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ARTICLES: WHY ILLINOIS? A COMPARISON OF ILLINOIS AND DELAWARE CORPORATE JURISPRUDENCE

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BIO:

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SUMMARY:

... However, over the years, corporations residing in Illinois increasingly organized under the laws of other states, particularly Delaware. ... The Delaware Duty of Care Cases ... Two major issues regarding the duty of loyalty and the duty of care were presented to the Delaware Supreme Court in *Technicolor*. ... Mesa Petroleum had made a front loaded cash tender offer for 64 million shares, or approximately 37%, of Unocal's outstanding stock at a price of \$ 54 per share. ... The board in *Revlon* met several times during the course of the *Pantry Pride* tender offer which began at \$ 47.50 per share. ... Nevertheless, the Delaware Supreme Court found that neither the original merger agreement nor the revised tender offer for Warner constituted putting Time in play. ... In response, Viacom discussed with Paramount raising its tender offer to \$ 80 per share also to be followed by a second step stock-for-stock merger of equivalent value. ... Later on November 6, Viacom unilaterally raised its tender offer to \$ 85, and on November 12, QVC increased its offer to \$ 90 per share. ... Consequently, the Delaware legislature did nothing to provide an explicit remedy to enforce a valid voting agreement. ...

TEXT:

[*1]

INTRODUCTION

In the early 1980s, then Secretary of State, now Governor, Jim Edgar appointed a commission to study and update the 1933 Illinois Business Corporation Act. At the time of its enactment, the 1933 Act was hailed as the most modern of state statutes and in fact, was the base for the Model Business Corporation Act. n1 However, over the years, corporations residing n2 in Illinois increasingly organized under the laws of other states, particularly Delaware. n3 By reviewing and revising the 1933 Act, Illinois hoped to stem the tendency to incorporate in other jurisdictions and to encourage corporations residing in Illinois, but which had incorporated or reincorporated n4 in other states, to return to Illinois.

From a public policy standpoint, it made little sense for a corporation headquartered in Illinois, with all its plant and equipment located in Illinois, and its employees' living in Illinois, and with most of its customers and suppliers also located in Illinois, to be incorporated under the laws of another state. However, lawyers and businessmen are generally

not focused upon matters of public policy. Instead, their decision on where to incorporate is based on whether the laws in question promote efficiency and economy within the corporation.

Historically, one of the largest impediments to incorporation under Illinois law had been the provision in the 1870 Constitution which mandated [*2] cumulative voting. n5 However, because the 1970 Constitution eliminated this constitutional mandate, n6 incorporation in Illinois has now become more attractive. Not only was cumulative voting no guarantee of minority representation, n7 it also precluded many potentially desirable techniques to protect minority shareholders. n8 Accordingly, the new 1983 Act sought to eliminate the impediment posed by cumulative voting. n9 In addition, the 1983 Act introduced a number of very positive and flexible provisions into Illinois statutory law. n10

Unfortunately, by the time the 1983 Act became effective, the takeover craze of the 1980s was in full bloom. n11 This craze led to a spate of litigation which challenged the defensive tactics that directors of corporations employed to neutralize the ever present specter of a tender offer n12 and led to a 500% and 200% increase in premiums for directors and officer's liability insurance in 1986 and 1987, respectively. n13 Also, at this time, the Delaware Supreme Court decided *Smith v. Van Gorkom*, n14 and exacerbated the ever increasing anxiety of members of corporate boards of [*3] directors with regard to their potential liability for such service. n15 Ever opportunistic, the Delaware legislature quickly responded by enacting legislation which provided the opportunity to limit director liability. n16 This director exculpation statute engendered a flurry of activity for other states to adopt comparable legislation. n17 Therefore, a primary determinant for choosing the state of incorporation became the availability of a director exculpation statute.

However, Illinois did not adopt a director exculpation statute. This was because the savings and loan fiasco was engendering widespread publicity about the competence of boards of directors of financial institutions in overseeing their operations. Unfortunately, the effect of Illinois' failure to adopt such a statute has increased the likelihood that corporations residing in Illinois will incorporate or reincorporate in other jurisdictions.

At the present time, a sluggish economy and a reappraisal of the initial free-wheeling lending policy that prevailed in the 1980s has led to some degree of sanity in the takeover market and a reduction in anxiety for corporate directors. In addition, Illinois has now added to its 1983 Business Corporation Act a director exculpation statute comparable to that of Delaware so that a major perceived disadvantage to incorporation in Illinois has now been mooted. n18 Accordingly, the focus on the bottom line invites reconsideration of whether the additional effort and expense of incorporation in another jurisdiction has merit, particularly considering the substantial developments in Illinois corporate law that have occurred in recent years.

The focus of this article will be to examine the cost and burdens of incorporating in another jurisdiction and to analyze the current state of Illinois statutory and case law as compared to that of other states, particularly Delaware. Such comparison bodes well for choosing Illinois as the state of incorporation. [*4]

I. THE PRICE PAID FOR DELAWARE INCORPORATION

Much has been written about the so-called advantages of incorporating in Delaware, such as a user friendly judiciary and a modern corporation code. However, in many of these areas, there is little difference between Illinois and Delaware and, in fact, Illinois today is the more hospitable state. But what are the disadvantages of Delaware incorporation? Today, there is increasing awareness that incorporation in Delaware is a two-edged sword.

A. The Tax Burden of Incorporating in Delaware

Many of the disadvantages of incorporating in another jurisdiction deal with cost and efficiency. These factors are of increasing importance in today's competitive economy. One obvious concern is the cost, in terms both of state taxes and of administrative time and effort, of dealing with two state jurisdictions. Incorporating in Delaware does not reduce Illinois taxes; it merely adds another tax burden which can be quite substantial. For a publicly held company with 30 million shares authorized, not merely outstanding, the Delaware annual franchise tax is \$ 150,000. Each of the four Illinois corporations which are traded on the New York Stock Exchange n19 would pay the \$ 150,000 maximum fee were they to reincorporate in Delaware. Numerous Illinois based companies that are now incorporated in Delaware pay the \$ 150,000 fee. In today's world, these Illinois corporations must seriously ask what they are buying for this \$ 150,000.

For a closely held company with less than 10,000 authorized shares, the Delaware annual franchise tax of \$ 90 is not particularly burdensome. But the costs do not stop here. Duplicate reports must be filed in each jurisdiction

entailing not just costs payable to the two respective states but additional costs in terms of internal administration and external lawyers' fees. n20

B. The Hidden Costs of Delaware Litigation

While Delaware proudly extols the so-called advantage of access to Delaware's sophisticated court system, Delaware is not quite so candid in recognizing the costs of Delaware litigation. Basically, these are two-fold: additional attorneys' fees and the exposure of directors to the jurisdiction of Delaware courts.

[*5] A Delaware corporation is, of course, subject to the jurisdiction of the Delaware courts. n21 When a corporation residing in Illinois is sued in Delaware, counsel in Illinois will normally recommend obtaining co-counsel in Delaware. Illinois counsel will be more or less actively engaged in the litigation; at a minimum, Illinois counsel will perform a supervisory role because the client's longstanding relationship is with Illinois counsel. The obvious result of having Illinois and Delaware counsel will be duplication of paper work and additional time and expense. There is no question that attorneys' fees will increase. Furthermore, litigation is always disruptive for corporate management. Litigation in another jurisdiction hundreds of miles away is even more disruptive and expensive.

Delaware has always sought to subject nonresident directors of Delaware corporations to the jurisdiction of Delaware courts. Originally, the stock sequestration procedure was used. According to one authority on Delaware law:

[Q] uasi in rem jurisdiction was obtained over defendants by seizure of their property, which forced them either to make a general appearance and submit to the court's jurisdiction or to forfeit the seized property. Usually the defendants' interests in shares of stock were seized, based on the fiction that shares of stock in a Delaware corporation have their situs in Delaware regardless of whether the stock certificates are located elsewhere. n22

However, the United States Supreme Court in *Shaffer v. Heitner*, n23 required that state claims of quasi in rem jurisdiction be evaluated according to the minimal contacts standard of *International Shoe*. n24 The *Shaffer* court held that jurisdiction predicated upon the statutory presumption of the presence of a nonresident's stock in Delaware did not meet the *International Shoe* test. n25 Delaware responded by enacting a director service statute. Under the statute, a nonresident director, by agreeing to serve in such capacity, is deemed to have consented to the appointment of the registered agent of the corporation, or the Secretary of State of Delaware, if there is no registered agent, as the director's agent upon whom process can be served. n26 The appointment applies to any suit in which the director is a [*6] proper party or in which the director is charged with a violation of his duties as a director. n27

The official synopsis of the amendment creating the above basis for jurisdiction sets forth the following policy:

Delaware has a substantial interest in defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them. In promoting that interest it is essential that Delaware afford a convenient and available forum for supervising the affairs of Delaware corporations and the conduct of directors of Delaware corporations. This legislation is designed to accomplish that objective. n28

Thus, should litigation involving the responsibilities of a director of a Delaware corporation ever ensue, attendance of the director in Delaware will be required. However, many directors, who are Illinois residents, would prefer to deal with the Illinois court system, both in terms of the applicable law, n29 and in terms of the time, the expense, and the inconvenience involved in out of state litigation.

II. THE DELAWARE JUDICIAL SYSTEM

The quality of the Delaware judicial system is often extolled as a major reason to incorporate in Delaware. Delaware lawyers like to point out that their court of chancery has no jurisdiction over criminal and tort cases which create huge backlogs in other judicial systems. n30 However, the circuit court of Cook County has its own chancery division, which likewise is not burdened with criminal and tort cases. Furthermore, in the other counties of Illinois, backlog problems are not a serious concern. Accordingly, the uniqueness of the Delaware chancery court in not being burdened with criminal and tort cases is not a substantial argument for Delaware incorporation.

Nevertheless, advocates for Delaware incorporation wax eloquent on the Delaware system. As Louis Black stated:

Indeed, the Court of Chancery has withstood the test of time. Moreover, its history and tradition and the trappings that come with it, and the human capital of its excellent judges, cannot be transplanted in an instant to some other jurisdiction as if by magic. The Court of Chancery is an institution [*7] unique to Delaware. Its very existence offers a further reason for corporations to choose to incorporate in Delaware. n31

In spite of this grandeur, there is no doubt most Illinois lawyers would forego the history and tradition and the trappings of the Delaware courts in exchange for the convenience of litigating in their home state with a judiciary that is responsive to local interests and not Delaware interests.

Moreover, the highly developed body of case lawⁿ³² that Delaware lawyers extol is not so consistent as they would suggest. One of the major arguments for choosing Delaware as the state of incorporation is that its case law is management oriented. Indeed, there are decisions in Delaware favoring management that are almost incredible from a rational perspective. For example, in *Aronson v. Lewis*,ⁿ³³ the Delaware Supreme Court held that an allegation that the defendant owned forty-seven percent of the outstanding shares of a publicly held corporation, and thereby controlled the board of directors, was insufficient to avoid the requirement of demand on the board in a derivative suit because control was not assured with less than fifty-one percent of the shares.

