Professor Margaret A. Bancroft
Dechert LLP
New York, New York
2008

DELAWARE STATUTORY CORPORATE LAW
SELECT ANNOTATIONS

§ 141. Annotations.

2006 Revisor's note. – Section 8 of 75 Del. Laws, c. 306, provides that this section shall become effective on August 1, 2006.

Blackline Showing Effect of 2005 Amendments. — (a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.

(c)(1) All corporations incorporated prior to July 1, 1996, shall be governed by paragraph (1) of this subsection, provided that any such corporation may by a resolution adopted by a majority of the whole board elect to be governed by paragraph (2) of this subsection, in which case paragraph (1) of this subsection shall not apply to such corporation. All corporations incorporated on or after July 1, 1996, shall be governed by paragraph (2) of this subsection. The board of directors may, by resolution passed by a majority of the whole board, designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may

replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not the member or members present constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the certificate of incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in subsection (a) of § 151 of this title, fix the designations and any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation or fix the number of shares of any series of stock or authorize the increase or decrease of the shares of any series), adopting an agreement of merger or consolidation under § 251, § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title, recommending to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property and assets, recommending to the stockholders a dissolution of the corporation or a revocation of a dissolution, or amending the bylaws of the corporation; and, unless the resolution, bylaws or certificate of incorporation expressly so provides, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to § 253 of this title.

(2) The board of directors may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter expressly required by this chapter to be submitted to stockholders for approval or (ii) adopting, amending or repealing any bylaw of the corporation.

(3) Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, a committee may create 1 or more

subcommittees, each subcommittee to consist of 1 or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.
(d) The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting ~~next ensuing~~ held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification ~~and election~~ becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire. The certificate of incorporation or bylaw provision dividing the directors into classes may authorize the board of directors to assign members of the board already in office to such classes at the time such classification becomes effective. The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors who shall serve for such term, and have such voting powers as shall be stated in the certificate of incorporation. The terms of office and voting powers of the directors elected in the manner so provided in the certificate of incorporation separately by the holders of any class or series of stock may be greater than or less than those of any other director or class of directors. In addition, the certificate of incorporation may confer upon one or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. If the certificate of incorporation provides that one or more directors elected by the holders of a class or series of stock shall have more or less than 1 vote per director on any matter, every reference in this chapter to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of such the directors.
(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.
(f) Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.
(g) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors of any corporation organized under this chapter may hold its meetings, and have an office or offices, outside of this State.
(h) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors.

(i) Unless otherwise restricted by the certificate of incorporation or bylaws, members of the board of directors of any corporation, or any committee designated by the board, may participate in a meeting of such board, or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting.
(j) The certificate of incorporation of any corporation organized under this chapter which is not authorized to issue capital stock may provide that less than 1/3 of the members of the governing body may constitute a quorum thereof and may otherwise provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section. Except as may be otherwise provided by the certificate of incorporation, this section shall apply to such a corporation, and when so applied, all references to the board of directors, to members thereof, and to stockholders shall be deemed to refer to the governing body of the corporation, the members thereof and the members of the corporation, respectively.
(k) Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, except as follows:
(1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, shareholders may effect such removal only for cause; or
(2) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no director may be removed without cause if the votes cast against such director's removal would be sufficient to elect such director if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which such director is a part.
Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, this subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole.

SYNOPSIS OF 2006 AMENDMENTS
2006, Ch. 306, Secs. 3 and 4. – Section 3 amends §141(d) to add a new provision that a resignation may be made effective upon the happening of a future event or events, coupled with authority granted in the same section to make certain resignations irrevocable. By permitting a corporation to enforce a director resignation conditioned upon the director failing to achieve the specified vote for reelection, e.g., more votes for than against, coupled with board acceptance of the resignation, these provisions permit corporations and individual directors to agree voluntarily, and give effect in a manner subsequently enforceable by the corporation, to voting standards for election of directors which differ from the plurality default standard in Section 216. The new provisions of Section 141(b) do not, however, address whether resignations submitted in other contexts may be made irrevocable.

Section 4 amends the first sentence of § 141(d) to clarify that the classified terms of directors commence after the classification of the board of directors becomes effective, thereby expressly permitting certificate of incorporation or bylaw provisions that provide for classification effective at a point in time after such provisions are adopted. The new sentence added to Section 141(d) permits the certificate of incorporation or bylaw provision that divides the directors into classes to include language authorizing the board of directors to assign members of the board already in office to the board classes at the time such classification becomes effective.

Annotations
CASE NOTES — REPORTED
I. General Consideration.
II. Officers.
A. In General.
B. Powers and Duties.
C. Election.
D. Removal.
III. Sale or Purchase of Assets or Control.
IV. Stockholders.

I. GENERAL CONSIDERATION.
Level of culpability required. — Level of due care that is the litmus test for director liability, absent an exculpatory charter provision, is gross negligence; pleading it successfully requires the articulation of facts that suggest a wide disparity between the process the directors use to ensure the integrity of the company's financial statements and that which is rational. Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003).
Applicability. — Where there is no clear contractual language that preempts default fiduciary duty rules, the courts of Delaware will continue to apply them. Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318 (Del. Ch. 2003).
Pleadings. —To state a claim for a breach of the duty of care, a plaintiff must allege more than simple negligence. Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318 (Del. Ch. 2003).
II. OFFICERS.
A. IN GENERAL.
Control and management rest in officers and board of directors. —While the corporation is the owner of the assets, yet their control and management rest in the officers and directors, whose relation to the assets is one of fiduciary character. Harden v. Eastern States Pub. Serv. Co., 14 Del. Ch. 156, 122 A. 705 (1923).
In certain areas the directors rather than the stockholders or others are granted the power by the State to deal with questions of management policy. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957).
The board of directors acting as a board must be recognized as the only group authorized to speak for "management" in the sense that under this section they are responsible for the management of the corporation. Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852 (1957).

