

# THE END OF RESPONSIBLE GROWTH AND GOVERNANCE?: THE RISKS POSED BY SOCIAL ENTERPRISE ENABLING STATUTES AND THE DEMISE OF DIRECTOR PRIMACY

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## I. INTRODUCTION

People start businesses to make money, or as scholars often say, “seek profit.”<sup>1</sup> There are times when businesses have other goals, but making money is usually the top priority. This concept is unremarkable, but when an entity has other goals, and an investor objects, it puts the question of the role and purpose of the entity before the courts. The issues related to the role and purpose of business entities are something all law students encounter when they first study in the area, and there is a long history establishing the basic concepts in the field.

What it means to “seek profit,” and how to do so, has traditionally been left up to those in charge of the business. Absent a showing of fraud, illegality, or self-dealing, the courts generally abstain from reviewing how a business operates.<sup>2</sup> There are signs that this may be changing,

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<sup>1</sup> See, e.g., Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 376 (2017) (stating that “for-profit corporations are required to seek profit”); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 176 (2008) (“Corporations seek profits for shareholders, but they seek other things, as well, including specific investment, stakeholder benefits, and their own continued existence.”).

<sup>2</sup> See, e.g., *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360–61 (discussing the business judgment rule and the presumptions afforded to business activities).

and those changes run the risk of being harmful to maximizing business success and creativity. Even worse, some of these changes are being pushed by those seeking increased social responsibility from businesses, a goal that stands to lose the most because of these emerging trends.

Some early research related to constituency statutes suggested that increased director discretion might not harm a firm's access to public capital, but even there, the authors noted that "the insignificant reaction to constituency statutes does not guarantee a similar attitude toward alternative purpose firms."<sup>3</sup> This caveat was prescient. There are two emerging issues that, working together, run the risk of derailing large-scale socially responsible business decisions: the emergence of social enterprise enabling statutes and the demise of director primacy. These issues could have the parallel impacts of limiting business leader creativity and risk taking. In addition to reducing socially responsible business activities, this could also serve to limit economic growth.

These emerging concepts threaten to greatly, and gravely, limit the scope of business decisions that directors can make for traditional for-profit entities, threatening both social responsibility and economic growth. This is especially true for Delaware entities. Recent Delaware cases, as well as other writings from Delaware judges, suggest that shareholder wealth maximization has become a more singular and narrow obligation of for-profit entities, and that other types of entities (such as non-profits or benefit corporations) are the only proper entity forms for companies seeking to pursue paths beyond pure, and blatant, profit seeking.<sup>4</sup> Although other state entity laws tend not to be as severe as Delaware, the fact that Delaware is viewed as a leader in entity law, and often leads the way for other states, means the risk is pervasive.

Now that many states have alternative social enterprise entity structures, there is an increased risk that traditional entities will be

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<sup>3</sup> Christopher Geczy, Jessica S. Jeffers, David K. Musto, & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 129 (2015). "Constituency statutes, passed as a part of widespread antitakeover legislation, authorize directors to consider other interests (that is, nonshareholder interests) in corporate actions." *Id.* at 76.

<sup>4</sup> See, e.g., *eBay Domestic Holdings v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

viewed (by both courts and directors) as pure profit vehicles, eliminating directors' ability to make choices with the public benefit in mind, even where the public benefit is also good for business (at least in the long term). Narrowing directors' decision making in this way limits the options for innovation, building goodwill, and maintaining an engaged workforce, all to the detriment of employees, society, and, yes, shareholders.

The potential harm from social benefit entities and eroding director primacy are not inevitable, and they are not insurmountable. This essay is designed to highlight and explain these risks with the hope that identifying and explaining the risks will help courts avoid them. This essay will first discuss the role and purpose of limited liability entities and explain the foundational concept of director primacy and the risks associated with eroding that norm. Next, the essay will describe the emergence of social benefit entities and describe how the mere existence of such entities can serve to further erode director primacy and limit business leader discretion, leading to lost social benefit and reduced profit making. Finally, the essay will make a recommendation about how courts can help avoid these harms.

## II. DIRECTOR PRIMACY AND THE PURPOSE OF LIMITED LIABILITY ENTITIES

How courts describe and assess the role and purpose of business entities is continually evolving, and in recent years, courts have been moving more and more toward a strict view that the purpose of a business is solely to make money.<sup>5</sup> There is an increasing sense, with the general public and in the courts, that anything else a business does must be secondary to, and must not at all interfere with, profit seeking.<sup>6</sup>

### *A. Limited Liability Entities*

To help facilitate business development, governments created limited liability entities to help encourage investment. Limited liability

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<sup>5</sup> *See id.* at 34.

<sup>6</sup> *See id.*

entities, including corporations, limited liability companies (LLCs), and limited partnerships, provide investors the ability to invest their capital (usually money), while limiting their liability to the sum of that investment. Investors are thus not personally liable for the debts of the entity, and they can only lose the amount invested. The investor can lose all of the money he or she exchanged for the stock, but such investors are not liable for debts beyond that investment.

The traditional business entity was the corporation. Corporations are created by statute and only exist by grant of state law.<sup>7</sup> “[T]he purpose of promoting commerce [is furthered] by providing limited liability for shareholders in state corporation laws . . . .”<sup>8</sup> The corporation is designed to promote investment and encourage innovation by permitting investors to pool resources, while limiting risk of loss (absent fraud, conflict of interest, or illegality) to the resources invested in the corporation.<sup>9</sup> State law has requirements that a corporation must follow, including certain formalities to preserve the corporate entity and preserve the grant of limited liability protection that comes with formation of the corporate entity.<sup>10</sup> These formalities require, among other things, certain filings,<sup>11</sup> annual meetings,<sup>12</sup> and regular oversight by a board of directors.<sup>13</sup>

The separate nature of the corporation serves to protect both shareholders and creditors. A properly formed corporation creates, in essence, a separate fictional person, which allows the corporation to op-

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<sup>7</sup> STEPHEN M. BAINBRIDGE, CORPORATE LAW § 1.1 (2d ed. 2009).

<sup>8</sup> *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 97 (1986) (quoting David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 373 (1981)).

<sup>9</sup> See WILLIAM A. KLEIN, ET AL., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 106–110 (11th ed. 2010).

<sup>10</sup> See BAINBRIDGE, *supra* note 7, at § 2.2.

<sup>11</sup> See, e.g., W. VA. CODE § 31D-1-120.