A. The Delaware Duty of Care Cases

The permissiveness of the Delaware judiciary at times apparently lulls some corporate counsel to sleep when it comes to giving sound advice; in reaction, the Delaware Supreme Court periodically reverses some of its earlier patterns and gives management, not merely a slap on the wrist, but rather, a boot elsewhere. For example, in *Smith v. Van Gorkom*,ⁿ³⁴ the Delaware Supreme Court held that the board of directors of Trans Union Corporation were grossly negligent in basing their agreement to sell Trans Union to the Pritzkers upon inadequate and erroneous information obtained during hasty deliberations.ⁿ³⁵ The court stated:

Without any documents before them e Board of Directors concerning the proposed transaction, the members of the Board were required to rely entirely upon Van Gorkom's 20-minute oral presentation of the proposal. No written summary of the terms of the merger was presented; the directors were given no documentation to support the adequacy of \$ 55 [*8] price per share for sale of the Company; and the board had before it nothing more than Van Gorkom's statement of his understanding of the substance of an agreement which he admittedly had never read, nor which any member of the board had ever seen.ⁿ³⁶

1. The Lack of Process in Van Gorkom

While the Van Gorkom case generated showers of outrage from the corporate bar, many corporate counsel would agree that the procedures followed by the board in Van Gorkom were lacking. For example, the transaction and the price were proposed by Van Gorkom himself.ⁿ³⁷ His price was apparently predicated upon an internal study that had been done a week before but which had been updated.ⁿ³⁸ The study upon which he had predicated the price of \$ 55 was based on an estimated range of \$ 50-\$ 60;ⁿ³⁹ whereas, by the board meeting held one week after Van Gorkom's initial discussions with Pritzker, the internal study had been revised to indicate a price of \$ 55 to \$ 65 per share.ⁿ⁴⁰

Moreover, only a week elapsed from the time Van Gorkom made his proposal to Pritzker until a board meeting was called to approve the transaction.ⁿ⁴¹ Van Gorkom never informed the board that he had suggested the priceⁿ⁴² and that members of management were opposed to the transaction.ⁿ⁴³ The entire board meeting lasted only two hours and the basis for the board's decision was basically the 20-minute oral presentation by Van Gorkom.ⁿ⁴⁴

Not only was the transaction approved by the board within a week after being proposed by Van Gorkom to Pritzker, but also it was signed the evening of the board meeting at the Chicago Lyric Opera without anyone on the board having seen the merger agreement.ⁿ⁴⁵ The holding of the supreme court that the board of directors had been grossly negligent is [*9] certainly supportable, even though the price offered was at a substantial premium.ⁿ⁴⁶

2. Act II: The Technicolor Case

Nevertheless, the shock created by Van Gorkom should pale by comparison to a decision reached this past year by the Delaware Supreme Court in *Cede & Company v. Technicolor, Inc.*ⁿ⁴⁷ According to the trial court in Technicolor, plaintiff contends that this case presents a compelling case for another administration of the discipline applied by the Delaware Supreme Court in *Smith v. Van Gorkom*.ⁿ⁴⁸ However, the trial court declined to administer such discipline and, in effect, modified Van Gorkom with some novel approaches to the traditional duty of care/duty of loyalty type analysis.ⁿ⁴⁹ But, on appeal, the Delaware Supreme Court was not so gentle toward the board of directors.

a. Factual Differences Between Van Gorkum and Technicolor

While factual differences were not the basis for the chancellor's finding for defendants, the facts in Technicolor were substantially different from the facts in Van Gorkom. First of all, the time frame extended over six weeks rather than one week. In addition, Technicolor, unlike Trans Union, was in financial difficulty.ⁿ⁵⁰ Its stock had dropped

from a high of \$ 22 to about \$ 8, partly because a planned expansion into a new line of business was turning out not to be profitable. n51 It was because of these difficulties that Perelman, on behalf of the MacAndrews & Forbes Group, approached Technicolor through one of its nonmanagement directors. n52 The initial figure mentioned by Perelman was \$ 15 per share, about twice the market price. n53 Perelman was informed that anything less than \$ 25 would not be satisfactory, n54 and eventually, the price was negotiated upward to \$ 23 before being submitted to the board of directors. n55

[*10] Two of the major shareholders, including the CEO, who together held about 14% of the shares, favored the transaction. An investment banker was hired to give a fairness opinion. n56 At the board meeting, the board of directors had the benefit of a presentation by outside counsel as well as an investment banking firm. n57 The investment banker provided a 78 page board book which was used to explain Technicolor's financial projections, stock price, and ownership data. n58

Similar to Van Gorkom, several members of Technicolor's board of directors were completely uninformed as to the proposed transaction prior to the board meeting. n59 However, in Van Gorkom, all of the outside board members were uninformed; n60 whereas, in Technicolor, several outside board members had some familiarity with the transaction. n61 Sullivan, who received a \$ 150,000 finders fee, was involved with the transaction from its inception, and at least two others, including a major shareholder and a taxattorney for the CEO, had been furnished some information about the transaction. n62

Thus, many counsel might conclude that the procedures in Technicolor met the Van Gorkom standard of being informed and acting with deliberation. First, while the board as a whole approved the transaction at its initial meeting, the transaction had been negotiated over an extended period of time by management, with the awareness of some of the outside board members. n63 Second, although the corporation was in financial difficulty, the price was substantially raised through negotiations. Third, an investment banker was hired to do a fairness analysis. Fourth, the input at the meeting came from third party professionals as well as the CEO of the company. n64 Finally, although some directors did suggest at the meeting that the company seek other offers or attempt to push Perelman for a higher price, they concluded, after receiving management's response that this would not prove successful, that a bird in the hand was better than a bigger one in the bush. n65 This would seem to be a valid exercise of business judgment.

[*11]

b. The Response of the Delaware Supreme Court

Two major issues regarding the duty of loyalty and the duty of care were presented to the Delaware Supreme Court in Technicolor. n66 The duty of loyalty issues involved two directors. One outside director, Sullivan, had been promised a \$ 150,000 finders fee in connection with putting Perelman and Kamerman, the CEO of Technicolor, in contact with each other. n67 In addition, an inside director, the president of Technicolor, had been more or less promised the CEO job if Perelman's acquisition were successful. n68

The duty of care issue revolved upon whether the board was grossly negligent in approving the transaction at the initial board meeting, and whether it was necessary for plaintiffs to show injury from such negligence in order to be able to state a cause of action based upon a breach of the duty of care. n69 The trial court had held that the fair market value of Technicolor was actually below Perelman's offer of \$ 23; n70 thus, if resulting loss were an element of the cause of action, there was no loss and thus no cause of action.

With respect to the duty of loyalty issue, the supreme court stated:

The Chancellor articulated a two -part test for finding a self-interest significant enough to rebut the presumption of director and board independence. This two -part test requires that a shareholder show: (1) the materiality of a director's self- interest to the given director's independence; and (2) the materiality of any such self-interest to the collective independence of the board. Proof of materiality under either part requires a showing that such an interest is reasonably likely to affect the decision-making process of a reasonable person on a board composed of such persons. n71

The supreme court observed that it knew of no Delaware decisional law which reflects this formulation and remanded this issue back to the trial court. n72 The supreme court rejected the idea that a reasonable person standard should be applied. n73 Although the court approved the first part of the materiality test, n74 it questioned how the second part of the test should be [*12] applied particularly where, as here, there was a requirement of board unanimity to approve the transaction in question. n75

With respect to the duty of care issue, the chancellor expressed grave doubts about whether the Technicolor directors had fulfilled their duty of care of being informed and acting deliberately. n76 However, the trial court ruled that it was not sufficient for Cinerama to prove that the defendant directors had collectively, as a board, breached their duty of care. Cinerama was required to prove that it had suffered a monetary loss from such breach and to quantify that loss. n77

The Supreme Court reversed. The court observed that the chancellor in effect, read into the business judgment presumption of due care the legal maxim that proof of negligence without proof of injury is not actionable. n78 This innovation was rejected by the supreme court. n79 In addition, the supreme court noted that the chancellor reasoned that a judicial finding of director good faith and loyalty in a third party, arms-length transaction should minimize the consequences of a board's found failure to exercise due care in a sale of the company. n80 The supreme court also disagreed with this proposition because it exalted the good faith and loyalty facets of the business judgment rule above the due care facet. n81

c. Applicability of the Business Judgment Rule in Sale of Company Cases

The Delaware Supreme Court, in *Technicolor*, reaffirmed that the business judgment rule, creates a presumption that in making a business decision, the directors of the corporation acted on an informed basis [i.e., with due care, in good faith and in the honest belief that the action taken was in the best interest of the company. n82 Implicit in the third element set forth by the court is that the directors must be loyal and not engage in self-dealing. Thus, [to rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty good faith, [*13] loyalty or due care. n83 However, [if the rule is rebutted, the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the entire fairness' of the transaction to the shareholder plaintiff. n84 If the business judgment rule is not applicable and the transaction is evaluated under the entire fairness standard, then:

[The defendant directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price. Further, in the review of a transaction involving a sale of a company, the directors have the burden of establishing that the price offered was the highest value reasonably available under the circumstances. n85

There is some circularity in the Delaware Supreme Court's formulation of the business judgment rule. The court begins by stating that the business judgment rule affords a presumption that the directors have exercised due care. n86 However, the court further stated that for the rule to apply and attach to a particular transaction, directors have a duty to inform themselves prior to making a business decision of all material information reasonably available to them. Having been so informed, they must then act with the requisite care in the discharge of their duties. n87 In other words, there is a presumption that directors exercise due care but the presumption is only established if directors in fact exercised due care.

In *Technicolor*, the court found the defendant directors, as a board, to have breached their duty of care by reaching an uninformed decision on October 29th, n88 thereby losing the business judgment rule presumption. In so doing, the court adopted the Chancellor's presumed findings as follows:

(1) [That the agreement was not preceded by a prudent search for alternatives, (2) that, given the terms of the merger and the circumstances, the directors had no reasonable basis to assume that a better offer from a third party could be expected to be made following the agreement's signing, (3) that, although Kamerman e CEO had discussed Perelman's approach with several of the directors before the meeting, most of the directors had little or no knowledge of an impending sale of the company until they arrived at the meeting and only a few of them had any knowledge of the terms of the sale and of the required side agreements, (4) that Perelman did, probably, effectively lock-up the transaction on [*14] October 29 when he acquired rights to buy the Kamerman and Bjorkman shares (about eleven percent together) and acquired rights under the stock option agreement to purchase stock that would equal 18 percent of the company's outstanding stock after exercise given Technicolor's charter provision and Perelman's prior stock ownership of about five percent, and (5) that the board did not satisfy its obligation *der Revlon* to take reasonable steps in the sale of the enterprise to be adequately informed before it authorized the execution of the merger agreement. In addition, the Chancellor noted the relevance of *Revlon* in illuminating the scope of the board's due care obligations . . . and implied that the Technicolor board's failure to auction the company evidenced a breach of their duty of care. n89

Arguably, the Technicolor court's view was highly influenced by the fact that the board approved the transaction at the meeting at which the transaction was presented. The court stated:

[t he question presented in this case is essentially the same as this Court was presented in Van Gorkom: whether the defendant directors, meeting as a board, satisfied the rule's presumption of board due care in meeting to consider for the first time a proposed sale of the company under terms negotiated exclusively by its chairman. n90

It is interesting to speculate what the decision of the Delaware Supreme Court would have been if the chairman had mentioned the possibility of a sale of the company at a September board meeting and been instructed by the board to negotiate a transaction. If the chairman returned with the same deal and the same justification, would the board in this circumstance likewise be deemed to have been grossly negligent? And, if Revlon sets up a duty to auction, does Technicolor set up a duty to have at least two board meetings on any major issue?

III. DEFERENCE BY ILLINOIS COURTS TO THE BUSINESS JUDGMENT OF DIRECTORS

The complexity of the judicial decision making process and the second guessing of management which occurs in Delaware stands in marked contrast to Illinois' decisions addressing the duty of care. Unquestionably, the leading case in Illinois is Shlensky v. Wrigley, n91 a shareholder's [*15] derivative suit brought against the directors of the Chicago National League Ball Club which operated the Chicago Cubs and Wrigley Field. n92

In Shlensky v. Wrigley, the plaintiff alleged that 19 of the 20 major league teams played night baseball; that, in 1966, 932 out of 1,620 major league games were played at night, and that every club, other than the Cubs, scheduled substantially all games other than weekends and holidays at night. Plaintiff alleged those night games were scheduled by the other teams to maximize attendance and thus revenue and profits. In addition, plaintiff alleged that the Cubs, from 1961-1965, sustained operating losses from its baseball operations, and that these losses were attributable to inadequate attendance because of the failure to install lights and schedule night baseball games. Plaintiff also alleged that attendance of a Cubs home game was less than attendance for their road games and that, while Cubs and Chicago White Sox weekend game attendance was comparable, the Sox outdrew the Cubs during the week because of the Sox night game schedule. n93

Allegedly, the failure to install lights was based upon Wrigley's concern for the neighborhood, irrespective of the welfare of the corporation. n94 Plaintiff further alleged that the other directors acquiesced in his policy and submitted to his domination and acted contrary to the best interests of the corporation. n95 The suit against the directors for negligence and

mismanagement was dismissed by the trial court and the appellate court affirmed. n96

If there was ever a bad judgment case, this would seem to be it. The Cubs were a maverick; every other team had lights, played night baseball, and generally scheduled weekday games at night. The Cubs did not; they were unprofitable, and they were even outdrawn by the White Sox during the week. How much more evidence of bad judgment need be shown? Yet, the appellate court stated:

Furthermore, it cannot be said that directors, even those of corporations that are losing money, must follow the lead of the other corporations in the field. Directors are elected for their business capabilities and judgment and the courts cannot require them to forego their judgment because of the decisions of directors of other companies. Courts may not decide these questions in the absence of a clear showing of dereliction of duty on the [*16] part of the specific directors and mere failure to follow the crowd is not such a dereliction. n97

The court also suggested that courts will not interfere with the honest business judgment of directors unless there is a showing of fraud, illegality or conflict of interest. n98

More recently, in Romanik v. Lurie Home Supply Center, Inc., n99 the court reiterated that:

Directors must exercise that degree of care and prudence that men prompted by self-interest exercise in the management of their own affairs. A director, however, will not be held liable for mere errors in judgment as long as the decision does not involve fraud, illegality or conflict of interest. n100

However, in Romanik, the court did hold directors liable for making a second and third loan to a trust set up by a former controlling shareholder to enable the trust to pay estate taxes. n101 The first loan, which was made at prime, was within the business judgment rule. n102 The second and third loans, however, were made at below prime at a time when the first loan was in default and without any security. n103 These loans, in reality, raised issues of loyalty rather than care.

