



**The Role of the Judiciary in Corporate Law, Corporate
Governance and Economic Goals**

by

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**Company Law Reform in OECD Countries
A Comparative Outlook of Current Trends**

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I. Models of Organic Corporate/Company Law

- A. Origins of U.S. law
- B. Developments of the Twentieth Century in U.S. corporation law
- C. The Delaware Model
 - 1. Enabling statutory framework
 - 2. Judge-made law—the Business Judgment Rule
 - 3. Private ordering—loyalty/care limits
 - 4. Manifestation of economic rationale
- D. The role of the board of directors of a Delaware corporation
 - 1. Encourage management to take risks (evaluation of risk/reward ratio)
 - 2. Monitor managers
 - 3. Constraining managers
- E. Role of stockholders of a Delaware corporation
 - 1. Approval of organic change
 - 2. Voting for directors
 - 3. Monitoring and commenting on director conduct
 - 4. Litigation
- F. Brief summary of some comparisons with the code model of company law
 - 1. Certainty?
 - 2. Flexibility?

II. The Emergence of U.S. Corporate Governance Models

- A. Distinguish corporate law and corporate governance
- B. How judges influence corporate governance
- C. The phenomenon of norms (non-legally enforceable rules and standards)
- D. Confirmation of norms in corporate doctrine (i.e. corporate law or corporate governance?)

III. The Economic Aspects of Corporate Doctrine

- A. Impact of legal environment on raising capital and profits
- B. Distinguish economic consequences of:
 - 1. The enabling act/private ordering/judicial oversight model
 - 2. A regulatory model
 - (a) Code model
 - (b) Securities laws
- C. What advantages/disadvantages in taking an economic approach to company law?

IV. Enterprise vs. Ownership Decisions and Actions

A. Discretion of management

1. Enterprise decisions

- (a) What business strategies—Kamen/Amex
- (b) Where to locate plants
- (c) Acquisitions—size?
- (d) Dividends? Stock splits? Reverse splits?

2. Ownership

- (a) Issuance of stock
- (b) Voting rights
- (c) Mergers, dissolutions, sale of company

B. Vote or veto by directors?

C. Vote by stockholders

D. Oversight

E. Legal redress

V. Midstream Governance v. End Game Rules

A. Pervasive BJR - midstream governance

- 1. Risk-taking
- 2. No micromanagement
- 3. Mostly applies to enterprise decisions
- 4. May apply to some ownership decisions
- 5. Courts not superdirectors
- 6. Limit - fraud or illegality
- 7. Good faith/waste

B. End game

- 1. Ownership
- 2. Takeover
- 3. Merger
- 4. Enhanced BJR
- 5. Sale of company - best price

C. 1985 watershed year

VI. Confluence/Divergence of Stockholder Interests

- A. Is liberal allowance for private ordering anathema or beneficial to stockholder interests?
- B. Economic coherence in judicial decisionmaking

- C. Do norms have any teeth? Do they need teeth?
- D. What corporate governance models advance the economic interests of stockholders? Who are the stockholders? What are their interests? Selling stock vs. staying and fighting management? Back to norms? Is the U.S. state-based (franchise) model vs. federal model anathema or beneficial to:
 - 1. Raising capital?
 - 2. Stockholder interests?
 - 3. Agency costs?
- E. What about the interests of other “stakeholders”?
 - 1. Takeover era of the 1980s
 - 2. Anti-takeover statutes of some states

VII. Specific Applications of Corporate Law

- A. Capital structure
 - 1. “Legal capital”
 - 2. Modern doctrine
 - 3. Raising capital
 - (a) Common stock
 - (b) Preferred stock
 - (c) Debt
 - (d) Convertible instruments
 - 4. Private ordering
- B. Voting rights
- C. Business Judgment Rule
- D. Fiduciary duties
 - 1. Is due care adherence basically nonlegal?
 - 2. Loyalty
 - 3. Good faith
- E. The role of independence of directors
 - 1. For what purpose?
 - 2. Should there be guidelines?
- F. Liability litigation
 - 1. Personal liability
 - 2. Transactional justification

3. Exoneration (Delaware's section 102(b)(7))
4. Derivative suits
5. Direct/class suits

G. Oversight

H. Illustrative cases

1. Business Judgment (*Aronson/Brehm*)
2. Due care (*Smith v. VanGorkom*)
3. Loyalty (*Guth v. Loft; Kahn v. Lynch/Tremont*)
4. Good faith (*Malone v. Brincat*)
5. Oversight (*Grahm, Lutz/Francis, Caremark*)
6. Takeover (*Unocal/Moran/Paramount*)
7. Voting rights (*Blasius/Loudon/Williams v. Geier*)
8. Preferred stock (*Kaiser*)
9. Disclosure (*Arnold/Malone*)
10. Private ordering (*Williams v. Geier*)
11. Independence (*Brehm/Rales*)

VIII. Conclusion

A. Judge-made law and judicial oversight works in DE/U.S.

B. Flexibility permits

1. Risk-taking
2. Private ordering
3. Innovation

C. Stockholder assurances through

1. Statutory framework
 - (a) Management/board of directors
 - (b) Issuance of stock
 - (c) Capital impairment (not)
 - (d) Dividends
 - (e) Certificate/Bylaws
 - (f) Amendments
 - (g) Merger
 - (h) Dissolution

2. Corporate law fiduciary duties

- (a) Due care
- (b) Loyalty
- (c) Good faith

D. Globalization of corporate law/corporate governance?