THE PROPOSED PENNSYLVANIA BUSINESS CORPORATION LAW: A HORSE DESIGNED BY COMMITTEE*

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INTRODUCTION

On March 20, 1985, S. 599,[1] a bill to amend Pennsylvania's corporate statutes, was introduced in the Pennsylvania Senate. The Pennsylvania Bar Association prepared and enthusiastically recommended S. 599.[2]

The Senate referred S. 599 to the Pennsylvania Senate Judiciary Committee, and, on June 18, 1985, the committee held a public hearing. A number of witnesses at the hearing severely criticized many of the provisions of S. 599, and urged that they be amended.[3] As a result of these criticisms, the proponents of S. 599 submitted to the Senate a number of changes and proposed amendments in the form of a separate bill, known as S. 600.[4]

To date, no further amendments to S. 599 have been proposed, and no fur-

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* A camel is sometimes defined as a horse designed by committee.

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The author has served as a consultant to the Judiciary Committee of the Senate of Pennsylvania on the New Business Corporation Law, S.599 and S.600, 169 Gen. Assembly, 1985 Sess.. All assertions, positions, opinions, and conclusions set forth in this article are the personal assertions, positions, opinions, and conclusions of the author and are not, nor should they be implied or construed to be, assertions, positions, opinions, or conclusions of the Judiciary Committee of the Senate of Pennsylvania, any members thereof, or of the Senate of Pennsylvania.

1. New Business Corporation Law, S. 599, 169th Gen. Assembly, 1985 Sess. S. 599 was introduced by Pennsylvania Senators Fisher, Zemprelli, Jubelirer, Stauffer, Lynch, Musto, Stapleton, Early, Lewis, O'Pake, Ross, Andrezeski, Rhoades, Scanlon, Bell, Williams, Brightbill, Loeper, Moore, Peterson, Lincoln, Bodack, Stout, Pecora, Kratzer, Mellow, Kelley, Helfrick, Hopper, Salvatore, Madigan, Corman, Greenleaf, and Shumaker.

2. *See* Penssylvania Bar Association, Section on Corporation Banking and Business Law, *Highlights of the General Association Act* 1-7 (March 1985) (Pennsylvania Bar Association made major effort to codify and revise Pennsylvania corporation laws) [hereinafter cited as *Highlights*].

3. *See, e.g.*, Testimony of Allen D. Black, Esquire (S. 599 has pro-management/antishareholder slant and diverges from its stated goal of following or adopting Delaware law when Delaware law is more protective or shareholders' rights than proponents of S. 599 desire) (on file at the *Temple Law Quarterly*); Letter from Stephen R. Miller, Esquire, Chairman, Philadelphia Bar Association, Section on Corporation, Banking and Business Law, to Philadelphia Bar Association Board of Governors (May 23, 1985) (at least six changes are needed in S. 599, and effective date should be delayed) (on file at the *Temple Law Quarterly*).

4. S. 600, 169th Gen. Assembly, 1985 Sess. *See* Memorandum from William E. Zeiter, Esquire, to the Honorable Stewart J. Greenleaf (June 21, 1985) at 1-9 (changes in directors' standard of care,

ther proceedings on either S. 599 or S. 600 have occurred. *** It is quite likely, however, that the Senate Judiciary Committee will act on S. 599 and S. 600—the New Business Corporation Law ("New BCL")—sometime in the current legislative session.

The New BCL is a massive undertaking. It would substantively amend and recodify all of Title 15 and parts of Title 59 of the Pennsylvania Statutes, including the Business Corporation Law, the Nonprofit Corporations Law, the Professional Corporation Law, the Partnership and Limited Partnership Acts, and other specialized statutes.[5]

The New BCL borrows heavily from the Delaware General Corporation Law ("DGCL").[6] The drafters of the New BCL have expressed a desire that Pennsylvania corporate law "catch up" with Delaware corporate law, apparently in an attempt to prevent the perceived flight of Pennsylvania chartered corporations to Delaware.[7] The DGCL is not, however, the only corporate statute from which the New BCL borrows provisions and concepts. The New BCL also bears influences from the Model Business Corporation Act ("MBCA"),[8] the New Jersey Corporation Act,[9] the New York Corporation Act,[10] and the Cali-

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conduct of derivative actions, antitakeover provisions, and new effective dates are included in S. 600) [hereinafter cited as Zeiter Memorandum] (on file at the *Temple Law Quarterly*).

For the sake of consistency and brevity, this article treats S. 599, as amended by S. 600, as the proposed New Business Corporations Law, except where otherwise indicated.

*** As of the date of the publication of this article (June 13, 1986) negotiations relating to the substance of S. 599 were taking place. The parties to these negotiations included the proponents of S. 599, the Pennsylvania Senate Judiciary Committee Staff, and several of the witnesses that testified at the public hearing of June 18, 1985. As a result of these negotiations, a number of amendments to S. 599 ("The Amendments") have been agreed to by the negotiating parties. Some of the amendments (for example, those covering "poison pills," "golden parachutes" and "disparate treatment") cover and alleviate some of the concerns expressed in this article. A version of S. 599 incorporating the amendments is expected to be reintroduced in the Pennsylvania Senate and considered by the Judiciary Committee in late June of 1986.

5. *Highlights*, *supra* note 2, at 3-4.

6. The Delaware General Corporation Law is codified at title eight, chapter one of the Delaware Code. DEL. CODE ANN. tit. 8, §§ 101-398 (1968 & Michie Supp. 1983) [hereinafter cited as Del. Gen. Corp. L.].

Compare S. 599, S. 600, 169th Gen. Assembly, 1985 Sess. § 1524 [hereinafter cited as New BCL] *with* Del. Gen. Corp. L. § 153 (payment for shares); New BCL § 1528 *with* Del. Gen. Corp. L. § 152 (shares represented by certificates); New BCL § 1726(a) *with* Del. Gen. Corp. L. § 141(k) (removal of directors by shareholders); New BCL § 1745 *with* Del. Gen. Corp. L. § 145(e) (advancing expenses); New BCL § 1759 *with* Del. Gen. Corp. L. § 212 (voting and other actions by proxy); New BCL § 1904 *with* Del. Gen. Corp. L. § 253 (abolition of de facto merger); New BCL § 1917 *with* Del. Gen. Corp. L. § 262 (dissenters' rights); New BCL § 1921(c) *with* Del. Gen. Corp. L. § 253 (merger and consolidation of associations and business trusts); New BCL § 1924(b) (1) (ii) *with* Del. Gen. Corp. L. § 251(c) (shareholder approval of merger); New BCL § 1930 *with* Del. Gen. Corp. L. § 262 (dissenters' rights in merger or consolidation); New BCL § 2521 *with* Del. Gen. Corp. L. § 211(d) (calling special shareholders meetings); New BCL § 2524 *with* Del. Gen. Corp. L. § 228 (consent of shareholders in lieu of meetings); New BCL § 2535 *with* Del. Gen. Corp. L. § 242 (proposal of amendments to articles).

7. *See, e.g.*, *Highlights*, *supra* note 2, at 2-3; Zeiter Memorandum, *supra* note 4, at 5-6.

8. MODEL BUSINESS CORP. ACT (1969).

9. N.J. STAT. ANN. §§ 14A:1-1 to 14A:16-4 (West 1969 & Supp. 1985).

fornia Corporation Act.[11]

The New BCL has basic problems. First, the drafters of the New BCL have borrowed language and concepts from a variety of corporation statutes. Yet because each statute from which the New BCL draws is an integrated entity, borrowing sections at random from each statute may alter the effect that the sections have in their original setting. Moreover, the drafters of the New BCL did not recognize that the philosophies and methodologies of the various corporation statutes that have influenced the New BCL are at times inconsistent. The various statutory influences therefore create internal conflict in the New BCL.

Second, the New BCL substantially changes the way a Pennsylvania corporation is organized and administered,[12] the net effect of which is to give manage-

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10. N.Y. BUS. CORP. LAW §§ 101-2001 (McKinney 1963 & Supp. 1986).

11. CAL. CORP. CODE §§ 100-2319 (Deering 1977 & Supp. 1986). *Compare* New BCL § 1509(c) (2) *with* MODEL BUSINESS CORP. ACT § 27A (personnel not liable for emergency change in bylaws); New BCL § 1525 *with* MODEL BUSINESS CORP. ACT § 20 (stock rights and options); New BCL § 1528(f) *with* MODEL BUSINESS CORP. ACT § 23 (uncertificated shares); New BCL § 1551 *with* MODEL BUSINESS CORP. ACT § 45 (distributions to shareholders); New BCL § 1552 *with* MODEL BUSINESS CORP. ACT § 15(a) (power of corporation to acquire own shares); New BCL § 1553 *with* MODEL BUSINESS CORP. ACT § 48 (liability for unlawful dividends and distributions); New BCL § 1554(a) *with* MODEL BUSINESS CORP. ACT § 52 (financial reports to shareholders); New BCL § 1571(a) *with* MODEL BUSINESS CORP. ACT § 80 (dissenters' rights); New BCL § 1572 *with* MODEL BUSINESS CORP. ACT § 80 (definitions used in dissenters' rights); New BCL § 1573 *with* MODEL BUSINESS CORP. ACT § 30 (record and beneficial owners); New BCL § 1574 *with* MODEL BUSINESS CORP. ACT § 81 (notice of intent to dissent); New BCL § 1576 *with* MODEL BUSINESS CORP. ACT § 81 (failure to comply with notice to demand payment); New BCL § 1577 *with* MODEL BUSINESS CORP. ACT § 54(h) (release of restriction on uncertificated shares); New BCL § 1578 *with* MODEL BUSINESS CORP. ACT § 80 (dissenter's estimate of value of shares); New BCL § 1579 *with* MODEL BUSINESS CORP. ACT § 80 (valuation generally); New BCL § 1580 *with* MODEL BUSINESS CORP. ACT § 74 (cost and expense of valuation); New BCL § 1721 *with* MODEL BUSINESS CORP. ACT § 36 (board of directors); New BCL § 1733 *with* MODEL BUSINESS CORP. ACT § 39 (removal of officers and agents); New BCL § 1764(a) *with* MODEL BUSINESS CORP. ACT § 64 (voting lists); New BCL § 1912(a) *with* MODEL BUSINESS CORP. ACT § 59(a) (amendment of articles of incorporation by directors); New BCL § 1915 *with* MODEL BUSINESS CORP. ACT § 61 (articles of amendment); New BCL § 1929(b) *with* MODEL BUSINESS CORP. ACT § 76 (property rights in merger); New BCL § 1931 *with* MODEL BUSINESS CORP. ACT § 72A (share exchanges); New BCL § 1957 *with* MODEL BUSINESS CORP. ACT § 75 (effect of division); New BCL § 1988 *with* MODEL BUSINESS CORP. ACT §§ 88-91 (discontinuation of liquidation proceedings).

The New BCL also adopts provisions from other state corporation statutes. *Compare* New BCL § 1522 *with* N.J. STAT. ANN. § 14A:7-2 (West Supp. 1985) (issuance of shares in classes or series); New BCL § 1726(d) *with* N.J. STAT. ANN. § 14A:7-4 (West 1969) (share exchanges); New BCL § 1764(b) *with* N.J. STAT. ANN. § 14A:5-8 (West Supp. 1985) (effect of voting list); New BCL § 1766(b) *with* N.J. STAT. ANN. § 14A:5-6 (West Supp. 1985) (partial written consent of shareholders in lieu of meeting); New BCL § 1767(a) (2) with N.J. STAT. ANN. § 14A:12-7 (West Supp. 1985) (appointment of custodian for closely held corporation); New BCL § 1769 *with* N.J STAT. ANN. § 14A:5-22 (West 1969) (minors as security holders); New BCL § 1921(b) *with* N.J. STAT. ANN. § 14A:10-6 (West 1969) (surviving corporation in merger); New BCL § 1957(b) (1) *with* N.J. STAT. ANN. § 14A:10-1 (West Supp. 1985) (effects of division on property rights). *Compare also* New BCL § 1721 *with* CAL. CORP CODE §§ 300-301 (Deering 1977 & Supp. 1986) (board of directors). *Compare also* New BCL §§ 1721, 1781(c) *with* N.Y. BUS. CORP. LAW § 625 (McKinney 1963) (control of derivative action by corporation).