Shortly after Romanik, the corporate directors in *Fields v. Sax*, n104 were charged with mismanagement for paying compensation to an elderly and ill officer and director, for settling certain lawsuits, and making improper loans. n105 The director was paid total salaries of \$ 643,072.50 from 1969 until April 1974 plus directors' fees of \$ 19,000 even though he was hospitalized for 251 days during this period and spent three months a year in Florida until his death in 1974. n106 Nevertheless, the evidence showed that the director was actively involved in the bank's policy making functions during this period, received daily briefings by phone when he was out of town, and received daily mailings. n107 In light of this evidence, the court held that the [*17] payment of compensation to ill employees is a matter of business practice and judgment of the board of directors. n108 With respect to the allegedly wrongful loans, the court also absolved the directors. n109 The court stated that [b ank directors are not insurers of the fidelity of the corporate agents and cannot be held responsible for losses resulting from the wrongful acts of other directors or agents unless they neglect to properly supervise the business. n110

More recently, in *Stamp v. Touche Ross & Co.*, n111 the Director of Insurance filed suit against the directors of Pine Top Insurance Company, which was in liquidation. n112 The complaint charged that the directors had acted negligently and had breached their fiduciary duties by the following acts:

- (a) Failed to develop and implement adequate underwriting procedures and controls;
- (b) Consistently underpriced reinsurance and insurance business written by Pine Top;
- (c) Failed to develop and implement adequate procedures and controls with respect to establishing reserves;
- (d) Failed to increase reserves when loss experience demonstrated the inadequacy of reserves;
- (e) Failed to set appropriate reserve liabilities for incurred but not reported claims;
- (f) Understated the reserves that were necessary to satisfy claims and claims administration expenses in Pine Top's Annual Statements for the years ending December 31, 1981, 1982, 1983, 1984, and 1985;
- (g) Failed to plan for or control a large premium growth, both through lack of management controls and inadequate staffing;
- (h) Paid excessive commissions to managing general agents;
- (i) Failed to oversee the performance of managing general agents and to monitor the quality of underwriting performed on Pine Top's behalf by such agents or the quality of reinsurance placed on Pine Top's behalf;
- [*18]
- (j) Failed to develop and implement adequate procedures for the collection of balances due from managing general agents;
- (k) Failed to require managing general agents to maintain adequate books and records;
- (l) Failed to place Pine Top's ceded reinsurance book of business with financially secure reinsurers;
- (m) Failed to develop and implement adequate procedures for the collection of balances due from reinsurers;
- (n) Failed timely to draw down on letters of credit posted by reinsurers on Pine Top's behalf;
- (o) Abdicated or wrongfully delegated to Pine Top's parent corporations (Greyhound and Whitney) the management responsibilities of Pine Top and its subsidiaries Pine Top Services and Pine Top Syndicate;
- (p) Failed to properly manage and supervise the affairs of Pine Top's subsidiaries, Pine Top Services and Pine Top Syndicate;
- (q) Failed to keep correct and accurate books and records of accounts for Pine Top in violation of Ill. Rev. Stat. ch. 73, 745;
- (r) Failed to report accurately the foregoing acts, omissions and circumstances to the Illinois Department, as required by Ill. Rev. Stat. ch. 73, 613 et seq., and particularly Ill. Rev. Stat. ch. 73, 745, 746, and 748;
- (s) Failed to accurately disclose Pine Top's true financial condition in its Annual Statements, as required by Ill. Rev. Stat. ch. 73, 748. n113

The foregoing allegations certainly were not lacking in specificity. However, quoting *Fields v. Sax*, the court stated that absent allegations of bad faith, fraud, illegality or gross overreaching, courts are not at liberty to interfere with the exercise of business judgment by corporate directors. n114 Regarding the allegations, the court noted that, while they were specific, they related to the exercise of judgment and thus are not actionable: The specific allegations of breach of fiduciary duty and of negligent mismanagement, as set out in detail above, pertain to actual decisions or determinations of judgment made by defendants. n115

Accordingly, the Court held that the complaint failed to state a cause of action:

[*19]

Nowhere in the complaint does plaintiff allege that the defendants did not make informed judgments or use due care in arriving at those judgments, facts which are essential for the plaintiff to recover for negligence. Likewise, there are no allegations that the decisions made involved any fraud, illegality, conflict of interest or bad faith on the part of defendants. Nor does the complaint allege that defendants acted other than in the best interest of the corporation, a fact necessary to recover for breach of fiduciary duty. Instead, plaintiff's complaint questions those decisions which defendants made. This is exactly the type of second-guessing which the business judgment rule was designed to preclude. n116

The court, however, did remand to permit plaintiffs to amend their complaint to allege inattentiveness, or the failure to make an informed decision. n117

While Illinois courts consistently state that directors are not liable for business decisions in the absence of fraud, illegality or conflict of interest, there are intimations that lack of process, failure to become informed and act deliberately, may give rise to liability. n118 This would produce a climate similar to that in Delaware. Yet a review of the Delaware and Illinois cases reflects much more hospitable language by the Illinois courts. More importantly, Delaware directors have been found liable while Illinois directors have avoided liability.

IV. THE HAZARD OF INCONSISTENT MESSAGES FROM THE DELAWARE COURTS

With the increase in hostile tender offers and the attending litigation, as well as an explosive increase in the premiums for D & O insurance, n119 anxiety about litigation by corporate directors reached epidemic proportions in the 1980s. As is so often the case, the myth was worse than the reality and the corporate paranoia about being sued was overdone. n120 Although the [*20] paranoia was overdone, it did generate a spate of litigation. At the same time, the attitude of the Delaware Supreme Court toward efforts of corporate boards of directors to manage the future of their companies (rather than docilely submitting to the whims of corporate take-over artists) seemed to reflect multiple personalities. In *Unocal*, n121 management's response to a hostile tender offer was extolled; in *Revlon*, n122 management was chastised for pulling a show-stopper rather than auctioning the company; in *Time*, n123 management was lauded for pursuing a long term strategic plan; and, most recently, in *QVC*, n124 management was again chided. Most disturbingly, in *QVC*, the court rejected the board's fervently and honestly-held view that one transaction was better than another on the basis that such view was predicated upon the directors instinct and experience rather than having been quantified by an investment banker. n125

The undulating actions of the Delaware courts remind one of the adage that just because you are paranoid does not mean that someone is not out to get you. Management's concern about litigation is only heightened by the unpredictable and unsettling decisions of the Delaware courts. These varied attempts by the Delaware courts to articulate permissible conduct by corporate directors is reminiscent of the attempts by the United States Supreme Court to articulate appropriate standards for law enforcement officials in search and seizure cases. It is anomalous for a judicial body, in the comfort of its chambers, to speculate abstractly and reflectively on what working people must do in the heat of the moment. Judicial decisions in the corporate area must reflect rational and discernible standards by which managers can realistically guide their conduct. This the Delaware courts have not done. This analysis will first trace the tortuous path from *Unocal* to *QVC* and then contrast the approach of Delaware courts to those of Illinois.

A. *Unocal*: Reassurance to Management

In *Unocal*, the Delaware Supreme Court found that the *Unocal* board was confronted with a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail. n126 *Mesa Petroleum* had made a front loaded cash tender offer for 64 million shares, or approximately [*21] 37%, of *Unocal*'s outstanding stock at a price of \$ 54 per share. n127 At this time, *Mesa* already owned 13% of *Unocal*'s stock. n128

A board meeting was called to consider the tender offer. n129 Although it lasted nine and one-half hours, the directors were given no agenda or written materials prior to the session. n130 Despite these shortcomings, presentations dealing with the board's fiduciary responsibilities and the adequacy of the Mesa proposal were made by legal counsel and investment bankers. n131 The investment banker opined that a sale of Unocal's stock should bring at least \$ 60 per share. n132 Numerous defensive strategies were presented, one of which was a self-tender by Unocal at a price of \$ 70 to \$ 75 per share which would cost the company \$ 6.1 to \$ 6.5 billion in additional debt and would reduce the exploratory drilling activity of the company. n133

During the meeting, the eight outside directors on Unocal's fourteen person board met separately with the attorneys and investment bankers and unanimously agreed to advise the board to reject the Mesa offer and pursue a self-tender. n134 The board then reconvened and unanimously resolved to reject the Mesa offer but made no decision on the self-tender. n135 Two days later, another board meeting was held; this one lasted two hours, at which a self-tender at \$ 72 was agreed upon. n136 The board was also advised about the debt securities that would be issued to fund the self-tender and the necessity for certain restrictive covenants on corporate activities to be incorporated in the debt instruments. n137 The self-tender would be made to all Unocal shareholders except Mesa. n138

In discussing the business judgment rule, the court stated that the rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. n139 Moreover, the court stated that [a hallmark of the business judgment rule [*22] is that a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose. n140

In setting forth the standards a court would apply in reviewing director responses to a tender offer, the court acknowledged that there is an inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved. The directors are of necessity confronted with a conflict of interest, and an objective decision is difficult. n141 However, to overcome such conflict, the directors only had to demonstrate that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership. n142 Moreover, the directors could satisfy that burden simply by showing good faith and reasonable investigation. n143 However, in addition to good faith, the directors must also demonstrate that their response was reasonable in relation to the threat posed. n144 In so doing, the directors could take into account the impact on constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally). n145 The court thereby gave the directors broad latitude with regard to the factors which could support their judgment.

In dealing with the situation at bar, the court recognized that front-end loaded, partial tender offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction. n146 Accordingly, the self-tender which excluded Mesa was reasonably related to the threat posed because it insured that back-end shareholders would receive fair value. n147 In addition, it avoided financing Mesa's front-end tender and precluded Mesa's participation in the self-tender from excluding other shareholders of Unocal in the event that the tender offer was over-subscribed and proration was necessary. n148

In its opinion, the court stated that our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving [*23] concepts and needs. n149 At this stage, corporate management was enthusiastic about the growth and development of Delaware law represented by Unocal. However, this enthusiasm was substantially dampened the following year with the Revlon decision.

B. Revlon: Introduction of Best Price and Duty to Auction

Revlon, like Unocal, involved the legality of a board of directors' response to a hostile tender offer. n150 In both cases, the board was composed of fourteen persons, of whom eight were apparently outside directors. n151 In Unocal, the court stated that proof of good faith and reasonable investigation is materially enhanced, as here, by the approval of a board comprised of a majority of outside independent directors. n152 However, in Revlon, the court pointed out that, of the eight directors who did not hold senior management positions with the company, two held significant blocks of stock and four were associated at some point with entities that had various business relationships with Revlon. n153 Accordingly, the court stated we cannot conclude that this board is entitled to certain presumptions that generally attach to the decisions of a board whose majority consists of truly outside independent directors. n154

The board in Revlon met several times during the course of the Pantry Pride tender offer which began at \$ 47.50 per share. n155 First, a note purchase rights plan was adopted which enabled each shareholder to receive as a dividend a right to exchange a common share for a \$ 65 Revlon note at 12% with a one-year maturity. n156 The board then authorized a self-tender for 10 million shares in exchange for a senior subordinated note of \$ 47.50 and one-tenth of a share of \$ 100 preferred stock. n157 Prior to the self-tender, 33 million shares were outstanding. n158

During the course of this activity, Pantry Pride continued the bidding process, offering first \$ 47.50 per share, then \$ 42 after the self-tender, then \$ 50, then \$ 53 on October 1st and \$ 56.25 on October 7th. n159 In the [*24] meantime, on October 3rd the Revlon board agreed to a leveraged buy-out by Forstmann Little & Co. n160 Under the leveraged buy-out by Forstmann, each shareholder would receive \$ 56 per share in cash, management would purchase stock in the new company through the exercise of golden parachutes, Forstmann would assume Revlon's \$ 475 million dollar debt incurred by the issuance of the notes, and Revlon would redeem the rights and waive the restrictive note covenants to enable Forstmann to sell off various divisions of Revlon. n161 Upon announcement of the proposed Forstmann transaction, the notes, which originally traded near par, dropped to \$ 87.50. n162

Pantry Pride responded to the Forstmann bid by raising its \$ 53 offer to \$ 56.25. n163 Forstmann then made a new offer at \$ 57.25 per share which included a lock-up on two divisions of Revlon for \$ 525 million, arguably some \$ 100 - \$ 175 million below the value placed on these divisions by the investment bankers. n164 Under the new Forstmann offer, there would be no management participation, but Forstmann would agree to support the par value of the notes. n165 The board unanimously approved this later Forstmann proposal because (1) it was for a higher price than the Pantry Pride bid, (2) it protected the noteholders, and (3) Forstmann's financing was firmly in place. n166

The Delaware Supreme Court found no problem with the first two defensive tactics: the issuance of the rights plan or the self-tender. n167 However, the court stated that when Pantry Pride increased its offer to \$ 50 per share, and then to \$ 53, it became apparent to all that the break-up of the company was inevitable. n168 The court noted:

[t he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company. n169

[*25]

Addressing the director's argument that the lock-up with Forstmann would shore up the sagging value of the notes in the face of threatened litigation by the noteholders, the court held that the Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders. n170 Regarding the Unocal statement that permitted consideration of other corporate constituencies, the court stated:

[T here are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder. n171

Because the Notes covenants specifically contemplated a waiver to permit sale of the company at a fair price, the court stated that the notes were accepted by the holders subject to the covenants, including the risk of an adverse market effect stemming from a waiver. n172 Accordingly, nothing remained for Revlon to legitimately protect, and no rationally related benefit thereby accrued to the stockholders. n173 Therefore, the court concluded that the merger agreement with Forstmann was unreasonable in relation to the threat posed. n174

With respect to the lock-up, the court found that a lock-up is not per se illegal under Delaware law because [s uch options can entice other bidders to enter a contest for control of the corporation, creating an auction for the company and maximizing shareholder profit. n175 However, the court continued, while those lock-ups which draw bidders into the battle benefit shareholders, similar measures which end an active auction and foreclose further bidding operate to the shareholders' detriment. n176 While the directors sought to justify the lock-up on the basis that Forstmann's offer contained better financing, protected the note holders, and was for a higher [*26] price, the court disagreed. According to the court, the Revlon board ended the auction in return for very little actual improvement in the final bid. n177

The decision in Revlon creates many dilemmas for the board of directors. How does one determine whether a lock-up encourages a bidder to enter the fray or prematurely ends the auction? How much improvement in the final bid would be necessary to offer a lock-up in order to get a higher price? What if Forstmann declined to raise its bid without the lock-up and Pantry Pride thereafter decided to abandon its tender offer? Then where would the shareholders be?