The business of every corporation "shall be managed by a board of directors." Whether that business consists of the operations of the usual going concern or but a single task, the corporation requires management, that is, a board of directors and such officers as may be necessary to accomplish its purpose or purposes. Olson Bros. v. Englehart, 42 Del. Ch. 348, 211 A.2d 610 (1965), aff'd, 245 A.2d 166 (Del. 1968).

Under Delaware law, board of directors comprises the management of the corporation. Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853 (D. Del. 1972).

The directors, not the stockholders, are the managers of the business affairs of the corporation. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

Relying on the General Assembly's determination under subsection (a) of this section that the business and affairs of every corporation shall be managed by or under the direction of a board of directors, courts defer to decisions made by boards of directors on how to run the corporation's affairs; generally, shareholders have only 2 protections against perceived inadequate business performance, they may sell their stock or they may vote to replace incumbent board members. In re MONY Group Inc. S'holder Litig., 853 A.2d 661 (Del. Ch. 2004).

Call of directors' meeting by illegally elected president is nullity. —Where election of president of the corporate board was illegal, it follows that the purported calls for meetings by him as president were invalid and the subsequent meetings insofar as their validity depended upon such calls were nullities. Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299 (1954).

Telephonic directors meeting without prior notice. —When the new board members of a corporation met and agreed to send certain instructions to the previous board members, the fact that they met telephonically and without prior written notice was not important, under subsection (i) of this section. Liebermann v. Frangiosa, 844 A.2d 992 (Del. Ch. 2002).

Directors of corporation cannot act by proxy. Stevens v. Acadia Dairies, Inc., 15 Del. Ch. 248, 135 A. 846 (1927).

Directors as agents. —Directors, in the ordinary course of their service as directors, do not act as agents of the corporation; it would be an analytical anomaly to treat corporate directors as agents of the corporation when they are acting as fiduciaries of the stockholders in managing the business and affairs of the corporation. Arnold v. Society for Savs. Bancorp., 678 A.2d 533 (Del. 1996).

De facto directors. —Where the corporate director was not a legally elected director but had acted as such under color of right at various directors' meetings since the action of the board purporting to elect him, he must therefore be regarded as a de facto officer. Drob v. National Mem. Park, 28 Del. Ch. 254, 41 A.2d 589 (1945).

The status of an illegally elected director who has acted in his or her position for some time after his or her election is not insulated from direct attack in subsequent proceedings by some extension of the de facto theory. Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299 (1954).

Director who lawfully is in office before election which later is found invalid continues in office until a successor is duly elected and qualified. Halle & Stieglitz, Filor, Bullard, Inc. v. Empress Int'l, Ltd., 442 F. Supp. 217 (D. Del. 1977).

Amendment of charter. —The board of directors alone is empowered to act on behalf of the corporation, including taking action to initiate an amendment to the corporation's charter. AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188 (Del. Ch. 1999).

Validity of indefinite class-designated directorships. —It was neither the intended nor the unintended effect of the 1974 amendment to subsection (d) to invalidate certificate provisions creating class-designated directorships that do not state the term of such directorships or their voting power. Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257 (Del. Ch. 1987).

B. POWERS AND DUTIES.

Duties of directors are administrative and relate to supervision, direction and control, the details of the business being delegated to inferior officers, agents and employees and this is what is meant by management. Cahall v. Lofland, 12 Del. Ch. 299, 114 A. 224 (1921), aff'd, 13 Del. Ch. 384, 118 A. 1 (1922).

Agreements by stockholders cannot substantially limit this power. —The Delaware corporation law does not permit actions or agreements by stockholders which would take all power from the board to handle matters of substantial management policy. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957).

If an agreement between stockholders and directors tends to limit in a substantial way the freedom of director decisions on matters of management policy it violates the duty of each director to exercise his or her own best judgment on matters coming before the board. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957).

The Court of Chancery cannot give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957).

Some powers of the board are delegated to officers. —The powers of a president of a corporation over its business and property are merely the powers of an agent, for a corporation can speak in no other manner. The control over the company's business and property is vested in the board of directors, but subject to this control certain powers are delegated by implication to certain officers. Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co., 34 Del. 567, 156 A. 350 (1931).

Delegation of duty to manage may be made in certificate of incorporation. —There is no conflict with the general principle that directors may not delegate their duty to manage the corporate enterprise where the delegation of duty, if any, is made not by the directors but by stockholder action via the certificate of incorporation. Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800 (1966).

But directors may not delegate their duty to manage corporate enterprise. Adams v. Clearance Corp., 35 Del. Ch. 459, 121 A.2d 302 (1956).

The general rule forbidding the directors to delegate managerial duties applies as well to a delegation of a single duty as to the delegation of several or of all duties. Adams v. Clearance Corp., 35 Del. Ch. 459, 121 A.2d 302 (1956).

Delegation of task to one-person committee. —The setting of a record date for a stockholder vote must be accomplished by a board resolution adopted before the record date, and under subsection

(c)(2), a board may delegate this task to a one-person board committee, but this board committee must itself comply with § 213(a) of this title by adopting a resolution fixing a future record date. In re Staples, Inc. Shareholders Litig., 792 A.2d 934 (Del. Ch. 2001).

Committee to be of directors. —Delegation by the board of directors to its president and secretary to determine whether a sale of assets of the corporation would be made, and if so upon what terms, is a violation of 8 Del. C. § 271 and of the stockholders' resolution empowering the board to sell, because subsection (c) of this section authorizes delegation of directors' powers to directors, not to officers. Clarke Mem. College v. Monaghan Land Co., 257 A.2d 234 (Del. Ch. 1969).

Options committee not covered by section. —Where committee was not empowered to grant options, but only to recommend to the board the grant of options to employees, thereafter, the board in its discretion, and in the exercise of its business judgment, was required to approve the grant of options, the options committee was not the type of committee subject to subsection (c) of this section which governs the creation of committees authorized to exercise the powers of the board of directors in the management of the business and affairs of the corporation. Elster v. American Airlines, 39 Del. Ch. 476, 167 A.2d 231 (1961).