12. *See, e.g.*, New BCL § 1306(a) (4) (iii) (board authority to change voting rights, preferences, and limitations); *id.* § 1504 (amendment of bylaws); *id.* § 1522 (issuance of shares in classes and

ment, through the corporation's board of directors, the exclusive power to make many decisions that shareholders formerly made.[13] Moreover, the New BCL renders shareholders virtually powerless to affect or control the behavior of management, thereby removing shareholders' ability to serve as a "check and balance" on the power of management.[14]

Third, the New BCL is replete with provisions that serve as antitakeover defenses,[15] some of which endorse, as a matter of substantive law, highly controversial tactics such as the use of "poison pill" warrants and preferred stock.[16] Other provisions so stack the deck in favor of the incumbent management as to make it extremely difficult, if not impossible, for a corporation to successfully effect a hostile takeover of a Pennsylvania corporation.[17] These provisions also will make it difficult for shareholders to unseat incumbent management, and evince a clear favoritism toward management.

Finally, the New BCL makes a large number of changes in Pennsylvania's substantive and procedural corporate law, and although some of these changes are welcome, many of them appear to change provisions that have not faced challenge or criticism.[18] The New BCL creates a new system of corporate law

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board action); *id.* § 1554 (financial reports to shareholders); *id.* § 1721(b) (directors' standard of care); *id.* § 1725 (selection of board); *id.* § 1726(a)(2) (removal of directors for cause); *id.* § 1731 (executive and other committees of board); *id.* § 1733 (removal of officers and agents); *id.* § 1745 (advancing expenses); *id.* § 1914(c) (adoption of amendments by board); *id.* § 1917 (dissenters' rights on certain amendments).

13. *See infra* notes 47-58 and accompanying text for a discussion of the provisions of the New BCL shifting power away from shareholders and to directors.

14. *See id.* for a discussion of the manner in which the New BCL strips control over management from shareholders.

15. *See, e.g., id.* § 1502(a)(16) (golden parachutes); *id.* § 1521 (poison pills); *id.* § 1906 (disparate treatment of shareholders).

16. *See, e.g., id.* § 1521 (authorized shares); *id.* § 1525 (stock rights and options). A "poison pill" warrant or a "poison pill" preferred stock is a right to purchase a security—either a warrant or a preferred stock—that so extensively changes the financial structure of the corporation in the event of a takeover attempt that the "raider" will be discouraged from acquiring the company. *See infra* note 144 for a discussion of cases in which courts have considered the impact of poison pills in takeover situations.

17. *See, e.g.,* New BCL § 1502(a)(16) (officers' compensation); *id.* § 1521 (authorized shares); *id.* § 1525 (warrants); *id.* § 1906 (disparate treatment of shareholders of same class or series of classes).

18. *Compare* PA. STAT. ANN. tit. 15, §§ 1008, 1404, & 1502 (Purdon 1967 & 1985 Supp.) *with* New BCL § 1702 (new manner of giving notice); PA. STAT. ANN. tit. 15 § 1008A, 1501, & 1502 (Purdon 1967) *with* New BCL § 1704 (place and notice of shareholder meetings); PA. STAT. ANN. tit. 15, §§ 1008B & 1008C (Purdon 1967) *with* New BCL § 1705 (waiver of notice); PA. STAT. ANN. tit. 15, § 1008E (Purdon Supp. 1985) *with* New BCL § 1708 (use of conference telephone and similar equipment); PA. STAT. ANN. tit. 15, §§ 1401-1403 (Purdon Supp. 1985) *with* New BCL § 1725 (selection of directors); PA. STAT. ANN. tit. 15, §§ 1401-1410 (Purdon 1967 & Supp. 1985) *with* New BCL § 1729 (voting rights of directors); PA. STAT. ANN. tit. 15, § 1402 (Purdon Supp. 1985) *with* New BCL § 1725 (number of directors); PA. STAT. ANN. tit. 15, §§ 1402(4) & 1404 (Purdon 1967) *with* New BCL § 1703 (place and notice of board meetings); PA. STAT. ANN. tit. 15, § 1501 (Purdon 1967) *with* New BCL § 1755 (time for holding shareholders meetings); PA. STAT. ANN. tit. 15, § 1503 (Purdon 1967) *with* New BCL § 1756 (what constitutes quorum); PA. STAT. ANN. tit. 15, § 1603 (Purdon 1967) *with* New BCL § 1524 (issuance of stock for future services of promissory

that will force Pennsylvania corporations to reexamine their articles of incorporation and bylaws and make them conform to the new system, a lengthy and time-consuming procedure.

This article discusses the issues and problems raised by the New BCL and concludes that, until the General Assembly examines and resolves these problems, it should reject the New BCL.

I. Borrowing from Foreign Corporation Statutes: Should Pennsylvania "Out-Delaware" Delaware?

The drafters of the New BCL have expressed the concern that a large number of Pennsylvania corporations are rechartering in other jurisdictions that have "more flexible, clear and modern corporate statutes."[19] The drafters have chosen one particular corporate statute as their lodestar: the DGCL. The drafters reasoned that :

> The list of changes to be made in the BCL is undoubtedly impressive, but at the same time the list reveals the large imbalance between the Pennsylvania corporate law (which has been largely unchanged for the last 17 years) and the constantly evolving *competing* law in Delaware. It is this imbalance which creates the increasingly powerful hydraulic pressure driving our corporations to forsake their Pennsylvania charters for Delaware reincorporation. . . . In view of the pressure from Delaware, the proponents of the legislation concluded that a corporate structure competitive with Delaware must be achieved to discourage further erosion of the base of major Pennsylvania chartered businesses.[20]

Delaware certainly is a jurisdiction in which many major corporations choose to incorporate. S. Samuel Arsht, a leading Delaware practitioner, has suggested that this popularity is a product of the fact that the DGCL permits a corporation to operate "with only those restraints, be they procedural or substantive, that most people would regard as proper and reasonable and even desirable."[21] Arsht adds that the DGCL is a corporate statute in which freedom of action is counterbalanced by the principle that managers of a corporation are fiduciaries that are liable to the corporation and its stockholders for any violations of their fiduciary duties.[22] Arsht applauds the DGCL as a statute that keeps pace with the changing needs of the business community through constant

notes); PA. STAT. ANN. tit. 15, § 1607 (Purdon 1967) *with* New BCL § 1528 (certificated and uncertificated shares); PA. STAT. ANN. tit. 15, §§ 1613 & 1613.1 (Purdon 1967 & Supp. 1985) *with* New BCL § 1529 (transfer of securities); PA. STAT. ANN. tit. 15, § 1810 (Purdon 1967 & Supp. 1985) *with* New BCL §§ 1571-1580 (dissenters' rights); PA. STAT. ANN. tit. 15, § 1810 (Purdon 1967) *with* New BCL § 1913 (survival of rights and remedies after dissolution); PA. STAT. ANN. tit. 15, § 2108 (Purdon 1967) *with* New BCL § 1986 (qualification of receivers); PA. STAT. ANN. tit. 15, § 2109 (Purdon 1967) *with* New BCL § 1988 (discontinuance of dissolution proceedings).

19. *Highlights, supra* note 2, at 3. No empirical evidence exists to support or contradict this assertion.

20. Zeiter Memorandum, *supra* note 4, at 5-7 (emphasis added).

21. Arsht, *How and Why of Incorporation in Delaware*, 3 DEL. J. CORP. L. 163, 163 (1978).

22. *Id.* at 164.

monitoring by business and corporate law experts.[23] Finally, Arsht notes that Delaware is a popular incorporation site because of the state's high quality judiciary, which has a smaller caseload and more exposure to corporate problems then the judiciary of other states.[24]

Thus, Delaware, according to Arsht and other commentators, is a popular incorporation situs because it encompasses the best of all possible worlds.[25] It offers both a short statute that provides general guidelines for behavior while leaving corporations free to handle specific issues as they see fit, and a judiciary and corporate bar that is unusually qualified and experienced.

Not all commentators agree with this laudatory view of Delaware. One commentator has indicated that part of the explanation for Delaware's attractiveness as a state of incorporation is the willingness of its legislature to adopt and endorse new devices that corporate counsel create to benefit management.[26] Another commentator attributes the popularity of Delaware to its "winning" of what Justice Brandeis called "the race of laxity":[27] the competition among the various states to see which can enact the simplest, least restrictive, and most management-oriented corporation law in order to lure corporations to the state.[28] The prize of this "race," notes the commentator, is a significant source of additional state revenue.[29] Criticizing the extremely and unusually close links between the Delaware Legislature and the judiciary, the commentator observes that Delaware courts consistently rely on the state's public policy to create a favorable climate for management in order to foster incorporation in Delaware.[30] The commentator continues that the Delaware courts, in their conscious or unconscious enforcement of this public policy, have relaxed the traditional corporate law standards of fiduciary duties and fairness in favor of management.[31] In short, Delaware's critics assert that its popularity as an incorporation situs mainly arises from a lack of restrictive regulation and an extreme pro-management bias.[32]

One of the drafters of the New BCL has stated that Pennsylvania should

23. *Id.*

24. *Id.* at 165.

25. *See, e.g.*, Finger, *Corporation Bylaws and Charters Under Delaware Law*, 3 DEL. J. CORP. L. 293, 295 (1978) (advantages of incorporation in Delaware).

26. *See* Kirk, *A Case Study in Corporate Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence*, 10 J. CORP. L. 233, 255 (1984) (Delaware legislature responsive to needs and desires of corporate management).

27. Louis K. Liggit Co. v. Lee, 288 U.S. 517, 559 (1932) (Brandeis, J., dissenting). Justice Brandeis, tracing the history of state incorporation laws, noted that states with the least restrictive laws attracted the greatest number of corporations. *Id.* at 557-60.

28. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 664 (1974) (industrial states developed liberal corporation statutes that removed limitations on size and power of business units).

29. *Id.*

30. *Id.* at 670.

31. *Id.* at 664-65.

32. *See id.* at 663 (Delaware law contributes to deterioration of corporation standards). *See also* Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 Bus. Law. 1101, 1114-15 (1974) (federal standards needed to remedy "Delaware Syndrome"); Schwartz, *A Case for Federal*

emulate and "compete" with Delaware by adopting a flexible, management-oriented corporate statute that would coax corporations away from Delaware and keep Pennsylvania corporations at home. The Honorable Robert A. Doyle, one of the drafters of the New BCL, indicated at the public hearing on the act that the main purpose of the New BCL was to ensure that Pennsylvania corporations would not reincorporate in Delaware, and that Pennsylvania jobs would not be lost.[33] Judge Doyle's remarks imply, however, that many Pennsylvania corporations were reincorporating in Delaware because Pennsylvania's present corporation statute is not sufficiently management-oriented.[34] The drafters, apparently, are striving to win the "race of laxity" with Delaware. This race, however, is not easily won; every time another state attempts to "out-Delaware Delaware," Delaware revises its corporate statute to make it even more permissive.[35]

Although the drafters of the New BCL are trying to "out-Delaware Delaware"[36] by borrowing heavily from the Model Business Corporation Act ("MBCA"),[37] the MBCA is incompatible with the DGCL, both in methodology and in philosophy. The MBCA differs substantially from the DGCL. The drafters of the MBCA considered the model act "modern," "complete," "flexible," and "relatively simple."[38] They explicitly stated that they were not influenced by the DGCL because:

> the Delaware statute is poor in sequence and loose in its provisions . . . . The Delaware statute bids for the corporate business of promotors. '*It makes little or no effort to protect the rights of investors.*' Hence, in the opinion of the committee, it was not the type of statute which the committee should present as a model for states intending to revise their laws.[39]

One commentator has characterized the MBCA as a "mildly restrictive, middle-of-the-road scheme" of statutory regulation;[40] the MBCA is not as restrictive as the traditional "regulatory" statutes and not as loose and management-oriented as the DGCL. The MBCA is a much more detailed, pro-

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Chartering of Corporations, 31 BUS. LAW 1125, 1125 (1976) (federal legislative reform of corporate law is necessary).

33. Address by the Honorable Robert A. Doyle before the Pennsylvania Senate Judiciary Committee (June 18, 1985).

34. *See id.*

35. *See*, Kirk, *supra* note 26, at 258-59.

36. *See supra* notes 6-7 and accompanying text for a discussion of the influence of Delaware law on the drafters of the New BCL.

37. MODEL BUSINESS CORP. ACT (1969).

38. *See* Campbell, *The Model Business Corporation Act*, 11 BUS. LAW. 98, 99-100 (1956) (general approach of Model Business Corporation Act).