Another troubling aspect of Revlon is that the court saw the directors' attempt to maintain the price of the notes as an exercise in self-dealing because it would insulate them from suit by the noteholders. However, maintaining the price of the notes could be seen as protecting a legitimate constituency of the corporation. If directors do not have fiduciary responsibilities to bondholders as well as shareholders, then financing will either be more difficult to obtain or more expensive. In either case, shareholder interests will be adversely affected as well.

Moreover, the court failed to realize that there was an identity of interest between the shareholders and the noteholders in Revlon. The noteholders were all former shareholders who had tendered their shares in exchange for the notes. n178 Because the self-tender for the shares in which the notes were issued was oversubscribed (about 87% of the Revlon shareholders tendered), n179 after the self-tender most shareholders were also noteholders. Due to proration, only about one-third of the shares each shareholder held would be exchanged for notes.

Inasmuch as only about one-third of the shares were retired, n180 each shareholder would hold approximately one note for every two shares that were held. Accordingly, because the notes dropped in value from \$ 100 to \$ 87.50, each shareholder suffered a loss in value of about \$ 6.25 per share. Conversely, by protecting the notes, each shareholder would have received an increase in value through the appreciation in the value of the note of about \$ 6.25 per share. This would have been substantially above the incremental bidding between Forstmann and Pantry Pride.

[*27]

C. Time: Long-Term Planning Prevails Over Short-Term Shareholder Gain

The undulating jurisprudence continued in Time. n181 Over a two year period, Time explored the possibility of a merger with Warner Communication. n182 While other companies were also considered, the Time board in July 1988 concluded that Warner was the superior candidate and negotiations continued on and off for several months. n183 Finally, a stock deal was negotiated which would provide Warner with a premium; Warner shareholders would own 62% of the combined Time-Warner companies. n184 The resulting company would have co-CEO's and a twenty-four person board with twelve members from each company. n185

Before the merger could be consummated, Paramount made an all cash, all shares, fully negotiable tender offer for Time at \$ 175 per share, at a time when Time was trading at \$ 126 per share. n186 In response, Time abandoned its debt-free merger and made an all cash offer for 51% of Warner at \$ 70 per share. n187 In so doing, Time would incur \$ 7 to \$ 10 billion dollars of debt, thus eliminating one of the principal transaction-related benefits of the original merger agreement. Nine billion dollars . . . would be allocated to the purchase of Warner's goodwill. n188 In response Paramount then raised its bid to \$ 200. n189

In the interim between Unocal and Time, Delaware courts had suggested that an all-cash, all-shares offer, falling within a range of values that a shareholder might reasonably prefer, cannot constitute a legally recognized threat to shareholder interests sufficient to withstand a Unocal analysis. n190 Accordingly, Paramount argued that its offer could not be considered a threat, and thus there was no basis for a defensive response by Time under the Unocal doctrine. n191 In addition, because Warner shareholders were to have a controlling interest in Time, Paramount argued that the Revlon [*28] obligation to conduct an auction and maximize shareholder value fell upon Time's management. n192

The Delaware Supreme Court, in Time, held that Revlon was not applicable because there was not substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable as was the case in Revlon. n193 In point of fact, some members of Time's board of directors had expressed concern that the Warner transaction might be viewed as effectively putting Time up for sale. n194 Nevertheless, the Delaware Supreme Court found that neither the original merger agreement nor the revised tender offer for Warner constituted putting Time in play. n195

With respect to the lack of threat argument advanced by Paramount, the court stated that Time's board could conclude that the Paramount offer did pose a threat. This was because Time shareholders might elect to tender into Paramount's cash offer in ignorance or a mistaken belief of the strategic benefit which a business combination with Warner might produce. n196 Moreover, following Unocal, the court would not substitute its judgment as to what is a better deal for that of a corporation's board of directors. n197 When evaluating a threat, directors are entitled to consider inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on constituencies other than shareholders . . . the risk of nonconsummation, and the quality of securities being offered in the exchange. n198 In explaining the reason for such broad latitude afforded to the directors, the court stated:

The open-ended analysis mandated by Unocal is not intended to lead to a simple mathematical exercise: that is, of comparing the discounted value of Time-Warner's expected trading price at some future date with Paramount's offer and determining which is the higher. Indeed, in our view, precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders. To engage in such an exercise is a distortion of the Unocal [*29] process and, in particular, the application of the second part of Unocal's test, discussed below. n199

The court adopted the chancellor's finding that Time's responsive action to Paramount's tender offer was not aimed at cramming down on its shareholders a management-sponsored alternative, but rather had as its goal the carrying forward of a pre-existing transaction in an altered form. Thus, the response was reasonably related to the threat. n200

The Delaware Supreme Court also rejected Paramount's argument that the Time directors had not duly investigated Paramount's offer. n201 The court stated that Time board's lengthy pre-June investigation of potential merger candidates, including Paramount, mooted any obligation on Time's part to halt its merger process with Warner to reconsider Paramount. Time's board was under no obligation to negotiate with Paramount. n202 The court concluded: Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy. n203

The court also agreed that the revised agreement did not preclude Paramount from making an offer for a combined Time - Warner Company n204 even though the value of the combined companies would be about \$ 30 billion. n205 Accordingly, the response was proportional. n206 Finally, the court noted that although Time was required to incur a heavy debt to finance its acquisition of Warner that fact alone does not render the board's decision unreasonable so long as the directors could reasonably perceive the debt load not to be so injurious to the corporation as to jeopardize its well being. n207

Thus, Time stands in mark contrast to Revlon, a case which the Time court suggested involved a limited set of circumstances. n208 Absent those limited circumstances, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short-term even in the context of a takeover. n209 Moreover, the Unocal balancing test is not intended to lead to a simple mathematical exercise: that is, of comparing the discounted value of Time -Warner's expected trading price at some future date with Paramount's offer and determining which is the higher. n210 Most importantly, [d irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy. n211 Unfortunately, this judicial deference in Time to director judgment evaporated in the recent QVC litigation. n212

D. QVC: With Friends Like Delaware, You Don't Need Enemies

In QVC, Paramount and Viacom engaged in a series of negotiations extending over several months. n213 In 1993, prior to these negotiations, Paramount had embarked upon a three- phase strategic plan which included acquiring entertaining and publishing companies. n214 In furtherance of this plan, Paramount sought to acquire Time in 1989. n215 In 1990, an investment banker sought to arrange a merger between Paramount and Viacom, but the negotiations broke down. n216 Negotiations were resumed in April of 1993. n217 With respect to the involvement and awareness of the board, the chancellor in QVC found as follows:

The record establishes that Paramount's board was well informed of Paramount's strategic goals and of the steps taken by management to achieve those objectives. For example, at a board retreat in early May 1993, the board was presented with, and considered, four books detailing Paramount's long-range strategic aims and the alternative methods of achieving them. Management had been exploring alternatives with Viacom, Turner Broadcasting System, Inc., and TCI, as well as other entities that they believed would fit the strategic plan. n218

[*31]

1. The Factual Background

Paramount and Viacom engaged in three rounds of negotiations. n219 The first began on April 20, 1993 and reached an impasse on July 7. n220 At that time the total value of the deal that Viacom was proposing was \$ 60.86 per share; however, Paramount sought a starting price in the \$ 70s. n221 In addition, Viacom wanted a lock-up for 19% of Paramount's outstanding shares exercisable at the market price of \$ 54.75 per share and a \$ 150 million termination fee. n222 Round two began on August 20. n223 In the interim Mr. Davis, the CEO of Paramount, had told Mr. Diller, the

CEO of QVC, that Paramount was not for sale. n224 Mr. Diller responded that [QVC had no intention of making a bid at that time. n225

The August 20th negotiations broke down shortly and the merger negotiations were resumed on September 7th. n226 As a result of this third round of negotiations, Paramount stock would be exchanged for Viacom stock and cash for a total package purportedly worth \$ 69.14. n227 In addition, Viacom would receive a \$ 100 million termination fee and a lock-up stock option. n228 Viacom was controlled by Mr. Redstone, who owned 91.7% of National Amusements, Inc. which in turn owned 85.2% of Viacom's voting Class A stock and 69.2% of Viacom's non-voting Class B stock. n229 If the transaction were completed, Redstone would emerge as the controlling shareholder of the combined company. n230

Board of directors meetings were held on September 9 and September 12, 1993. n231 At the latter three hour meeting, the original merger agreement, the original stock option agreement, and the original voting agreement were executed. n232 The merger agreement contained a no-shop provision prohibiting Paramount from soliciting or considering competing transactions unless the board, upon advice of counsel, determined in good faith that its [*32] fiduciary obligations so required. n233 The board reviewed voluminous Lazard Freres' materials, including:

an overview of the transaction, business and financial analyses and valuations of the two companies, a list of six potential acquirors or groups of acquirers of Paramount, and an analysis of a status quo alternative. Lazard's presentation included discounted cash flow values for Paramount ranging from \$ 61 to \$ 73 per share, and breakup values ranging from \$ 62 to \$ 76 per share. n234

After the merger agreement was announced, QVC, on September 20th, proposed the acquisition of Paramount by QVC with a package valued at \$ 80 per share including \$ 30 cash. n235 On September 27th, the board met to discuss QVC's proposal and decided to consider the proposal once it received satisfactory evidence of financing. n236 However, Mr. Davis pointed out that, if there were a transaction with QVC, the Viacom lock-up stock option and the \$ 100 million termination fee would be triggered. n237

Lazard valued the QVC proposal at \$ 63.93 per share and the Viacom merger at \$ 59.58 per share. n238 After QVC furnished financing information, Paramount met again on October 11 to discuss the proposal. n239 The Paramount board was then informed that Booz-Allen & Hamilton (Booz-Allen), a management consulting firm, had been engaged to study the incremental earnings potential that would result from a Viacom-Paramount combination as compared with a QVC-Paramount combination. n240 However, according to the chancellor, Paramount delayed and avoided meaningful discussions with QVC. n241

Frustrated by Paramount's delay, QVC announced a tender offer for 51% of Paramount's shares for \$ 80 and filed suit. n242 In response, Viacom discussed with Paramount raising its tender offer to \$ 80 per share also to be followed by a second step stock-for-stock merger of equivalent value. n243 Paramount's board met on Sunday, October 24, 1993 to discuss the revised [*33] Viacom proposal. n244 Lazard Freres valued the QVC proposal at \$ 68.10 and the Viacom proposal at \$ 70.75. n245 In addition, Booz-Allen presented a report that concluded that the merger with Viacom would create over \$ 3BN llion more incremental shareholder value than a merger with QVC. n246 Later on November 6, Viacom unilaterally raised its tender offer to \$ 85, n247 and on November 12, QVC increased its offer to \$ 90 per share. n248

On November 15, the Paramount board met to discuss the new QVC offer. n249 Prior to the meeting, Paramount management sent a three page document, which focused on the conditions and uncertainties of QVC's offer without dealing with the financial terms of the offer, to the director's homes. n250 At the meeting, the directors were furnished with additional materials which compared the two offers, focusing on their respective terms and sources and conditions of financing. n251 The chancellor stated:

[t he disproportionate emphasis on QVC's contingencies led the directors quickly to conclude that the offer was not even a bona fide proposal, and that they were therefore precluded (under the Amended Merger Agreement) from even considering it. Furthermore, in contrast to their actions in September, the board simply rejected the QVC offer based on the financing conditions, rather than authorizing management, or the board's advisors, to seek information from QVC. n252

The chancellor acknowledged that Lazard Freres discussed the financial merits of the two transactions but pointed out that even Lazard recognized the QVC offer (without the Viacom lock-up) was worth approximately \$ 5 per share more than the Viacom offer. n253 While Lazard referred to the Booz-Allen study that had indicated \$ 3 billion of additional value from the Viacom merger as opposed to the QVC merger, the chancellor stated that Lazard did not opine

upon or quantify that information. n254 Furthermore, the chancellor pointed out that the Lazard report also noted that the market [*34] has valued the combination [Paramount-QVC more favorably than the Booz-Allen analysis would suggest. n255

While the directors found that (i) the Viacom transaction offers greater long-term value because of the synergistic, strategic benefits that a Paramount-Viacom transaction will afford; and (ii) the QVC offer is so highly conditional and speculative that it must be disregarded as not being a real alternative, the chancellor determined that the directors have demonstrated that they were sufficiently informed to have a reasoned basis for that conclusion. n256

2. Time v. Revlon

The Paramount board relied heavily upon the Time decision which indicated that Revlon is triggered generally by one of two circumstances: (i) the corporation initiating an active bidding process to sell itself; or (ii) the abandonment by a corporation of its long-term strategy and the seeking of an alternative transaction in response to a tender offer. n257 According to the Paramount directors, their conduct was explicitly permitted under Time, because the Viacom transaction will carry out a preexisting strategy, will afford higher long-term value to shareholders, and will be in the corporation's best long-run interests. n258

With these considerations, the directors argued that they had no duty to abandon a deliberately conceived corporate plan in favor of a short-term shareholder profit, n259 a line almost verbatim out of the Time decision. n260 The directors also argued that, if the court were to apply Revlon rather than Time, Delaware corporations would be discouraged from entering into valuable strategic combinations such as the one at issue here. n261

To these arguments, the chancellor simply responded, I cannot agree. n262 Because the Paramount shareholders would have a minority position in the combined companies and Mr. Redstone would be in control, a situation for which he paid a premium, there was consequently a change of control for which the shareholders were entitled to secure the best value [*35] available. n263 But, in Time, the shareholders also received a minority interest and no auction was triggered. The difference appears to be that, in Time, Time paid a premium to Warner; n264 whereas, in QVC, Viacom was paying a premium to Paramount. n265

Apparently this difference was the determining factor for the chancellor. Unfortunately, this leads to the paradoxical result that, if you give value away as was done with Time, directors are protected, n266 but if the directors obtain increased value for their shareholders, as the Paramount directors extracted from Viacom in QVC, their judgment is suspect unless they get the highest possible value. n267 According to the chancellor, Revlon requires that the directors be adequately informed. n268 While an auction is one way of becoming so informed, a canvas of the market is another way. n269 But here the directors conducted neither an auction nor a market canvas to elicit higher bids. n270

The court also noted that, in a cash tender offer, the board will normally be required to choose the highest offer. n271 However, it recognized that where, as here, stock is part of the consideration, the valuation of that component requires business judgment as well. In making a judgment that one transaction is superior to another, the directors may take long-term strategic considerations into account. n272 But, once again the directors could not demonstrate business judgment that was reasonable and adequately informed because they did not hold an auction or market canvas, and they merely relied upon information furnished by management and the board's financial advisers. n273 But upon whom other than the board's financial advisers should the board rely?

Up to November 12, the court found no material defects in the board's information-gathering process because the Lazard Freres analysis had valued the Viacom deal higher than the QVC deal. n274 However, when QVC raised its bid to \$ 90, Lazard acknowledged that, on its face, it was worth \$ 1.3 [*36] billion more than Viacom. n275 To the directors' claim that they were entitled to have the shareholders forego that value because the future incremental value of the Viacom combination would exceed \$ 1.3 billion based on the Booz-Allen study, the court responded that the directors have not come forward with any quantitative valuation data to support that judgment. n276

In making the foregoing statement, the chancellor relied upon Time. n277 However, the supreme court stated in Time that [t he open-ended analysis mandated by Unocal is not intended to lead to a simple mathematical exercise: that is, of comparing the discounted value of Time-Warner's expected trading price at some future date with Paramount's offer and determining which is the higher. n278 Yet that is what the chancellor required. The chancellor also countered the directors' argument that they should be permitted to make judgments as to long-term strategic value based on their business instinct and experience, n279 by responding:

In other circumstances that may be sufficient. Undoubtedly, instinct and experience play a role in these decisions, and directors must bring both to bear on vital decisions of this kind. But the qualitative concept of long-term strategic value upon which the board's decision rests is not infinitely elastic from a valuation standpoint. Were the spread between the QVC and Viacom offer \$ 5 billion or even \$ 10 billion, could instinct alone justify a refusal to consider the QVC transaction? In this case at least, the enhanced duty of the directors obligated them to have more information. Having chosen not to obtain such information by conducting an auction or a market check, and having determined not to meet with QVC to ascertain what its best and highest offer might be, the board put itself in a position where it had a heightened duty to obtain reliable information from other sources. That information was not obtained. n280

3. The Delaware Supreme Court: Who's in Charge the Board or the Court?

The Delaware Supreme Court, affirmed in an initial, abbreviated opinion. The court acknowledged that the Paramount directors were entitled, indeed required, to bring to bear their independent, informed, good faith, reasonable business judgment on strategic issues as they relate to the [*37] best interest of the Paramount stockholders. n281 However, the court continued with chilling language that restricted the deference Delaware courts will give to director discretion:

[I n the end, the Court of Chancery and this Court must be satisfied that the course of action determined by the directors, in the context of a sale of control, was reasonably calculated to secure the best value available to the Paramount stockholders. Any judgments of the directors as to strategic alliance issues must be consistent with that ultimate objective, where, as here, the strategic alliance is predicated on a change of control. n282

Two months later, in a formal opinion, the supreme court reaffirmed, stating that the conduct of the Paramount board was not reasonable as to process or result. n283 According to the court, the directors had an enhanced duty because control was being sold. This triggered the obligation to obtain the best value reasonably available for the shareholders. n284 The court distinguished Time on the basis that, when a transaction involves two publicly held corporations and the consideration is stock of one corporation, no sale of control occurs because neither corporation could be said to be acquiring the other. Control of both remained in a large, fluid, changeable and changing market. n285

In effect, the Delaware court held that if the directors of a publicly held corporation are offered stock by another publicly held corporation which is widely held, there is no obligation to get the best price available. However, if the directors are offered stock and cash by a corporation which has a controlling shareholder, there is an obligation to obtain the best price. This is a distinction without a difference.

Directors always have an obligation to act in the best interests of shareholders. It does not make any difference whether they are buying another corporation or selling the instant corporation, whether the consideration is cash or securities, or whether the buyer is an individual or a publicly held corporation. Only Delaware could take a simple concept and complicate it beyond comprehension.

The real issue is whether directors can negotiate a deal and honor the agreement, or whether a third party can intrude on a negotiated transaction and induce a Delaware court to believe that the third party was offering a [*38] better deal. If negotiated transactions can be undone, in the short term shareholders will benefit from the requirement of bidding. But, if the effect is to discourage negotiated deals, the long-term effect will be disadvantageous to the economy as a whole and to future shareholders. From a policy and legal standpoint, the question is whether boards of directors or the Delaware judiciary should decide whether negotiated transactions or public auctions are the best way to strategically structure industries in the future. The language and tone of the Delaware courts stands in marked contrast to the deference that Illinois courts accord the business judgment of directors. n286

V. STATUTORY LAW: ILLINOIS V. DELAWARE

Delaware lawyers are fond of extolling the Delaware corporation code. For example, Mr. Black has stated:

When compared to some corporation laws where the drafters have attempted to regulate every nuance of corporate behavior or deal with every conceivable eventuality, the Delaware statute has a spare, almost open quality. Every effort is made to simplify drafting and to avoid intricacy. n287

Anyone who has had to deal with the Delaware statute would gasp at Black's statement! It is hard to imagine anyone reading the Delaware statute and concluding that it has a spare, almost open quality, or that it embodies simplicity and lack of intricacy in drafting.

Delaware lawyers also proudly state that various provisions of the Delaware statute have been copied in other jurisdictions. However, it was the 1933 Illinois Business Corporation Act that was the model for the Model Business Corporation Act. n288 Many other states have adopted the Model Business Corporation Act and thus their provisions will have closely paralleled the provisions of the 1933 Illinois Business Corporation Act. While substantial revisions have been made to the Model Business Corporation Act over the years, many of these have been incorporated in the 1983 Illinois Business Corporation Act. Consequently, statutes across the country bear a closer resemblance to the Model Act, and to the 1983 Illinois Business Corporation Act, than they do to the Delaware code.

[*39] Not only is the Delaware Act not a model of clarity in drafting, but also its organization and numbering system leave something to be desired. By way of contrast, the 1983 Illinois Business Corporation Act has an organization and numbering system that parallels the Model Business Corporation Act. Thus, when doing research, it is easy to cross-reference between the Model Act, its multi-volume annotation, and the Illinois Act.

In addition to its greater clarity, the Illinois Act has incorporated numerous provisions into its 1983 Business Corporation Act that enhance its superiority to the Delaware Act. In Illinois, a corporation can now reduce the former requirement of a two-thirds shareholder vote for mergers, sales of substantially the assets, dissolution, and charter amendments to a mere majority. n289 In addition, the new concept of share exchanges has been introduced into the Act. n290 The 1983 Act also permits either the shareholders or the directors to amend the by-laws n291 and allows the directors to fill vacancies on the board of directors n292 as well as allow the shareholders to remove directors with or without cause. n293

The Illinois Act also allows post 1970 corporations to have non-voting stock n294 or create classes with special rights to elect designated directors. n295 Furthermore, a staggered or classified board of directors is also permissible. n296 If the board is classified, the articles may provide that a director can only be removed for cause. n297

In addition to these developments, the Galler n298 case has, in effect, been codified so that there is no question that shareholder agreements affecting director discretion are valid in Illinois. n299 Also, provisions validating [*40] shareholder agreements and restrictions on transfer of shares are applicable to all corporations, both closely held and public. n300

Adding to these advantages, the Close Corporation Act has been integrated into the Business Corporation Act as a separate article. n301 Furthermore, the formation of a close corporation has been facilitated by removing the requirement that a restriction on share transfer, which is essential in order to be a close corporation, must be in the articles of incorporation. n302 The requirement that share restrictions be in the articles had been a serious stumbling block to the formation of a close corporation. This was because most restrictions on transfer contain methodologies for valuing the shares a matter most owners would not want to be in the public records. The definition of a close corporation now provides that restrictions on share transfer may be in either the corporation's articles of incorporation or an agreement entered into by all of its shareholders. n303

In contrast, the Delaware Act has several substantive deficiencies. For example, Delaware does not have a share exchange provision similar to that provided by the Illinois Business Corporation Act in Section 11.10. n304 A share exchange statute permits a corporation to acquire 100% of the shares of the selling corporation through corporate action, rather than individual action by the shareholders. n305 Thus, if a corporation attempted to purchase the shares of the selling corporation directly from the shareholders, the likelihood of obtaining 100% is fairly remote. On the other hand, if the shares can be obtained through corporate action similar to a merger, where the authorization for the transfer of shares would come from either a majority or two-thirds shareholders' vote, then an acquiring corporation can acquire 100% of the selling corporation's stock. While the same goal could be accomplished through a two-step, triangular merger, it is much simpler to accomplish it directly through a share exchange. Moreover, in a triangular merger, there may be concern as to whether some assets of the selling corporation are transferable. In a share exchange, the assets stay in place so there is no question about their lack of transferability. All that occurs in a share exchange is that ownership of the selling corporation [*41] changes and, in effect, the selling corporation becomes a subsidiary of the acquiring corporation.