<sup>12</sup> *Id.* § 31D-7-701.

<sup>13</sup> *Id.* § 31D-8-801(b); see Gordon Smith, *eBay v. Newmark: A Modern Version of Dodge v. Ford Motor Company*, THE CONGLOMERATE (Sept. 9, 2010), <http://www.theconglomerate.org/2010/09/ebay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html>.

erate, potentially, in perpetuity.<sup>14</sup> This separate legal personality of the corporation acts to partition the business assets of the entity from the assets of the shareholders.<sup>15</sup> This separate corporate “person” takes on the legal rights and obligations of an individual.<sup>16</sup> Those doing business with corporations have the option of seeking personal guarantees from those working on behalf of the corporation.<sup>17</sup> Absent such a guarantee, however, investors’ losses are capped at the level of their investment in the corporation.<sup>18</sup> That is, shareholders have limited liability for actions of the corporation, unless the corporation’s Articles of Incorporation expressly state otherwise.<sup>19</sup> In exchange for this limited liability, shareholders give up their individual rights to corporate property and instead become residual claimants. A corporation’s shareholders only have rights to corporate property remaining at liquidation after all other debts and obligations of the corporation have been satisfied.<sup>20</sup>

Beyond limited liability protection, the asset partition corporate formation serves an additional, and critical, purpose that functions to protect those doing business with the corporation. The asset partition creates a separate and clear set of assets that belong to the firm upon which the firm’s creditors have a claim that is superior to any claims by personal creditors of any of the corporation’s shareholders.<sup>21</sup> As such,

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<sup>14</sup> W. VA. CODE § 31D-3-302.

<sup>15</sup> BAINBRIDGE, *supra* note 7, at § 1.1(B).

<sup>16</sup> W. VA. CODE § 31D-3-320 (“Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . .”).

<sup>17</sup> *See, e.g.*, Clendenin Lumber & Supply Co., Inc. v. Volpi, 365 S.E.2d 56, 57 (W. Va. 1987) (finding that a corporate vice president was a personal guarantor of the debt of the corporation because he signed a credit application in his capacity both as a corporate officer and as an individual).

<sup>18</sup> W.VA. CODE § 31D-6-622(b).

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* § 31D-14-1405.

<sup>21</sup> BAINBRIDGE, *supra* note 7, at § 1.1(B).

the firm cannot be negatively impacted by the financial problems or other liabilities of its shareholders (or those of a separate, affiliated corporation).<sup>22</sup>

### B. *Eroding Director Primacy*

The seminal case of *Dodge v. Ford* set forth the parameters of the business judgment rule and the foundation for the concept of director primacy, which is the idea that, absent extraordinary circumstances, the directors are responsible for the decision making of the entity.<sup>23</sup> There are some, like Professor Lynn Stout, who have criticized the foundational role this case has played in business law,<sup>24</sup> but the case has appropriately remained among the more important business law cases taught in law school.<sup>25</sup>

Dean Gordon Smith notes some comparisons between *Dodge v. Ford*<sup>26</sup> and the much more recent Delaware case of *eBay v. Newmark*, noting that there “is an amazing similarity.”<sup>27</sup> The comparison is apt, and Dean Smith’s take<sup>28</sup> on the case, as well as Professor Christine Hurt’s

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<sup>22</sup> *Id.*

<sup>23</sup> See generally *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (discussing the discretion given to directors in managing the affairs of the entity).

<sup>24</sup> Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 164 (2008) (stating that *Dodge v. Ford* is to blame for “the idea that corporations exist only to make money for shareholders”); see Joshua Fershee, *Philanthropy as a Business Model: Comparing Ford to Craigslist*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Sept. 10, 2010), [http://lawprofessors.typepad.com/business\\_law/2010/09/philanthropy-as-a-business-model-comparing-ford-to-craigslist.html](http://lawprofessors.typepad.com/business_law/2010/09/philanthropy-as-a-business-model-comparing-ford-to-craigslist.html).

<sup>25</sup> M. Todd Henderson, *Everything Old Is New Again: Lessons from Dodge v. Ford Motor Company*, 32 (John M. Olin Program in Law & Econ. Working Paper No. 373, 2007) (“Dodge is about much more than it appears on first reading.”), [http://www.chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1197&context=law\\_and\\_economics](http://www.chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1197&context=law_and_economics).

<sup>26</sup> *Dodge*, 170 N.W. 668 (Mich. 1919).

<sup>27</sup> *eBay*, 16 A.3d at 1.

<sup>28</sup> See Smith, *supra* note 13.

assessment<sup>29</sup> are insightful, but there is also reason to be critical of the *Dodge v. Ford* analogy.

In *Dodge v. Ford*, Henry Ford stated clearly that he was operating the business as he saw fit and that he was changing toward supporting philanthropic purposes. As the *Dodge v. Ford* opinion notes:

‘My ambition,’ declared Mr. Ford, ‘is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.’

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The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give. His testimony creates the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to

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<sup>29</sup> Christine Hurt, *eBay v. Craigslist: David & Goliath or Clash of the Titans?*, THE CONGLOMERATE (May 14, 2008), <http://www.theconglomerate.org/2008/05/ebay-v-craigslist.html>.

be pursued by the Ford Motor Company—the policy which has been herein referred to.<sup>30</sup>

Contrast this with Chancellor Chandler’s explanation of craigslist:

craigslist’s unique business strategy continues to be successful, even if it does run counter to the strategies used by the titans of online commerce. Thus far, no competing site has been able to dislodge craigslist from its perch atop the pile of most-used online classifieds sites in the United States. craigslist’s lead position is made more enigmatic by the fact that it maintains its dominant market position with small-scale physical and human capital. Perhaps the most mysterious thing about craigslist’s continued success is the fact that craigslist does not expend any great effort seeking to maximize its profits or to monitor its competition or its market share.<sup>31</sup>

In further contrast to Henry Ford’s statements, in footnote 6, Chancellor Chandler provides a quote from craigslist’s CEO “testifying that craigslist’s community service mission ‘is the basis upon which our business success rests. Without that mission, I don’t think this company has the business success it has. It’s an also-ran. I think it’s a footnote.’”<sup>32</sup> Nonetheless, Chancellor Chandler, as Dean Smith notes, sees these cases in a similar vein:

The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested

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<sup>30</sup> *Dodge*, 170 N.W. at 683–84.