39. *Id.* at 100-01 (emphasis added).

40. Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 MINN. L. REV. 53, 58 (1983). Branson also noted that it was Professor Melvin Eisenberg who recognized the Model Business Corporation Act's "shift toward laissez faire." *Id.* at 58 n.23 (citing Eisenberg, *The Model Business Corporation Act and the Model Business Corporation Act Annotated*, 29 BUS. LAW (1974)).

shareholder statute than the DGCL.[41]

In attempting to create a Delaware-like statute by borrowing parts from a statute that was consciously drafted with a different philosophy and intention in mind, the drafters of the New BCL are running the risk of creating a legislative Frankenstein—a statute that resembles something that it is not, and one that cannot achieve its goals. For example, the liberal dissenters' rights provisions in the New BCL[42] are patterned after the MBCA's even more extensive and liberal provisions,[43] and they extend the application of dissenters' rights to many more situations than Pennsylvania and Delaware law presently allow.[44] The drafters of the New BCL, however, by essentially adopting Delaware's exceptions to the dissenters' rights provisions, effectively remove the option of dissenters' rights from all fundamental changes involving large public corporations.[45] It would have been simpler and more appropriate for the drafters of the New BCL to have adopted the Delaware law of dissenters' rights directly than to have adopted the more liberal provisions of the MBCA and amend them to conform with the DGCL's more restrictive provisions.

The drafters' wholesale borrowing from inconsistent statutes represents an example of how a statute should *not* be revised. The General Assembly must first decide what philosophy of corporate governance it prefers: the DGCL approach, the MBCA approach, or the approach favored by present law. The revised statute that the General Assembly enacts should resemble closely the statute evincing the approach and the philosophy that the General Assembly has decided to adopt, and should *not* incorporate provisions from inconsistent statutes.

II. THE SHIFT IN THE BALANCE OF POWER: THE PRIMACY OF MANAGEMENT

The New BCL, if enacted, will drastically change the way Pennsylvania corporations are organized and administered. The current Pennsylvania Business Corporation Law,[46] is much more shareholder-oriented than the DGCL

41. *Compare* MODEL BUSINESS CORP. ACT §§ 18 & 45 (outdated concepts of stated capital and par value of shares abandoned) *with* Del. Gen. Corp. L. §§ 152-154 (stated capital and par value); MODEL BUSINESS CORP. ACT § 19 (issuance of stock for prommissory notes or future services prohibited) *with* Del. Gen. Corp. L. §§ 152-153 (issuance of stock for promissory notes prohibited); MODEL BUSINESS CORP. ACT § 39 (directors may be removed without cause) *with* Del. Gen. Corp. L. § 140(k) (directors who are part of classified board may not be removed without cause unless articles of incorporation authorize removal without cause); MODEL BUSINESS CORP. ACT § 80 (shareholders have dissenters' rights when substantially all corporation's assets sold) *with* Del. Gen. Corp. L. § 262 (no dissenters' rights on sale of substantially all corporation's assets).

42. New BCL §§ 1571-1579 (dissenters' rights).

43. MODEL BUSINESS CORP. ACT §§ 80 & 81 (dissenters' rights).

44. *See* PA. STAT. ANN. tit. 15, § 1515 (Purdon 1967 & Supp. 1985) (dissenters' rights to any proposed plan of action to which a shareholder objects); Del. Gen. Corp. L. § 262 (dissenters' appraisal rights available to those that neither voted in favor of merger or consolidation nor consented thereto in writing).

45. *See* Del. Gen. Corp. L. § 262(b)(2).

46. PA. STAT. ANN. tit. 15, §§ 1001-3000 (Purdon 1967 & Supp. 1985).

and resembles the less restrictive MBCA in its regulatory philosophy.[47] Under the New BCL, the management, in the form of the board of directors, will possess the right to engage in many significant operations that the shareholders will be powerless to challenge. The drafters of the New BCL, in their apparent zeal to "out-Delaware Delaware," have given to the management powers not granted even by the DGCL, while at the same time eliminating many shareholder rights.[48]

This imbalance may reflect the perception of the drafters that the model of "corporate democracy" on which Pennsylvania's present corporation statute is based is no longer viable because of the nature of the national economy or of "modern corporations."[49] Alternatively, the drafters may have believed that management needs these new "administrative tools" to fight off hostile takeover

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47. *Compare* PA. STAT. ANN. tit. 15, § 1515 (Purdon 1967 & Supp. 1985) (dissenters' rights exist on amendment of articles of incorporation to eliminate cumulative bidding) *and* PA. STAT. ANN. tit. 15, § 1810 (Purdon 1967 & Supp. 1985) (existence of accumulated but undeclared preferred dividends) *with* Del. Gen. Corp. L. § 242 (no dissenters' rights for any type of amendment to articles of incorporation). *Compare* PA. STAT. ANN. tit. 15, § 1604 (Purdon 1967) (shares may not be issued for promissory notes) *with* Del. Gen. Corp. L. §§ 152 & 153 (no such restrictions). *Compare* PA. STAT. ANN. tit. 15, §§ 1900-1909 (Purdon 1967 & Supp. 1985) (board of directors of subsidiary always must act on merger with parent corporation regardless of parent's degree of share ownership) *with* Del. Gen. Corp. L. § 253 (parent may effect merger into itself of 90% owned subsidiary by action of parent corporation alone). *Compare* PA. STAT. ANN. tit. 15, § 1405 (Purdon 1967 & Supp. 1985) (shareholders have statutory right to remove directors without cause that may not be restricted by articles of incorporation or bylaws) *with* Del. Gen. Corp. L. § 141(k)(i) (directors of classified board may not be removed without cause unless expressly permitted by articles of incorporation. *Compare* PA. STAT. ANN. tit. 15, § 1311D (Purdon 1967) (sale of corporation's assets is equivalent of merger for purposes of dissenters' rights) *with* Del. Gen. Corp. L. § 271 (no dissenters' rights in event of sale of corporate assets). *Compare* PA. STAT. ANN. tit. 15, § 1501 (Purdon 1967) (20% of shareholders have statutory right to call special meeting of shareholders) *with* Del. Gen. Corp. L. § 211(d) (no such right for special shareholders' meeting).

48. The New BCL significantly alters the traditional relationship between shareholders and the board of directors recognized under Pennsylvania statutory law. *Compare* PA. STAT. ANN. tit. 15, § 1204 (Purdon 1967 & Supp. 1985) *with* New BCL § 1306(a)(4)(iii) (board of directors' authority to change voting rights); PA. STAT. ANN. tit. 15, § 1304 (Purdon 1967 & Supp. 1985) *with* New BCL § 1504(a) (issuance of shares in classes and board action); *and* PA. STAT. ANN. tit. 15, § 1408 (Purdon 1967 & Supp. 1985) *with* New BCL § 1721(b) (directors' duty of good faith).

The New BCL also adds new provisions further diluting shareholders' rights. *See* New BCL § 1781(a) (demand requirements for derivative actions); *id.* § 1906 (disparate treatment of shareholders); *id.* § 1914(c) (adoption of amendments to articles of incorporation by board of directors); *id.* §§ 2501-2538 (registered corporations). The provisions regulating registered corporations eliminate may of the rights retained by shareholders in other types of corporations. *See infra* note 114 for a discussion of the impact of the new registered corporation provisions.

49. The Pennsylvania Bar Association drafting committee noted, for example, that the state of incorporation has become largely incidental because the business of the modern corporation is often national or international in scope, and that states are therefore increasingly making their corporation statutes more permissive in order to attract corporations. Pennsylvania Bar Association, Committee on Business Associations of the Section on Corporation, Banking and Business Law, Title 15 Revision Subcommittee, *Business Corporation Law of 1985 with Official Source Notes and Committee Comments* at 2 (March 1985) [hereinafter cited as *Committee Comments*].

attempts, tools that the present statute does not provide.[50] Nonetheless, the New BCL strikes the balance between management and shareholders so strongly in favor of management that it *must* be revised in order to protect the corporation and its shareholders from incompetent, inefficient, unfair, or larcenous management.

In their effort to protect management, the drafters of the New BCL have departed drastically from traditional corporate law principles. Although a small number of the more egregious aspects of S. 599 were amended in S. 600, most of the unduly pro-management provisions remain in the New BCL. For example, the New BCL provides that the articles of incorporation may include a provision vesting in the board of directors the authority—which may even be exclusive if the articles so provide—to determine the number of shares issued, to divide them into classes or series, or both, and to determine or change, apparently without restrictions, the voting rights, designations, preferences, limitations, or special rights for any class or series of stock.[51] No other state grants this power to the board of directors. Even the DGCL merely provides that the board of directors, if the articles of incorporation so provide, may issue certain stock and determine its attributes.[52]

Such a provision in the articles of incorporation would give management the absolute power to control and change the financial structure of the corporation and the powers (including voting power), rights, preferences, and attributes of stock. The New BCL is very different from present Pennsylvania law, which only allows the board of directors, by resolution, to issue classes or series of shares that are already authorized in the articles of incorporation.[53] Moreover, a corporation that includes such a provision in its articles of incorporation undoubtedly would be required by federal securities laws to disclose the existence of the provision to prospective purchasers of its stock.[54] Disclosure could alter significantly the value or marketability of a class of stock, and could affect adversely a corporation's efforts to raise capital.

Another drastic departure from traditional corporate law is a section in the New BCL providing that the articles of incorporation may permit election of directors by a method other than shareholder vote.[55] Once again, such a provision is unprecedented. The DGCL and the current Pennsylvania statute provide that, except for situations involving newly created directorships or vacancies in

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50. New BCL § 1502(a)(16) (golden parachutes); *id.* §§ 1521 & 1525 (poison pills); *id.* § 1906 (disparate treatment of shareholders); *id.* §§ 2501-2538 (registered corporations).

51. New BCL § 1306(a)(4)(iii) (board has authority to determine and change voting rights, preferences, and limitations); *id.* § 1522(a)-(c) (issuance of shares in classes or series).

52. Del. Gen. Corp. L. § 141.

53. *See* PA. STAT. ANN. tit. 15, § 1601 (Purdon 1967 & Supp. 1985) (business corporation shall have power to create and issue classes of shares or series of shares as authorized in articles of incorporation); *id.* § 1602 (corporation must file statement with Department of State before issuing shares of class or series of class not set forth in articles of incorporation).

54. *See* 15 U.S.C. § 77(g) (1982) (information required in registration statement); 17 C.F.R. § 229.202 (1985) (disclosure of stock attributes and ability to modify rights other than by vote of majority of outstanding shares).

55. New BCL § 1725(b).

the board of directors, members of the board of directors are elected by the shareholders.[56] The New BCL thus allows management to perpetuate itself, and denies the shareholders their most effective tool in affecting and controlling corporate policy.[57]

The New BCL also creates a unique set of procedures concerning shareholders' actions.[58] It provides that an aggrieved shareholder must make a written demand to the board of directors to institute litigation on behalf of the corporation before filing an action, and that failure to execute this demand cannot be excused for any reason.[59] This provision is also unprecedented. To the

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56. Del. Gen. Corp. L. § 223(a); 15 PA. STAT. ANN. tit. 15, § 1402 (Purdon 1967 & Supp. 1985).

57. New BCL § 1725(b).In a publicly traded corporation, § 1725(b) also would allow management to elect the members of the board of directors without having to utilize the proxy machinery and without having to make the disclosures required by the Williams Act, 15 U.S.C. §§ 781(i), 78m(d),(e), 78n(d)-(f) (1982).