In addition, in Delaware there is serious uncertainty about the enforceability of voting agreements. In *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, n306 the court had before it a voting agreement entered into between two women, Edith Ringling and Aubrey Ringling Haley, who each owned 315 shares out of 1,000 outstanding shares. n307 The balance of 370 shares was held by John Ringling North. n308 The shares were entitled to be voted cumulatively and the board of directors consisted of seven persons. n309 Under cumulative voting, approximately 125 shares would be necessary to elect one director. Thus, each of the three shareholders could elect two

directors but no shareholder had the ability to elect a third director. However, when the two women combined, their 630 shares were sufficient to elect five directors between them. n310

The agreement provided that the two women would vote in concert to elect 5 directors and that, if they were not able to reach agreement, they would abide by the decision of an arbitrator. n311 When Aubrey breached the agreement by failing to vote in accord with the arbitrator's decision, Edith filed suit. n312 The chancellor determined, first, that the agreement was valid and, second, that the Agreement constitutes the willing party . . . an implied agent possessing the irrevocable proxy of the recalcitrant party for the purpose of casting the particular vote. n313

This was a pragmatic and workable approach to take. The Delaware Supreme Court likewise upheld the agreement, but determined that the appropriate remedy was to disqualify Aubrey from voting. n314 At the shareholder's meeting, Edith had voted for herself, her son and the person designated by the arbitrator, Mr. Dunn, who had been a member of the board for several years. n315 Aubrey, through her husband, voted all her shares for herself and her husband. n316 John voted his shares for himself and [*42] two people friendly to him. n317 Thus, when the Delaware Supreme Court threw out Aubrey's vote, only six directors received votes, three nominated by Edith and three by John. A special meeting would need to be called to fill the seventh vacancy and, if Aubrey's shares still could not be voted, then John would elect the fourth director and have control of the corporation. n318

This is indeed an anomalous result. If the supreme court had held the voting agreement invalid, the two women would have elected four directors and John the other three. However, by enforcing the agreement, the supreme court exposed the women to the possibility that John would have a majority of the board. As previously suggested, with friends like the Delaware Supreme Court, you do not need enemies.

Almost ten years later, in *Abercrombie v. Davies*, n319 the parties, faced with the specter of *Ringling* that an agreement may be lawful but not enforceable, entered into an agreement in which irrevocable proxies were exchanged to provide a mechanism to ensure that the shares would be voted according to the terms of the agreement. n320 However, in *Abercrombie*, the court decided that the parties had gone too far and that they had, in effect, created an unlawful voting trust. n321 So once again, the agreement was not enforced. n322

In response, the Delaware legislature sought to provide a legislative fix by adding the following provisions to Section 218 of the Delaware code:

(c) An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them. No such agreement shall be effective for a term of more than 10 years, but, at any time within 2 years prior to the time of the expiration of such agreement, the parties may extend its duration for as many additional periods, each not to exceed 10 years, as they may desire.

(d) The validity of any such voting trust or other voting agreement, otherwise lawful, shall not be affected during a period of 10 years from the date when it was created or last extended by the fact that under its terms it will or may last beyond such 10-year period.

[*43] (e) This section shall not be deemed to invalidate any voting or other agreement among stockholders or any irrevocable proxy which is not otherwise illegal. n323

However, the efficacy of the fix is somewhat unclear. Not only does it limit the validity of a voting agreement to ten years, but also it merely deals with what is lawful, not with the mode of enforcement. The Delaware Supreme Court in *Ringling* recognized that the agreement was lawful. Unfortunately, rather than specifically enforcing the agreement, it provided a rather unhappy remedy. Consequently, the Delaware legislature did nothing to provide an explicit remedy to enforce a valid voting agreement.

By way of contrast, the Illinois Business Corporation Act simply provides that [s]hareholders may provide for the voting of their shares by signing an agreement for that purpose. n324 This is clearly a statute that has a spare, almost open quality. n325 In addition, the statute specifically states that [a] voting agreement created under this Section is not subject to the provisions of Section 7.65, n326 thereby negating any possibility that a voting agreement would be limited to the ten year duration of voting trust under section 7.65. n327 Most importantly, the statute specifically states that [a] voting agreement created under this Section is specifically enforceable in accordance with the principles of equity. n328 This grants the court the power to specifically enforce the agreement and utilize its power of contempt if a shareholder is recalcitrant. Such an approach stands in marked contrast to the Delaware statute, both in terms of clarity and liberality. In Illinois, voting agreements will be enforced and may extend for more than ten years.

With respect to the means of private enforcement, both Illinois and Delaware recognize irrevocable proxies and that the interest which is necessary to support an irrevocable proxy can be an interest in the stock itself or an interest in the corporation generally. n329 However, the Illinois statute provides that [b y way of example and without limiting the generality of the foregoing, a proxy can be coupled with an interest when the proxy appointed is a party to a voting agreement created under Section [*44] 7.70. n330 This statute is further evidence that the drafters of voting agreements in Illinois have clearly articulated flexibility to deal with mechanisms for enforcement.

In other areas as well, the 1983 Illinois Business Corporation Act is both more clear and more flexible than the Delaware statute. For example, while Delaware recognizes nimble dividends n331 and has a wasting assets provision under which profits can be determined without taking into consideration the depletion of such assets, n332 dividends generally are limited to payment out of surplus but not out of capital. n333 Illinois, on the other hand, has adopted the Model Act financial provisions and thus, aside from liquidity (equitable insolvency) and preference concerns, the only limitation on paying dividends is that assets cannot be reduced below liabilities. n334 Furthermore, in making the determination that net assets are greater than zero, the board of directors is explicitly empowered to base its determination on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances. n335 It is hard to conceive of a statutory provision that is more flexible than that embodied in the Illinois Business Corporation Act.

In considering Delaware statutory law, another matter for concern is the fact that the majority of shareholders of Delaware corporations do not live in Delaware. This point was brought out when Delaware was considering the adoption of a control share statute after the United States Supreme Court upheld Indiana's control share statute in *CTS Corp. v. Dynamics Corp. of America*. n336 The plaintiff in *CTS* had argued that Indiana had no legitimate interest in protecting non-resident shareholders. n337 However, the United States Supreme Court noted that the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. Thus every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting. n338

[*45] The Indiana statute applied to a corporation which had more than 10% of its shareholder's resident in Indiana, or more than 10% of its shares owned by Indiana residents, or 10,000 shareholders resident in Indiana. n339 While similar legislation was under consideration in Delaware, the Delaware bar attempted to justify enacting a business corporation statute rather than a control share statute on the basis that the Business Corporation Act was better legislation because it did not intrude upon the voting rights of shareholders. However, the real reason Delaware did not enact a control share statute was that Delaware does not have a sufficient shareholder base to meet the concern of the Supreme Court that legislation which impacts shareholders generally must be predicated upon a substantial shareholder base in the state of incorporation. How many publicly held corporations have 10,000 shareholders in Delaware, or 10% of their shareholders living in Delaware, or 10% of their shares owned by residents of Delaware? Thus, Delaware simply does not have a sufficient shareholder base to justify legislation supposedly protecting shareholders.

VI. FINANCING FACILITATED BY ILLINOIS INCORPORATION

In recent years, Congress and the Securities and Exchange Commission have sought to facilitate the raising of capital by small businesses. In large part, these efforts have focused upon expanding the exemptions from registration under the 1933 Securities Act so that businesses would be spared the delay and expense of registration. Another benefit of an exemption from federal registration is that the draconian liability under Section 11 of the 1933 Act is avoided. Liability under Section 11 is draconian because detrimental reliance is presumed, because the defendant must prove that the plaintiff knew of any untruth or omission, and because the defendant has the further burden of proving, after a reasonable investigation, that the defendant had reasonable grounds to believe that there was no untruth or omission. n340

In 1980, Congress added Section 4(6) which permitted a corporation to sell up to \$ 5.0 million in securities to accredited investors and be exempt. n341 For an individual to be an accredited investor, he or she normally will need either to have a net worth of \$ 1.0 million or an annual income of [*46] \$ 200,000. n342 Later in the 1980s, the Commission promulgated Regulation D which added a larger series of exemptions. n343 However, if more than \$ 1.0 million is to be raised, n344 Regulation D is primarily available only to accredited investors. The number of unaccredited investors is limited to 25, and substantial disclosure requirements are imposed. n345 Moreover, because securities issued under Regulation D are restricted securities, n346 there is also a two year holding period requirement. n347

In view of the limitations on who is an accredited investor, the disclosure requirements applicable to non-accredited investors, and the two year holding period before resale, the exemption of choice to avoid federal registration may well be the intrastate offering exemption. However, before a corporation can avail itself of that exemption, the statute and the rule promulgated under it require the issuer to be incorporated in, and doing business in, the state in which the securities are sold. n348 Doing business is defined in the rule as (i) deriving 80% of revenues from the operation of a business in a particular state, (ii) having 80% of its assets in a particular state, and (iii) using 80% of the proceeds in a particular state. n349 Thus, a business that is financing Illinois operations cannot be incorporated in Delaware because it cannot meet the two-pronged test of being incorporated and doing business in the same state. Basically, if a company's operations are in Illinois, it must also be incorporated in Illinois if it wants to avail itself of the intrastate offering exemption from registration under the federal securities laws.

While Rule 147 also has a limitation on resales, it only limits resales for a period of nine months. n350 In addition, the resale limitation is not a general resale limitation but rather a limitation on resales outside of Illinois. From a federal perspective, it is immaterial whether and when resales within Illinois take place. Thus, resales to Illinois residents can occur immediately. Moreover, the intrastate offering exemption has no limits on the number of [*47] purchasers or the dollar value of the securities issued, nor is there any investor qualification requirement. Regulation of these matters, if any, is left to the states.

Although federal registration is avoided under the Rule 147 exemption, there still remains the possibility of state regulation. However, in Illinois, there can be sales to twenty- five pre-organization subscribers n351 and thirty-five additional purchasers within a twelve month period. n352 Thus, there can be sales to sixty investors with no limits on investor qualification or total funds raised. This is a much more benign situation than under federal law.

VII. ADMINISTRATIVE COOPERATION

Another supposed reason for favoring Delaware incorporation is the efficiency of the Delaware Secretary of State's Office. However, anybody who has worked with the Business Services division of the Illinois Secretary of State cannot fail to be impressed by the efficiency and cooperativeness of the office. Moreover, the Illinois Business Services office, like Delaware, now has an expedited processing service so that corporations can be organized or filings can be accomplished almost instantaneously. In addition, the Illinois Business Services office regularly publishes a newsletter to facilitate communication between the office, the attorneys, and others who are involved with serving Illinois businesses.

Most importantly, the Illinois Secretary of State has an advisory committee of experienced corporate lawyers from around the state to keep him/her abreast of developments in the corporate field and to recommend updating legislation when such appears necessary. The Secretary of State has been very responsive to suggestions made by the committee, and legislation recommended by the committee has been expedited through the legislature because of the advocacy of the Secretary of State. The cooperation between the Secretary of State and the corporate bar in Illinois is a model for other states to follow.

CONCLUSION

Illinois has one of the most modern corporation statutes in the country and a judiciary which respects the business judgment of the board of directors of corporations that provide employment and wealth for the citizens of Illinois. The corporation laws are administered by a Secretary [*48] of State who is vitally interested in maintaining a positive business climate in Illinois and in providing service to Illinois corporations and the professionals who work with them. These facts alone compel the conclusion that a business, which is domiciled in Illinois, should also incorporate under the laws of Illinois so that its fortunes are overseen by Illinois laws, rather than the laws of some remote state. However, when one considers the additional costs of incorporating in a state such as Delaware in terms of additional taxes payable, in terms of administrative expenses in dealing with two jurisdictional bodies, and in terms of being subject to laws, courts, and rulings that are not responsive to the needs of Illinois businesses there is no question that incorporation in Illinois is the sound and prudent way to go.

