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The Faithful Business as a Publicly Traded Corporation: Testing the Outer Limits of Corporate Law

Stephen N. Bretsen — Wheaton College

Abstract

A faithful business operates its business as a mission by holistically integrating Christian theological and social principles. A business strategy leading to profitable growth can allow a faithful business to raise capital from the public markets. The question becomes whether corporate law permits a publicly traded corporation to primarily glorify God and advance God's Kingdom rather than to primarily maximize shareholder wealth. In affirming that a faithful business can function within the mandates of corporate law as a publicly traded corporation, this article reveals the expanding outer limits of corporate law.

Introduction

One of the most vexing problems in corporate law is determining the ultimate beneficiaries of the fiduciary duties of due care and loyalty owed by the managers of a corporation. Corporate law mandates that

these duties are owed to the corporation. The problem arises in defining the nature of the corporation and what is in the best interests of the corporation.

The corporation itself has a legal existence separate from its shareholders, directors, officers, employees, creditors, suppliers, customers, and the communities within which it operates. Each of these players within the corporation has varying and sometimes opposing interests. For example, in the zero sum game of measuring the profits of a corporation by revenue less costs, the shareholders' interest in increasing their return by increasing profits can conflict with the interests of employees in boosting wages, salaries, and benefits and thus increasing costs. Given these varying interests, how do corporate managers determine whether a decision or a proposed course of action is in the best interest of the corporation? Unfortunately,

legal scholarship has provided corporate managers with at least two different and opposing ways of understanding their responsibility to act in the best interests of the corporation.

In the shareholder primacy model, corporate managers discharge their responsibilities by maximizing profits for the benefit of shareholders. Although the focus is on profit maximization, the corporation's ability to do so is not unbounded since the corporation must obey secular laws and is subject to certain basic ethical obligations, such as honesty (Friedman, 1970, p. 2). In this model, the pursuit by corporate managers of any other social responsibilities represents an unfair tax on the shareholders and converts a capitalistic organization that is designed to serve the greater good by using market mechanisms to allocate scarce resources into a political organization serving the policy wishes of its managers (Friedman, 1970, p. 3).

In the stakeholder primacy model, corporate managers undertake additional responsibilities beyond compliance with law to balance the interests of the

corporation's multiple stakeholders. The list of stakeholders not only includes shareholders, employees, creditors, suppliers, customers, and local communities, but society at large. These additional social responsibilities are often associated with enhanced human resource policies and benefits, environmentalism, the promotion of human rights, and community development.

The idea of a faithful business conducting its operations as a Christian mission challenges both of these models.¹ Although such a business needs to be profitable to continue to fund its present and future operations, a faithful business is not in the business of profit maximization. The social justice demands of the Bible require the Christian managers of a faithful business to consider the needs of stakeholders other than shareholders (Proverbs 31:8-9; Isaiah 1:17; James 2:14-19). However, the Christian managers of a faithful business will not be balancing the interests of stakeholders as an end in itself or for larger social considerations. The mission of a faithful business is far more radical since the commandment

to “love your neighbor as yourself” is second to the greatest commandment to “[l]ove the Lord your God with all your heart and with all your soul and with all your mind” (Matthew 22:34-40). Thus, for a faithful business, the profits that are made and the stakeholders that are served are all for the glory of God (Colossians 3:17).

Within the Christian business as mission movement is a desire to shift from programs that emphasize micro-finance and micro-enterprise development to larger scale businesses. According to Mats Tunehag, the convener of the Business as Mission Issue Group No. 30 at the Lausanne Forum 2004 and a consultant and leader in the broader business as mission movement, “If [Christians] are to tackle the enormity of the challenge before us, we need to think and act bigger, beyond micro to small, medium and large sized businesses” (Tunehag, McGee & Plummer, 2005, p. 7). In the United States, a business that is growing, whether through increased sales in its original product line or by expanding its geographic scope or through

horizontal diversification, often seeks equity capital in the public markets. The question for a faithful business following this route is whether it can operate its business as a mission by holistically integrating Christian theological and social principles as a publicly traded corporation. Does the current state of corporate law on fiduciary duties allow the corporate managers of a faithful business to place their obligations to God before their obligations to shareholders and other stakeholders in the event of a conflict? This article answers that question affirmatively after exploring the following areas: (i) the debate between the shareholder primacy and stakeholder models over the ends and means of the corporation and the nature of the fiduciary duties; (ii) the concept of a faithful business and how it radicalizes this debate; and (iii) the application of corporate law to operational and change of control decisions made by the corporate managers of a faithful business. The conclusion that a faithful business operating as a publicly traded corporation can function within the mandates of corporate law reveals the expand-

ing outer limits of corporate law and corporate governance.

The Means and Ends of the Corporation

The long running debate over the corporation's social responsibilities is an attempt "to answer two basic sets of questions: (1) as to the means of corporate governance, who holds ultimate decision-making power? and (2) as to the ends of corporate governance, whose interests should prevail?" (Bainbridge, 2003, p. 549).

The Means — Who Decides?

Lord Chancellor and First Baron Edward Thurlow (1731-1806) observed over two hundred years ago that "[c]orporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like" (cited in Micklethwait & Wooldridge, 2003, p. 33). In Christian thinking, the corporation is not soulless since the soul of the corporation is found in the people who comprise it (Pollard, 1996, p. 23). The moral obligations of the corporation become "the moral obligations and legal duties of

the actors who make corporate decisions" (Bainbridge, 1992, p. 971). The "who decides" question, therefore, becomes an important one with three possible answers: the shareholders, the board of directors, and the officers.

Although the shareholders are typically characterized as the owners of the corporation,² their ability to make corporate decisions is constrained. Legally, the decisions that shareholders are empowered to make are essentially limited to the election of directors and the approval of charter or by-law amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution (Bainbridge, 2003, p. 569; see also, Del. Code Ann. tit. 8, §§ 109, 242, 251, 271, and 275 (2006)). While these decisions are important ones for the corporation, they do not give the shareholder a voice in the many smaller operational and financial decisions that ultimately define the social responsibilities a corporation undertakes. A further legal limitation placed on the shareholders' ability to make decisions is the manner in which

decisions can be made. The ability of shareholders to make decisions or to question decisions made by others can only occur proactively at a shareholders' meeting or via a written agreement of a majority of shareholders, or reactively through a shareholder's derivative lawsuit (Del. Code Ann. tit. 8, §§ 211, 228, 327 (2006)). Since the shareholders in a publicly traded corporation are numerous and widely dispersed, they tend to be disorganized due to various collective action problems ranging from the difficulties and costs of being able to identify and communicate with other shareholders to the incentive of each shareholder to "free ride" on the activist efforts of other shareholders and undermine any collective shareholder effort (Branson, 2001, pp. 606-607).