58. New BCL § 1781 (procedure for institution of derivative actions).

59. *Id.* § 1781(a). Prior to its amendment in S. 600, S. 599 provided that before a shareholder brings a derivative action, the shareholder must wait until he or she receives final notification from the board of directors that it plans to take no action, the final action of an inquiry committee appointed by the board, or 180 days, whichever comes earlier. S. 599, § 1781(c). This requirement was unprecedented. S. 600 eliminated the six-month waiting period. S. 600, § 1781(c). In addition, S. 600 expanded the applicability of the derivative action sections from use in "any action" to "any action or proceeding," presumably expanding the control of the board of directors to cover administrative or other nonjudicial proceedings commenced by a shareholder in the name of the corporation. *Id.*

In addition, section 1781(c) of S.599 originally had provided that once a derivative action was commenced, the board of directors could dismiss it if a majority of disinterested directors determined that the action was not in the best interests of the corporation. S. 599, § 1781(c). Judicial review of the dismissal would have been limited to determining whether those directors who voted for the dismissal were in fact disinterested or were acting in good faith. *Id.*

By contrast, under Delaware law, a board of directors may file a pretrial motion to dismiss a derivative action when a majority of disinterested directors, a committee of disinterested directors, or a group of other disinterested individuals selected by the board of directors, determines that the derivative action is not in the best interests of the corporation. Zapata Corp. v. Maldonado, 430 A.2d 779, 788 (Del. 1981) (by implication, Delaware statute permits disinterested directors to act for board). Judicial review of the decision of a disinterested committee, however, includes an inquiry into the independence and good faith of this disinterested committee and the bases for its conclusions and an additional determination by the court, using its own "independent business judgment," that the dismissal actually was in the best interests of the corporation. *Id.* at 788-89. One commentator has noted, however, that Delaware law is in a state of flux because the DGCL does not explicitly codify the standard of care for director responsibilities. *See* Note, Zapata Corporation v. Maldonado: *A Limitation on the Use of Delaware's Businesss Judgment Rule in Stockholder Derivative Actions*, 6 DEL. J. CORP. L. 80, 85 (1981).

The provision in the S. 599 version of the New BCL, which limited judicial review of special litigation committees, was far more permissive than Delaware law, which grants reviewing courts a broader scope of review. As amended by S. 600 the New BCL contains a stricter standard for the dismissal of a derivative action. In order to prevent the dismissal of a derivative action, a reviewing court must find that the directors made a determination to dismiss the action in bad faith, without due diligence, or that the decision was so unwise or unreasonable that it fell outside the bounds of the permissible soud discretion of the board of directors. S. 600 § 1781(c). Moreover, S. 600 does not require the corporation to file a motion to dismiss the action. *Id.* This provision presumably allows a court to dismiss a derivative action on its own initative.

contrary, the common law principle excusing a shareholder from making a written demand that the board of directors take action when a demand would be futile reflects the almost universal rule in the states.[60]

Many other provisions in the New BCL radically alter traditional principles of corporate law. For example, the New BCL provides that a corporation may act without notifying certain shareholders if the shareholders have not informed the corporation of their current addresses or have not claimed corporate communications sent to them for more than twenty-four months.[61] Neither the DGCL nor the current Pennsylvania statute has a comparable provision. The provision essentially disenfranchises shareholders who do not have a current address on file with the corporation. Moreover, the notification exception may conflict with the proxy regulations of the federal securities laws, which require that a proxy statement be sent to *all* of the corporation's shareholders when their votes by proxy are being solicited.[62]

The New BCL also provides that classified directors[63] may be removed only for cause unless the corporation's articles provide otherwise.[64] In following the DGCL,[65] the drafters thus have rejected the current Pennsylvania rule allowing removal of all directors with or without cause.[66]

In addition, the New BCL provides that a committee of the board of directors, which may exercise extensive powers on behalf of the corporation, may, in

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60. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) (demand futile when board of directors is under "sterilizing" influence that makes it inappropriate for directors to conduct litigation on behalf of corporation).

Demand futility will also excuse a derivative plaintiff from complying with Federal Rule of Civil Procedure 23.1, which governs derivative actions by shareholders when jurisdiction is based on diversity of citizenship. Rule 23.1 provides, in pertinent part, that "[t]he complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority." FED. R. CIV. P. 23.1. Demand is presumptively futile when the board of directors are antagonistic or involved in the transactions attacked. Abramowitz v. Posner, 672 F.2d 1025, 1033 (2d Cir. 1982). Conclusory allegations of director wrongdoing, however, will not excuse a derivative plaintiff from Rule 23.1's demand requirement. *See, e.g.*, Lewis v. Graves, 701 F.2d 245, 248 (2d Cir. 1983) (absent specific allegations of self-dealing or bias by majority of board of directors, mere approval or acquiescence is insufficient to render demand futile under Rule 23.1); Lewis v. Curtis, 671 F.2d 779, 785 (3d Cir. 1982) (majority view is that mere approval of allegedly injurious corporate transactions is insufficient to excuse demand under Rule 23.1 absent self-interest or bias by majority of board of directors) (citing Greenspun v. Delaware E. Webb Corp., 634 F.2d 1204, 1210 (9th Cir. 1980); Heit v. Baird, 567 F.2d 1157, 1162 (1st Cir. 1977); *In re* Kauffman Mutual Fund Actions, 479 F.2d 257, 265 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973)).

61. New BCL § 1707(b). *See* Black Testimony, *supra* note 3, at 7-15 (Pennsylvania should not be only state that fails to reflect demand futility and that erects rigid barrier to prosecution of shareholders derivative actions).

62. 15 U.S.C.A. § 78(n)(c) (1985).

63. The board of directors is classified when its membership is divided into classes whose terms expire in different years. H. HENN & J. ALEXANDER, LAW OF CORPORATIONS § 205, at 556-57 (3d ed. 1983).

64. New BCL § 1726.

65. *See* Del. Gen. Corp. L. § 141(e) (good faith reliance of board).

66. PA. STAT. ANN. tit. 15, § 1405 (Purdon Supp. 1985) (entire board of directors or individual director may be removed without assignment of cause).

accordance with the DGCL, consist of one individual.[67] Present Pennsylvania law requires that a committee of the board of directors have at least two members.[68]

The New BCL further provides that a bylaw may change the rule that officers and agents of the corporation may be removed by the board of directors without cause.[69] In contrast, the DGCL and present Pennsylvania law allow the removal of officers with or without cause.[70] The provision in the New BCL may authorize the adoption by the board of directors of a bylaw providing that officers of the corporation may not be removed, either with or without cause, during their term of office. Such a bylaw would effectively insulate management from control by the board of directors.

The New BCL also grants the board of directors some power to amend the articles of incorporation without a shareholder vote.[71] By contrast, the DGCL authorizes amendment without shareholder approval only when the corporation has not yet received payment for any of its stock.[72] Present Pennsylvania law provides that the shareholders must approve all amendments to the certificate of incorporation.[73]

Finally, the New BCL provides that a parent corporation that owns ninety percent or more of the stock of a subsidiary, directly or indirectly, may merge with the subsidiary without the approval either of the shareholders of the parent corporation, or of the board of directors or shareholders of the subsidiary.[74] The DGCL permits such a "short form merger" only if the shares of the subsidiary are not *indirectly* owned by the parent,[75] whereas present Pennsylvania law prohibits short form mergers altogether.[76]

S. 599 contained a number of extremely pro-management provisions. One of these provisions, defining the directors' standard of care, relieved directors of any liability for their actions if the directors relied in good faith on information, opinions, reports, or statements prepared or presented by others whom they be-

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67. *Compare* New BCL § 1731 (one or more directors required for committee) *with* Del. Gen. Corp. L. § 141(c) (committee to consist of one or more directors).

68. PA. STAT. ANN. tit. 15 § 1402(6) (Purdon 1967) (board may delegate authority to executive committee of at least two to manage business of corporation).

69. New BCL § 1733 (removal of officers and agents).

70. *Compare* Del. Gen. Corp. L. § 142(b) (officer holds office until resignation or removal) *with* PA. STAT. ANN. tit 15, § 1407 (Purdon 1967) (board of directors may remove officer or director if removal is in best interests of corporation).

71. New BCL § 1914(c) (adoption of amendments to articles of incorporation by board of directors).

72. Del. Gen. Corp. L. §§ 241-242.

73. PA. STAT. ANN. tit. 15, § 1804-4 (Purdon Supp. 1985) (ability of holders of outstanding shares to vote on proposed amendments to articles of incorporation).

74. New BCL § 1924(b)(1)(ii).

75. Del. Gen. Corp. L. § 253(a) (short form merger permissible where parent corporation does not own all outstanding stock of subsidiary corporation).

76. *Compare* New BCL § 1924 (adoption of plan of merger or consolidation) *with* PA. STAT. ANN. tit. 15, § 1901 (Purdon 1967) (two or more corporations may merge or be consolidated into new corporation).

lieved to be reliable or competent.[77] S. 599 did not require that the directors' beliefs be reasonable, or that the directors have any reason to have confidence in the particular report or recommendation at issue.[78] The provision, which does not exist in any other jurisdiction, would permit directors to shield themselves from responsibility by relying on the work product of others. In addition, the Committee Comments to S. 599 suggested that a professional whom the board of directors chose to serve as a director because of certain skills could insulate himself or herself from liability by pretending that the skills were lacking.[79] Thus, an attorney director who knew that the opinion of an attorney advising the board was incorrect or unreliable nontheless would be entitled to rely on the attorney-adviser's opinion if a *layperson* would have believed that the attorney was acting within his or her field of expertise and was reliable or competent.

As a result of the criticism expressed during the hearing on S. 599,[80] the drafters amended the directors' good faith reliance section in S. 600 and included a requirement that the directors' good faith reliance be reasonable.[81] Under S. 600, directors may rely on the information, opinions, reports, and statements of another individual only if they *reasonably* believe that the individual is reliable and competent in the matters presented, and if they have no knowledge concerning the matter that would cause their reliance to be unwarranted.[82] S. 600, however, has not omitted the Committee Comment described above. This may lead to an interpretation that the "knowledge" described in the new section is only the knowledge that a lay person would have. Thus, this Committee Comment could dilute the effect of the amendment and lend support to the argument that an attorney who knew of a defect or an error in a legal advisor's opinion would be able to rely on the opinion in good faith because a lay person would not possess the attorney's specialized knowledge.

The drafters of the New BCL, in their effort to "out-Delaware Delaware," have gone too far. The drafters have adopted a series of restrictions on the rights and powers of shareholders that, in practice, will be more restrictive than those in the DGCL. Under the New BCL, management possesses exclusive power to conduct the business of the corporation, and shareholders possess little or no power to control management. The General Assembly should restore

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77. New BCL § 1721(b).

78. *Id.*

79. *Committee Comments*, *supra* note 49, at 163-64.

80. *See, e.g.*, Black Testimony, *supra* note 3, at 16-20 (elimination of fiduciary duty from statute represents conscious decision of legislature to reduce directors' standard of care and provides directors with unbalanced opportunity to rely on workproduct of others).

81. *See* S. 600 § 1721(b). Section 1721(b) provides that directors satisfy their duty of good faith in a manner they *reasonably* believe to be in the best interests of the corporation. *Id.* (emphasis added). Section 1721(b) also provides that a director may rely in good faith on information, opinions, reports, or statements prepared by others if the director *reasonably* believes that the person being relied upon is reliable and competent in the matters presented. *Id.* (emphasis added). In addition this section provides that a director will not be considered to be acting in good faith if he or she has knowledge concerning the matter in question that would cause the reliance to be unwarranted. *Id.*

82. *Id.* § 1721(b) (emphasis added).

some of the balance that the drafters of the New BCL eliminated, by either deleting or substantially revising at least some of the provisions discussed above.

III. The Antitakeover Provisions

One of the most controversial phenomenona in modern business history has been the recent proliferation of hostile corporate takeovers, mergers, and acquisitions.[83] According to one estimate, 2,543 merger deals, with a total price of $122 billion, were struck during 1984 alone.[84] This trend does not appear to be abating; on the contrary, a casual perusal of the *Wall Street Journal* on almost any given day will reveal several ongoing takeover battles.[85]

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83. The proliferation of hostile corporate takeovers has prompted an extensive literature in scholarly journals and in the popular press. *See, e.g.*, Block & Miller, *The Responsibilities and Obligations of Corporate Directors in Takeover Contests*, 11 SEC. REG. L.J. 44, 52-67 (1983) (innovative defensive techniques used by corporate boards to fend off unwanted takeovers); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169-70 (1981) (explanation of proliferation of tender offers); Gilson, *The Case Against Shark Repellent Amendments: Structural Limits on the Enabling Concept*, 34 STAN. L. REV. 775, 775 (1982) (history of tender offer movement resenbles unrestrained arms race); McCord, *Limiting Defensive Tactics in Tender Offers: A Model Act for the Protection of Shareholder Decisionmaking*, 17 SEC. L. REV. 415 (1985) (recommending limits on defensive tactics).

84. O'Connell, *Do Mergers Really Work?* BUS. WK., June 3, 1985, at 88.

85. *See, e.g.*, Wall St. J., Oct. 1, 1985, at 63, col. 4 (discussion of takeover batles of Revlon, Pantry Pride, Beatrice Foods, and Richardson-Vicks). *See also* Easterbrook & Fischel, *supra* note 83, at 1168-69 (costs of tender offers).