FOOTNOTES:

n1. WILLIAM H. PAINTER, INTRODUCTION: SYMPOSIUM ON THE 1983 ILLINOIS BUSINESS CORPORATION ACT, 1985 U. ILL. L. REV. 635, 635 (1985).

n2. .AS USED IN THIS ARTICLE, "RESIDING" IS USED IN THE POPULAR SENSE OF THE WORD TO MEAN A CORPORATION WHOSE PRINCIPAL ACTIVITIES ARE LOCATED IN ILLINOIS.

n3. .DELAWARE HAS BEEN FREQUENTLY REFERRED TO AS A MANAGEMENT STATE AND HAS BEEN ACCUSED OF LEADING A RACE TO THE BOTTOM. WILLIAM L. CARY, FEDERALISM AND CORPORATE LAW: REFLECTIONS UPON DELAWARE, 83 *YALE L.J.* 663 (1974). See also, Bartley A. Brennen, Current Developments Surrounding the Business Judgment Rule: A Race To The Bottom Theory of Corporate Law Revised, 12 *WHITTIER L. REV.* 299 (1991).

n4. . REINCORPORATION MEANS THE PROCESS OF INCORPORATING A SUBSIDIARY IN ANOTHER JURISDICTION AND THEN MERGING THE PARENT INTO THE SUBSIDIARY SO AS TO CHANGE THE STATE OF INCORPORATION OF THE PARENT.

n5. .ILL. CONST. art. XI, 3 (1870).

n6. .SEE ILL. CONST. art. XIII, 6 (1970) which provides simply that [c orporate charters shall be granted, amended, dissolved, or extended only pursuant to general laws. But see section 8 to the Transition Schedule which preserves the right of shareholders in a pre-1971 corporation to vote cumulatively. This provision was interpreted to permit a waiver of the right to vote cumulatively even in pre-1971 corporations because of the change in policy embodied in the 1970 Constitution. See *Roanoke Agency, Inc. v. Edgar*, 461 *N.E.2d* 1365 (Ill. 1984).

n7. .FOR EXAMPLE, WHILE CUMULATIVE VOTING WILL ASSURE EACH OF THREE EQUAL SHAREHOLDERS A POSITION ON A THREE-PERSON BOARD OF DIRECTORS (SINCE 25% PLUS ONE SHARE IS NECESSARY TO ELECT A DIRECTOR), IF THE SHAREHOLDERS ARE SPLIT 40%/40%/20%, CUMULATIVE VOTING WILL NOT ENABLE A 20% SHAREHOLDER TO SECURE A POSITION ON THE BOARD.

n8. .FOR EXAMPLE, IN *LEHRMAN V. COHEN*, 222 *A.2D* 800 (DEL. 1966), THREE CLASSES OF STOCK WERE CREATED: TWO CLASSES EACH ELECTED TWO DIRECTORS AND THE THIRD CLASS ELECTED ONE DIRECTOR. THUS, IN THE EXAMPLE IN NOTE 7, SUPRA, THREE CLASSES OF STOCK COULD BE CREATED WITH EACH CLASS HAVING THE RIGHT TO ELECT ONE DIRECTOR. IN THIS WAY, THE 20% SHAREHOLDER COULD BE ASSURED A SEAT ON THE BOARD OF DIRECTORS. BUT THIS APPROACH PROBABLY WOULD HAVE VIOLATED THE REQUIREMENT FOR CUMULATIVE VOTING UNDER THE 1870 CONSTITUTION.

n9. .SEE, E.G., 1983 *BCA* 7.40(B)(C); 805 *ILCS* 5/7.40(B),(C) (1993).

n10. .SEE INFRA, TEXT AT NOTES 288-303.

n11. .BY OCTOBER 1984, 485 OF THE STANDARD AND POOR'S 500 CORPORATION HAD ADOPTED ANTI-TAKEOVER MEASURES. ANTI-TAKEOVER CHARTER AMENDMENTS 1 (INVESTOR RESPONSIBILITY RESEARCH CENTER 1985 SUPPL.).

n12. *SEE, FOR EXAMPLE, UNOCAL CORP. V. MESA PETROLEUM CO.*, 493 A.2D 946 (DEL. 1985) AND ITS PROGENY.

n13. *SEE MURDOCK, CORPORATE GOVERNANCE THE ROLE OF SPECIAL LITIGATION COMMITTEES*, 68 WASH. L. REV. 79, 104 (1993).

n14. 488 A.2D 858 (DEL. 1985).

n15. *SEE, E.G., HEIDRICH & STRUGGLES, THE CHANGING BOARD 1* (1987) (Eight of nine participants their annual survey would not serve on a board that did not offer D & O liability insurance.).

n16. 8 DEL. C. 102(B)(7), *DEL. CODE ANN. tit. 8, 102(b)(7)* (1991).

n17. *AT LEAST 34 STATES HAVE ENACTED PROVISIONS LIMITING THE PERSONAL LIABILITY OF DIRECTORS. SEE MODEL BUSINESS CORP. ACT ANNO. 2.02, Statutory Comparison, at 120 (1993 Suppl.); 2 MODEL BUSINESS CORP. ACT ANNO. 8.50, Statutory Comparison, at 1093 (1993 Suppl.). See also Hazen, Corporate Directors' Accountability: The Race to the Bottom The Second Lap*, 66 N.C. L. REV. 171 (1987).

n18. 805 ILCS 5/2.10(B)(3) (1993).

n19. *ABBOTT LABORATORIES, ILLINOIS POWER COMPANY, W.W. GAINGER COMPANY, AND WALGREENS.*

n20. 8 DEL. C. 503 (A)(1).

n21. *DEL. CODE ANN. tit. 10, 3111* (1991).

n22. 3 ERNEST L. FOLK, III ET. AL., *FOLK ON THE DELAWARE GENERAL CORPORATE LAW* 324.4.1 (3d ed. 1992) (footnote omitted).

n23. 433 U.S. 186, 207 (1977).

n24. *INTERNATIONAL SHOE CO. V. WASHINGTON*, 326 U.S. 310 (1945).

n25. *SHAFFER*, 433 U.S. AT 216-17.

n26. *DEL. CODE ANN. tit. 10, 3114* (Supp. 1992).

n27. *ID.*

n28. .S. 341, 129TH GEN. ASSEMBLY, 1ST SESS., 3, 61. DEL. LAWS ch. 119, 1 (1977).

n29. .SEE INFRA TEXT AT NOTES 91-117.

n30. .LOUIS BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 7 (Prentice Hall 1993).

n31. .ID. AT 8.

n32. .ID.

n33. .473 A.2D 805 (DEL. 1984). MOREOVER, THE DEFENDANT HAD PERSONALLY SELECTED EACH MEMBER OF THE BOARD OF DIRECTORS. ID. AT 815.

n34. .488 A.2D 858 (DEL. 1985).

n35. .VAN GORKOM, 488 A.2D AT 874.

n36. .ID.

n37. .ID. AT 866.

n38. .ID.

n39. .ID. AT 865.

n40. .ID. AT 867.

n41. .ID. AT 866-68.

n42. .ID. AT 868.

n43. .ID. AT 867.

n44. .ID. AT 869.

n45. .ID.

n46. .ID. AT 869 N.9. THE PREMIUM WAS 62% OVER THE AVERAGE OF THE HIGH AND LOW PRICES AT WHICH TRANS UNION STOCK HAD TRADED IN 1980. ID.

n47. .634 A.2D 345 (DEL. 1993).

n48. .TECHNICOLOR, 634 A.2D AT 358-59 (QUOTING PERSONAL LIABILITY OPINION AT 3).

n49. .ID. AT 358.

n50. .COMPARE, TECHNICOLOR, 634 A.2D AT 351- 52 WITH VAN GORKOM, 488 A.2D AT 864.

n51. .TECHNICOLOR, 634 A.2D AT 351-52.

n52. .ID. AT 352-53.

n53. .ID. AT 353.

n54. .ID.

n55. .ID. AT 356.

n56. .ID. AT 355.

n57. .ID. AT 357.

n58. .ID.

n59. .ID. AT 356.

n60. .VAN GORKOM, 488 A.2D AT 869.

n61. .TECHNICOLOR, 634 A.2D AT 356.

n62. .ID. AT 354-57.

n63. .ID. AT 356.

n64. .ID. AT 356-57.

n65. .ID. AT 357.

n66. .ID. AT 360.

n67. .ID. AT 358, N.24.

n68. .ID. AT 356, N.18.

n69. .ID. AT 366-67.

n70. .ID. AT 350. *SEE ALSO CEDE & CO. V. TECHNICOLOR, INC., 636 A.2D 956 (DEL. 1994).*

n71. .TECHNICOLOR, 634 A.2D AT 362-63.

n72. .ID. AT 363.

n73. .ID. AT 364.

n74. .ID. AT 363-64.

n75. .ID. AT 364-66.

n76. .ID. AT 369.

n77. .ID. AT 358.

n78. .ID.

n79. .ID. AT 371.

n80. .ID. AT 358.

n81. .ID. AT 371.

n82. .ID. AT 360 (*QUOTING CITRON V. FAIRCHILD CAMERA & INSTRUMENT CORP.*, 569 A.2D 53, 64 (DEL. 1989) (*QUOTING ARONSON V. LEWIS*, 473 A.2D 805, 812 (DEL. 1984))).

n83. .ID. AT 361.

n84. .ID. (CITATION OMITTED).

n85. .ID. (CITATIONS OMITTED) (EMPHASIS ADDED).

n86. .ID. AT 360.

n87. .ID. AT 367 (*QUOTING ARONSON V. LEWIS*, 473 A.2D 805, 812 (DEL. 1984)).

n88. .ID. AT 367.

n89. .ID. AT 369 (QUOTING PERSONAL LIABILITY OPINION AT 5-6) (CITATIONS OMITTED) (EMPHASIS ADDED).

n90. .ID. AT 370 (EMPHASIS ADDED).

n91. .237 N.E.2D 776 (ILL. APP. CT. 1968).

n92. .ID. AT 777.

n93. .ID. AT 777-78.

n94. .ID. AT 778.

n95. .ID.

n96. .ID. AT 781.

n97. .ID.

n98. .ID. AT 780.

n99. *435 N.E.2D 712 (ILL. APP. CT. 1982)* (CITATION OMITTED).

n100. *ROMANIK*, 435 N.E.2D AT 722.

n101. *.ID.* AT 723.

n102. *.ID.* AT 722.

n103. *.ID.*

n104. *462 N.E.2D 983 (ILL. APP. CT. 1984)*.

n105. *FIELDS*, 462 N.E.2D AT 985.

n106. *.ID.* AT 987.

n107. *.ID.*

n108. *.ID.* AT 987.

n109. *.ID.* AT 988.

n110. *.ID.*

n111. *636 N.E.2D 616 (ILL. APP. CT. 1993)*.

n112. *.STAMP*, 636 N.E.2D AT 618.

n113. *.ID.* AT 618-19.

n114. *.ID.* AT 621 (*QUOTING FIELDS V. SAX*, 462 N.E.2D 983, 989 (*ILL. APP. CT. 1984*)).

n115. *.ID.*

n116. *.ID.* AT 622.

n117. .ID. AT 624.

n118. .SEE STAMP, 636 N.E.2D AT 616.

n119. .PREMIUMS FOR D & O INSURANCE INCREASED 500% IN 1986 AND 200% IN 1987. HEIDRICH & STRUGGLES, THE CHANGING BOARD 1 (1986); HEIDRICH & STRUGGLES, THE CHANGING BOARD 1 (1987).

n120. .ACCORDING TO THE WYATT SURVEY OF D & O LITIGATION, THE LARGEST INDIVIDUAL SOURCES OF LITIGATION ARE WRONGFUL EMPLOYEE TERMINATION, TENDER OFFER TACTICS AND INADEQUATE DISCLOSURE, EACH ACCOUNTING FOR 10% OF THE TOTAL LITIGATION. DISCLOSURE SUITS ARE GENERALLY BROUGHT UNDER FEDERAL LAW, NOT STATE LAW, AS ARE MANY WRONGFUL TERMINATION CASES, SO STATE LAW IS NOT CONTROLLING. LESS THAN TWO PERCENT OF ALL LITIGATION IS BASED UPON GROSS NEGLIGENCE OR BREACH OF FIDUCIARY DUTY. WYATT 1993 SURVEY, AT 48.

n121. *UNOCAL CORP. V. MESA PETROLEUM, CO.*, 493 A.2D 946, 958-59 (DEL. 1985).

n122. *REVLON, INC. V. MACANDREWS & FORBES HOLDINGS, INC.*, 506 A.2D 173, 176 (DEL. 1986).

n123. *PARAMOUNT COMMUNICATIONS, INC. V. TIME, INC.*, 571 A.2D 1140, 1155 (DEL. 1989).

n124. *QVC NETWORK, INC. V. PARAMOUNT COMMUNICATIONS, INC.*, 635 A.2D 1245 (DEL. CH. 1993).

n125. .ID. AT 1270.

n126. .UNOCAL, 493 A.2D AT 956.

n127. .ID. AT 949.

n128. .ID.

n129. .ID. AT 950.

n130. .ID.

n131. .ID.

n132. .ID.

n133. .ID.

n134. .ID.

n135. .ID.

n136. .ID. AT 950-51.

n137. .ID. AT 951.

n138. .ID.

n139. .ID. AT 954 (*QUOTING ARONSON V. LEWIS*, 473 A.2D 805, 812 (DEL. 1984)) (EMPHASIS ADDED).

n140. .ID. AT 954 (*QUOTING SINCLAIR OIL CORP. V. LEVIEN*, 280 A.2D 717, 720 (DEL. 1971)) (EMPHASIS ADDED).

n141. .ID. AT 955 (*QUOTING BENNETT V. PROPP*, 187 A.2D 405, 409 (DEL. 1962)).

n142. .ID.

n143. .ID. (*QUOTING CHEFF V. MATHES*, 199 A.2D 548, 555 (DEL. 1964)).

n144. .ID.

n145. .ID.

n146. .ID. AT 956.

n147. .ID. AT 957.

n148. .ID.

n149. .ID.

n150. .REVLON, 506 A.2D AT 175-76.

n151. .COMPARE UNOCAL, 493 A.2D AT 950 WITH REVLON, 506 A.2D AT 176 N.3.

n152. .UNOCAL, 493 A.2D AT 955.

n153. .REVLON, 506 A.2D AT 176 N.3.

n154. .ID.

n155. .ID. AT 176-77.

n156. .ID. AT 177.

n157. .ID.

n158. .ID.

n159. .ID.

n160. .ID. AT 178.

n161. .ID.

n162. .ID.

n163. .ID.

n164. .ID.

n165. .ID. AT 178-79.

n166. .ID. AT 179.