Authority delegated to compensation committee to grant stock options. —Corporate directors do not breach their fiduciary duty by delegating authority to a compensation committee to grant stock options. Michelson v. Duncan, 386 A.2d 1144 (Del. Ch. 1978), aff'd in part and rev'd in part, 407 A.2d 211 (Del. 1979).

Authority relating to merger. —The question of the independence of the members of a special committee that recommended a merger turned upon the reality of the interests and incentives affecting the independent directors; as the full board of directors had to act to approve a merger agreement and recommend the merger to the stockholders for approval, a committee could not be empowered to perform that necessary board function, under subsection (c) of this section and 8 Del. C. § 251(b). Krasner v. Moffett, 826 A.2d 277 (Del. 2003).

The court did not conclude that the 9 independent directors of 10 total directors were either too enamored with the opportunity of reaping the gains that would flow to them from their accelerated options that became vested in the event of a change of control merger, or too poorly informed to step forward and demand a better process, because the 9 directors: (1) did not have improper motives; (2) engaged in a reasonable corporate process to determine afair whole-company sale value; and (3) made a reasonable decision to execute a merger agreement containing the challenged termination fee and matching rights. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Board's procedure to remain as independent as it could while it considered merger proposals included that the board and the executive committee be committed to avoiding discussion of future management equity, cash compensation, or positions with bidders early in the process; as a means of enforcing that commitment, meetings with bidders were held only in the presence of the investment banker and with all of the final 4 bidders. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Authority to bind corporation through settlement agreements. —Settlement agreement negotiated by corporation's attorney was enforceable as it contained agreement (through the eyes of a reasonable negotiator) on all of the essential terms, including the payment of attorney fees in the

event of a breach of the agreement; the agreement was not contingent upon the corporation's board's approval, based upon the presumption that an attorney had that authority and based upon lack of any statement or indication by the corporation's attorney to the contrary. Loppert v. Windsortech, Inc., 865 A.2d 1282 (Del. Ch. 2004), aff'd, 867 A.2d 903 (Del. 2005).
Purpose of independent committee, delegated authority to decide whether to pursue pending derivative action, is to act as an independent arm of the ultimate power given to a board of directors under subsection (a) of this section to determine whether or not derivative plaintiff's pending suit brought on behalf of the corporation should be maintained when measured against the overall best interests of the corporation. Abbey v. Computer & Communications Technology Corp., 457 A.2d 368 (Del. Ch. 1983).
Bylaw construed so as not to limit board's power. —A bylaw giving the president the power to submit matters for stockholder action presumably only embraces matters which are appropriate for stockholder action. So construed the bylaws do not impinge upon the statutory right and duty of the board to manage the business of the corporation. Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852 (1957).
Courts will not interfere with directors' business judgment. —Courts will not upset the decisions of either directors or stockholders as to questions of policy and business management. Mercantile Trading Co. v. Rosenbaum Grain Corp., 17 Del. Ch. 325, 154 A. 457 (1931).
Unwise business management, while a source of irritation to disappointed stockholders, does not in itself necessarily show recoverable grounds of action against those responsible therefor. Freeman v. Hare & Chase, Inc., 16 Del. Ch. 207, 142 A. 793 (1928).

In stockholders' suit to cancel a voting trust, where the directors of the corporation produced evidence that they had acted in good faith and free from disqualifying interest in settling the complaint, the suit will be defeated, and with that finding on the corporation's behalf, equity court will not inquire into the merits of the settlement. Perrine v. Pennroad Corp., 28 Del. Ch. 342, 43 A.2d 721 (1945), aff'd, 29 Del. Ch. 531, 47 A.2d 479 (1946), cert. denied, 329 U.S. 808, 67 S. Ct. 620, 91 L. Ed. 690 (1946).
In the absence of a showing of bad faith on the part of the directors or of a gross abuse of discretion, the business judgment of the directors will not be interfered with by the courts. Kaplan v. Centex Corp., 284 A.2d 119 (Del. Ch. 1971).
Wide discretion in the matter of valuation is confided to directors, and as long as they appear to act in good faith, with honest motives, and for honest ends, the exercise of their discretion will not be interfered with. Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973); Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977).
Board's actions, taken as defensive measures to takeover threat, were entitled to the protection of the business judgment rule. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987).
Power of court to limit contract terms. —Central purpose of Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1985), is to ensure the fidelity of fiduciaries, not to serve as a license for the judiciary to set arbitrary limits on the contract terms that fiduciaries acting loyally and carefully can shape in the pursuit of their stockholders' interest; even less is it the purpose of Revlon to push the pricing of sales transactions to the outer margins

(or beyond) of their social utility. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Unless there is fraud or illegal misconduct. —Fraud, actual or presumed, or illegal or ultra vires misconduct must be shown to justify an interference by the courts with questions of corporate policy and management. Mercantile Trading Co. v. Rosenbaum Grain Corp., 17 Del. Ch. 325, 154 A. 457 (1931).

In the absence of fraud, either express or implied, the action of the governing body of a corporation, in matters of internal management of this nature, will not be disturbed by a court of equity. Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co., 26 Del. Ch. 16, 21 A.2d 178 (1941), aff'd, 26 Del. Ch. 411, 24 A.2d 315 (1942).

Courts will not undertake, in the absence of fraud, to review the exercise by a corporation's directors of their business judgment as to what is required for the best interests of the corporation. Sandler v. Schenley Indus., Inc., 32 Del. Ch. 46, 79 A.2d 606 (1951).

It is not the proper function of the Court of Chancery to overturn a business transaction duly ratified by the stockholders absent a showing of fraud, a gift of assets, illegality, or ultra vires action. Lewis v. Hat Corp. of Am., 38 Del. Ch. 313, 150 A.2d 750 (1959).