<sup>31</sup> *eBay*, 16 A.3d at 8.

<sup>32</sup> *Id.* at 8 n.6.



in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.<sup>33</sup>

Although the appropriateness of the other moves taken by the majority owners of craigslist is suspect (this is more aptly viewed as a self-dealing case), craigslist's explanation of their business model should sufficiently distinguish the mission—and business purpose—from that put forth by Henry Ford. That is, had Henry Ford simply stated that he was running Ford to be the best company it could be, the court could have properly allowed his decisions to stand. To the extent there were concerns about his motivations, that court, too, would have more properly treated *Dodge v. Ford* as a self-dealing case.<sup>34</sup>

That is, it's a concern for Henry Ford to say, in essence, that his shareholders should be happy with what they get and that workers and others are more important to him than the shareholders.<sup>35</sup> However, it would have been quite another thing for Ford to say:

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<sup>33</sup> *Id.* at 34.

<sup>34</sup> See Henderson, *supra* note 25, at 33 (“Drawing on the expressive function of law, the Court took an opportunity to announce a standard for firms to use in decisionmaking—that firm’s exist to make profits—but simultaneously limiting the role of courts in policing this standard to extreme cases of self-dealing or grossly negligent decisionmaking.”).

<sup>35</sup> See *id.* (“Ford’s rhetoric could not be left unanswered.”).

I, along with my board, run this company the way I always have: with an eye toward long-term growth and stability. That means we reinvest many of our profits and take a cautious approach to dividends because the health of the company comes first. It is our belief that is in the best interest of Ford and of Ford's shareholders.

In *Dodge v. Ford*, there seemed to be a change in the business model (and how the business was operated with regard to dividends) once the Dodge Brothers started thinking about competing. All of a sudden, Ford became concerned about community first. For craigslist, at least with regard to the concept of serving the community, the company changed nothing. And, in fact, it seems apparent that craigslist's view of community is one reason, if not the reason, it still has its "perch atop the pile."<sup>36</sup>

Thus, while it is true craigslist never needed to accept eBay's money, eBay also knew exactly how craigslist was operated when they invested. If they wanted to ensure they could change that, they should have bought a majority share rather than relying on a court to question the profit-seeking motives of those in charge.<sup>37</sup>

One of the main problems with the *eBay* case is that it has helped to reinforce the incorrect notion that "it is literally malfeasance for a corporation not to do everything it legally can to maximize its profits."<sup>38</sup> As Professor Todd Henderson has explained:

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<sup>36</sup> *eBay*, 16 A.3d at 8.

<sup>37</sup> Maxwell Kennerly, *eBay v. Newmark: Al Franken Was Right, Corporations Are Legally Required to Maximize Profits*, LITIG. & TRIAL (Sept. 13, 2010), <http://www.litigationandtrial.com/2010/09/articles/the-law/for-lawyers/eBay-v-newmark-al-franken-was-right-corporations-are-legally-required-to-maximize-profits/>.

<sup>38</sup> Todd Henderson, *The Shareholder Wealth Maximization Myth*, TRUTH ON THE MARKET (July 27, 2010), <https://truthonthemarket.com/2010/07/27/the-shareholder-wealth-maximization-myth/>.

Individuals across the political spectrum share this common canard. Those on the right, like Milton Friedman, argue that the shareholder-wealth-maximization requirement prohibits firms from acting in ways that benefit, say, local communities or the environment, at the expense of the bottom line. Those on the left, like Franken, argue that the duty to shareholders makes corporations untrustworthy and dangerous. They are both wrong.<sup>39</sup>

The Franken-like argument, which the eBay decision reinforces from a more conservative approach, seems to suggest that Delaware's *Revlon* duties, which require the "board to enhance short-term shareholder value,"<sup>40</sup> apply all the time, and not just when the board puts the company up for sale. This interpretation makes for good political sound bites, and is a plausible interpretation, but that is not exactly what Chancellor Chandler's opinion says.

Instead, the Chancellor stated that craigslist's majority owners "prove[d] that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future."<sup>41</sup> Thus, he concluded, "The corporate form in which craigslist operates . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment."<sup>42</sup> As such, corporations clearly can do at least some things that are philanthropic; it's just that they cannot be "solely" philanthropic—thus the *Dodge v. Ford* connection.

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<sup>39</sup> *Id.*

<sup>40</sup> *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1149 (Del. 1989).

<sup>41</sup> *eBay*, 16 A.3d at 34.

<sup>42</sup> *Id.*

The problem with Chancellor Chandler's conclusion is that craigslist is not a nonprofit, and it files and pays taxes like any other (proper, for-profit) corporation. According to a BusinessWeek article, the company started being profitable in 1999 and has remained so.<sup>43</sup> That said, it is also true that the company's leaders repeatedly stated that that they were not trying to take over the world or maximize wealth.<sup>44</sup> Of course, choosing not to try to aggressively expand is not inherently good or bad, just as a company deciding to grow as fast as possible is neither inherently good nor bad.

In addition, under the Delaware General Corporation Code § 101(b), “[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes . . . .”<sup>45</sup> Certainly there is nothing there that indicates a company must maximize profits or take risks or “monetize” anything. Chancellor Chandler concedes as much when he notes that it is at least conceivable that a philanthropic company may be okay when there are no “other stockholders interested in realizing a return on their investment.”<sup>46</sup>

Thus, the real question is what it means to say there was a stockholder “interested” in realizing a return on their investment. As mentioned above, eBay knew the kind of company in which they were buying shares (and taking a minority position). Craigslist was operating exactly with the same philosophy as they had before eBay bought in to the company. And, in fact, that philosophy is probably why eBay invested: they wanted to reserve a right to compete, but be a part of monetization if craigslist chose that path.

As such, eBay's primary motive was not any specific expectation of a return on investment. Instead, eBay invested as something of a hedge—they recognized that if craigslist were to monetize, craigslist

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<sup>43</sup> *Craigslist's Ongoing Success Story*, BUSINESSWEEK (May 15, 2007).

<sup>44</sup> *See id.*; Don Dodge, *Craigslist's Jim Buckmaster on why bigger isn't better - The Mythical Man Month*, TYPEPAD (May 18, 2007), [http://dondodge.typepad.com/the\\_next\\_big\\_thing/2007/05/craigslist\\_phil.html](http://dondodge.typepad.com/the_next_big_thing/2007/05/craigslist_phil.html).

<sup>45</sup> DEL. CODE ANN. tit. 8 § 101(b).