Commentators have proferred a number of explanations for the recent surge of takeover battles. These explanations include gains realized because of the ability of corporations working jointly to keep confidential information that would otherwise be conveyed to an independent joint venture partner (and possibly be transmitted to others); "synergistic" gains resulting from improved efficiency and savings because of joint operation; tax advantages; and the belief that the management of the corporation is able to perform better than the management of the acquired corporation and will therefore increase the profits of the acquired corporation. *See, e.g.*, E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 64-68 (1973) (suggested reasons for growth of tender offer phenomenon); Easterbrook & Fischel, *supra* note 83, at 1169-70 (explanation for proliferation of tender offers).

Takeover attempts may take the form of a friendly offer to merge or a "bear hug." *See, e.g.*, Note, *The Business Judgment Rule and Potential Liability for Defensive Takeover Maneuvers by the Board of Directors*, 53 U.MO.K.C.L. REV. 647, 651 N.46 (1985) (variations of bear hug).

In the classic bear hug, the target is notified of the offeror's intent to make a tender offer at a specified price without a concurrent public announcement. *See*, Gilson, *supra* note 83, at 775 n.2 (describing classic bear hug). Tender offers may also be formal. *See* 17 C.F.R. § 240.14d (1985) (SEC regulates formal tender offers, partially through disclosure requirements).

A tender offer may be a full tender offer, where the tender offeror is seeking to purchase 100% of the target company's shares, or a partial tender offer, where the tender offeror is seeking to purchase a controlling percentage of the target company's shares. *See* Greene & Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, 132 U. PA. L. REV. 647, 676 (1984) (although Williams Act does not distinguish between full and partial tender offers, partial offers raise special policy concerns).

The "two-step front-end loaded" tender offer is a recent refinement of the partial tender offer. *See* Reiser, *Corporate Takeovers: A Glossary of Terms and Tactics*, 89 CASE & COM. 35, 40 (1984) (defining two-tier tender offer). A two-step front-end loaded tender offer involves a two step acquisition program having as its ultimate objective the acquisition of 100% ownership of the target company. Green & Junewicz, *supra*, at 677. The first step in a partial tender offer for a controlling

The recent increase in takeover attempts has engendered the development of a rash of defensive tactics through which the management of potential target corporations have attempted to protect themselves.[86] These tactics include requiring supermajority approval for the removal of a director or for changes in the corporation's form, bylaws, and articles of incorporation;[87] providing senior management with "golden parachute" employment contracts;[88] paying "greenmail" to an unwanted bidder;[89] selling the corporation's "crown jewels;"[90] merging with a "white knight;"[91] engaging in the "pac man defense;"[92] making

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percentage of the target company's shares, generally for cash, but sometimes for senior securities of the acquiring entity. *Id.* The second step is a merger, generally accomplished through the issuance of junior securities, notes, or cash and securities for the shares not purchased in the first step. *Id.*

Characteristic of this type of tender offer is a higher cash payment for the shares tendered in the first step, and a smaller cash payment—or payment in newly issued junior securities of the acquiring company—for the shares acquired in the merger. Green & Junewicz, *supra*, at 677. The object of this tactic is to induce a first step "stampede" of tendering shareholders, who wish to avoid the risk of receiving a smaller or less liquid payment for their stock in the ultimate merger. *Id.* A result of this type of tender offer is that some shareholders will receive a lower average price for their shares than others. *Id.* This risk factor gives the bidder in such a tender offer a significant tactical advantage by stimulating shareholders to tender their stock during the first step, thus increasing the tender offer's probability of success. *Id.*

86. *See, e.g.*, Block & Miller, *supra* note 83, at 44 (increase in hostile takeover activity resulted in novel and innovative defensive tactics). *See also* McCord, *supra* note 83, at 417-22 (limitation of defensive techniques is justifiable on grounds of economic efficiency and limiting conflicts between interests of management and shareholders).

87. *See* Gilson, *supra* note 83, at 780-83 (purpose of provisions is to impede transfer of control of board of directors). These supermajority approval requirements are commonly known as "shark repellent" amendments. *Id.* at 777.

88. A "golden parachute" contract is a special termination agreement that shelters executives from the effects of a corporate takeover by providing executives who are dismissed, or who resign as a result of a change in the control of a corporation, with either continued compensation for a certain period of time or a lump sum payment. Note, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L.J. 909, 912 (1985) (golden parachutes becoming commonplace) [hereinafter cited as Note, *Golden Parachutes*]. *See also*, Note, *Golden Parachute Agreements: Cushioning Executive Bailouts in the Wake of a Tender Offer*, 57 ST. JOHN'S L. REV. 516, 516-18 (1983) (golden parachutes insulate management and are unfair to corporation).

89. A company targeted for a takeover can pay "greenmail" to an unwanted corporate suitor and settle the raider's tender offer by purchasing all of the stock of the target company bought by the raider in the open market at a significant premium over its market price. The end result of this transaction is a significant profit for the raider. Greene & Junewicz, *supra* note 85, at 706.

90. A target company can sell its "crown jewels" by selling to a friendly suitor one of the company's subsidiaries or property that is particularly attractive to the raider, enabling the friendly suitor to make a friendly merger proposition or tender offer that the target company will favor. *Id.* at 701. *See, e.g.*, MacAndrews & Forber Holdings, Inc. v. Revlon, Inc., No. 8126 (Del. Ch. Oct. 23, 1985).

91. A "white knight," a company that maintains a friendly relationship with the target company, has been persuaded by the target company's management to make a competing tender offer in order to defeat the hostile raider's tender offer. Reiser, *supra* note 85, at 51.

92. A target company engages in the "pac man defense" by launching an equally hostile tender offer for the stock of the raider. If each company succeeds in buying control of the other, both companies will be effectively paralyzed. Green and Junewicz, *supra* note 85, at 702. The classic example of the pack man defense is the Bendix-Marietta takeover battle. *See* Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 627-28 (D. Md. 1982) (attempt by Martin Marietta to prevent

the corporation unpalatable by providing it with a "poison pill;"[93] and the ultimate defense, the "Jonestown defense."[94] The range of defenses that management can create to fend off unwanted takeover attempts are limited only by the imagination and creativity of corporate counsel.

Both takeover bids and the defensive techniques created by management to resist them are extremely controversial. Two schools of thought represent the polarity of views. One group of commentators argues that arbitageurs[95] are the only beneficiaries of takeover attempts; that these attempts actually harm the shareholders of both the target company and the acquiring company; and that takeover attempts do not serve the long-term interest of the nation's corporate system and economy.[96] The enormous capital spent in such struggles, assert these commentators, should instead be spent in improvements in industrial productivity and new technology.[97] According to one commentator, the management of a target company has a duty to resist these attempts[98] in order to protect the best interests of the corporation.[99]

A contrary viewpoint is that takeover attempts actually benefit the shareholders of the target corporation by acting as a monitoring device on management's performance,[100] and that because resistance to takeover attempts allows management to become entrenched at the shareholders' expense, it is "socially wasteful."[101] These commentators assert that defense tactics to takeover attempts are objectionable and should be proscribed[102] and that management should not offer any resistance to the raider, but should allow the shareholders to "evaluate the merits of the offer."[103]

Courts, in evaluating the actions of a target corporation's management during a takeover battle, have taken a middle course. In actions involving hostile takeover attempts, the plaintiff usually alleges that by resisting the takeover at-

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takeover by Bendix). *See also* H. Lampert, *Till Death Do Us Part* 53 (1983). ("Mexican Standoff" could result if each company buys control of the other).

93. A "poison pill" is a dividend distributed by a corporation to its shareholders in the form of convertible securities or warrants. In the event of a takeover attempt, the dividend can be converted into common stock held by the bidder, thus presenting a would-be bidder with the prospect of a severe dilution of earnings if the tender offer is successful. Green & Junewicz, *supra* note 85, at 705.

94. The target company uses the "Jonestown defense," also known as the "scorched earth defense", by deciding to liquidate itself, either in whole or in part. *See*, Green & Junewicz, *supra* note 85, at 701; Reiser, *supra* note 85, at 44.

95. Arbitageurs are speculators interested in a quick profit by trading in the target companies' securities, which rapidly increase in value before the takeover is completed. Reiser, *supra* note 85, at 35-36.

96. *See, e.g.*, Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 104 (1979) (no empirical evidence that change in control as result of takeover improves management's efficiency).

97. *See id.* at 103-04 & 109-12 (better use of capital improves productivity).

98. *Id.* at 119-24.

99. *Id.* at 130 (directors need not submit takeover bids if bids not in best interests of corporation).

100. *See* Easterbook & Fischel, *supra* note 83, at 1173-74.

101. *Id.* at 1174-76.

102. *Id.* at 1164, 1198.

103. *Id.* at 1164, 1194-95.

tempt and adopting defensive tactics, the target corporation's board of directors has breached its fiduciary duties to the corporation and its shareholders.[104] Courts in Delaware and other jurisdictions analyze such claims under the "business judgment rule," which provides that the courts will not disturb the decisions of the board without evidence that the board acted in bad faith or without a rational business purpose.[105] Courts have stated that if the board's sole or primary purpose of a defensive tactic in a hostile takeover situation is to keep itself in office, the tactic violates the business judgment rule because it constitutes an irrational business judgment.[106]

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104. *See, e.g.*, Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 265-66 (2d Cir. 1984)(defense tactic challenged as breach of duties of care and loyalty); Panter v. Marshall Field & Co., 646 F.2d 271, 285 (7th Cir. 1981) (shareholders have legal remedy if directors breach their fiduciary duty during defense of tender offer); Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 374 (2d Cir. 1980) (defensive tactic challenged by shareholders as breach of fiduciary duty); Enterra Corp. v. SGS Assocs., 600 F. Supp. 678, 681 (E.D. Pa. 1985) (substantial shareholder alleged board of directors breached fiduciary duty to corporation and shareholders by entering into standstill agreement that restricted substantial shareholder's ability to purchase corporation's stock); EAC Indus. v. Frantz Mfg. Corp., No. 8003, at 23 (Del. Ch. June 28, 1985) (available on LEXIS)(director's participation in block purchases challenged as breach of fiduciary duty); Edelman v. Phillips Petroleum Corp., No. 7899, at 35 (Del. Ch. Feb. 12, 1985) (available on LEXIS)(plaintiff alleged board adopted recapitalization agreement with improper motive and in grossly negligent manner); Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769, 773 (1967); Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548, 554 (1964).

105. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 285 (7th Cir. 1981) (no evidence of self-dealing, fraud, overreaching or other bad conduct sufficient to give rise to inference that impermissible motives predominated). *Accord* Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 264-65 (2d Cir. 1984) (applying New York law) (directors afforded wide latitude in devising strategies to resist unfriendly advances); Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 382-83 (2d Cir. 1980) (applying New Jersey law) (directors presumed to have acted properly and in good faith); Enterra Corp., v. SGS Assocs., 600 F. Supp. 678, 685-87 (E.D. Pa. 1985)(applying Pennsylvania law) (presumption of business judgment rule does not apply where board acted fraudulently or in bad faith or self-interest).

See, e.g., Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 266-67 (2d Cir. 1984) (transfer of stock to employees' stock option plan in order to resist takeover attempt valid exercise of board of directors' business judgment and attempt to perpetuate itself); EAC Indus. v. Frantz Mfg. Corp., No. 8003, at 26 (Del. Ch. June 28, 1985) (available on LEXIS) (issuance of stock by takeover target to "white knight" invalid exercise of board's judgment because primary purpose was to entrench management).

106. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 296 (7th Cir. 1981) (various takeover defenses, including target company's defensive acquisitions and filing antitrust action against raider, proper exercise of board's business judgment because plaintiffs failed to present evidence of self dealing, fraud, or overreaching); Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 384 (2d Cir. 1980) (issuance of target copporation's stock to white knight proper exercise of board's business judgment because plaintiffs failed to show stock sale was improper); Enterra Corp. v. SGS Assocs., 600 F. Supp. 678, 688-89 (E.D. Pa. 1985) (target company's entry into standstill agreement with raider proper exercise of target corporation's board's business judgment because valid business purpose demonstrated); Edelman v. Phillips Petroleum Corp., No. 7899, at 35 (Del. Ch. Feb. 12, 1985) (available on LEXIS) (greenmail buyout of raider by target company's board of directors entitled to presumption of good faith afforded by business judgment rule); Cheff v. Mathes, 41 Del. Ch. 494, 501, 199 A.2d 548, 556 (1964) (purchase of target corporation's stock with target's corporate funds proper exercise of business judgment of target company's board of directors because purchase made with good faith belief that corporate interests were served).

