

The Delaware Law of Corporations and Business Organizations

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For many years, Delaware has been preeminent in corporation law. Delaware's policy of maximizing management's flexibility by limiting state regulation or interference has attracted a substantial number of corporations to reincorporate there.¹ In the last five years, more than sixty publicly owned corporations reincorporated in Delaware, including Gulf Oil, Burroughs, Atlantic Richfield, and Carter Hawley Hale Stores. The Delaware state courts have developed substantial expertise in corporate litigation and have become the leading forum for takeover battles. In 1985 alone, the Delaware Supreme Court produced landmark decisions on such controversial matters as the exercise of due care by a board of directors in approving a sale of the company,² the application of the business judgment rule to an exclusionary self-tender offer,³ and the legality of a preferred stock purchase rights plan (poison pill).⁴

It is a particularly opportune time for the publication of this four-volume work by two practitioners who, together with their partners who contribute chapters to the work, have been on the front lines of most of the recent takeover battles. These contests for corporate control have provided the background for many of the recent developments in Delaware law. Whereas Ernest Folk barely mentioned takeover bids in his 1972 book on the 1967 revisions to the Delaware General Corporation Law, these authors devote most of a chapter to hostile takeovers and defenses under Delaware law. The increasing takeover activity is further illustrated in the treatment of the business judgment rule, which was discussed by Folk in the context of the "currently delicate area [of] the duty of the board of a parent corporation to the minority stockholders of a less-than-wholly owned subsidiary."⁵ In this new text, the rule is analyzed in the more fertile context of corporate-control transactions.

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1. E. Folk, *The Delaware General Corporation Law: A Commentary and Analysis* xii (1972).
2. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (the *Trans Union* case).
3. *Mesa Petroleum Co. v. Unocal Corp.*, 493 A.2d 946 (Del. 1985).
4. *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).
5. E. Folk, *supra* note 1, at 77.

The well-organized text follows the structure of the Delaware General Corporation Law. The initial chapters discuss the formation of the corporation and its powers. The heart of the work begins with chapter 4, on directors and officers, by E. Norman Veasey. In addition to describing the statutory provisions relating to board meetings, committees, and vacancies, the author provides an analytical framework for the business judgment rule by examining each element of the rule. This analysis emphasizes recent decisions, including specific lessons that can be drawn from *Trans Union*. The chapter contains a full discussion of the duty of loyalty as applied in cases of interested-director transactions, diversion of corporate opportunities, and sales of corporate control. There is also a good discussion of compensation of directors and officers, including golden parachutes, which have not been addressed by Delaware courts, and stock options, which have a rich history in Delaware case law.

The chapter on stock and dividends by Louis J. Finger integrates the historical evolution of Delaware corporate law on source of dividends, adequacy of consideration for stock, and redemption and preemptive rights with the contemporary issues addressed by provisions such as section 160(c), which restricts voting by a subsidiary of shares of the parent, in the context of Pac-Man tender offers. The chapter on transfers of securities and tender offers focuses on the recent cases relating to the fiduciary duty of directors in takeovers. The cases illustrate a panoply of defensive tactics, from "pre-planned defensive mechanisms" used in *Household*⁶ to actions by the target in response to an unsolicited bid, as exemplified by *Unocal*. The authors conclude that *Unocal* reaffirmed the reasoning of prior decisions that, in the absence of a showing of bad faith, overreaching, self-dealing, or fraud on the part of directors, a defensive action by the board of directors will be protected by the business judgment rule. In such cases, the plaintiff must generally prove that the sole or primary purpose of the action was to maintain control. While *Unocal* stressed that the defensive measure must be "reasonable in relation to the threat posed," this determination was explicitly based on the directors' analysis of the nature of the bid and its effect on the "corporate enterprise."⁷ Examples of such threats, the court stated, may include inadequacy of price, inappropriate nature and timing of the offer, questions of illegality, risk of nonconsummation, quality of securities offered, and the impact on "constituencies" other than shareholders (creditors, customers, employees, and perhaps even the community generally).⁸

The text contains useful chapters on both the statutory requirements for and practical aspects of stockholders' meetings and mergers. There is a thorough review of appraisal rights, including the development of the "fairness" concept and the impact of *Weinberger v. UOP*.⁹ This section also discusses a post-*Weinberger* case, *Rabkin v. Phillip A. Hunt Chemical Corp.*,¹⁰ which develops

6. 500 A.2d at 1346.

7. *Unocal*, 493 A.2d at 955.

8. *Id.*

9. 457 A.2d 701 (Del. 1983).

10. 498 A.2d 1099 (Del. 1985).

the fair-dealing considerations of the *Weinberger* opinion. The authors have also produced a fine chapter on suits against corporations, directors, officers, or stockholders, which contains a clear discussion of the often nebulous line between derivative and individual actions and the implications of each.

The authors include chapters on Delaware limited partnerships and special-purpose banking corporations. The material on limited partnerships is confined for the present to the text of the 1985 Delaware Revised Uniform Limited Partnership Act and comparisons with the 1983 Act as well as the 1976 version of the Revised Uniform Limited Partnership Act. The authors intend to supplement this information with an analysis and discussion of the 1985 Act, which should prove useful as Delaware has increasingly become a favored location for limited partnerships.

The book also includes over one hundred forms cross-referenced to chapters of the text. The emphasis is on documents to be filed with the Secretary of State, the forms for which have been reviewed by that office. The book also has other kinds of corporate forms, such as documents used in connection with stockholder meetings and board resolutions. In addition, a dozen transactional documents (such as the Household Rights Agreement, the Unocal Exchange Offer, and the notice of settlement to former Trans Union stockholders) are included, primarily to provide historical background for some of the cases discussed in the text and to illustrate the flexibility of the Delaware corporation statute.

The final volume contains an innovative and useful presentation of the statutory material. The current language of each section of the Delaware General Corporation Law is followed by the 1967 text, each amendment through July 1985, and the comments on these amendments. This format makes it easy to trace the evolution of each section, some of which have been frequently amended, such as those dealing with powers of the board, mergers, and appraisal rights.

The Delaware Law of Corporations and Business Organizations will become indispensable not only for corporate counsel of Delaware corporations, but for all attorneys who advise Delaware corporations. The work combines a clear and well-organized analysis of the statutory provisions and case law with useful tips and guidelines for the practitioner.