Rule applies where no showing of fraud or domination of outside directors. —The business judgment rule, rather than the rule of fairness, was applied to test the validity of a stock transaction between the corporation and a stockholder group which included insider directors, where there was no showing of fraud, no showing of domination of the outside directors, and no testimony which even tended to show that the terms of the transaction had been dictated by the group or any member thereof. Puma v. Marriott, 283 A.2d 693 (Del. Ch. 1971).

"Control" and "domination" may be exercised directly or through nominees. But, at minimum, the words imply (in actual exercise) a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling. Kaplan v. Centex Corp., 284 A.2d 119 (Del. Ch. 1971).

Allegation of domination of board must be proved. —A plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it. Kaplan v. Centex Corp., 284 A.2d 119 (Del. Ch. 1971).

Stock ownership alone, at least when it amounts to less than majority, is not sufficient proof of domination or control. Kaplan v. Centex Corp., 284 A.2d 119 (Del. Ch. 1971).

Plaintiff has burden to show breach of duty. —To rebut the business judgment 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, loyalty or due care; if a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

Good faith must be present in business judgments of directors. —Good faith may always be brought in question where it appears that the settlement of a dispute between stockholders of a corporation is so grossly inadequate that one is required to reach the decision that the directors were reckless and indifferent as to the rights of the stockholders and did not exercise reasonable business judgment. Perrine v. Pennroad Corp., 29 Del. Ch. 531, 47 A.2d 479, cert. denied, 329 U.S. 808, 67 S. Ct. 620, 91 L. Ed. 690 (1946).

Determination of breach of duty not outcome-determinative per se. —An initial judicial determination that a given breach of a board's fiduciary duties has rebutted the presumption of the business judgment rule does not preclude a subsequent judicial determination that the board action was entirely fair, and is, therefore, not outcome-determinative per se. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995), aff'd, 663 A.2d 1156 (Del. 1995).

It is presumed that directors form their business judgment in good faith. Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136 (1960).

Attempting action without meeting does not prove bad faith. —An attempt to take corporate action without a directors' meeting when all the directors did not approve of that action, while apparently in violation of this section, did not compel an inference of bad faith, where there was nothing surreptitious about the proceedings; those holding the minority view were informed of the proposed action, were given the opportunity to record their dissent, and approved in the procedure, apparently in the interest of saving the expense of getting the directors together for a meeting. Bowers v. Columbia Gen. Corp., 336 F. Supp. 609 (D. Del. 1971).

Directors, not corporation, are charged with liability for fraud and ultra vires acts. —In cases of fraud, ultra vires acts or acts of negligence on the part of those charged with the duty of managing the affairs of a corporation, the offending officers, and not the aggrieved corporation, are the proper parties to account. Harden v. Eastern States Pub. Serv. Co., 14 Del. Ch. 156, 122 A. 705 (1923).

Honest mistake of business judgment on part of directors is not reviewable by courts. Karasik v. Pacific E. Corp., 21 Del. Ch. 81, 180 A. 604 (1935).

In the settlement of disputes in which corporations are interested, the directors of the corporation, who are its duly accredited managers, are called upon to exercise honest business discretion, and if it appears that they acted honestly, they are not responsible for mere mistakes, and under such circumstances courts will not interfere with their action or attempt to assume their authority to act. Perrine v. Pennroad Corp., 29 Del. Ch. 531, 47 A.2d 479 (1946), aff'd, 57 A.2d 63 (Del.), cert. denied, 329 U.S. 808, 67 S. Ct. 620, 91 L. Ed. 690 (1947).

In a suit alleging that defendant board of directors breached their fiduciary duties in a series of note transactions, defendants were entitled to summary judgment as to the allegations of accounting abuses because the board of directors relied upon a clean accounting report (shielding them from liability under subsection (e) of this section). Cantor v. Perelman, 235 F. Supp. 2d 377 (D. Del. 2002).

But error in law is reviewable. —When a board acts under misconception of the law on a vital point, judicial review is in order, without there being any question of bad faith. Gottlieb v. Heyden Chem. Corp., 33 Del. Ch. 82, 90 A.2d 660 (1952).

Directors of corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing, especially where their individual interests are concerned. Lofland v. Cahall, 13 Del. Ch. 384, 118 A. 1 (1922); Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 A. 54 (1928); Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904 (1938); Bovay v. H.M. Byllesby & Co., 27 Del. Ch. 381, 38 A.2d 808 (1944).

Directors of a corporation stand in a position of trustees with the stockholders. As such, the utmost good faith and fair dealing are required of directors, especially where their individual interests are concerned. Petty v. Penntech Papers, Inc., 347 A.2d 140 (Del. Ch. 1975).

And directors of corporation stand in fiduciary relation to corporation and its stockholders. Their acts are subject to be tested by the familiar rules that govern the relations of a trustee to the trustee's beneficiary. Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A.2d 225 (1938), aff'd, 23 Del. Ch. 255, 5 A.2d 503 (1939); Bovay v. H.M. Byllesby & Co., 27 Del. Ch. 381, 38 A.2d 808 (1944).

A director will be held as a trustee for the corporation he or she has undertaken to represent, and must account for the profits resulting from an unlawful act done to promote his or her own interest, because he or she cannot derive any personal benefit or advantage by reason of his or her position distinct from other stockholders. Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A.2d 225 (1938), aff'd, 23 Del. Ch. 255, 5 A.2d 503 (1939).

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests and while technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954).

Under Delaware law a stockholder who in fact controls the management of a Delaware corporation owes a fiduciary duty to that corporation and its shareholders. Harriman v. E.I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

Their acts are scanned in light of principles which define trust relationship. —Directors of a corporation are spoken of as its trustees; their acts are scanned in the light of those principles which define the relationship existing between trustee and cestui que trust. Bowen v. Imperial Theatres, Inc., 13 Del. Ch. 120, 115 A. 918 (1922).