The determination of the sole or primary purpose behind a defensive tactic is a factual analysis that will vary considerably from case to case.[107] Courts have found the use of the same defensive technique in two different takeover situations to be permissible in one case and impermissible in another.[108]

The drafters of the New BCL have adopted the reasoning of the first school of thought regarding the value of corporate takeovers: the New BCL manifests an implicit stance that takeover attempts are bad and should be discouraged. The New BCL allows numerous antitakeover defenses,[109] including some highly controversial tactics that the New BCL seems to endorse unconditionally.[110] The abundance of defensive tactics sanctioned by the New BCL would render it extremely difficult, if not impossible, for a hostile takeover of a Pennsylvanian corporation to be consummated.

A. The Registered Corporation Provisions

The New BCL divides Pennsylvania corporations into two types of entities: "regular corporations," and "registered corporations."[111] The registered corporation is a new concept in Pennsylvania and has never surfaced in any state corporate statute. The New BCL defines a registered corporation as a corporation with publicly traded stock that is subject to the registration and reporting requirements of the Securities Act of 1933[112] and the Securities Exchange Act of 1934.[113] Moreover, a wholly-owned subsidiary of a registered corporation is itself a registered corporation.[114] The New BCL provides that a corporation

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107. This factual analysis, which is identical to a court's analysis whether the actions of a board of directors are the product of an informed business judgment, can be quite extensive and complex. For example, in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), the Delaware Supreme Court, in attempting to ascertain whether approval by the board of directors of a friendly cash-out merger with another company was the product of the board's informed business judgment, carefully examined all the actions of management and the board of directors in minute detail. *Id.* at 864-70. The *Smith* court held that because the board was grossly negligent in evaluating the merger proposal before it, the merger was not the product of the board's informed business judgment and therefore was improper. *Id.* at 884.

108. *Compare* Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 357 (1967) (issuance of stock to white knight for improper purpose invalid) *with* Treadway Co. v. Care Corp., 638 F.2d 357, 379-80 (2d Cir. 1980) (issuance of stock to white knight proper).

109. *See* New BCL § 1502(a)(16)(golden parachutes); *id.* §§ 1521, 1525 (poison pills); *id.* §§ 1906, 2501-2538 (registered corporations).

110. For example, the New BCL permits both golden parachutes and poison pill stock. New BCL § 1502(a)(16)(golden parachutes); *id.* §§ 1521 & 1525 (poison pills). Both of these defensive tactics are controversial and are far from universally accepted.

Moreover, some of the provisions in the New BCL, apparently included as antitakeover provisions, so stack the deck in favor of management and against shareholders that they completely change the current relationship between shareholders and management. The pro-management bias of these provisions cries out for balance. *See supra* note 47 and accompanying text for a discussion of the changes made by the New BCL in the traditional relationship between management and shareholders.

111. *See* New BCL § 2502 (definition of "registered corporation").

112. 15 U.S.C. §§ 77a-77bbbb (1982).

113. 15 U.S.C. §§ 78a-78kk (1982).

114. New BCL § 2502(2).

automatically becomes a registered corporation when it meets the statutory definition.[115]

Current Pennsylvania law grants shareholders more rights and powers than offered under the New BCL.[116] On the other hand, the New BCL gives the least control to shareholders of registered corporations.[117] According to the drafters of the New BCL, the registered corporation provisions of the New BCL are designed to ease the regulatory burden of public corporations, which are subject to federal public disclosure requirements, by exempting them from state disclosure requirements.[118]

The drafters of the New BCL seem to be saying that the purpose of the registered corporation provisions is to eliminate any "double regulation" by state law of matters that already are extensively regulated by federal securities laws. Yet only one of the registered corporation provisions exempts from disclo-

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115. *Id.* § 2503.

116. Shareholders in Pennsylvania may examine the corporation's books and records, Durin v. Allentown Federal Sav. & Loan Ass'n, 218 F. Supp. 716, 718 (E.D. Pa. 1963) (shareholder examination of books and records at proper time and for proper purpose); dissent from a merger or consolidation, Levin v. Pittsburgh United Corp., 330 Pa. 457, 473, 199 A. 332, 337, (1938) (shareholders are entitled to pro rata share of assets); assert a derivative action, Fitzpatrick v. Shay, 314 Pa. Super 450, 456-57, 461 A.2d 243, 247 (1983) (demand not required if futile); and vote their shares, Steinberg v. American Bantam Car Co., 76 F. Supp. 426, 436 (W.D. Pa. 1948) (right to vote on shares inherent in ownership of shares), *appeal dismissed*, 173 F.2d 179 (3d Cir. 1949).

117. The extensive restrictions in the New BCL include the following:

(1) A registered corporation does not have to send shareholders the annual financial statements that the New BCL requires be sent to the shareholders of regular corporations. *See* New BCL § 2511 (registered corporation); *id.* § 1554 (regular corporation).

(2) The shareholders of a registered corporation are not entitled to call a special meeting of shareholders. *Id.* § 2521. In regular corporations, a vote by 20% of the voting shareholders may call a special meeting of shareholdelrs. *Id.* § 1755(b)(2).

(3) A meeting of shareholders of a registered corporation may be adjourned for a period of time. *Id.* § 2522. In regular corporations, however, shareholders' meetings at which directors are to be elected only may be adjourned from day to day or for a period of no more than 15 days each until the directors have been elected. *Id.* § 1755(c).

(4) The board of directors of a registered corporation is permitted to adopt a bylaw varying the statutory quorum provisions. *Id.* § 2523. The board of directors of a regular corporation lacks this right. *Id.* § 1756.

(5) Shareholders of a registered corporation cannot propose any amendments to the articles of incorporation. *Id.* § 2535. In regular corporations, a vote by 10% of the voting shareholders permits shareholders to propose amendments to the articles of incorporation. *Id.* § 1912(a)(2).

(6) Shareholders of a registered corporation adopting a plan of asset transfer are not entitled to dissenters' rights unless: (a) they have been subjected to disparate treatment by the corporation; or (b) the board chooses to give the shareholders' dissenters' rights. *Id.* § 2537. Shareholders of a regular corporation have dissenters' rights wKenever the corporation adopts a plan of asset transfer. *Id.* § 1932(c)(1).

(7) Corporate action in a registered corporation may be adopted by less than unanimous consent of the shareholders, in lieu of a shareholder meeting and may be effective immediately, regardless of whether nonconsenting shareholders have been notified. *Id.* § 2524. In regular corporations, less than unanimous consent must equal at least the minimum number of votes necessary to authorize the consented action at a meeting of shareholders, and this action *cannot* become effective until after at least 10 days, written notice of the action has been given to all shareholders. *Id.* § 1766.

118. *Id.* § 2501 *Committee Comments*, *supra* note 49, at 395.

sure information that is required to be disclosed by the federal securities laws.[119] The remaining sections of the registered corporation provisions deal with subjects that traditionally are regulated by state law and *not* regulated by the federal securities laws.

Perhaps the New BCL's drafters' real intentions are other than those stated in their Official Comments. A glance at the registered corporation provisions suggests an alternative purpose: these provisions may be antitakeover provisions in disguise. The registered corporation provisions make it extremely difficult for a raider who has bought a minority of a corporation's shares to amend the corporation's articles of incorporation in order to repeal antitakeover provisions in the articles,[120] or to call a special meeting of shareholders to inconvenience or unseat management or to elect directors.[121] Management, however, is given the freedom to vary statutory quorum provisions for meetings,[122] to adjourn a shareholders' meeting indefinitely,[123] and to adopt immediately effective corporate action by less than unanimous consent without having to give prior or contemporaneous notice to the remaining shareholders.[124] Thus, a raider who has become a minority shareholder of a public company will encounter great difficulties in challenging management. Management, however, will be able to manipulate the structure of shareholders' meetings to enable it to control such proceedings. Moreover, these registered corporation provisions have ramifications beyond takeover controversies. They make it difficult for any shareholder to challenge management. Conversely, by giving the board of directors great flexibility in controlling the machinery of shareholders' meetings and voting, these provisions also make it easy for the present management to perpetuate its control over the corporation.

The New BCL's registered corporation provisions suffer from a number of defects. They constitute an unwarranted judgment by the drafters that takeover attempts are so "bad" that it is permissible to take "drastic" steps to stop takeover attempts, including allowing management to manipulate and control the machinery of shareholders' meetings and voting. Moreover, the proposed registered corporation provisions give management the ability to become almost unchallengeable by the shareholders. The New BCL drastically alters the relationship between management and shareholders in Pennsylvania corporations by allowing the incumbent management of publicly traded corporations to obtain almost absolute control over machinery of shareholders' meetings and voting, rendering the shareholders virtually impotent. The drafters' rationale for the new provision is unconvincing; federal law does not extend to these types of regulation. Consequently, the registered corporation provisions are unwarranted and should be eliminated from the New BCL.

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119. New BCL § 2511 (financial reports to shareholders); *Id.* § 2512 (dissenters rights procedure).

120. *Id.* § 2535 (proposal of amendment to articles).

121. *Id.* § 2521 (call of special meetings by shareholders).

122. *Id.* § 2523.

123. *Id.* § 2522.

124. *Id.* § 2524.

B. "Golden Parachutes"

The New BCL provides that a corporation shall have the power "to elect or appoint and remove officers, employees and agents of the corporation, define their duties, fix their compensation and the compensation of directors, *including, without limitation, compensation payable upon termination of employment.* . . ."[125] The Official Comment to this section provides that "[s]ubsection . . . (a)(16) . . . recognize[s] the prevalence and importance of 'golden parachutes' and . . . is intended to validate expressly those types of arrangements and agreements as a matter of state corporation law."[126]

"Golden parachutes" are special termination agreements that shelter senior corporate executives from the effects of a corporate takeover.[127] Typically triggered by a change in the control of the corporation, golden parachutes allow a corporation to provide executives who are dismissed or who resign as a result of a takeover to receive continued compensation for a specified period of time after leaving, or to receive a lump sum payment.[128]

Although the validity of golden parachute contracts has been challenged in a number of cases, state and federal courts have dismissed these cases on procedural grounds or on grounds unrelated to the validity of the golden parachute contract.[129] Thus, no court has expressly ruled on the validity of a golden parachute contract. Golden parachute agreements, however, have been the subject of great controversy and debate,[130] and a number of commentators have argued that they are invalid.[131] Nevertheless, most commentators agree that "golden parachutes," like other defensive techniques, are subject to the business judgment rule, under which a court must ascertain whether the primary or sole purpose for the existence of golden parachutes was the entrenchment of management.[132] The validity of each particular agreement would thus depend

125. *Id.* § 1502(a)(16) (emphasis added).

126. *Id.* § 1502(a)(16) *Committee Comments, supra* note 49, at 66.

127. *See supra* note 88 and accompanying text for a discussion of golden parachutes.

128. When a corporate takeover occurs, the senior management of the target firm is generally replaced. Accordingly, the recent increase in the number of takeover battles has exposed senior executives to a greater risk of termination if the takeover battle is lost. Senior management now frequently uses golden parachutes, which shift the risk of termination from the executive to the corporation. *See* Note, *Golden Parachutes, supra* 88, at 909.

129. *See, e.g.*, Shreiber v. Burlington Northern, Inc. 731 F.2d 163, 166 (3d. Cir. 1984) (plaintiff failed to link nondisclosure of golden parachutes to alleged injury); Wolgin v. Simon, 722 F.2d 389, 394 (8th Cir. 1983) (golden parachutes issue avoided because plaintiff failed to take proper actions before bringing suit); Smachlo v. Birkelo. 576 F. Supp. 1439, 1445 (D. Del. 1983) (plaintiff failed to make proper demand on board of directors, golden parachutes issue dismissed); Lewis v. Anderson, 453 A. 2d 474, 480 (Del. Ch. 1982) (case dismissed because plaintiff lacked standing).

130. *See* Note, *Golden Parachutes, supra* note 88, at 918-22.