<sup>46</sup> *eBay*, 16 A.3d at 34.

would likely become a huge revenue source, and they wanted to ensure eBay was part of that process if (not necessarily when) that were ever to happen.<sup>47</sup> As shareholders, eBay had reserved the right to compete with craigslist, allowing eBay to pursue monetizing a similar product. (And it's not clear that eBay was not getting a return on the investment; it was likely just a lower return than some people think that return might have been had craigslist monetized its product more broadly.) As such, it is improper to allow eBay, simply by virtue of being a shareholder, to require a change in the way in which craigslist operates. This is not a bait-and-switch situation where craigslist changed the rules of the game (at least with regard to their corporate philosophy) after cashing eBay's check.

Therefore, Chancellor Chandler's assessment that craigslist was operating as a "purely philanthropic" corporation is incorrect, and eBay was not being deprived of any expected potential return on investment.<sup>48</sup> Just because craigslist's majority owners used a lot of pro-philanthropic language, that does not change the fact that craigslist was a market leader seeking to perpetuate that position. At the end of the day, then, craigslist may operate as a "largely" philanthropic entity, but it is exactly the kind of small-but-profitable entity eBay bought a portion of in the first place. And that, as matter of contract and under Delaware law, is fine. At least, it should be.

A closer look at Chancellor Chandler's opinion in *eBay v. Newmark*, though, proves troubling in that by embracing a "community service mission," craigslist was determined to be improper as a corporate entity.<sup>49</sup> Recall that Chancellor Chandler explained that by choosing "a for-profit corporate form, the craigslist directors are bound by the fidu-

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<sup>47</sup> Cf. David Gelles, *Ebay Hoped to Acquire Craigslist*, FIN. TIMES, Dec. 9, 2009, <https://www.ft.com/content/4630e366-e380-11de-8d36-00144feab49a> (stating that eBay bought craigslist stock in part to keep other Internet companies from being able to do so).

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 8 n.6.

ciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.”<sup>50</sup>

But embracing a “community service mission” is not inconsistent with “promot[ing] the value of a corporation for the benefit of its stockholders.”<sup>51</sup> In fact, the community service mission might be the precise reason that stockholders were reaping the benefit of a profitable company in the first place: customers liked the company’s mission. Ben & Jerry’s Ice Cream, for example, built its reputation on community connection. Ben & Jerry’s began as a small start-up looking to expand its business, and over time, the company began to grow.<sup>52</sup> Along with this growth, the company embraced environmental causes and created a foundation giving seven and a half percent of pretax profits for distribution to worthy causes.<sup>53</sup> Of course, the company would not likely have any value if the ice cream were bad (just as craigslist would have no value if it did not work to sell things), but the company philosophy helped build the brand.

Ben & Jerry’s grew to the point that it is now a wholly owned subsidiary of Unilever.<sup>54</sup> The company has a three-tiered mission statement,<sup>55</sup> which includes a social mission, a product mission, and an economic mission. The economic mission of Ben & Jerry’s is “[t]o operate the Company on a sustainable financial basis of profitable growth, increasing value for our stakeholders and expanding opportunities for development and career growth for our employees.”<sup>56</sup>

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<sup>50</sup> *Id.* at 34.

<sup>51</sup> *Id.* at 8 n.6, 34.

<sup>52</sup> *About Us*, BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/about-us>.

<sup>53</sup> *Id.*

<sup>54</sup> *See* UNILEVER, <https://www.unilever.com>.

<sup>55</sup> *Our Values*, BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/values>.

<sup>56</sup> *Id.*

Furthermore, the company explains:

Capitalism and the wealth it produces do not create opportunity for everyone equally. We recognize that the gap between the rich and the poor is wider than at any time since the 1920's. We strive to create economic opportunities for those who have been denied them and to advance new models of economic justice that are sustainable and replicable.<sup>57</sup>

Is Ben & Jerry's just as vulnerable as Craigslist to a shareholder complaint? Obviously not directly, because Unilever owns all the shares. But should Unilever be permitted to allow Ben & Jerry's to operate in this manner? There is now a risk that Unilever's shareholders could have a legitimate complaint. After all, if the use of the corporate form for such goals is improper, it should be an improper use of Unilever's assets, too. Unilever could seek to accomplish Ben & Jerry's goals through a variety of other mechanisms, such as the use of gifts to a nonprofit entity or forming a foundation.<sup>58</sup> But if the use of the corporate form to pursue Ben & Jerry's goals without the primary stated goal of profiting for the shareholders is improper, this is an instance where form would triumph over substance under the *eBay* standard.

Perhaps the answer instead lies in the size of the investment or the amount of money available to be made. That is, Ben & Jerry's is a small portion of Unilever, so Unilever shareholders would not have too much to complain about.<sup>59</sup> Regardless of the decision, Ben & Jerry's is a small part of the overall parent entity.

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<sup>57</sup> *Ben & Jerry's*, UNILEVER, <https://www.unileverusa.com/brands/our-brands/ben-and-jerrys.html> (last visited Sept. 12, 2017).

<sup>58</sup> See, e.g., *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953).

<sup>59</sup> There are scholars who view Unilever's acquisition of Ben & Jerry's as a bad thing for a different reason, claiming that "[w]hen large corporations acquire social enterprises, they sever the connection between these smaller entities and the communities they were

Chancellor Chandler noted that “[i]f Jim and Craig were the only stockholders affected by their decisions, then there would be no one to object. eBay, however, holds a significant stake in craigslist, and Jim and Craig’s actions affect others besides themselves.”<sup>60</sup> Perhaps it is this “significant stake” that is the problem.<sup>61</sup> That is, if the decision pursued seems significant enough (or the potential loss of not pursuing the apparently more profitable end is great enough), then the Delaware court will step in and provide its own judgment. If so, it seems to mean that the business judgment rule can be rebutted in another way, in addition to showing fraud, self-dealing, and illegality—by showing the likely profitability of choosing another course.

Beyond that, the decision suggests that entity purpose is tested differently based on ownership. That is, Ben & Jerry’s can do as a subsidiary of a large company what it could not do as a stand-alone entity. That cannot be the state of Delaware law.