The law imposes upon the directors the duty of disposing of the shares in the interest of the corporation; the manner in which they perform that duty must meet the exacting standards required of a fiduciary acting in an office of trust and confidence. Cahall v. Burbage, 14 Del. Ch. 55, 121 A. 646 (1923).

Each case of director's breach of fiduciary duty must be decided on its own facts. Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136 (1960).

Public policy demands of directors undivided loyalty to corporation to the end that there shall be no conflict between duty and self-interest. Italo-Petro. Corp. of Am. v. Hannigan, 40 Del. 534, 14 A.2d 401 (1940); Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941).

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his or her duty, not only affirmatively to protect the interests of the corporation committed to his or her charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his or her skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941).

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to

the corporation and its stockholders. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941).

Directors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all stockholders generally. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988).

Judgment of directors of corporation enjoys benefit of presumption that it was formed in good faith and was designed to promote the best interests of the corporation they serve. Davis v. Louisville Gas & Elec. Co., 16 Del. Ch. 157, 142 A. 654 (1928); Karasik v. Pacific E. Corp., 21 Del. Ch. 81, 180 A. 604 (1935).

Insulation of directors. —The fact that charter or bylaw provisions may technically permit an action contemplated by the directors does not automatically insulate directors against scrutiny of purpose. Petty v. Penntech Papers, Inc., 347 A.2d 140 (Del. Ch. 1975).

Obligations to spin off company. —Prior to the date of distribution, the interests held by a spin off subsidiary's prospective stockholders were insufficient to impose fiduciary obligations on the parent and the subsidiary's directors, thus, corporate parent and directors of a wholly-owned subsidiary did not owe fiduciary duties to the prospective stockholders of the subsidiary after the parent declares its intention to spin-off the subsidiary. Anadarko Petro. Corp. v. Panhandle E. Corp., 545 A.2d 1171 (Del. 1988).

Nonstockholder usurping function of directors assumes fiduciary duty. —A nonstockholder who usurps the function of the board of directors of a Delaware corporation or otherwise directs its activities assumes the same fiduciary duty as its directors have. Harriman v. E.I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

One who exercises control over a corporation which in turn exercises control over a Delaware corporation may have a fiduciary duty to the latter corporation. Harriman v. E.I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

Fiduciary duty arises from exercise of power with respect to corporation. —Under the Delaware cases which speak of fiduciary duty to a corporation or its stockholders, that duty arises from the exercise of power with respect to that corporation. Harriman v. E.I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

Such as exercise of stockholder power by majority stockholder. —A fiduciary duty may arise from the exercise of a stockholder power by a majority stockholder in his or her capacity as such, absent any intrusion in the affairs of the board of directors. Harriman v. E.I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

Affirmative undertaking necessary. —It is only when a person affirmatively undertakes to dictate the destiny of the corporation that he or she assumes such a fiduciary duty. Harriman v. E.I. DuPont De Nemours & Co., 372 F. Supp. 101 (D. Del. 1974).

Directors derive their managerial decision making power from subsection (a) of this section. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

Good faith presumption has been consistently reaffirmed. —The presumption that boards of directors act in good faith has been consistently reaffirmed and broadened with respect to the sale of corporate assets over the past several decades. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).

"Business Judgment Rule" is important aspect of presumption. —An important aspect of the presumption that boards of directors act in good faith has generally come to be known as the "business judgment rule." Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).

Business judgment rule is merely presumption of propriety accorded decisions of corporate directors. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

And rule permits directors to exercise their discretion in managing corporation's business affairs in the manner they deem in the corporation's best interests. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

When a stockholder's derivative suit challenges the propriety of a decision of the directors, the business judgment rule protects the directors from liability by a presumption that the decision is proper. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

"Business Judgment Rule" evolved to give recognition and deference to directors' business expertise when exercising their managerial power. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

Business judgment rule requires utmost loyalty from directors to corporation and its interests. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

The concept of reasonable doubt in corporate derivative jurisprudence is akin to the concept that the stockholder has a reasonable belief that the board lacks independence or that the transaction was not protected by the business judgment rule. Grimes v. Donald, 673 A.2d 1207 (Del. 1996).

Determining whether self-interest of directors overcame loyalty. —A court must determine whether the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand; if the derivative plaintiff satisfies this burden, then demand will be excused as futile. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

A director is being independent only when the director's decision is based entirely on the corporate merits of the transaction and it not influenced by personal or extraneous considerations; by contrast, a director who receives a substantial benefit from supporting a transaction cannot be objectively viewed as disinterested or independent. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

One director's colorable interest in a challenged transaction is not sufficient, without more, to deprive a board of the protection of the business judgment rule presumption of loyalty. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

In assessing a challenge to defensive actions by a target corporation's board of directors in a takeover context, the Court of Chancery should evaluate the board's overall response, including the justification for each contested defensive measure and the results achieved thereby. Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

A material interest of one or more directors less than a majority of those voting would rebut the application of the business judgment rule if the plaintiff proved that the interested director

controls or dominates the board as a whole or the interested director failed to disclose an interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the proposed transaction. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995), aff'd, 663 A.2d 1156 (Del. 1995).

Duty of care. —The duty of the directors of a company to act on an informed basis forms the duty of care element of the business judgment rule; duty of care and duty of loyalty are of equal and independent significance. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

Loyalty-based standard. —The standard for liability for failures of oversight requires a showing that the directors have breached their duty of loyalty by failing to attend to their duties in good faith; the directors should be conscious of the fact that they are not doing their jobs under this standard set out in In Re Caremark Int'l Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003).

Duty of loyalty. —Disclosure of conflicts of interest may preclude a claim for breach of the duty of loyalty; a stockholder cannot complain of corporate action in which, with full knowledge of all the facts, he or she has concurred; nonetheless, it cannot be said that certain boilerplate disclosures convey full knowledge of all of the facts. Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318 (Del. Ch. 2003).