Except for the few matters reserved for shareholders, corporate law clearly designates the board of directors as the ultimate decision making authority.³ Thus, the answer to the question of who decides is the board of directors, whether the board of directors is viewed as the agent or steward of the shareholders in the

traditional view of the corporation, or as a "Platonic guardian serving as the nexus for the various contracts comprising the corporation" in a law and economics contractarian view of the corporation (Bainbridge, 2003, p. 552), or as a "mediating hierarch" balancing the interests of the various groups needed to produce the corporation's goods or services in a stakeholder-based team production model of the corporation (Blair & Stout, 1999, p. 284). However, the board of directors often becomes subordinated to the officers it is supposed to select and monitor. Since the board of directors can only act as a board and usually only meets as a board several times a year, the directors cannot be involved in the day-to-day affairs of the corporation and delegate much of their power to the corporation's officers. In addition, the officers of the corporation control the flow of information to the directors and often set the agenda for the meetings of the board of directors. In an information age, information is power, and the power to set an agenda and provide information is the power

to decide what is and is not reviewed by the board of directors and at what depth. Until reforms, such as the Sarbanes-Oxley Act of 2002, result in truly independent boards of directors, the directors and officers are appropriately lumped together as managers of the corporation, and these managers are the de jure and de facto decision makers of the corporation.⁴ So, the focus of the social responsibilities of the corporation should be on the decisions of the managers of the corporation.

The Ends — Whose Interests Prevail?

The shareholders own the stock of the corporation but make few decisions for the corporation while managers own a small percentage of the stock of the corporation but make the primary decisions for the corporation. In a closely held corporation, where the shareholders are the managers or where the shareholders are venture capitalists who can leverage the corporation's present and future need for money into preferred shares and investor-favorable shareholder agreements,

there is either no split between ownership and control or the preferred shareholders are satisfied with their level of control. However, in a publicly traded corporation this split between ownership and control creates an agency problem in which shareholders are interested in profits and a return on their investment while managers' interests can reduce corporate profits via rent seeking and shirking. The agency problem has been noted and analyzed by scholars of corporations from Adam Smith to Berle and Means to Jensen and Meckling (Fama & Jensen, 1983, p. 301).

Imposing fiduciary duties on directors is corporate law's attempt to address the potential agency issues arising from the separation of ownership and control in a corporation. Directors owe a duty of due care in managing and overseeing the affairs of the corporation and a duty of loyalty to the corporation. The duty of care requires a director to act in good faith and in a manner that the director reasonably believes to be in the best interests of the corporation (Revised Model Business Corpo-

ration Act § 8.30(a)).⁵ The duty of loyalty requires a director to subordinate his or her own interests to the interests of the corporation and avoid or disclose conflicts of interest, such as those arising from transactions between the director and the corporation or from a director taking advantage of a business opportunity that is also available to the corporation (Revised Model Business Corporation Act §§ 8.31(a)(2)(iii), 8.60, 8.62). While a director's fiduciary duties do not legally create a fiduciary relationship between a director and the corporation, the fiduciary duties parallel the Christian virtue of stewardship (Luke 12:42-46).

Although corporate law generally requires managers to act in "the best interests of the corporation" to alleviate the agency problem, that phrase raises the issue over whose interests prevail within a corporation and the nature of a corporation's social responsibility. The modern legal debate about corporate social responsibility has focused on two candidates: the shareholders alone or a broader group of stakeholders, such as

shareholders, employees, customers, creditors, suppliers, local communities, and society at large.⁶

The case for shareholder primacy is best summarized in Milton Friedman's famous observation that in a free society "there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud" (1970, p. 8). Thus, what is in "the best interests of the corporation" is measured by what maximizes profits or shareholder returns. Among scholars, the shareholder primacy norm applies whether the corporation is viewed traditionally as owned by the shareholders (Friedman, 1970, p. 2) or whether the corporation is viewed as a nexus of explicit and implicit contracts between shareholders, creditors, employees, suppliers, and customers under a contractarian model (Easterbrook & Fischel, 1991, p. 12).

The shareholder primacy norm is also based on certain

other assumptions about the corporation. The first assumption is that pursuing social goals other than profit maximization for the benefit of shareholders aggravates the already dangerous agency problem. Replacing a single group of shareholders with multiple stakeholders and replacing a clear metric of profit maximization with multiple, competing goals decreases the accountability of corporate managers by increasing their discretion. Anything other than a shareholder wealth maximization norm “could leave managers with so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own” (Stout, 2002, p. 1200). Thus, Jesus’ proverb that a man cannot serve two masters (Matthew 6:24; Luke 16:13) becomes the legal warning that a fiduciary cannot serve two conflicting beneficiaries and the practical warning that a manager responsible to everyone is responsible to no one (Green, 1993, p. 1417). A second assumption is that the corporation is an economic institution. “Allowing

corporate managers to deviate from profit maximization would distort market mechanisms for distributing goods and services, and might, if pursued with enough force, produce long-run market failure” (Wells, 2002, p. 109). Pursuing social goals other than shareholder wealth maximization risks converting an economic institution into a political institution and subjecting the corporation to greater public control because it does not have the checks and balances present in a republican form of government (Friedman, 1970, p. 4).

The stakeholder primacy norm asserts that corporations should be operated for the benefit of all stakeholders, not just shareholders, since shareholders are just one of several stakeholders. Other stakeholders include “employees, financiers, customers, and communities” (Evans & Freeman, 1993, p. 82). Thus, what is in “the best interests of the corporation” involves balancing the long term interests of each group. Under more traditional stakeholder thinking often adopted by corporate executives, doing so ensures

profitability in the long term (A. Murray, 2006),⁷ while under more radical stakeholder thinking espoused by legal scholars, doing so allows corporate decision-making to more closely approximate the moral choices of individuals (Nesteruk, 1989, pp. 452-453; Elhauge, 2005, p. 844).

The stakeholder primacy norm is also based on certain assumptions about the corporation. First, the shareholders are not the owners of the corporation, since legal title to the assets of the corporation are held by the corporation as a separate legal entity. Instead, the shareholders, by virtue of owning the corporation's stock, hold an equitable interest in the corporation and are granted certain rights, primarily through the corporation's articles of incorporation and by-laws, but also by statute and common law. In addition to voting rights, these rights include the right to participate in a proportionate share of the profits of the company if and when the board of directors determines that dividends will be paid as set forth in the by-laws, and the right to receive a proportionate share of the corporation's residual

assets after all other creditors have been paid upon dissolution or liquidation of the corporation. Under the stakeholder primacy norm, this limited legal relationship is reinforced by the reality of public markets in which shareholders no longer view themselves as owners, but as investors or as beneficiaries of investment decisions made by financial managers (Nesteruk, 1989, p. 452). Shareholders ultimately exercise control not as owners through the legal mechanisms provided by corporate law, but as investors through the investment choices and automated transactions provided by the financial services industry (Wilcke, 2004, p. 200). Second, the stakeholder primacy norm assumes that all the stakeholders are required for the corporation to survive and thrive. For example, in a team production theory of the corporation, the ability of the corporation to produce its goods or services requires the coordinated efforts of several groups. Each group of stakeholders makes specific investments in the corporation in the form of time, money, or expertise in the hope of realizing a return on that

investment if the corporation succeeds and grows. To give the shareholders primacy is to ignore the explicit and implicit contracts between the corporation and its other stakeholders and allow the shareholders to capture a disproportionate share of the benefits of team production (Stout, 2002, pp. 1195-1198; Blair & Stout, 1999). Third, the stakeholder primacy norm assumes that the corporation is not just a voluntary economic association, but an entity with public responsibilities. The source for these public responsibilities is the privilege granted by the state of forming a corporation as an artificial, separate legal entity that provides its shareholders with limited liability.