A more recent company decision helps demonstrate that the *eBay* decision may be impacting how companies publicly explain company decisions. In February 2015, CVS/Caremark announced that the company would no longer sell tobacco products in its 7,600 U.S. pharmacies. The entity estimated that it would lose about \$2 billion in revenues from the decision. CVS managed the announcement well, and the company received generally good press about the decision.<sup>62</sup>

On its face, this is a reasonable decision and the board appears to have properly exercised its authority to set CVS stores up for long-term success. The company tried to maximize the feel-good story of the deci-

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intended to serve.” Joanne Bauer & Elizabeth Umlas, *Do Benefit Corporations Respect Human Rights?*, STANFORD SOC. INNOVATION REV., Fall 2017, at 27, 32, available at [https://ssir.org/articles/entry/do\\_benefit\\_corporations\\_respect\\_human\\_rights](https://ssir.org/articles/entry/do_benefit_corporations_respect_human_rights). As this article explains, this is not always true, or at least, it does not have to be.

<sup>60</sup> *eBay*, 16 A.3d at 34.

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Ronnie Cohen, *CVS Decision to Stop Selling Cigarettes Changed Customers’ Lives*, HUFFPOST (Mar. 21, 2017), [https://www.huffingtonpost.com/entry/cvs-decision-to-stop-selling-cigarettes-changed-customers-lives\\_us\\_58d141a0e4b00705db52d501](https://www.huffingtonpost.com/entry/cvs-decision-to-stop-selling-cigarettes-changed-customers-lives_us_58d141a0e4b00705db52d501).



sion,<sup>63</sup> but that message was noticeably tempered by CVS when it also explained the profit-seeking role of the decision with the announcement.<sup>64</sup> It seems apparent that CVS's board (or their counsel) read *eBay v. Newmark*.<sup>65</sup>

The CVS announcement had two components. First, the consumer component<sup>66</sup>—for the “aren’t-they-great?” response:

We have about 26,000 pharmacists and nurse practitioners helping patients manage chronic problems like high cholesterol, high blood pressure and heart disease, all of which are linked to smoking,’ said Larry J. Merlo, chief executive of CVS. ‘We came to the decision that cigarettes and providing health care just don’t go together in the same setting.’<sup>67</sup>

Second, was the business-judgment-rule spin—a/k/a the “hey-we’re-not-craigslist<sup>68</sup>-or-Ford”<sup>69</sup>—statement:

The decision to exit the tobacco category does not affect the company's 2014 segment operating profit guidance, 2014 EPS

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<sup>63</sup> See George Anderson, *Can CVS Justify Its No-Tobacco Decision Beyond the Great PR?*, FORBES (Feb. 5, 2014), <https://www.forbes.com/sites/retailwire/2014/02/05/can-cvs-justify-its-no-tobacco-decision-beyond-the-great-pr/#6950cf23fe0d>.

<sup>64</sup> See Daniel Gross, *CVS Quits Tobacco to Become a Medical Giant*, DAILYBEAST (Feb. 5, 2014), <https://www.thedailybeast.com/cvs-quits-tobacco-to-become-a-medical-giant>.

<sup>65</sup> See *eBay*, 16 A.3d at 1.

<sup>66</sup> See Stephanie Strom, *CVS Vows to Quit Selling Tobacco Products*, N.Y. TIMES (Feb. 5, 2014), [https://www.nytimes.com/2014/02/06/business/cvs-plans-to-end-sales-of-tobacco-products-by-october.html?\\_r=1](https://www.nytimes.com/2014/02/06/business/cvs-plans-to-end-sales-of-tobacco-products-by-october.html?_r=1).

<sup>67</sup> *Id.*

<sup>68</sup> See Smith, *supra* note 13.

<sup>69</sup> See Dodge, 170 N.W. at 668.

guidance, or the company's five-year financial projections provided at its December 18th Analyst Day. The company estimates that it will lose approximately \$2 billion in revenues on an annual basis from the tobacco shopper, equating to approximately 17 cents per share. Given the anticipated timing for implementation of this change, the impact to 2014 earnings per share is expected to be in the range of 6 to 9 cents per share. The company has identified incremental opportunities that are expected to offset the profitability impact. This decision more closely aligns the company with its patients, clients and health care providers to improve health outcomes while controlling costs and positions the company for continued growth.<sup>70</sup>

Although a company may choose to do the second part to placate investors, a company should do so because that is how they want to do business, and not because of the recent language used by the Delaware courts. The proper application of the business judgment rule is as an abstention doctrine<sup>71</sup>—absent conflicts of interest, fraud, or illegality, CVS should be able to make this decision without further justification.<sup>72</sup> The court should abstain, but courts seem to want more.

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<sup>70</sup> *CVS Caremark to Stop Selling Tobacco at all CVS/Pharmacy Locations*, PR NEWSWIRE, (Feb. 05, 2014) <https://www.prnewswire.com/news-releases/cvs-caremark-to-stop-selling-tobacco-at-all-cvsparmacy-locations-243662651.html>.

<sup>71</sup> *See* BAINBRIDGE, *supra* note 7, at § 6.1. Some view the business judgment rule as a standard of review rather than an abstention doctrine, and while the outcome is usually the same, the latter is the better course. *See id.*

<sup>72</sup> *See id.*

Chancellor Chandler wanted more. He was not satisfied that craigslist was profitable or that the company had achieved market-leading status through its chosen course of operations:

craigslist's unique business strategy continues to be successful, even if it does run counter to the strategies used by the titans of online commerce. Thus far, no competing site has been able to dislodge craigslist from its perch atop the pile of most-used online classifieds sites in the United States. craigslist's lead position is made more enigmatic by the fact that it maintains its dominant market position with small-scale physical and human capital. Perhaps the most mysterious thing about craigslist's continued success is the fact that craigslist does not expend any great effort seeking to maximize its profits or to monitor its competition or its market share.<sup>73</sup>

For Chancellor Chandler and Delaware courts, rather than abstaining—or looking for self-dealing—they are now looking behind the motive of the decision making. As such, CVS had to go further to show where their decision fit within their profit-making scenario. Now Delaware Supreme Court Chief Justice Strine agrees. Strine states, “[T]he corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.”<sup>74</sup>

Chief Justice Strine immediately seeks to soften the blow by explaining, “The directors, of course, retain substantial discretion, outside the context of a change of control, to decide how best to achieve that

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<sup>73</sup> See *eBay*, 16 A.3d at 8.