Application of business judgment rule, of necessity, depends upon a showing that informed directors did, in fact, make a business judgment authorizing the transaction under review. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).

Where there is no conscious decision by directors to act or refrain from acting, the business judgment rule has no application. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

Business judgment rule does not irrevocably shield decisions of corporate directors from challenge. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).

And rule provides shield with which directors may oppose stockholders' attacks on the decisions made by them. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

But rule does not protect fraudulent, illegal or reckless decisions by directors. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

Deliberate indifference. —Shareholder's pleading is sufficient to withstand a motion to dismiss where the shareholders' claims are based on an alleged knowing and deliberate indifference to a potential risk of harm to the corporation; where a director consciously ignores duties to the corporation, thereby causing economic injury to its stockholders, the director's actions are either not in good faith or involve intentional misconduct. In re Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003).

The business judgment rule has no application where the directors have profited at the expense of the corporation. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

Presumption of sound business judgment reposed in directors will not be disturbed if any rational business purpose can be attributed to its decision. Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977).

In order to overcome presumption that decision of directors is proper under the business judgment rule and successfully assail the directors' decision, a derivative plaintiff must first show

facts which, if true, would remove the directors' decision from the protection of the rule. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

When the business judgment rule is applied to defend directors against personal liability, as in a derivative suit, the plaintiff has the initial burden of proof and the ultimate burden of persuasion. Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

In order to rebut the protection of the business judgment rule, the burden on the plaintiffs will be to demonstrate, by a preponderance of the evidence, that the directors' decisions were primarily based on (1) perpetuating themselves in office or (2) some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or (3) being uninformed. Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

Sale of stock to employee stock ownership plan. —Where company adopted plan to sell repurchased stock to newly formed employee stock ownership plan as defensive measure, a proper corporate purpose was served by the defensive measure but action was not reasonable in relation to the threat posed. AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986).

In responding to a takeover threat, neither a board's failure to become adequately informed nor its failure to apply the analysis of Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985) where such an approach is required, will automatically invalidate a corporate transaction; under either circumstance, the business judgment rule will not be applied and the transaction at issue will be scrutinized to determine whether it is entirely fair. Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989).

The business judgment rule applies to the conduct of directors in the context of a takeover. Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

Duty to inform shareholders. —The question whether shareholders have been provided with appropriate information upon which an informed choice on a matter of fundamental corporate importance may be made, is not a decision concerning the management of business and affairs of the enterprise of the kind the business judgment rule is intended to protect; it is rather a matter relating to the directors' duty to shareholders. Bear, Stearns & Co. v. Anderson, Clayton & Co., 519 A.2d 669 (Del. Ch. 1986).

Standard of review for business judgment rule. —Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of derivative litigation; thus where a board takes action designed to defeat a threatened change in control of a company, a flexible, intermediate form of judicial review is appropriate. First, there must be shown some basis for the board to have concluded that a proper corporate purpose was served by implementation of the defensive measure and, second, that measure must be found reasonable in relation to the threat posed by the change in control that instigates the action. AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986).

When business judgment rule is rebutted. —The entire fairness standard applies only if the presumption of the business judgment rule is defeated, and requires judicial scrutiny regarding both "fair dealing" and "fair price." Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

Directorial self-compensation decisions. —Directorial self-compensation decisions lie outside the business judgment rule's presumptive protection, so that, where properly challenged, the receipt of self-determined benefits is subject to an affirmative showing that the compensation arrangements are fair to the corporation. In re Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003).

Directors' failure to carry their initial burden under Unocal Corp. v. Mesa Petro. Co., Del. Supr., 493 A.2d 946 (1995) does not, ipso facto, invalidate the board's actions; instead, once the Court of Chancery finds the business judgment rule does not apply, the burden remains on the directors to prove "entire fairness." Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

Directors' powers do not include power to give away corporate property; they cannot make gifts except as authorized by 8 Del. C. § 122. Taussig v. Wellington Fund, Inc., 187 F. Supp. 179 (D. Del. 1960), aff'd, 313 F.2d 472 (3d Cir.), cert. denied, 374 U.S. 806, 83 S. Ct. 1693, 10 L. Ed. 2d 1031 (1963).

Power to oust members of foundation. —Where members were responsible for the foundation's creation and continued endowment and electing its directors, the members' power was intended to resemble that of stockholders, and as a result, the foundation's members could not be ousted by the very directors whom they had elected, for any other interpretation would render the foundation's corporate structure fundamentally unstable. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

Wrongdoing by employees is not required to be anticipated as a general proposition, and it is only where the facts and circumstances of an employee's wrongdoing clearly throw the onus for the ensuing results on inattentive or supine directors that the law shoulders them with the responsibility. Graham v. Allis-Chalmers Mfg. Co., 40 Del. Ch. 335, 182 A.2d 328 (1962), aff'd, 41 Del. Ch. 78, 188 A.2d 125 (1963).

Especially in large corporation. —Though corporate directors, particularly of a small corporation, may cause themselves to become personally liable when they foolishly or recklessly repose confidence in an untrustworthy officer or agent and in effect turn away when corporate corruption could be readily spotted and eliminated, such principle is hardly applicable to a large corporation, whose operation is hedged about with numerous and sometimes conflicting federal and state controls. Graham v. Allis-Chalmers Mfg. Co., 40 Del. Ch. 335, 182 A.2d 328 (1962), aff'd, 41 Del. Ch. 78, 188 A.2d 125 (1963).

But each case must be factually considered. —The degree of care required of corporate directors in the selection and supervision of employees is that each case of alleged negligence must be considered on its own facts, giving regard to the nature of the business, its size, the extent, method and reasonableness of delegation of executive authority, and the existence or nonexistence of zeal and honesty of purpose in the directors' performance of their duties. Graham v. Allis-Chalmers Mfg. Co., 40 Del. Ch. 335, 182 A.2d 328 (1962), aff'd, 41 Del. Ch. 78, 188 A.2d 125 (1963).