The Faithful Business

The shareholder primacy model would view a corporation as a vehicle for maximizing profits and shareholder returns, and the stakeholder primacy model would view a corporation as a vehicle for balancing the interests of shareholders, employees, customers, suppliers, and local communities. However, the concept of a faithful business

using the corporate form to practice its business as a mission moves beyond both of these norms to a more radical view of the corporation as a vehicle for doing Kingdom work. For a faithful business, making a profit and satisfying stakeholders are not ends in themselves or even a means to broader goals such as maximizing societal wealth through efficiency gains or greater corporate social responsibility, but instead are a means to glorify God. Anything less would be idolatrous (Exodus 20:3).

Historically, the business as mission movement is an outgrowth of The Lausanne Committee on World Evangelism and its motto of “The Whole Church taking the Whole Gospel to the Whole World” (<http://www.lausanne.org/Brix?pageID=12722>). The First International Congress on World Evangelism was called by evangelist Billy Graham and held in Lausanne, Switzerland in July 1974 (Tunehag et al., 2005, p. ii). The Forum for World Evangelism held in Pattaya, Thailand in September and October 2004 included a Business as Mission Issue Group as

one of thirty-one issue groups, and this group of over seventy participants from all continents issued *The Business as Mission Manifesto* and *Lausanne Occasional Paper No. 59 on Business as Mission* (Tunehag, et al., 2005, pp. 2, 55). However, the business as mission movement has even more ancient roots.

The Theological Roots of the Faithful Business

The Christian business as mission movement and the idea of a faithful business are rooted in the Creation (Genesis 1:1). “At the beginning of man’s work is the mystery of creation” (John Paul II, 1981, § 54). The Creation sanctifies work in two different ways. First, as creatures created in the image of God (Genesis 1:26-27), men and women ought to emulate God. Since God worked to create the heavens and the earth and all that is within them (Genesis 2:2) and pronounced the work of His creative activity good (Genesis 1:31), men and women are called to exhibit God’s likeness through work that is pleasing to God. Second, God gives humankind dominion over the earth and a

stewardship mandate to care for the earth (Genesis 1:28-30; Genesis 2:15; Psalm 8:5-8). Thus, through work, men and women share in the creative activity of God and the unfolding work of God’s creation (John Paul II, 1981, §§ 113-115; Volf, 1991). Although the Fall corrupts work by making work toilsome and burdensome (Genesis 3:17-19), “God’s fundamental and original intention with regard to man, whom he created in his own image and after his own likeness was not withdrawn or canceled out even when man, having broken the original covenant with God, heard the words: ‘In the sweat of your face you shall eat bread’” (John Paul II, 1981, § 39). Work itself continues to be good because “through work man not only transforms nature, adapting it to his own needs, but he also achieves fulfillment as a human being and indeed in a sense becomes ‘more a human being’” by both reflecting the image of God and by fulfilling the ongoing creation mandate (John Paul II, 1981, § 40).

Business is the child of work and is thus both an extension of

the creation mandate and a victim of the Fall (Colossians 1:16; Romans 8:20-21). The model of work given by God is not one of solitary labor but of work in the context of relationships. Through the mystery of the Trinity, God is not just one, but three in one: Father, Son, and Holy Spirit. God's creative activity in the beginning unfolded through this Trinitarian relationship (Genesis 1:1-2 and 26; John 1:1-4). Business allows work to be performed both on a larger scale and within a community. "That the role of trade and commerce — business — is to enable humankind to glorify God and participate in God's creative and redemptive activity can be deduced in that we were designed to be in relationship with one another, that we were designed to be interdependent and that we have differing gifts and abilities" (Daniels, Dearborn, Franz, Karns, Van Duzer & Wong, 2003, p. 3).

The business as mission movement and the idea of a faithful business are testimonies to the belief that Christ can reform and transform the corporation. The Christian

managers of a faithful business seek to ultimately glorify God through business and to use business as a vehicle for fulfilling the creation mandate and the Great Commission (Matthew 28:18-20; Tunehag et al., 2005, p. 2). While "the business of business is business," the business of a faithful business "is business with a kingdom of God purpose and perspective" (Tunehag et al., 2005, p. 7). Although a faithful business will exhibit its faith through its works, such as creating jobs that provide dignity and self-reliance to the poor, "[t]he goal is not simply about making people materially better off. Business as mission is actively praying and incarnating the [Lord's Prayer]: 'Your kingdom come, your will be done' even in the marketplace" (Matthew 6:10; Tunehag et al., 2005, p. 7). A faithful business brings salt and light in the world (Matthew 5:13-16) while avoiding business practices that might cause it to lose its saltiness so that "it is fit neither for the soil nor for the manure pile; it is thrown out" (Luke 14:34-35). Thus, the ultimate bottom line for a faithful business is *ad maiorem*

Dei gloriam, for the greater glory of God (Tunehag et al., 2005, p. 7). This bottom line must be the starting point to avoid the trap of thinking that the value of Christianity lays chiefly in how it can support and reform business to promote a just society. C. S. Lewis warns against believing in Christianity, "...not because it is true, but for some other reason" (2001, p. 127). As Screwtape, a senior tempter in the bureaucracy of Hell, diabolically advises Wormwood, a junior tempter on his first field assignment, "On the other hand we do want, and want very much, to make men treat Christianity as a means to their own advancement, but, failing that, as a means to anything — even social justice" (Lewis, 2001, p. 126). So, a faithful business must first and foremost be about glorifying God to avoid adding "Christianity and Business" to C. S. Lewis' deadly list of "Christianity And."

In this context, a faithful business strives to eliminate the individualism and dualism that can compartmentalize Christianity and business. "A specific danger is that the BAM [business as mission] movement

ends up preaching an individualistic gospel, that Christians do business and live out their morality as a matter of simply between an individual and God alone" (Ewert, 2006, p. 75). Thus, a faithful business moves beyond traditional Christian business models of promoting the Kingdom through spiritualizing (praying and exhibiting personal virtues, such as honesty and generosity, in the workplace), workplace evangelism (witnessing to co-workers, suppliers, and customers), tentmaking (working in a business to financially support a ministry outside that business), and "business for missions" (donating profits from a business to support a ministry) (Alford & Naughton, 2001, pp. 14-15; Tunehag et al., 2005, p. 6). In an attempt to end the division between the sacred and the secular that arose out of human sin and the Fall, a faithful business strives to allow Christian business people to live out their calling, both their general calling to fulfill the Great Commission (Matthew 28:18-20) and the Great Commandment (Matthew 22:36-40) and their specific calling to a vocation, through business itself.

The Faithful Business and the Multiple Bottom Line

A faithful business holistically integrates a real business with Christian theological and social principles and meets the challenge of balancing these multiple demands through a multiple bottom line (Tunchag et al., 2005, p. 19). As a real business, a faithful business must meet customers' needs and earn a profit to sustain its operations. Thus, a faithful business must have a financial bottom line. However, a faithful business does not fit the shareholder primacy model since, like the stakeholder primacy model, it has a multiple bottom line. As a business that holistically integrates Kingdom values, such as "holiness, justice, and love" (Hill, 1997, p. 19) or stewardship, justice, shalom, dignity, and community (Ewert, 2006, p. 66), a faithful business also has spiritual and social bottom lines. The social bottom line intersects with the stakeholder primacy model, but the spiritual bottom line reveals the enormous gap between the faithful business and the stakeholder primacy model and its concern for corporate social

responsibility. As a faithful business, it is not primarily serving shareholders or stakeholders and temporal goods, whether financial or social, but instead it is serving God and supernatural goods.