<sup>74</sup> Leo E. Strine, Jr., *Essay: Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).

goal and the appropriate time frame for delivering those returns.”<sup>75</sup> The problem is that this qualifier does not ring true if you add this philosophy together with the *eBay* decision, which appears to require “great effort” to maximize profits,<sup>76</sup> or monitor competition or market share, as opposed to pursuing a corporate philosophy that creates and maintains profitability and market leadership.

It is worth noting here that my concern about courts second guessing managers in this way has been implied to be a view coming from the political (or at least ideological) left.<sup>77</sup> That is inaccurate. If anything, this critique comes from a conservative perspective. That is, when courts substitute their judgment for the decisions of directors, government is interfering in what should remain in the control of private citizens. Delaware law, and business law general, should tread lightly on such decisions, which (again) is why the business judgment rule should be applied as an abstention doctrine.<sup>78</sup>

Thus, this is not about corporate social responsibility (“CSR”).<sup>79</sup> This is about director primacy and keeping the courts out of the boardroom as much as possible.<sup>80</sup> CVS should be able to decide to drop tobacco if they wish, just as craigslist should be able to decide that it wants to stay profitable and be a market leader forever. If long-term success, in the board’s judgment, means not selling cigarettes or not monetizing and

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<sup>75</sup> *Id.*

<sup>76</sup> *eBay*, 16 A.3d at 8.

<sup>77</sup> See Strine, *supra* note 74, at 149–50 n.44 (discussing the views of “liberal commentator and lawyer” Maxwell S. Kennerly and citing Joshua P. Fershee, *The Wake of the eBay Decision: Is Ben & Jerry’s Next?*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Dec. 6, 2010), [http://lawprofessors.typepad.com/business\\_law/2010/12/the-wake-of-the-ebay-decision-is-ben-jerrys-next-.html](http://lawprofessors.typepad.com/business_law/2010/12/the-wake-of-the-ebay-decision-is-ben-jerrys-next-.html)).

<sup>78</sup> See BAINBRIDGE, *supra* note 7, at § 6.1.

<sup>79</sup> See *Corporate Social Responsibility*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/corp-social-responsibility.asp> (last visited Sept. 12, 2017).

<sup>80</sup> See Stephen M. Bainbridge, *Director Primacy*, UCLA, LAW-ECON RESEARCH PAPER SERIES No. 10-06. (May 25, 2010), <https://ssrn.com/abstract=1615838>.

not taking risks of a boom and bust, that should be a reasonable business decision beyond the reach of the courts.

To illustrate this point: it cannot be that case that Boston Market<sup>81</sup> and Krispy Kreme<sup>82</sup> had to expand as fast as possible and seek as much profit as they could in the near term. With the benefit of hindsight, the expansion model both pursued was a disaster. Directors are supposed to be in charge and make these type of decisions, not the shareholders, and not the courts. Because the business judgment rule is properly viewed as an abstention doctrine,<sup>83</sup> courts should stay out of it unless there is a strong indication of a conflict of interest, fraud, or illegality.

CVS took the proper steps to minimize the risk of a court intervention. They should not, however, have to justify that decision to anyone but their shareholders when it is time for director elections. Companies should be free to pursue their course of business for any lawful purpose without courts second guessing their motives absent a requisite showing that directors' business judgment should not apply.<sup>84</sup> That alone could prove harmful in developing a company's image for consumers, and that risk of negative profit impact should be sufficient to make clear that director primacy should be respected.

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<sup>81</sup> See Don Daszkowski, *History of Boston Market*, THE BALANCE (Apr. 28, 2017), <https://www.thebalance.com/history-of-boston-market-1350952>.

<sup>82</sup> See *Learning from the Franchising Mistakes of Failed Krispy Kreme*, MORE BUSINESS, (Jan. 27, 2010), <http://www.morebusiness.com/franchise-risks>.

<sup>83</sup> See Stephen Bainbridge, *The Business Judgment Rule is NOT a Standard of Review*, PROFESSOR BAINBRIDGE (Jan. 31, 2011), <http://www.professorbainbridge.com/professorbainbridge.com/2011/01/this-is-the-sort-of-arrant-nonsense-about-the-business-judgment-rule-up-with-which-i-will-not-put.html>.

<sup>84</sup> See Jena Martin, *Business and Human Rights: What's the Board Got to Do With It?*, 2013 Ill. L. Rev. 959, 995 ("[G]iving boards the leeway to examine business and human rights issues may go a long way towards mitigating 'short-termism.'").

### III. THE EMERGENCE OF THE SOCIAL BENEFIT ENTITY

In parallel to the “business as profit seeker” movement described above, there has been a growing desire to see businesses be more socially responsible and promote public welfare.<sup>85</sup> The corporate social responsibility movement emerged to try to hold businesses accountable and promote a public welfare obligation. In addition, voluntary certification programs now allow businesses to seek external review to demonstrate to consumers their commitment to social responsibility.

State governments have now stepped into the action, creating new laws allowing for social benefit entities like benefit corporations and low-profit limited liability companies.<sup>86</sup> These entities give those in charge of the entity greater latitude to consider stakeholder needs and external concerns in deciding how to operate the business. These goals are admirable, especially as a voluntary option, but the existence of these entities poses a threat to decision making for those in charge of traditional entities.

A benefit corporation is similar to, although different from, the low-profit limited liability company (or L3C), which only a few states adopted. Unlike the benefit corporation, L3Cs have not taken off. In fact, North Carolina abolished its 2010 L3C law as of January 1, 2014.<sup>87</sup> As both the benefit corporation and the L3C are generally not going to be tax-exempt for federal income tax purposes, the state law distinction makes a difference to the IRS. The benefit corporation is presumably going to be taxed as a C Corporation, unless it qualifies and makes the election to be an S Corp (and there’s nothing in the legislation that sug-

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<sup>85</sup> See GEORGE A. STEINER, *BUSINESS AND SOCIETY* 164 (1971) (“Business is and must remain fundamentally an economic institution, but . . . it does have responsibilities to help society achieve its basic goals and does, therefore, have social responsibilities.”).

<sup>86</sup> See, e.g., DEL. CODE ANN. tit. 8, § 362 (2015). Note also that cooperatives are another option for a community benefit entity, but the cooperative’s long history does not have the same overlap or create the same challenges as public benefit entities. See Elaine Waterhouse Wilson, *Cooperatives: The First Social Enterprise*, 66 DEPAUL L. REV. 1013, 1016 (2017) (“A cooperative is a business entity that is owned and managed by its members—those individuals for whose benefit the cooperative was organized.”).