131. *See id.* at 910, 910 n.9, 913 & 920. *See also* Johnson, *Those "Golden Parachute" Agreements: The Taxman Cuts The Ripcord*, 10 DEL. J. CORP. L. 45, 65 (1985); Note, *Golden Parachutes Executive Compensation or Executive Overreaching*, 9 J. CORP. L., 346, 348 (1984); Note, *Future Executive Bailouts: Will Golden Parachutes Fill the American Business Skies?* 14 TEX. TECH L. REV. 615, 622-23 (1983); Riger, *On Golden Parachutes—Ripcords or Ripoffs? Some Comments on Special Termination Agreements*, 3 PACE L. REV. 15, 39 (1982).

132. *See* Note, *Golden Parachutes, supra* note 88, at 912 & n.17 (courts should follow business

on the facts surrounding its creation. One commentator, however, has noted that in evaluation golden parachutes, overcoming the presumption of validity imposed by the business judgment rule is nearly impossible.[133]

Golden parachutes can serve valid economic purposes for a corporation and its executives. They can ensure that an executive evaluating the merits of a proposed takeover transaction will do so objectively, without the fear that a successful takeover attempt would result in personal financial loss.[134] A golden parachute also may be useful in providing an incentive for talented individuals to enter industries where corporate takeovers have engendered frequent job displacement.[135]

On the other hand, golden parachute agreements can be highly prejudicial to a corporation and to its shareholders. Departing executives may obtain large termination payments that in effect "loot" the corporation's assets.[136] Moreover, executives may use golden parachute agreements to ensure that their positions are never downgraded, that their salaries and bonuses are never reduced, or that they are never relocated from their present geographic positions, regardless of their performance.[137] Executives also may utilize golden parachutes to coerce significant payments from their employers even when their employment is secure.[138] Finally, the security provided by golden parachute agreements could have the opposite of their anticipated effect by enabling executives to become headstrong and reckless without impunity, to the detriment of the corporation and its shareholders.[139]

The deferential business judgment rule may not be sufficient to police

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judgment rule regarding golden parachute contracts). *See supra* note 105-08 and accompanying text for a discussion of the business judgment rule.

133. Note, *Golden Parachutes*, *supra* note 88, at 923.

134. *See id.* at 914-15.

135. *Id.* at 917.

136. Several critics have charged that the multi-million dollar bonus awarded to Revlon's Michel Bergerac as a result of the takeover of the company he led is so excessive that it constitutes a looting of corporate assets. *See, e.g.*, Hartzberg, *Advice in Revlon Brawl Wasn't Cheap*, Wall St. J., Nov. 8, 1985, at 6, col. 1.

137. An example of this use of the golden parachute agreement is the agreement entered into between Conoco, Inc. and its chief executive officer, which allowed the CEO to terminate his employment and receive a specified termination payment if Conoco's stock was delisted from the New York Stock Exchange or if 20% of the stock was acquired by another corporation or individual. Riger, *supra* note 131, at 18-19.

138. For example, in 1979, the board of directors of Burnup and Sims gave its chief executive officer, Nick Caporella, a golden parachute that provided for a lump sum payment in the event that any party acquired 29% or more of the corporation's stock. Note, *supra* note 131, at 618. In 1982, an individual acquired the requisite percentage and Caporella resigned, obtaining more than four million dollars in benefits. *Id.* Soon afterward, Caporella returned to his position as chief executive officer of Burnup and Sims, considerably richer. *Id.*

139. For example, executives of the St. Joe Minerals Corporation, when faced with a hostile takeover bid from the Seagram Corporation, protected themselves with golden parachutes and began a "scorched-earth" defense policy that included the sale of all of the assets of St. Joe Minerals Corporation. *Id.* at 621.

golden parachute agreements.[140] Yet the New BCL fails to provide an alternative regulatory mechanism. It does not recognize any potential dangers from golden parachute agreements, but rather, approves the golden parachute unconditionally as a matter of Pennsylvania corporate law. This unconditional approval is excessive. The General Assembly should create a mechanism with which courts can evaluate these agreements.

C. The "Poison Pill"

The New BCL expressly approves the "poison pill" defensive technique without any restraints or limitations.[141] One particular type of poison pill is the distribution of rights to purchase shares that have not yet been issued. These rights would become exercisable only in the event of a takeover attempt, and would entitle the holder to purchase shares having an inordinately high dividend preference or an inordinately high redemption value.[142]

The exercise of these rights could be devastating to a raider that acquired control of the company. The raider would incur an extremely expensive and burdensome preferred stock obligation that would hinder the payment of dividends to common stock, in turn making the common stock of the target company less attractive to investors. Moreover, management's ability to redeem the rights would give it a strong bargaining device in a takeover situation.[143]

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140. *See, e.g.*, Note, *Golden Parachutes, supra* note 88, at 923 (presumption of validity difficult to overcome).

141. Section 1521(1)(b)(iv) of the New BCL provides that: "[a] corporation, when so authorized in its articles, may issue shares or classes of series of shares . . . (iv) convertible into shares of any other class or series, obligations of the corporation or shares or obligations of any other person." New BCL § 1521(b)(1)(iv) The Comment notes that "[s]ubsection (1)(iv) is intended to validate expressly poison pill preferred stock as a matter of state corporation law." *Id.* § 1521(b)(1)(iv) *Committee Comments, supra* note 49, at 95.

Section 1525(a) of the New BCL provides that:

> Unless otherwise provided in its bylaws, a business corporation may create and issue whether or not in connection with the issuance of any of its shares or other securities, rights or options entitling the holders thereof to purchase shares of any class or series, obligations of the corporation or shares or obligations of any other person.

Id. The committee comment to this section remarks that the section "is intended to validate expressly as a matter of state corporation law 'poison pill' warrants." *Id.* § 1525(a) *Committee Comments, supra* note 49 at —.

142. This takeover defense technique is best illustrated by examining its use in Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985). In *Moran*, the defendant, as an antitakeover defense tactic, issued certain "rights," valid for 10 years, to all shareholders of the company. *Id.* at 1348. The rights would enable the holder to buy 1/100 of a share of a new series of preferred stock, which would yield 100 times the dividend declared on common stock. *Id.* These rights would become exercisable on the occurrence of a "triggering event," which included the acquisition of a certain percentage of the company's stock by any group of persons. *Id.* The rights also contained a "flip over" provision, which in the event of a merger or consolidation resulting in the stock of the target company being exchanged for the stock of the raider company, would entitle the holder to purchase common stock of the raider company at a price representing a market value of twice the exercise price of the right. *Id.* Thus, the rights holder would be entitled to purchase $200 worth of the acquiror's common stock for $100. *Id.* at 1348-49.

143. *Id.* at 1349.

Other poison pills have different structures, but all have the effect of either giving the existing shareholders of a target company an advantage over the raider in a takeover situation—for instance, by giving the original shareholders additional voting power—or by changing the target company's capital structure so as to render acquisition of the company more costly or more difficult.[144] Nevertheless, just as golden parachutes provide some corporate benefits, poison pills can serve some valid purposes for a corporation and its shareholders. First, a poison pill, by making a takeover more difficult, can protect the corporation's shareholders from the coercive effects of a two-step tender offer.[145] Moreover, management's ability to defuse the effectiveness of a particular poison pill may give it substantial negotiating leverage with the raider, which might force the raider to increase the amount of its offer to the benefit of all shareholders.[146]

On the other hand, poison pills have a number of potential disadvantages. They can be drafted in such a fashion that no hostile takeover of the target corporation can ever succeed. In this situation, shareholders who desire the takeover to succeed are effectively disenfranchised.[147] Moreover, a poison pill can substantially dilute the voting rights of some of the corporation's sharehold-

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144. *See, e.g.*, Hanson Trust, PLC v. SCM Corp. 774 F.2d 47, 51 (2d. Cir. 1985); Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 724 (5th Cir. 1984); Minstar Acquiring Co. v. AMF Inc., No. 85 Civ. 3800 (S.D.N.Y. 1985); Asarco, Inc. v. Asarco, Inc., 611 F. Supp. 468, (D.N.J. 1985); Crown Zellerbach Corp. v. Goldsmith, 609 F. Supp. 187, 188 (S.D.N.Y. 1985); Horwitz v. Southwest Forest Indus., 604 F. Supp. 1130 (D. Nev. 1985); Revlon, Inc. v. Mac Andrews & Forbes Holdings, 506 A.2d 173 (Del. 1986); Telvest, Inc. v. Olson, No. 5798 (Del. Ch. 1979) (available on LEXIS).

145. *See infra* note 156 for a discussion of the coercive effects of a two-step tender offer. *See also* Finkelstein, *Antitakeover Protection Against Two-Tier Tender Offers and Partial Tender Offers: The Validity of Fair Price, Mandatory Bid, and Flip-Over Provisions under Delaware Law*, 11 SEC. REG. L.J. 292, 301-10 (1984) (validity of flip-over provision); Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The 'Poison Pill' Preferred*, 97 HARV. L. REV. 1904, 1966-69 (1983) (effect of two-tiered tender offers).

146. In Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985), the Delaware Chancery Court expressly recognized the potentially immediate and devastating dilution of acquiror's capital. 490 A.2d at 1066.

147. In Asarco v. Court, 611 F. Supp. 465 (D.N.J. 1985), the target company's management created a poison pill consisting of a preferred stock dividend that would be issued to all common shareholders of record as of a given date. *Id.* at 470-71. Initially, the holders of these shares possessed no voting rights except on matters relating to their preferential rights. *Id.* at 471. If, however, any person became the "beneficial owner" of more than 20% of either Asarco's common stock or its Series C preferred stock, each preferred share owned by anyone other than a 20% owner would have five votes in all matters submitted to the common shareholders. *Id.* The Series C preferred shares owned by the 20% holder would continue to have no voting rights. *Id.* The court concluded that the preferred stock voting provisions would make a hostile takeover of Asarco impossible and held that the proposed preferred stock dividend was invalid. *Id.*

Similarly, in Telvest, Inc. v. Olson, No. 5798 (Del. Ch. Mar. 8, 1979) (available on LEXIS), management created and issued to the common shareholders a series of preferred stock whose voting rights provided for a supermajority vote of 80% (including at least 50% of the outstanding shares not held by the raider) in order to approve any merger with any party who, at any time, was the owner of 20% or more of the company's outstanding common stock. *Id.* The court found that this arrangement made a hostile takeover of the target company impossible. *Id.*

ers while leaving the voting rights of the holders of similar shares intact.[148] Poison pills also may entrench management at the expense of the welfare of the corporation's shareholders. Futhermore, the financial obligations imposed by a poison pill can exceed the corporation's ability to pay them,[149] or make its equity capital a "moribund investment" unattractive in the capital markets.[150] The poison pill also may hurt the target corporation by making its stock unmarketable to other bidders and thus preventing the appearance of a "white knight" to rescue the target company from the raider.[151]

Poison pills seem to create as many problems as they can solve and, for the reasons discussed above, a number of courts have held these provisions invalid.[152] Some commentators have suggested that poison pills are not as effective in deterring hostile takeover attempts as their proponents claim.[153] The New BCL does not recognize any of the problems of poison pill agreements, and provides no mechanism, not even one as deferential as the business judgment rule, to regulate their use. Indeed, at least one legislator has suggested that even the business judgment rule is not enough to protect corporate shareholders from management's abusive use of antitakeover defenses and has suggested stronger devices to curb these abuses.[154] To the contrary, the New BCL ignores all these

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148. In Asarco v. Court, 611 F. Supp. 468 (D.N.J. 1985), the court concluded that the issuance of new Series C preferred stock created a situation where the same class of stock (the Series C preferred) would have different voting rights depending on whether the stock was held by the "beneficial owner" of more than 20% of the corporation's preferred or common stock or held by any other stockholder. *Id.* at 471. Because of this relationship between the preferred stock and the common stock, certain common shareholders would have their voting power diluted five times that of other common shareholders. *Id.* The court enjoined issuance of the preferred stock, reasoning that it would create impermissible voting rights within a class of stock and was therefore illegal under New Jersey law. *Id.* at 480. *See also* Telvest, Inc. v. Olson, No. 5798 (Del. Ch. Mar. 8, 1979) (available on LEXIS) (new preferred stock created unacceptable alteration of shareholders' voting rights and was therefore illegal under Delaware law).