Directors giving themselves stock to retain control. —Where the directors in whose control the company's stock was vested as its trustees, gave it to themselves for nothing in pursuance of a deliberate plan to retain control over its affairs, there was a clear breach of trust. Bowen v. Imperial Theatres, Inc., 13 Del. Ch. 120, 115 A. 918 (1922).

Overvaluation of stock. —In a shareholders' derivative action, once the shareholders had made a showing that the corporation's former chief executive officer (CEO) had used stock (the inflated price of which was due entirely to inaccurate financial information that the CEO had signed) to pay back a loan from the corporation, the burden of production shifted to the CEO (whose arguments that the board, which was entitled to rely on information supplied by officers, was somehow in pari delicto or that the CEO was the victim of subordinates' misrepresentations), were entirely inadequate; the court therefore entered summary judgment rescinding the stock buyback agreement. In re HealthSouth Corp. S'holders Litig., 845 A.2d 1096 (Del. Ch. 2003).
Use of corporate funds to acquire shares of dissident stockholder faction is proper exercise of business judgment where it is done to eliminate what appears to be a clear threat to the future business or the existing, successful business policy of a company and is not accomplished for the sole or primary purpose of perpetuating the control of management. Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977).
Takeover bids. —When a board considers a takeover bid, it is obliged to determine whether the offer is in the best interests of the corporation and its shareholders and, if the board gives a negative answer to that inquiry, a Delaware court will not substitute its judgment for that of the board, provided that the answer the board gave can be attributed to any rational business purpose. Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988).
Evidence sufficient to find that actions of board of directors in response to takeover bid were entitled to protection of business judgment rule and that the actions were proper and in fulfillment of the board's fiduciary duties to the corporation and all its shareholders. Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990).
Directors of corporation acted in good faith and with due care in recommending one takeover offer over another, accordingly, the board's decision was entitled to the presumption of the business judgment rule. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53 (Del. 1989).
Delayed redemption provision was invalid since it would have prevented a new board of directors from managing the corporation by redeeming a rights plan to facilitate a transaction that would have served the stockholders' best interests, even under circumstances where the board would have been required to do so because of its fiduciary duties to stockholders. Quickturn Design Sys. v. Shapiro, 721 A.2d 1281 (Del. 1998).
Lock-ups (options to purchase assets of corporation) and related agreements are permitted under Delaware law where their adoption is untainted by director interest or other breaches of fiduciary duty. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).
Adoption of "poison pill" plan, by which shareholders receive the right to be bought out by the corporation at a substantial premium on the occurrence of a stated triggering event, was consistent with the directors' fiduciary duty in facing a takeover threat perceived as detrimental to corporate interests. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).
The adoption of the poison pill and the limited repurchase of stock program were not coercive. Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).
Violations stated in challenge to validity of rights plan. —Complaint challenging the validity of a "dead hand" provision in a poison pill rights plan stated violations of subsections (b) and (d)

because the plan conferred the right to redeem the pill only upon some, but not all, directors; vested the pill redemption power exclusively in continuing directors which transgressed the shareholders' right to elect directors who would be so empowered; and impermissibly interfered with the directors' statutory powers to manage the business and affairs of the corporation. Carmody v. Toll Bros., 723 A.2d 1180 (Del. Ch. 1998).

Preferred share purchase rights plan giving shareholders one right per common share upon announcement of tender offer for 30% of corporation's shares or acquisition of 20% of corporation's shares by any single entity or group was authorized by this section and constituted a legitimate exercise of business judgment by directors concerned over takeovers. Moran v. Household Int'l, 500 A.2d 1346 (Del. 1985).

Showing sufficient to support board's decision to buy out threatening stockholders. —The presence of 10 outside directors out of 13 on the board of a corporation, coupled with the advice rendered by an investment banker and legal counsel that the stock held by certain investors posed a threat to the corporation, constituted a prima facie showing of good faith and reasonable investigation supporting the board's decision to buy out the investors at a premium. Polk v. Good, 507 A.2d 531 (Del. 1986).

Board of directors approval of merger reasonable. —Finally adopted merger agreement that contained four deal protection measures ((1) a fixed termination fee of $247.5 million, equal to 3.75% of equity value or 3.25% of enterprise value—payable for the most part only if the acquired corporation terminated the merger agreement in order to sign up another acquisition proposal within a year; (2) an agreement to pay up to $30 million in documented expenses after a naked no vote; (3) a relatively non-restrictive no-shop clause that permitted the consideration of unsolicited bids; and (4) a temporally-limited 3-day match right) was considered to be reasonable to secure a superior merger proposal and allowed a subsequent bidder room to make a bid that was within the range of estimated values for the corporation that would still net the corporation more money after paying the termination fee; a 50% "trigger" to allow the boardto consider a superior offer did not preclude the board from changing its recommendation if such a bid was received, although that decision would also have triggered the payment of a termination fee. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Adding a control premium on top of a discounted cash flow (DCF) is not intuitively or theoretically logical; indeed, because a Gordon growth model DCF is not infected by a minority discount, it is the model most consistent with what a company's stockholders would receive in an appraisal (their pro rata share of the company's value) which is precisely the kind of information the Delaware Supreme Court has said it should have. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Second-guessing the board's decision not to insist on a smaller termination fee, more like 2.5% or 3.0%, and the abandonment of the matching right, was precisely the sort of quibble that did not suffice to prove a Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985) claim. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Argument that financial buyers for the corporation were typically more deterred by termination fees than strategic buyers (because financial buyers could not reap the gains from operational synergies) was rejected because those were exactly the same universe of buyers that had already been broadly solicited at the commencement of the strategic review, and were therefore least

likely to have missed out on the opportunity to bid on the company; the unknown, synergistic strategic bidder that the plaintiff shareholders hoped was waiting in the wings was precisely the least likely buyer to be deterred by existing deal protections. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