However, operating a business for the glory of God has a financial cost. In the same way that corporate social responsibility policies and practices add costs that can reduce the profitability of a firm, a faithful business' commitment to a multiple bottom line means that the financial bottom line may not be as attractive as the financial bottom line in an equivalent secular firm. This apparent financial disadvantage does not mean that a faithful business cannot effectively compete with an equivalent secular firm and ultimately attract sufficient equity capital and become a publicly traded corporation.

One of the core concepts in the academic discipline of strategic management is that of competitive advantage. A competitive advantage allows a firm to distinguish itself from its competitors and to create greater value than its competitors.

A competitive strategy implements the firm's competitive advantage to capture as much of the value created as possible given the constraints of the firm's overall industry structure. Value is created by "offering lower prices than competitors for equivalent benefits or providing unique benefits that more than offset a higher price" (Porter, 1985, p. 3). The former is often associated with having a cost advantage and pursuing a cost leadership strategy. The latter is often associated with differentiation and attributes such as a brand name, quality, features, or customer service, although for a faithful business, its existence as a faithful business may be a source of differentiation.

A firm without a competitive advantage risks getting "stuck in the middle" (Porter, 1985, p. 16). The firm is unable to compete on costs, and the firm does not have the unique product, service, or transactional innovation that would allow it to compete via differentiation. Due to the extra costs associated with a multiple bottom line, a faithful business risks getting "stuck in the middle" if it pursues a cost leadership

strategy since there can only be one cost leader (Porter, 1985, p.13).⁸ However, a differentiation strategy does not pose the same problems. "In contrast to cost leadership...there can be more than one successful differentiation strategy in an industry if there are a number of different attributes that are widely valued by buyers" (Porter, 1985, p.14). By successfully pursuing a differentiation strategy, as the Starbucks Corporation has done in the specialty coffee market, a faithful business can increase its customers' willingness to pay to both cover the costs of the multiple bottom lines and grow. This growth coupled with profits anchored in a defensible competitive advantage based on differentiation would allow a faithful business to first attract private equity investments and ultimately public equity capital through an initial public offering. In moving from a small, closely held corporation in which there is either no separation of ownership and control or in which a limited number of investors understand and support the corporation's radical goals to a larger, publicly traded corpora-

tion in which ownership and control are divorced, the question becomes whether corporate law will support the faithful business in pursuit of its Christian mission.⁹

Using Corporate Law as a Faithful Business

The need to give managers discretion even under the shareholder primacy norm combined with incremental changes in corporate law to accommodate the stakeholder primacy norm provides the faithful business with the corporate law tools it needs to operate and defend its business. The business judgment rule, corporate constituency statutes, and key court decisions all become vehicles that allow the faithful business to use corporate law to glorify God in a way that transcends the secular debate between the shareholder primacy norm and the stakeholder primacy norm. By using these legal tools, the managers of a faithful business are being “as shrewd as snakes” in their Christian witness (Matthew 10:16).

Operational Decisions

Operational decisions represent the variety of decisions,

both large and small, that must be made by managers to keep a corporation running. These decisions range from high level strategy decisions about whether to develop a new product or enter an overseas market through important decisions about capital expenditures for new plants or equipment to more mundane decisions about accepting individual offers from customers and suppliers based on their price, quantity, and delivery terms. For the Christian managers of a faithful business, these decisions might also include whether to pay a higher living wage rather than the legally mandated minimum wage (Deuteronomy 24:14-15), whether to refuse to do business with a customer because of the nature of that customer’s business, or whether to create an in-house chaplaincy position. Both the common law business judgment rule and state corporate constituency statutes provide broad legal protections to the discretion exercised by Christian managers in making these types of operational decisions.

Traditionally, at common law, a lawsuit by a shareholder

disputing a decision by the board of directors of a corporation was evaluated by a court under the business judgment rule. The business judgment rule is a standard of judicial review used to determine if the board of directors had violated the primary fiduciary duties of due care, loyalty, and good faith (Branson, 2002, p. 631). As defined under Delaware law, the key state for corporation law due to the number of companies incorporated in Delaware, the business judgment rule creates 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” (*Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

To rebut the presumptive applicability of the business judgment rule, a shareholder plaintiff has the burden of proving that the board of directors, in reaching its challenged decision, violated

any one of the triad of fiduciary duties. If the shareholder plaintiff is not successful, then the business judgment rule operates to provide substantive protection for directors and their decisions. If the business judgment rule is successfully rebutted, then the burden shifts to the directors to prove to the trier of fact that the challenged transaction was entirely fair. (*Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001))

Thus, the business judgment rule prevents courts from second guessing corporate managers¹⁰ as long as they do not violate the duty of loyalty through self dealing or some other conflict of interest, show due care by making the decision in a deliberative fashion after reviewing the material facts that are reasonably available, and, in Delaware though not in other states, pass the “smell test” implied by the phrase “good faith” (Branson, 2002, pp. 641-644). The rationale underlying the business judgment rule is that judges are not able to evaluate and assess the business decisions of corporate

managers. However, due to this judicial deference, the application of the business judgment rule in individual cases produces inconsistent results that provide both the proponents of the shareholder primacy norm and the proponents of the stakeholder primacy norm with supporting precedents.

The case typically cited to demonstrate that corporate managers have a fiduciary duty to shareholders to maximize profits even under the business judgment rule's deferential standard of review is *Dodge v. Ford Motor Co.*, a 1919 decision of the Michigan Supreme Court. The Dodge brothers, ten percent minority shareholders in the Ford Motor Company, filed a lawsuit after Henry Ford, the president of the company and a member of its board of directors, announced that the company would no longer pay special dividends and would implement a business plan that involved lowering the prices of automobiles and expanding the company's production facilities. At the time, the company had approximately \$112,000,000 in surplus above capital and over \$52,000,000 in

cash and was highly profitable. Henry Ford indicated that the rationale for the decision was his concern for stakeholders other than the shareholders. "My ambition," said Mr. Ford, "is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes" (*Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (Mich. 1919)). The court ordered the payment of a dividend under a rationale that endorsed the shareholder primacy norm:

There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice

of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes. (*Dodge*, 170 N.W. at 684)

However, the court refused to enjoin the business plan even though it recognized that the plan reduced profits under a rationale that reflects the more typical deferential level of review under the business judgment rule:

The judges are not business experts. It is recognized that plans must often be made for a long future, for expected competition, for continuing as well as an immediately profitable venture. The experience of the Ford Motor Company is evidence of capable management of its affairs. (*Dodge*, 170 N.W. at 684)

Thus, although the court indicated that managers of the corporation have discretion in making decisions under

the business judgment rule, that discretion must advance the primary purpose of the corporation, which is to maximize profits for the shareholders.