149. In Minstar Acquiring Corp. v. AMF, Inc., No. 85 Civ. 3800 (S.D.N.Y. 1985) (available on LEXIS), the target corporation declared a dividend of one right per share of its outstanding common stock. Each right entitled the holder to exchange one share of AMF common stock for a "unit" consisting of a new series of preferred stock and a $5.75 principal share of 14.5% subordinated debentures due in 1995. *Id.* at 10. These rights were exercisable only after an individual acquired 30% or more of the company's shares. *Id.* The plaintiff noted that should these rights be exercised, the target corporation might not have sufficient assets to pay the preferred and debenture dividends. *Id.* The court held that the facts raised a strong inference that entrenchment of management was the only reason for the adoption of the defensive techniques. *Id.* at 16. Thus, the court shifted the burden to the directors to show that the transaction was fair and reasonable under the business judgment rule. *Id.*

150. *See* Chittur, *Wall Street's Teddy Bear: The "Poison Pill" as a Takeover Defense*, 11 J. CORP. L. 32, 35-45 (1985) (discussion of economic effect of poison pill).

151. *Id.* at 35.

152. *See, e.g.*, Asarco, Inc. v. Court, 611 F. Supp. 468, 478-79 (D.N.J. 1985) (rights plan invalid because it impermissibly changes voting powers); Minstar Acquiring Corp. v. AMF, Inc., No. 85 Civ. 3800 (S.D.N.Y. June 7, 1985) (available on LEXIS) (rights plan invalid as matter of law because effect of plan was to restrict transferability of stock).

153. *See, e.g.*, Chittur, *supra* note 150, at 45.

154. *Id.* at 53. Representative Timothy Wirth has proposed modifying the business judgment rule so that management would have to establish that an antitakeover device was "prudent for the

problems and unconditionally approves the poison pill as a matter of Pennsylvania law. As with the provision on golden parachutes, this unconditional approval is excessive. The General Assembly should not adopt the poison pill as a matter of Pennsylvania corporate law without concurrently adopting a mechanism to curb its possible abuses.

D. Disparate Treatment

The New BCL allows the management and board of directors of a corporation to discriminate against a "raider" who has acquired a minority of the corporation's stock, or against "unpopular" or "troublesome" minority shareholders.[155] The New BCL unconditionally authorizes a corporation's management to discriminate against individual shareholders for any reason, including their identity. An examination of a case addressing the issue of discriminatory treatment of shareholders illustrates that even Delaware has been hesitant to permit such discrimination against shareholders.[156]

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issuer and fair to the shareholders" in addition to meeting the other requirements of the rule. *Id.* at 53-54. Mr. Wirth was especially concerned that the target company management's frequent "scorched earth" mentality could cripple the company financially. *Id.* As part of his proposal, Mr. Wirth would also prohibit two-tier tender offers, the takeover tactic that appears to have created the need for the poison pill. *See id.*

155. New BCL § 1906 provides in pertinent part:

> [A]n amendment or plan may contain a provision classifying the holders of shares of a class or series into one or more separate groups by reference to any facts or circumstances which are not manifestly unreasonable and providing mandatory treatment for shares of the class or series held by particular shareholders or groups of shareholders which differs materially from the treatment accorded other shareholders holding shares of the same class or series.

New BCL § 1906(a). The committee comment to § 1906 provides that "[t]his section authorizes 'black hat-white hat' treatment of shareholders, and the facts or circumstances forming the basis for a disparate treatment of shareholders are specifically intended to include the identity of individual shareholders." *Id.* § 1906 *Committee Comments, supra* note 49, at 251.

156. One Delaware case permitting discriminatory treatment may be distinguished on the basis of its unique facts. In Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), the owner of approximately 13% of Unocal's stock, a notorious corporate raider, commenced a two-tier, front-end loaded tender offer to acquire control of Unocal. *Id.* at 949. The Unocal board of directors rejected Mesa's tender offer as grossly inadequate and, as a defensive technique, initiated a self tender for its own stock that excluded Mesa from participation. *Id.* at 950-51. Mesa contended that Unocal's self tender offer violated the fiduciary duties that Unocal owed to Mesa, a minority shareholder of Unocal, and therefore was impermissible. *Id.* at 953.

The Delaware Supreme Court, after an extensive examination of the facts surrounding the Mesa tender offer and Unocal's reactions to the tender offer, concluded that Unocal was facing a situation in which the very future of the corporation was at stake. *Id.* at 954-55. Therefore, the court asserted, Unocal's directors had a duty to protect the company and, consequently, had the power to oppose the tender offer by any means that the board rationally believed was reasonable in relation to the threat posed by Mesa's inadequate and coercive tender offer. *Id.* at 956. The court found that the evidence showed that Unocal's self tender was not primarily motivated by the directors' desires to perpetuate themselves in office or by some other breach of fiduciary duty such as fraud, overreaching, or lack of good faith. *Id.* at 958-59. Therefore, the court held that the self tender was entitled to the protection of the business judgment rule and would not be invalidated. *Id.* at 959. The Delaware Supreme Court's decision in *Unocal* was based on unique facts. Other Delaware cases, and federal cases discussing Delaware law, illustrate that discriminatory treatment often has adverse

In *Unilever Acquisitions Corp. v. Richardson-Vicks, Inc.*,[157] the board of directors of Richardson-Vicks proposed to issue a quantity of poison pill preferred stock as a dividend in order to stop a tender offer by Unilever Acquisition Corporation.[158] Each share of the new class of preferred stock would entitle the holder to cast twenty-five votes on every issue on which the holders of common stock could vote.[159] If the preferred stock was transferred, however, the new owner could exercise only five of those twenty-five votes for the first thirty-six months of ownership.[160] The end result of this tactic would be that each common stockholder would have the same voting rights as before, but would be unable to transfer those rights because two-thirds of them would be unexercisable for thirty-six months following the transfer.[161] Thus, all new shareholders would have a significantly diluted voting power, and a takeover by any raider would be impossible.[162]

The United States District Court for the District of Delaware held that the Richardson-Vicks tactic was invalid.[163] It explained that the poison pill dividend would undoubtedly discriminate in the future among different holders of the same issue of preferred stock because the voting rights of the holders would vary depending on the circumstances under which they acquired the stock.[164] The court reasoned that this discrimination would result in a fundamental transfer of power from one corporate constituency (all holders of common stock) to another (all holders of common stock affiliated with management), and was thus impermissible.[165] Moreover, stated the court, this discrimination would essen-

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effects on the corporation. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 297 (7th Cir. 1981) (business judgment rule not applied if entrenchment motivating factor) Crouse Hinds Co. v. Internoth. Inc., 634 F.2d 690, 704 (2d Cir. 1980) (director interest must be demonstrated). Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964) (stock must be issued for proper purpose); Bennett v. Propp, 187 A.2d 405, 408 (Del. 1962) (improper use of corporate funds).

157. 618 F. Supp. 407 (S.D.N.Y. 1985).

158. *Id.* at 408.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 410.

163. *Id.* at 410. The court noted that the proposed poison pill would both restrict the transferability of Richardson-Vicks common stock and affect the holders' voting rights. *Id.* at 409.

164. Courts have refused to allow such discrimination among shareholders. *See, e.g.*, Asarco v. Court, 611 F. Supp. 468, 480 (D.N.J. 1985)(disparate treatment of shareholders prohibited under New Jersey law); National Educ. Corp. v. Bell & Howell Co., No. 7278 (Del. Ch. Aug. 25, 1983) (available on LEXIS) (issuance of stock permitted); Telvest v. Olson, No. 5798 (Del. Ch. Mar. 8, 1979) (available on LEXIS) (stock issuance invalid because of disparate treatment).

165. Unilever Acquisition Corp. v. Richardson-Vicks, Inc., 618 F. Supp. 407, 409 (S.D.N.Y. 1985). The *Unilever* court, in response to an argument by Richardson-Vicks that *Unocal* specifically authorized this type of discrimination, distinguished *Unocal* by noting that the discrimination among shareholders in the case before it, unlike *Unocal*, stripped shareholders without warning of the ability to transfer their shares, and thus significantly affected the value of the shareholders' investment. 618 F. Supp. at 409-10. In such a situation, the discrimination was so egregious because management stripped shareholders of the right to vote, one of the major rights of stock ownership; thus, the court reasoned that the principles set forth in *Unocal* were inapplicable. *Id.* at 409-10 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985)). The court therefore enjoined the issuance of this new poison pill preferred stock. 618 F. Supp. at 409. *Accord* Revlon,

tially strip certain shareholders, without warning, of one of the most important attributes of shareownership: the right to vote.[166] Implicit in the court's analysis was the concern that the discriminatory stock dividend would make current management unchallengeable for a period of three years.[167]

As *Unilever* demonstrates, courts have prohibited management from discriminating among shareholders in the absence of highly unusual circumstances.[168] Because discriminatory treatment can strip shareholders of fundamental rights of shareownership—such as the right to vote—and thus entrench management's position to the point that it becomes unchallengeable, the potential for abuse of this technique is too high. The Securities and Exchange Commission ("SEC"), fearful of the potential for abuse, has proposed a regulation under the Williams Act to deal with this issue.[169] The proposed regulation would ban all tender offers unless: (1) the tender offer is open to all security holders of the class of security subject to the offer; and (2) each security holder is paid the highest consideration offered to any other security holder at any time during the tender offer.[170] Therefore, the proposed regulation would prohibit tender offers that discriminate against shareholders because of their status.

The drafters of the New BCL wholeheartedly and unconditionally approve a suspect antitakeover technique that allows management to discriminate against any shareholder for any reason. The effects of this technique can extend far beyond the takeover field—it can be used to strip or extensively dilute the voting power of troublesome shareholders, thus rendering management unchallengeable. Moreover, this technique can be used to discriminate against certain holders of the same class of stock. Thus, management could grant a dividend to shareholders affiliated with management or those that management wished to reward while it withholds the dividend from other shareholders.[171] Because of this potential for abuse, the General Assembly should reject the "disparate treatment" concept set forth in the New BCL.

Inc. v. Mac Andrews & Forbes Holdings, 506 A.2d 173 (Del. 1986) (lockup agreement favoring note holders at the expense of shareholders constituted impermissible discrimination by Board of Directors); American Pac. Corp. v. Super Food Servs., No. 7020 (Del. Ch. Dec. 6, 1982) (available on LEXIS) (proposed provisions that included supermajority requirement for amendment or repeal of articles of incorporation would effectively disenfranchise stockholders owning five percent or more of company's stock and was improper under Delaware law).

166. 618 F. Supp. at 409.

167. *Id.*

168. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985) (board's selective exchange offer reasonably related to threat posed by coercive tender offer and threat of greenmail). *See supra* note 156 and accompanying text for a discussion of *Unocal.*

169. 15 U.S.C. §§ 781(i), 78m(d)-(e), 78n(d)-(f)(1982). The Williams Act amends §§ 13(d), 13(e), 14(d), 14(e), 14(f) of the Securities Act of 1934.

170. *See* proposed Rule 14-d(10), discussed at Release 33-14611, 34-22198, IC-14611 (File No. S-7-34-85) (July 1, 1985), noted at 33 SEC Docket 894-898 (July 16, 1985).

171. The Committee Comment to the New BCL recognized this possibility when it noted that "[c]ommon examples . . . [of disparate treatment] are provisions providing marketable securities to non-management holders and earn-out securities to continuing management in connection with the acquisition of a corporation." New BCL § 1906 *Committee Comment*, *supra* note 49, at 251.

CONCLUSION

In their zeal to create a new business corporation law that will "keep corporations in Pennsylvania" and that will "out-Delaware Delaware," the drafters of the New BCL have not stopped to think about what the values behind a corporate statute should be, what the corporate statute should do, and how the statutory goals are to be achieved. Until the drafters of the New BCL complete this analysis, it will be impossible for them to draft a truly workable statute.

The proposed business corporation law represents a massive undertaking that significantly affects the way corporations are organized and administered. If the New BCL is adopted, incumbent management, through the corporation's board of directors, will have the exclusive right to engage in many significant operations without shareholder approval or control. Many of the New BCL's provisions render the shareholders of a corporation powerless to mount any effective challenge against incumbent management. The New BCL has failed to strike a fair balance between the freedom of directors and the interests of shareholders.

Moreover, the drafters' wholehearted and limitless approval of many controversial antitakeover devices, which even Delaware courts have hesitated to approve unconditionally, would insulate incumbent management against challenges from insiders and outsiders. The New BCL's unconditional adoption of these controversial antitakeover provisions is meant to attract corporate business away from Delaware and into Pennsylvania. Nevertheless, these antitakeover devices are so troublesome that the Pennsylvania legislature should not adopt them without providing safeguards to minimize their harmful effects.

The provisions of the New BCL present so many problems that any further attempts to amend it will require a substantial, if not complete, redrafting. The General Assembly should reject the New BCL absent such redrafting.