<sup>87</sup> Law of January 1, 2014, ch. 57D, § 20, 2014 N.C. Laws 2, 2013-157 (repealed 2013).

gests a benefit corporation could not qualify as an S Corp as a matter of law). By contrast, the L3C, by default will be taxed as a partnership, although again it could conceivably check the box to be treated as a C Corp (and even then making an S election). The choice of entity determination, as is usually the case, would be made, in part, based upon the planning needs of the individual equity holders and the potential for venture capital or an IPO in the future.

Social benefit entities, as demonstrated by the Model Benefit Corporation Legislation, are about “purpose.”<sup>88</sup> The model legislation provides that benefit corporations must seek a “general public benefit,” which means “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”<sup>89</sup> That “general public benefit purpose” standard is, as Professor J. Haskell Murray explains, “both too vague and too confining.”<sup>90</sup> It is too vague “because it does not provide a practical way for directors to make decisions.”<sup>91</sup> And it is too confining because making directors in such entities “consider an unprioritized group of stakeholders while also requiring [an entity] purpose that looks at societal and environmental impact *as a whole* is not only unworkable, but could also exclude corporations with a more specific mission.”<sup>92</sup>

Beyond these reasons, though, there is a more compelling reason to disfavor the existence of social benefit entities. In 2014, my colleague

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<sup>88</sup> See MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a) (2014).

<sup>89</sup> J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 549 (2016) (citing MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a) (2014), available at [http://benefitcorp.net/sites/default/files/documents/Model\\_Benefit\\_Corp\\_Legislation.pdf](http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf)).

<sup>90</sup> J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 30 (2012).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 32.

Elaine Wilson and I wrote *March of the Benefit Corporation: So Why Bother? Isn't the Business Judgment Rule Alive and Well?*<sup>93</sup> We observed:

Regardless of jurisdiction, there may be value in having an entity that plainly states the entity's benefit purpose, but in most instances, it does not seem necessary (and is perhaps even redundant). Furthermore, the existence of the benefit corporation opens the door to further scrutiny of the decisions of corporate directors who take into account public benefit as part of their business planning, which erodes director primacy, which limits director options, which can, ultimately, harm businesses by stifling innovation and creativity. In other words, this raises the question: does the existence of the benefit corporation as an alternative entity mean that traditional business corporations will be held to an even stricter, profit-maximization standard?<sup>94</sup>

As discussed earlier, the erosion of director primacy and a more intrusive application of the business judgment rule is already a concern for business-leader decision making. With the addition of social benefit entities, courts are even more likely to question the business purpose of traditional entities. Although the risks these new entities create could be

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<sup>93</sup> See Joshua Fershee & Elaine Waterhouse Wilson, *March of the Benefit Corporation: So Why Bother? Isn't the Business Judgment Rule Alive and Well?*, Part III, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Sept. 23, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/09/march-of-the-benefit-corporation-so-why-bother-isnt-the-business-judgment-rule-alive-and-well-part-i.html](http://lawprofessors.typepad.com/business_law/2014/09/march-of-the-benefit-corporation-so-why-bother-isnt-the-business-judgment-rule-alive-and-well-part-i.html).

<sup>94</sup> *Id.*



addressed through law, passing more laws and regulations to fix the things we added is not especially efficient.<sup>95</sup>

Entity purpose should be viewed through the principle of director primacy.<sup>96</sup> Directors are obligated to run the entity for the benefit of the shareholders, but, absent fraud, illegality, or self-dealing, the directors should decide what actions are for the benefit of shareholders. As such, the profit-maximization norm for traditional entities remains intact, but absent some reason to question director motives, neither courts nor shareholders should decide what “profit maximizing” means.

Some social benefit entity statutes predicted this risk and actively stated that traditional entities are not in any way impacted by the creation of the new statute. Tennessee, for example, provides the following in its benefit corporations statute:

This chapter shall not affect a statute or other rule of law applicable to a domestic business corporation that is not a for-profit benefit corporation, except as provided in § 48-28-104. Specifically, no implication is made by, and no inference may be drawn from, the enactment of this chapter as to whether, in exercising their duties, the officers or directors of a domestic business corporation that is not a for-profit benefit corporation may consider the impact of the corporation's transactions or other conduct on:

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<sup>95</sup> See Joshua Fershee, *Fake News! Trump's LLCs Are Not Corporations*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (May 2, 2017), [http://lawprofessors.typepad.com/business\\_law/2017/05/fake-news-trumps-llcs-are-not-corporations.html](http://lawprofessors.typepad.com/business_law/2017/05/fake-news-trumps-llcs-are-not-corporations.html).

<sup>96</sup> See Joshua Fershee, *CVS: More Evidence Courts are Creeping into the Boardroom*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Feb. 11, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/02/cvs-more-evidence-courts-are-creeping-into-the-boardroom.html](http://lawprofessors.typepad.com/business_law/2014/02/cvs-more-evidence-courts-are-creeping-into-the-boardroom.html).

- (1) The interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders; or
- (2) Any public benefit or public benefits identified in its charter.<sup>97</sup>

This language provides little comfort given the direction at least Delaware law has taken with regard to the business judgment rule and director primacy. Furthermore, despite the language of the statute, the existence of an entity type that specifically allows profit seeking entities to pursue public benefit cannot help but suggest that entities not formed as benefit entities have a different purpose. If nothing else, these entities can be expected to heighten courts' sensitivity to claims that those in charge of a traditional business entity are not properly or adequately seeking profit.

The risk of the social benefit entity serving as a problematic foil for traditional entities is exacerbated by the fact that states have flocked to pass such statutes, but relatively few entities have adopted the entity form.<sup>98</sup> In addition, Professor Joan MacLeod Heminway's research was unable to assess a publicly held U.S. benefit corporation,<sup>99</sup> and the lack of such entities—there is only such company in existence<sup>100</sup>—could lead

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<sup>97</sup> TENN. CODE ANN. § 48-28-109 (2016).

<sup>98</sup> Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U.L. REV. 611, 613 (2017).

<sup>99</sup> *Id.* at 615. Etsy is a certified B Corp, but it is not a benefit corporation. Haskell Murray, *Etsy to Drop B Corp Certification*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Dec. 1, 2017), [http://lawprofessors.typepad.com/business\\_law/2017/12/etsy-to-drop-b-corp-certification.html](http://lawprofessors.typepad.com/business_law/2017/12/etsy-to-drop-b-corp-certification.html).