However, *Shlensky v. Wrigley*, a 1968 decision of the Illinois Court of Appeals, affirms the business judgment rule's deferential standard of review in the context of a decision to forgo profits for shareholders for the benefit of other stakeholders. Shlensky, a minority shareholder in the corporation that owned the Chicago Cubs, sued over the board of directors' refusal to install lights at Wrigley Field and play night baseball games. The complaint alleged that these decisions reduced the corporation's profits and provided uncontested evidence that the decisions were based on the personal opinion of Philip Wrigley, the president, director, and majority shareholder of the corporation, "that baseball is a 'daytime sport' and that the installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood" (*Shlensky v. Wrigley*, 237 N.E.2d

776, 777-778 (Ill. App. Ct. 1968)) Despite the fact that Shlensky cited *Dodge v. Ford Motor Co.*, the court affirmed the trial court's dismissal of the complaint under the business judgment rule. The court stated that "the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors" (Shlensky, 237 N.E.2d at 779, quoting *Helpman v. American Light & Traction Co.*, 187 A. 540, 550 (N.J. 1923)). Although the court noted that the reasons for the decision could be in the best interests of the corporation because neighborhood decay might reduce attendance and affect the ballpark's property value, the allegations that the decision was motivated by concerns other than profit maximization were ultimately moot because "the decision was one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in the making of that

decision" (Shlensky, 237 N.E.2d at 780). Given Philip Wrigley's obviously poor business decision (as alleged in the complaint and supported by the Chicago Cubs' subsequent night baseball games), the stakeholder nature of the beneficiaries of the decision, and the court's efforts to stretch its rationale to find that the business decision was not contrary to the best interests of the corporation, the opinion not only demonstrates how the business judgment rule protects corporate managers, but the opinion can be seen as a more fundamental attack on the shareholder primacy norm to maximize profits (Greenfield & Nilsson, 1997, p. 830).

Since the business judgment rule can be used to support either the shareholder primacy norm or the stakeholder primacy norm, it ultimately reflects the tensions created by the separation of ownership and control and the agency problem. Implied in the managers' control of the corporation is both the discretion necessary to exercise that control and accountability for how that control is exercised. However,

[w]hile both accountability and discretion are important goals, they are also ultimately irreconcilable. One inevitably reaches a point at which additional accountability can be held only by limiting management discretion. The business judgment rule thus reflects a policy decision to accept the risks encompassed by the two masters and managerial sin problems in order to capture the benefits flowing from broad managerial discretion. Management's freedom to consider nonshareholder interests is merely an incidental by-product of that determination. (Bainbridge, 1993, pp. 1439-1440)

While it appears that the Christian managers of a faithful business can take advantage of the judicial deference provided by the business judgment rule to incorporate profit-sacrificing Kingdom values into operational decisions, using the business judgment rule as a shield is not risk free. Although the business judgment rule may relax the shareholder primacy norm's mandate to maximize

profits, it does not eliminate it, as demonstrated in *Dodge v. Ford Motor Co.* (Greenfield & Nilsson, 1997, pp. 817-818). Further, while as a practical matter corporate managers will be able to successfully defend lawsuits using the business judgment rule by creating some rationale as a pretext to tie the decision to the best interest of the corporation and its shareholders, this option is not available to the Christian managers of a faithful business for several reasons. First, a pretext is essentially a lie, since a pretext is defined as "a false reason or motive put forth to hide the real one" (*Webster's New World College Dictionary*), and Christian morality has clear prohibitions against lying (Leviticus 19:11; Proverbs 12:17). Second, by giving pretexts and secular rationalizations for a decision rather than the reasons that reflect the business as mission, the Christian manager is sacrificing his or her witness by lighting a lamp and then placing it under a bowl (Matthew 5:14-16). For a Christian manager to provide a pretext under these circumstances is to allow the ends of winning a lawsuit filed by a disgruntled

shareholder to justify the means of lying. Like Henry Ford and Philip Wrigley on behalf of their respective stakeholders, the Christian manager will ideally want to clearly assert, or at least not deny, that operational decisions are made primarily to glorify God by advancing His Kingdom and not primarily for the benefit of shareholders in order to be a valuable witness. The risk of doing so is that the court will determine that the Christian manager has exceeded the discretion provided by the business judgment rule to change the ends of the corporation. Fortunately, the risk is a small one since the business judgment rule appears to “stand for the proposition that courts will abstain from reviewing the exercise of directorial discretion even when the complainant alleges that directors, in making their decision, took nonshareholder interests into account” (Bainbridge, 2003, pp. 601-602; Elhauge, 2005, p. 770).

The Christian manager of the faithful business can supplement the protections provided by the business judgment rule by incorporating in a state with a

corporate constituency statute. Initially enacted by states in the 1980s to discourage hostile takeovers and the accompanying loss of jobs (Orts, 1992, p. 24), over thirty states¹¹ have constituency statutes, although Delaware, a key state in the area of corporation law, does not. Generally, constituency statutes explicitly allow corporate managers to consider the interests of stakeholders independently of shareholders when making decisions. The Ohio statute is typical, although the list of stakeholders and the nature of the interests that can be considered varies from state to state. Per the Ohio statute:

For purposes of this section [generally describing the director’s authority and standard of care], a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation’s shareholders and, in the director’s discretion, may consider any of the following: (1) The interests of the corporation’s employees, suppliers,

creditors, and customers; (2) The economy of the state and nation; (3) Community and societal considerations; (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation. (Ohio Rev. Code Ann. § 1701.59(E) (Page 2006))

While all constituency statutes allow corporate managers to consider the interests of various stakeholders, the Ohio statute also highlights several variations in constituency statutes from state to state. First, most statutes, like the Ohio statute, only extend to decisions by the board of directors. However, some statutes, like the Illinois statute, extend coverage to officers of the corporation (805 Ill. Comp. Stat. 5/8.85 (Lexis 2005)). Second, while most state statutes cover all corporate decisions, others, such as the Missouri statute, only apply when the corporation is the target of a takeover and the decision before the board of

directors is whether to accept or reject the takeover proposal (Mo. Ann. Stat. § 351.347.1 (2006)). Third, some statutes, like the Ohio statute, *require* the board of directors to consider the interests of shareholders and *allow* the board of directors to consider the interests of other stakeholders. However, most statutes are permissive, such as the Minnesota statute, allowing the board of directors to consider a variety of stakeholder interests without elevating the interests of shareholders (Minn. Stat. Ann. § 302A.251(5) (Lexis 2005)).

The typical constituency statute — one that allows the board of directors to consider the interests of all stakeholders equally in all decisions — supports a stakeholder primacy model of the corporation. All the statutory interpretation rules, such as interpreting statutes according to their “plain meaning” and consistently with legislative purpose and legislative history, indicate that the typical constituency statute changes the common law fiduciary duty of care (Orts, 1992, pp. 75-76 and 86). What is in “the best interests of the corporation” now includes

stakeholders as well as shareholders, so the constituency statutes “release management from the legal duty to maximize profits” (Greenfield, 2002, p. 607) and allow corporate managers to mediate among the interests of the various stakeholders. However, with this result, the typical constituency statute exacerbates the agency problem by replacing a single beneficiary of the fiduciary duty of care, the shareholders, with multiple beneficiaries in the form of stakeholders, and replacing a single standard of measurement, maximizing profits, with no fixed benchmark given the disparate nature of the various stakeholders’ interests. The typical constituency statute thus increases the discretion of corporate managers especially since none of the statutes give stakeholders standing to sue to enforce the expanded definition of what is in “the best interests of the corporation” (Orts, 1992, p. 83). The extent of this discretion is unknown because of the dearth of cases interpreting constituency statutes, especially in the area of operational decisions.