n167. .ID. AT 181.

n168. .ID. AT 182.

n169. .ID.

n170. .ID.

n171. .ID. (CITATION OMITTED).

n172. .ID.

n173. .ID. AT 182-83.

n174. .ID. AT 183.

n175. .ID.

n176. .ID.

n177. .ID. AT 184.

n178. .ID. AT 177.

n179. .ID.

n180. .ID. AT THE TIME OF THE SELF-TENDER, THERE WERE APPROXIMATELY 33 MILLION SHARES OUTSTANDING OF WHICH 10 MILLION WERE BOUGHT BACK BY THE COMPANY. ID.

n181. *PARAMOUNT COMMUNICATIONS, INC. V. TIME INC.*, 571 A.2D 1140 (DEL. 1989).

n182. .TIME, 571 A.2D AT 1144.

n183. .ID. AT 1144-1146.

n184. .ID. AT 1146.

n185. .ID.

n186. .ID. AT 1147.

n187. .ID. AT 1148.

n188. .ID.

n189. .ID. AT 1149.

n190. .ID. AT 1152.

n191. .ID.

n192. .ID.

n193. .ID. AT 1150.

n194. .ID. AT 1151.

n195. .ID.

n196. .ID. AT 1153.

n197. .ID.

n198. .ID. (*QUOTING UNOCAL CORP. V. MESA PETROLEUM CO.*, 493 A.2D 946, 955 (DEL. 1985)).

n199. .ID. AT 1153.

n200. .ID. AT 1154-55 (FOOTNOTE OMITTED).

n201. .ID. AT 1153-54. THIS OCCURRED EVEN THOUGH THE CHANCELLOR HAD NOT DEALT WITH THIS ISSUE.

n202. .ID. AT 1154.

n203. .ID.

n204. .ID. AT 1155.

n205. .ID. AT 1151.

n206. .ID. AT 1155.

n207. .ID.

n208. .ID. AT 1150.

n209. .ID.

n210. .ID. AT 1153.

n211. .ID. AT 1154.

n212. *SEE QVC NETWORK, INC. V. PARAMOUNT COMMUNICATIONS, 635 A.2D 1245 (DEL CH. 1993).*

n213. .QVC, 635 A.2D AT 1248-52.

n214. .ID. AT 1248.

n215. .ID.

n216. .ID.

n217. .ID.

n218. .ID. (CITATIONS OMITTED).

n219. .ID. AT 1248-52.

n220. .ID. AT 1248-49.

n221. .ID. AT 1249.

n222. .ID.

n223. .ID.

n224. .ID. AT 1249.

n225. .ID.

n226. .ID. AT 1250.

n227. .ID.

n228. .ID.

n229. .ID. AT 1247.

n230. .ID. AT 1250.

n231. .ID. AT 1250-51.

n232. .ID. AT 1250.

n233. .ID. AT 1251.

n234. .ID. (CITATIONS OMITTED) (FOOTNOTE OMITTED).

n235. .ID. AT 1252.

n236. .ID. AT 1252-53.

n237. .ID. AT 1253.

n238. .ID.

n239. .ID.

n240. .ID. (CITATION OMMITED).

n241. .ID. AT 1253-54.

n242. .ID. AT 1254.

n243. .ID.

n244. .ID. AT 1255.

n245. .ID.

n246. .ID.

n247. .ID. AT 1256.

n248. .ID.

n249. .ID. AT 1257.

n250. .ID.

n251. .ID.

n252. .ID. (FOOTNOTES OMITTED).

n253. .ID. AT 1258.

n254. .ID.

n255. 255.255..ID.

n256. .ID. AT 1269.

n257. .ID. AT 1265 (*CITING PARAMOUNT COMMUNICATIONS, INC. V. TIME INC.*, 571 A.2D 1140, 1150 (DEL. 1990)).

n258. .ID.

n259. .ID.

n260. .CF., 571 A.2D AT 1154.

n261. .QVC, 635 A.2D AT 1265.

n262. .ID.

n263. .ID. AT 1266.

n264. .TIME, 571 A.2D AT 1148-49.

n265. .QVC, 635 A.2D AT 1266.

n266. .TIME, 571 A.2D AT 1154-55.

n267. .QVC, 635 A.2D AT 1267.

n268. .ID.

n269. .ID. AT 1268.

n270. .ID.

n271. .ID.

n272. .ID.

n273. .ID.

n274. .ID. AT 1269.

n275. .ID. AT 1256.

n276. .ID. AT 1270.

n277. .ID.

n278. .TIME, 571 A.2D AT 1153.

n279. .QVC, 635 A.2D AT 1270.

n280. .ID.

n281. *PARAMOUNT COMMUNICATIONS, INC. V. QVC NETWORK, INC.*, 1993 WL 544314, AT *3 (DEL. DEC. 9, 1993) (UNPUBLISHED DISPOSITION).

n282. .ID.

n283. *PARAMOUNT COMMUNICATIONS, INC. V. QVC NETWORK, INC.*, 637 A.2D 34, 36 (DEL. 1994).

n284. .ID. AT 37.

n285. .ID. AT 47 (EMPHASIS OMITTED).

n286. .SEE SUPRA NOTES 91-118 AND ACCOMPANYING TEXT.

n287. .BLACK, supra note 30, at 3.

n288. .SEE RAY GARRETT, MODEL BUSINESS CORPORATION ACT, 4 *BAYLOR L. REV.* 412, 424 (1952); see also MODEL BUSINESS CORP. ACT (Revised 1953).

n289. .SEE 1983 *BCA* 11.20(B), 11.60(E), 12.15(D), 10.20(D), RESPECTIVELY; 805 *ILCS* 5/11.20(B), 11.60(E), 12.15(D), 10.20(D) (1993).

n290. .1983 *BCA* 11.10, 805 *ILCS* 5/11.10 (1993).

n291. .1983 *BCA* 2.25, 805 *ILCS* 5/2.25 (1993). HOWEVER, THE SHAREHOLDERS MAY FREEZE THE BY-LAWS; THAT IS, THE SHAREHOLDERS MAY AMEND THE BY-LAWS TO PROVIDE THAT THE BY-LAWS IN GENERAL, OR A PARTICULAR BY-LAW, MAY THEREAFTER ONLY BE AMENDED OR MODIFIED BY THE SHAREHOLDERS. ID.

n292. *1983 BCA 8.30, 805 ILCS 5/8.30 (1993).*

n293. *1983 BCA 8.35(A), 805 ILCS 5/8.35(A) (1993). (HOWEVER, IF THERE IS CUMULATIVE VOTING, A DIRECTOR CANNOT BE REMOVED IF THE VOTES CAST AGAINST REMOVAL WOULD HAVE BEEN SUFFICIENT TO ELECT HER; ALSO, IF A CLASS OF SHARES IS ENTITLED TO ELECT A DIRECTOR, A DIRECTOR CAN BE REMOVED ONLY BY THE SHAREHOLDERS OF THAT CLASS. 1983 BCA 8.35(A)(2)(3), 805 ILCS 8.35(A)(2)(3) (1993).*

n294. *1983 BCA 7.40(B)(C), 805 ILCS 7.40(B)(C) (1993); CF. ROANOKE AGENCY, INC. V. EDGAR, 461 N.E. 2D 1365 (ILL. 1984).*

n295. *1983 BCA 7.40(B)(C), 805 ILCS 7.40(B)(C) (1993); CF. 1983 BCA 8.35(A)(3), 805 ILCS 5/8.35(A)(3) (1993).*

n296. *1983 BCA 8.10(E), 805 ILCS 5/8.10(E) (1993).*

n297. *1983 BCA 8.35(A)(4), 805 ILCS 5/8.35(A)(4) (1993).*

n298. *GALLER V. GALLER, 203 N.E.2D 577 (ILL. 1964).*

n299. *SEE 1983 BCA 7.71, 805 ILCS 5/7.71 (1993).*

n300. *1983 BCA 7.71 AND 6.55 ARE FOUND IN ARTICLES 7 AND 6, RESPECTIVELY, WHICH ARE APPLICABLE TO ALL CORPORATIONS. PROVISIONS AFFECTING ONLY CLOSE CORPORATIONS ARE FOUND IN ARTICLE 2A.*

n301. *SEE 1983 BCA 2A.05-.60, 805 ILCS 5/2A.05-.06 (1993).*

n302. *SEE THE CLOSE CORPORATION ACT, P.A. NO. 80-672, 1977 ILL. LAWS 2046, 3.*

n303. *1983 BCA 1.80(S), 805 ILCS 5/1.80(S) (1993).*

n304. *1983 BCA 11.10, 805 ILCS 5/11.10 (1993).*

n305. *ILLINOIS' SHARE EXCHANGE STATUTE ALLOWS THIS ACTION TO BE ADOPTED THROUGH THE MAJORITY VOTE OF THE BOARD OF DIRECTORS OF EACH CORPORATION. SEE 1983 BCA 11.10, 805 ILCS 5/11.10 (1993).*

n306. *53 A.2D 441 (DEL. 1947).*

n307. .ID. AT 442.

n308. .ID.

n309. .ID.

n310. .ID. AT 444 N.1.

n311. .ID. AT 443.

n312. .ID. AT 444-45.

n313. .ID. AT 445.

n314. .ID. AT 448.

n315. .ID. AT 444.

n316. .ID.

n317. .ID.

n318. .ID. ALTHOUGH THE DELAWARE SUPREME COURT RECOGNIZED THIS DILEMMA,
THEY FAILED TO RULE ON IT. ID.

n319. *130 A.2D 338 (DEL. 1957).*

n320. .ID. AT 342-43.

n321. .ID. AT 347.

n322. .ID.

n323. .DEL. C. 218, *DEL. CODE ANN. tit. 8, 218* (1991).

n324. *1983 BCA 7.70(A), 805 ILCS 5/7.70(A)* (1993).

n325. .COMPARE SUPRA TEXT ACCOMPANYING NOTE 287.

n326. .1983 BCA 7.70(A), 805 ILCS 5/7.70(A) (1993).

n327. .SEE 1983 BCA 7.65, 805 ILCS 5/7.65 (1993).

n328. .1983 BCA 7.70(B), 805 ILCS 5/7.70(B) (1993).

n329. .SEE 8 DEL. C. 212(e), *DEL. CODE ANN. tit. 8, 212(e)* (1991); cf. 1983 BCA 7.50(c), 805 ILCS 5/7.50(c) (1993).

n330. .SEE 1993 BCA 7.50(C)(5), 805 ILCS 5/7.50(C)(5) (1993).

n331. .8 DEL. C. 170(a), *DEL. CODE ANN. tit. 8, 170(a)* (1991).

n332. .8 DEL. C. 170(b), *DEL. CODE ANN. tit. 8, 170(b)* (1991).

n333. .8 DEL. C. 170(a), *DEL. CODE ANN. tit. 8, 170(a)* (1991).

n334. .1983 BCA 9.10(C)(2), 805 ILCS 5/9.10(C)(2) (1993).

n335. .1983 BCA 9.10(D), 805 ILCS 5/9.10(D) (1993).

n336. .481 U.S. 69 (1987).

n337. .ID. AT 93 (CITATION OMITTED).

n338. .ID. (CITATION OMITTED).

n339. .ID. AT 73; SEE ALSO *IND. CODE ANN. 23-1-42-4(a)(3)* (West 1989).

n340. .SECURITIES ACT OF 1933, 11(A), (B)(3), 15 U.S.C.A. 77K(A), (B)(3) (WEST 1981 AND SUPP. 1992).

n341. .SECURITIES ACT OF 1933, 4(6), 15 U.S.C.A. 77D(6) (WEST 1981 AND SUPP. 1993).

n342. .SECURITIES ACT OF 1933, 17 C.F.R. 230.215(E),(F) (1993).

n343. .SEE 17 C.F.R. 230.501-508 (1993).

n344. 17 C.F.R. 230.504 (1993), IS VERY BENEFICIAL BECAUSE IT PERMITS SALES TO AN UNLIMITED NUMBER OF INVESTORS WITH NO INVESTOR QUALIFICATION. HOWEVER, THE AGGREGATE OFFERING AMOUNT IS LIMITED TO \$ 1.0 MILLION.

n345. .SEE 17 C.F.R. 230.502(B), .505(B)(2)(II), .506(B)(2)(I) (1993).

n346. .SEE 17 C.F.R. 230.502(D) (1993).

n347. .SEE 17 C.F.R. 230.144(D) (1993).

n348. .SEE SECURITIES ACT OF 1933 3(A)(II), 15 U.S.C.A. 77C(A)(II)(WEST 1981 AND SUPP. 1993); RULE 147, 17 C.F.R. 230.147 (1993).

n349. 17 C.F.R. 230.147 (C)(2)(I)-(III) (1993).

n350. 17 C.F.R. 230.147(E) (1993).

n351. .815 ILCS 5/4M (1993).

n352. .815 ILCS 5/4G (1)(A) (1993).

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