<sup>100</sup> Heminway, *supra* note 98, at 615 n.16. Laureate Education, Inc., is the first publicly traded benefit corporation. See Press Release, Laureate International Universities, Laureate Education Announces Closing of its Initial Public Offering (Feb. 6, 2017), <http://www.laureate.net/NewsRoom/PressReleases/2017/02/Laureate-Education-Announces-Closing-of-its-Initial-Public-Offering>; Haskell Murray, *First Standalone Publicly Traded Benefit Corporation - Laureate Education*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Feb. 10, 2017), [http://lawprofessors.typepad.com/business\\_law/2017/02/first-standalone-publicly-traded-benefit-corporation-laureate-education-.html](http://lawprofessors.typepad.com/business_law/2017/02/first-standalone-publicly-traded-benefit-corporation-laureate-education-.html).

courts to determine that publicly traded entities do not have the latitude to pursue public benefit that is not directly and clearly linked to profit motive. As Professor Heminway explains, “the benefit corporation structure places pressure on the intersection between the corporation’s benefit purpose and managerial conduct.”<sup>101</sup> Similarly, the benefit corporation puts pressure on the intersection of profit seeking and the traditional corporation.

This reality is playing out with perhaps the highest profile B Corp, Etsy, preparing to drop its B Corp certification rather than reincorporate as a Delaware public benefit corporation statute.<sup>102</sup> B Lab tried to help Etsy by modifying a deadline for converting to a public benefit corporation,<sup>103</sup> but Etsy’s new management team still determined that the desire to increase sales was not being assisted by the B Corp certification, despite the company’s “best intentions.”<sup>104</sup>

Etsy provides a perfect example of this tension, as the new management team considers whether the company’s sales mission is compatible with other goals. As a public company, these tensions are especially acute. An early employee of the company claimed, “There’s only so much wiggle room as a public company. If you really want to build a company that works for people and the planet, capitalism isn’t the solution.”<sup>105</sup> It is a reality that public companies face media and analyst pressures that private companies often do not, and it is here that the public benefit entity causes the most confusion.

Before public benefit entities, Etsy would likely have been viewed simply as a company that had intertwined its sales mission with its public benefit mission as a means to run a good company. But, when

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<sup>101</sup> Heminway, *supra* note 98, at 646.

<sup>102</sup> David Gelles, *The Revolution at Etsy*, N.Y. TIMES, Nov. 26, 2017, at BU1, available at [https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html?\\_r=0](https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html?_r=0).

<sup>103</sup> Murray, *supra* note 99.

<sup>104</sup> Gelles, *supra* note 102, at BU1.

<sup>105</sup> *Id.*

earnings are not as good as analysts hope, the benefit entity overlay raises questions about whether the public benefit part of the entity's mission is the reason earnings lagged. In Etsy's case, the B Corp requirement of reincorporation helped highlight this concern, leading the company to pull back on its public benefit mission, which is a predictable and unsurprising, if unfortunate, response from management.

#### **IV. CONCLUSION: ERODING DIRECTOR PRIMACY AND SOCIAL BENEFIT ENTITIES DO NOT MIX**

The evolving views of director primacy and application of the business judgment rule mark significant changes in the law and, in some cases, are doctrinally unsound.

First, the *eBay* case may have added options to rebut the business judgment rule or switched that burden to directors, forcing them to affirmatively assert profit motive. Under traditional business judgment rule standard, it is the plaintiff's job to show fraud, illegality, or self-dealing. It is at least arguable that *eBay* and Chief Justice Strine are suggesting that there is a new way to rebut the business judgment rule: in addition to showing fraud, self-dealing, and illegality, the rule can be rebutted by showing the likely profitability of choosing another course, at least if the profitability is potentially significant. This is significant change in application of the business judgment rule and an improper one.

Another way to look at evolving Delaware law would be to view it as burden shifting, with courts now requiring directors (as fiduciaries) to justify their decisions without any showing by the plaintiff of the things traditionally necessary to rebut the business judgment rule in the first place. That is, simply showing directors had an unwillingness to pursue additional profit and a lack of an affirmative statement that declining to pursue a potentially profitable course of action is, in fact, profit based, could be sufficient. This is a new way to view the business judgment rule, and it cannot help but having a chilling effect on directors' assessment of business opportunities. It cannot be that simply not pursuing risk, without more, is a breach of a fiduciary duty.

As noted above, the new jurisprudence could force directors to state a position about profit seeking that actually serves to undermine their business-based motive and public relations objectives. This improperly usurps director power and potentially harms the entity and, in

turn, the shareholders. Alternatively, it could motivate directors to pursue risks that they would not otherwise take simply because of perceived risk or a noisy, risk-loving shareholder.

Finally, to be doctrinally sound, the rationale for the business judgment rule must apply to all director decisions that are not a result of a breach of fiduciary duty. That is, if the rule does not work in both directions—where the directors pursue risk and fail or eschew risk and do not profit—the explanation of the doctrine (or the application of it) is wrong.

Thus, if the directors of an entity pursue rapid growth that fails miserably, but that decision did not rise to the level of gross negligence, the director should not face liability. Similarly, if directors choose not to pursue a path that could prove lucrative, even wildly so, they should not face liability, absent a showing of self-dealing. The former appears clear under Delaware law, but the latter is less so. As noted above, what it means to be “profit maximizing” is to be defined by the directors, absent a breach of fiduciary duty. Similarly, the purpose of the corporation should be defined by the directors under the same standard.

The protections of the business judgment rule are intended to run both ways, but the new-found prevalence of social benefit entity statutes has made this reciprocal nature less clear.<sup>106</sup> There is an emerging sense that the business judgment rule exists to protect decisions (and presume good faith) where risk (and loss) follows, while choosing socially responsible (or even just risk averse) paths seems to allow a presumption of bad faith or waste.

Before social benefit entities emerged, directors were deemed to be the ones in charge of the company. That should still be the case. Courts should work to ensure they apply the same standard to director decisions regardless of whether the decision is clearly profit seeking or clearly not, because directors are in charge of the company. Before looking behind a decision, plaintiffs must show courts why the directors should be second guessed. The existence of another entity form, social

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<sup>106</sup> See, e.g., DEL. CODE ANN. tit. 8, § 362 (2015).

benefit or otherwise, should not change the duties of directors of existing entities. If courts are not careful, however, those duties will change. And perhaps they already have.