Whatever the merits of constituency statutes, in conjunction with the business judgment rule, they provide Christian managers of a faithful business with the legal room to maneuver in making operational decisions. To obtain the protection of the business judgment rule, a Christian manager is potentially placed in the position of providing a pretext tying an unprofitable operational decision made primarily to advance the Kingdom to long-term profits if the corporation is sued by a disgruntled shareholder. However, with a typical constituency statute, the Christian manager should be able to legitimately tie an operational decision that reflects the principles of stewardship, justice, shalom, dignity, and community to a stakeholder, especially when a definition of a stakeholder includes not just employees, suppliers, creditors, and customers, but also local community and general societal considerations or “any other factors the director considers pertinent” (Ind. Code Ann. 23-1-35-1(d) (Burns 2006)). The statutory definition of interests that can be considered by

corporate managers in a typical constituency statute is broad enough to encompass Jesus' answer to the question, "And who is my neighbor?" (Luke 10: 25-37). Thus, all the criticisms of the constituency statutes inure to the benefit of the faithful business, even if the statutes themselves have not yet led to the revolution in corporate law hoped for by proponents of the stakeholder primacy norm or feared by the proponents of the shareholder primacy norm (Springer, 1999, pp. 120-123).

Change of Control

A faithful business that is a publicly traded corporation will not just have to make the large and small operating decisions necessary to run a business, but will also likely face issues related to takeover proposals and changes in control. In fact, a faithful business that is successful enough to attract capital in the public markets may be particularly vulnerable to takeover threats that would undermine its business as mission. However, the business judgment rule as modified by Delaware law protects the faithful business

from takeovers to a certain extent while several constituency statutes, most notably in Indiana and Pennsylvania, provide higher levels of protection.

A publicly traded corporation is subject to the federal securities laws, such as the Securities Act of 1933, the Securities Exchange Act of 1934, and their accompanying regulations. The goal of the federal securities laws is to create financial transparency in the public capital markets through the mandatory disclosure of information to investors, primarily financial information about operating results. The faithful business as a publicly traded corporation would want to disclose how it is glorifying God and how its activities reflect Kingdom values for several reasons. First, the faithful business would want to let its light shine before others, so that they can see its good deeds and also glorify God (Matthew 5:14-16). Second, the faithful business would want to disclose the nature of its business as mission to avoid misleading or deceiving shareholders about its true nature, primarily to avoid the spiritually devastating conse-

quences of deception (Acts 5:1-11), but also for the practical reason of avoiding class action lawsuits by disgruntled shareholders for misrepresentation. Finally, the faithful business would want to comply with the federal securities laws as an act of submission to earthly authority (Romans 13:1-5).

However, disclosure will likely reveal that the faithful business has a higher cost structure than its competitors due to the extra costs associated with a multiple bottom line.¹² The increased operating costs associated with a faithful business will also likely increase the costs of raising capital. Although the faithful business has a real financial bottom line, the cost burdens of the other bottom lines will reduce the returns produced by the financial bottom line relative to secular competitors. Thus, fewer investors will be attracted to a faithful business since an investor who insists on profit maximization will invest elsewhere.

Given these hurdles, the faithful business that becomes a publicly traded corporation must have a compelling business

strategy. However, the source of the faithful business' financial success will also be its Achilles heel. A successful business strategy combined with higher costs unrelated to the implementation of that strategy will make the faithful business a potential target for a hostile takeover attempt, such as a tender offer by a secular competitor or a leveraged buyout by a private equity firm. The potential acquirer will see in the faithful business an opportunity to realize higher financial returns on the business strategy after eliminating the costs related to the business as mission. In this scenario, the salt of the faithful business will have lost its saltiness (Matthew 5:13). Although the faithful business can rely on the loyalty of its shareholders who support the business as mission, both the business judgment rule and constituency statutes offer additional protections in the takeover context.

Under Delaware law, decisions by corporate managers to defend against a takeover are subject to a less deferential version of the business judgment rule. When the board of directors

of a corporation are taking actions to thwart a hostile takeover attempt, the burden of proof is on the board of directors to show: (i) they had reasonable grounds to believe that the takeover posed a danger to corporate policy and effectiveness; and (ii) the defensive measure adopted was reasonable in relation to the threat of the hostile takeover (the “Unocal standard”) (*Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955-956 (Del. 1985)). This higher burden of proof in the takeover context reflects a heightened concern for the agency problem due to the potential conflict between shareholders, who want to maximize the stock price, and corporate managers who want to preserve their jobs and generally maintain the status quo. The board of directors’ burden of proof for the first prong is met by showing that the board acted in good faith and conducted a reasonable investigation (*Unocal Corporation*, 493 A.2d at 955). More importantly for the Christian manager of a faithful business, the burden of proof for the second prong is met if the board of directors

undertakes an analysis of “the nature of the takeover bid and its effect on the corporate enterprise,” including “the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)” (*Unocal Corporation*, 493 A.2d at 955). While the board of directors “may reasonably consider the basic stockholder interests at stake,” such interests are “not a controlling factor” (*Unocal Corporation*, 493 A.2d at 955-956). However, once the decision is made to sell the company, then the board of directors’ duty changes “from the preservation of [the company] as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit” (the “Revlon standard”) (*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)). With a decision to sell, the directors are no longer the protectors of “corporate policy and effectiveness,” but “auctioneers charged with getting the best price for the stockholders at a sale of the company” (*Revlon, Inc.*, 506 A.2d at 182). In announcing the

Revlon standard, the Delaware Supreme Court clarified the Unocal standard's broad language concerning stakeholders by noting that "a board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders" (*Revlon, Inc.*, 506 A.2d at 182). Thus, the business judgment rule in the takeover context only provides partial protection to the Christian manager of a faithful business in defending against a hostile takeover since the standard, deferential business judgment rule does not apply and the enhanced business judgment rule under the Revlon standard "expressly forbids management from protecting stakeholder interests at the expense of shareholders interests" (Bainbridge, 1992, p. 982). As with the use of the business judgment rule for operational decisions, the Christian manager is placed in the position of creating a pretext for why a takeover defense is in the long term best interest of shareholders. Not only is the pretext morally indefensible, but the pretext is even more obvious

because a takeover bid monetizes all the corporation's prior profit sacrificing decisions (Elhauge, 2005, p. 819).¹³

Constituency statutes provide a safety net for Christian managers in the takeover context as they do for operational decisions. State constituency statutes were a political solution to the problem of factory closures and job losses resulting from hostile takeovers, and several state constituency statutes apply specifically to takeovers. The constituency statutes of two states in particular, Indiana and Pennsylvania, aggressively recast the business judgment rule as developed by the Delaware courts in the takeover context to provide greater protections for corporate managers. In typical fashion, both the Indiana and Pennsylvania statutes allow a director, in considering the best interests of the corporation, to consider the effects of any action on a list of stakeholders that includes shareholders, employees, suppliers, customers, local communities, and all other factors the director considers pertinent, including the long-term interests of the corporation, and, in Pennsylvania, the

“benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation” (Ind. Code Ann. § 23-1-35-1(d), (g) (Burns 2006); 15 Pa. Cons. Stat. Ann. § 1715(a) (Lexis 2006)). However, both constituency statutes then proceed to repudiate the Delaware common law. The Indiana statute states (as does the Pennsylvania statute in almost identical language) that in making a determination that an action is not in the best interests of the corporation, “directors are not required to consider the effects of a proposed corporate action on any particular corporate constituent group or interest as a dominant or controlling factor” (Ind. Code Ann. § 23-1-35-1(f) (Burns 2006); 15 Pa. Cons. Stat. Ann. § 1715(b) (Lexis 2006)). Even more explicitly, the Indiana statute states that

