, the courts will look much more closely where managers make decisions that benefit themselves in ways different from the corporation. A concern identified here with benefit corporations is that managers will find it easier to justify such decisions by pointing to non-shareholder interests; courts will need to guard against those arguments, and apply fairness scrutiny (where it applies) with rigor. In change of control transactions, boards will find it easier to negotiate lower premiums for shareholders, but may have to worry that if a transaction hurts another mandated interest enough, they will face a suit, and that tradeoff is as it should be given the purposes of benefit corporations.

The benefit corporation statutes themselves do little to help in the second part of our challenge, providing guidance as to how to make a decision where various interests conflict. However, the statutes will hopefully set in play processes, which over time will provide some help. As courts decide duty cases, even where they do not impose liability, they will still articulate best practices, and will point out where directors and officers have not done their jobs well. These judicial discussions will both draw upon emerging best practices and also help reinforce and refine them. Only slight risk of liability will exist for not heeding the courts' articulation of best practices, but that slight risk may be enough to get many directors and officers to pay attention to what courts say. The other main element of the statutes, the mandated regular reports following third party standards for reporting and measuring how actions affect the public interest, will also help shed light on best practices.

These legal strategies would not work without various actors in the marketplace doing the hard work to create those best practices, and that work is more important than anything the statutes or courts can do. However, there is at least some real hope that these new laws can support entrepreneurs, managers, and investors as they create institutions and norms which shape a new form of business in which they can do good while still doing well.