[c]ertain judicial decisions in Delaware and other jurisdictions, which might otherwise be looked to for guidance in interpreting Indiana corporate law, including decisions

relating to potential change of control transactions that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control of the corporation, are inconsistent with the proper application of the business judgment rule under this article. (Ind. Code Ann. § 23-1-35-1(f) (Burns 2006))

To underscore this point, the official commentary on the statute by the Indiana General Assembly states “in deciding what is in ‘the best interests of the corporation’...a director is not required to view presently quantifiable profit maximization as the sole or necessarily controlling determinant of the corporation’s ‘best interests’” (Official Comment to Ind. Code Ann. § 23-1-35-1(d) (Burns 2006)). The decisions of the board of directors in both states are presumed to be in the best interests of the corporation unless, in Indiana, “it can be demonstrated that the determination was not made in good faith after reasonable investigation” (Ind. Code Ann. § 23-1-35-1(g) (Burns 2006)),

or, in Pennsylvania, if there is a “breach of fiduciary duty, lack of good faith, or self-dealing” (15 Pa. Cons. Stat. Ann. § 1715(d) (Lexis 2006)). In Indiana, in reaction to a Delaware Supreme Court decision which found the directors of a corporation liable for gross negligence in approving a merger in the absence of any allegations of fraud, bad-faith, or self-dealing, the constituency statute was amended to exclude liability for “any action taken as a director, or any failure to take action, unless: (1) [t]he director has breached or failed to perform the duties of the director’s office in compliance with this section; and (2) [t]he breach or failure to perform constitutes willful misconduct or recklessness” (*Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); Ind. Code Ann. § 23-1-35-1(e) (Burns 2006)). The official commentary notes that the change represented a conscious effort to narrow the basis for imposing personal liability on directors in response to the increasing amount of litigation against directors and the increasing expense of defending such claims, which made it difficult for corporations to

persuade qualified individuals to serve on boards of directors (Official Comment to Ind. Code Ann. § 23-1-35-1(e) (Burns 2006)). Taken together, these statutes explicitly reject the duties encompassed by the Revlon standard and other Delaware cases to auction a company or to give primacy to shareholder interests. Instead, they “permit directors to select a plan that is second-best from the shareholders’ perspective, but which alleviates the decision’s impact on the firm’s nonshareholder constituencies” since the right to consider stakeholder interests equally presumes the right to protect those interests (Bainbridge, 1992, pp. 994-995). In the faithful business, what may be second-best from a financial perspective is defending against a takeover to preserve the spiritual and social bottom lines so that the Christian manager can continue to seek first the Kingdom of God through the continued operation of the business as mission (Matthew 6:33).

Case law interpreting the constituency statutes in both Pennsylvania and Indiana confirm the protection given the

faithful business facing takeover. An early case arose from an attempt to acquire control of Strawbridge & Clothier, a publicly traded Pennsylvania corporation in which the descendants of the two founders were both officers and directors and owned forty percent of its stock (*Baron v. Strawbridge & Clothier*, 646 F. Supp. 690 (E.D. Pa. 1986)). Not surprisingly, Strawbridge & Clothier's management and board viewed the independence of the company as a predominant factor in its success and defended against a tender offer with a stock reclassification plan. The directors were accused of attempting to perpetuate the Strawbridge & Clothier families' control over the company in violation of their duties of loyalty and of care to the company's shareholders (*Baron*, 646 F. Supp. at p. 692). In a ruling that favored the company, the court reviewed Pennsylvania's first-generation constituency statute and stated, "Under the law of Pennsylvania, as in other jurisdictions, *Enterra Corp. v. SGS Associates*, 600 F. Supp. 678, 686 (E.D. Pa. 1985), the fiduciary duty of corporate directors

"to act in the best interests of the corporation's shareholders . . . requires the directors to attempt to block takeovers that would [in their judgment] be harmful to the target company," and "directors are obliged to oppose tender offers deemed to be 'detrimental to the well-being of the corporation even if that [opposition] is at the expense of the short-term interests of the individual shareholders'" (*Baron*, 646 F. Supp. at p. 697). Subsequently, in 1990, the Pennsylvania legislature amended the constituency statute and added the additional considerations previously cited to strengthen the protections given to directors (R. Murray, 2000, p. 629). In another federal district court case arising from Conrail Inc.'s attempt to merge with the CSX Corporation and disregard the Norfolk Southern Corporation's tender offer, "the court upheld Pennsylvania's constituency statute and supported the notion that a board of directors has 'wide discretion in how to react to so-called takeover bids' even when such discretion fails to maximize shareholder wealth" (Transcript, *Norfolk Southern Corp. v. Conrail, Inc.*, Nos.

96-7167, 96-7350, November 19, 1996, cited in R. Murray, 2000, pp. 647-648). In several cases filed by shareholders alleging a breach by directors of their fiduciary duties, the Indiana state courts have broadly construed the Indiana constituency statute by noting that "Indiana has statutorily implemented a strongly pro-management version of the business judgment rule" and that "Section 23-1-35-1 grants incumbent directors broad authority in running the affairs of a corporation, including decisions related to hostile takeovers, and permits them to consider many factors in doing so with lessened fear of being held liable to shareholders for breaching their duties as a director" (*GE Aircraft, Inc. v. Boehm*, 743 N.E. 2d 227, 238 (Ind. 2001); *Murray v. Conseco, Inc.*, 766 N.E. 2d 38, 44-45 (Ind. Ct. App. 2002)). In a case involving the merger of a publicly traded Indiana corporation, a federal district court stated that the Indiana constituency statute "recognizes that corporate directors may consider many interests beyond those of shareholders (Ind. Code § 23-1-35-1(d)).

The business judgment rule was written to make clear, for example, that even in the sale of the business, the directors do not have an unqualified duty to maximize shareholder value at the expense of all other considerations and constituencies" (*American Union Insurance Company v. Meridan Insurance Group Inc.*, 137 F. Supp. 2d. 1096, 1113 (S.D. Ind. 2001)).

The level of protection offered by the constituency statutes in both of these states is so high that a faithful business should consider incorporating in one of them, especially since a corporation's state of incorporation does not have to coincide with its business operations or principal place of business. In addition to the benefits of the constituency statutes, the faithful business will have the benefits of anti-takeover statutes that provide additional protections beyond the Revised Model Business Act or the General Corporation Law of Delaware. Indiana law gives broad authority to boards of directors by allowing them to adopt special change-of-control procedures (Ind. Code Ann. § 23-1-22-4 (Burns 2006)).

The combination of Pennsylvania's constituency and anti-takeover statutes creates one of the most comprehensive, strictest, pro-management anti-takeover regimes in the nation (15 Pa. Cons. Stat. §§ 2501-2588 (Lexis 2006); R. Murray, 2000, p. 630; MacKerron, 1994, p. 502). The faithful business can take advantage of the Indiana and Pennsylvania constituency and anti-takeover statutes without surrendering the general benefits of the Revised Model Business Corporation Act or the General Corporation Law of Delaware since all "the corporate law statutes are more alike than they are different" outside of several key areas, such as the business judgment rule and change of control (MacKerron, 1994, p. 517).

Conclusion

The discretion given to corporate managers under the business judgment rule despite the underlying assumption of profit maximization combined with changes in corporate law to accommodate a broader stakeholder view of the corporation have stretched corporate

law. The faithful business' ability to operate and defend itself as a publicly traded corporation despite its focus on glorifying God rather than maximizing shareholder wealth or balancing stakeholder interests reveals just how far the outer limits of corporate law have been stretched. While a faithful business still needs to count the cost of the limitations placed on its operations by Christian theological and social principles, those costs do not include foreclosure from the public markets as a publicly traded corporation or liability from disgruntled shareholders for actions that sacrifice profits to advance the Kingdom of God.

Stephen N. Bretsen

Associate Professor
William Volkman Chair of
Business and Law
Wheaton College
501 College Avenue
Wheaton, IL 60187-5593
630-752-5899
stephen.n.bretsen@wheaton.edu

Endnotes

¹A faithful business is another way of describing what others call a business as mission (Tunehag et.al., 2005) or a Great Commission company (Rundle & Steffen, 2003). In this sense, “faithful” means more than a business that is operated by Christians or that applies Christian principles to some aspects of its business, but instead a business that holistically integrates Christian theological and social principles with its business operations for the glory of God. The term “faithful business” is not meant to imply that the former is unfaithful, but only that it does not go far enough in implementing the countercultural demands of the Good News. By conventional business standards, the former would probably be considered a more prudent firm. In a similar manner, Rundle & Steffen (2003) specifically distinguish a Great Commission company from a Christian company (pp. 39-41).

²“The acquisition of a share of stock makes a person an owner and shareholder in a corporation. Shareholders thus own the corporation” (Miller, Jentz, & Cross, 2003, p. 715).

³All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors, subject to any limitation set forth in its articles of incorporation or in [a shareholder agreement] (Revised Model Business Corporation Act, § 8.01(b); see also Del. Code Ann. tit. 8, §141(a) (2006)).

⁴Bainbridge (2003, p. 561) notes that the twentieth century legal scholars Adolf Berle and E. Merrick Dodd erred by failing to distinguish between directors and officers. While in theory boards of directors do have significant attributes that deserve special attention, in practice, the failure to distinguish between the two is not necessarily an error. See also Endnote 9.

⁵See also Revised Model Business Corporation Act § 8.42 for similar duties imposed on officers.

⁶For an historic overview of the corporate social responsibility debate, see Wells (2002) and Branson (2001). For an overview of the antinomy between the corporate goals of profitability and social responsibility and the points of tension between shareholder primacy models and stakeholder primacy models, see Margolis & Walsh (2003).

⁷Article on A.G. Lafley, Chief Executive Officer of Proctor & Gamble Co. The Business Roundtable, an association of the chief executive officers of leading

corporations, has stated that it is in the long-term interests of shareholders for the corporation to treat other stakeholders well (Business Roundtable, 1997, p.3).

⁸A faithful business can be the cost leader if it achieves productivity gains that are sustainable because they cannot be imitated and because they offset the costs associated with the spiritual and social bottom lines.

⁹The idea that a faithful business is better positioned to pursue a differentiation strategy is explored in greater detail in a separate paper (Bretsen, 2007).

¹⁰Although often expressed as a rule relating the liability of directors, the business judgment rule applies to both directors and officers. In describing the rule, one court noted “[t]he sound business judgment rule...expresses the unanimous decision of American courts to eschew intervention in corporate decision-making if the judgment of directors and officers i[s] uninfluenced by personal considerations and is exercised in good faith...” (*Miller v. American Telephone & Telegraph Co.*, 507 F.2d 759, 762 (3rd Cir. 1974), cited in Gevurtz, 2000, p. 279). Including officers within the protection of the business judgment rule makes sense since all authority to manage the business and affairs of the corporation rests with the board of directors, and the board of directors delegates much of this authority by appointing officers (Revised Model Business Corporation Act §§ 8.01(b) and 8.40(a)). Further, the business judgment rule is a rule related to the duty of care and the duty of care of directors and officers is nearly identical (Revised Model Business Corporation Act §§ 8.30 and 8.42). However, there is no authority for extending the business judgment rule to employees below top management (Gevurtz, 2000, p. 298).

¹¹See, e.g., Ariz. Rev. Stat § 10-2702 (Lexis 2006); Fla. Stat. Ann. § 607.0830(3) (Lexis 2005); Ga. Code Ann. §§ 14-2-202(b)(5), 14-2-830 (2005); Haw. Rev. Stat. Ann. § 414-221(b) (Lexis 2005); Idaho Code § 30-1602 (Lexis 2005); 805 Ill. Comp. Stat. 5/8.85 (Lexis 2005); Ind. Code Ann. § 23-1-35-1(d)-(g) (Burns 2006); Ky. Rev. Stat. Ann. § 271B.12-21(4) (Lexis 2005); La. Rev. Stat. Ann. § 12:92(G) (Lexis 2005); Me. Rev. Stat. Ann. tit. 13-C § 831.6 (Lexis 2005); Md. Code Ann. § 2-104(b)(9) (Lexis 2005); Mass. Gen. Laws Ann. ch. 156B, § 65 (Lexis 2005); Minn. Stat. Ann. § 302A.251(5) (Lexis 2005); Miss. Code. Ann. 79-4-8.30 (Lexis 2005); Mo. Ann. Stat. § 351.347.1 (2006); Neb. Rev. Stat. § 21-2432(2) (2005); Nev. Rev. Stat. Ann. § 78.134(4) (Lexis 2005); N.J. Stat. Ann. § 14A:6-1 (Lexis 2005); N.M. Stat. Ann. § 53-11-35(D) (Lexis 2005); N.Y. Bus. Corp. Law § 717(b) (Lexis 2006); N.D. Cent. Code § 10-19.1-50(6) (Lexis 2005); Ohio Rev. Code Ann. §§ 1701.13(F)(7), 1701.59(A)(E) (Page 2006); Or. Rev. Stat. § 60.357(5) (2003); 15 Pa. Cons. Stat. Ann. §§ 515, 516, 1715, 1716

(Lexis 2006); R.I. Gen. Laws § 7-5.2-8 (2006); S.D. Codified Laws § 47-33-4 (2006); Tenn. Code Ann. § 48-103-204 (2005); Tex. Bus. Org. Code § 21.401 (2005); Vt. Stat. Ann. tit. 11A § 8.30 (2005); Va. Code Ann. § 13.1-727.1 (Lexis 2005); Wis. Stat. Ann. § 180.0827 (Lexis 2005); Wyo. Stat. Ann. § 17-16-830 (Lexis 2005).

¹²Although a faithful business will likely have higher costs than a firm following the shareholder primacy model, the cost differential with a firm following the stakeholder primacy model may not be as great. However, since a faithful business' multiple bottom lines include a spiritual bottom line that would not usually be present in a socially responsible firm, there will likely be a difference in cost structure between the two types of firms.

¹³In a later case involving a corporate reorganization, *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989), the Delaware Supreme Court appeared to limit the Revlon standard to situations where the break up of the corporate entity is inevitable and stated that a board of directors "is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover" 571 A.2d at 1150. Based on the treatment of the Unocal and Revlon standards in that case and a later case involving a change of control, *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993), some legal scholars have argued that the Revlon standard is limited to change of control transactions that transform a public held corporation into a privately held corporation (Stout, 2002, pp. 1203-1204; Fairfax, 2002, p. 409).

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