It was reasonable for board not to consider selling the company's most marginally profitable and fastest growing retail business, while retaining the more mature business, based, in part, on the profound adverse tax implications of such a strategy. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Board's procedure to conduct as independent a search for merger proposal bidders as it could included a requirement that the its investment banker not discuss financing with any bidders before the merger was finalized; the investment banker's request to the board to finance the high bidder (made 2 months after the merger was finalized, but before the shareholder vote to approve the merger) created the appearance of impropriety, playing into already heightened suspicions about the ethics of investment banking firms, but was not considered to be causally related to the board's merger decisions. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Board was not found to have considered an unreasonably low value for the entire company, where it excluded a 25% control premium that it might have been able to later obtain (if it retained 1 of its divisions), because, associated with retention of just that 1 division, there were: (1) increased expenses; (2) complications related to ongoing operations that interfered with the sale of the other divisions, because of the divisions' interrelated facilities and services; (3) no assurances the control premium could be obtained; and (4) no assurances the projected basic value could be obtained,because the potential buyers would primarily include the buyer who successfully bought the other divisions and would likely bid a lower amount because of the interrelationships. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Board was not to be faulted for considering a value for the entire company that included the investment banker's discounted cash flow value (DCF) for 1 division at the value that division had if it was retained by the company (which DCF did not include a control premium, because the shares would have traded on a minority basis in the marketplace), because that had been value the investment banker derived under the company's strategic plan to retain that division until it was presented with whole-company sale proposals; the DCF the board received was consistent with what the Delaware Supreme Court required. In re Toys "R" Us, Inc., Shareholder Litig., 877 A.2d 975 (Del. Ch. 2005).

Board of directors of corporation is entitled to rely on summaries, reports and corporate records in making broad policy decisions. Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 188 A.2d 125 (1963).

Subsection (e) of this section "protects" directors relying in good faith upon certain reports made to the corporation. David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427 (Del. Ch. 1968).

Subsection (e) of this section fully protects directors of a corporation where they rely in good faith on books of account and reports made by any of its officials, or by an independent certified public accountant. Prince v. Bensinger, 244 A.2d 89 (Del. Ch. 1968).

While a board of directors may rely in good faith upon "information, opinions, reports or statements presented" by corporate officers, employees and experts "selected with reasonable

care," pursuant to subsection (e), it may not avoid its active and direct duty of oversight in a matter as significant as the sale of corporate control, particularly where insiders are among the bidders. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988).

Reliance on counsel. —Reasonable reliance upon expert counsel is a pertinent factor in evaluating whether corporate directors have met a standard of fairness in their dealings with respect to corporate powers. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134 (Del. Ch. 1994), aff'd, 663 A.2d 1156 (Del. 1995).

Under subsection (e), report must be pertinent to the subject matter upon which a board is called to act, and be entitled to good faith, not blind reliance. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

Incumbent board speaks for corporation. —The incumbent board of directors, so long as they maintain that status, are alone entitled to speak for or to authorize others to speak for the corporation. Empire S. Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).

The actions of the board of directors, speaking through the majority of its members, must be recognized no matter which particular faction may be in control. Empire S. Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).

And right to speak for board may be given or withheld. —The right to speak for the board of directors may be given or withheld by those in control of the board as they see fit, and if one purports to speak on its behalf without authority, the board acting through the corporate entity should be able to and can prevent it, whether it be in a proxy contest or otherwise. Empire S. Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).

Director who misrepresents action of board of directors is thereby misrepresenting action of corporation, because under this section the directors are authorized to manage the business of the corporation. Empire S. Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).

Majority of stock cannot be substituted for quorum requirements. —The fact that directors owning a majority of the stock vote in favor of certain corporate action cannot be substituted for the quorum requirements imposed by law concerning meetings of the board of directors. Belle Isle Corp. v. MacBean, 29 Del. Ch. 261, 49 A.2d 5, aff'd sub nom. Belle Isle Corp. v. Corcoran, 29 Del. Ch. 554, 49 A.2d 1 (1946).

Each director has single vote. —In the absence of certificate provisions providing otherwise, directors, including those designated by a special class of stock, are elected annually pursuant to 8 Del. C. § 211 and each director has a single vote on each matter that occasions board action pursuant to subsection (b). Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257 (Del. Ch. 1987).

Action taken without required quorum is void. —Where the bylaws of a corporation required specific number to constitute a quorum of directors, an action by the directors with less than that number present is unauthorized. Drob v. National Mem. Park, 28 Del. Ch. 254, 41 A.2d 589 (1945).

Approval of minutes of meeting is not approval of unauthorized act. —When a board of directors approves an act which is void because the meeting of the board was illegal for lack of a quorum, the approval of the minutes of such meeting at a subsequent meeting is not an approval of such an unauthorized act. Belle Isle Corp. v. MacBean, 29 Del. Ch. 261, 49 A.2d 5, aff'd sub nom. Belle Isle Corp. v. Corcoran, 29 Del. Ch. 554, 49 A.2d 1 (1946).

And approval of minutes of preceding directors' meeting is simply assertion that secretary had properly recorded them and is not a legalizing of invalid acts recorded therein. In re Chelsea Exch. Corp., 18 Del. Ch. 287, 159 A. 432 (1932).

Minutes of meetings of corporate directors are prima facie correct. Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299 (1954).

Where the oral testimony of corporate directors is in conflict as to the results of an election to fill a vacancy, the court will accept the minutes of the directors' meeting as depicting what occurred. Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299 (1954).

Adjournment of meeting by legally elected directors. —Where motion to adjourn a meeting of corporate directors appears to be defeated, but was actually approved by a majority of the legally elected directors, the meeting was legally adjourned, and subsequent action of the meeting was void. Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299 (1954).

Stockholders may ratify voidable acts of directors. —Stockholders' ratification of voidable acts of directors is effective for all purposes unless the action of the directors constituted a gift of corporate assets to themselves or was ultra vires, illegal or fraudulent. Kerbs v. California E. Airways, Inc., 33 Del. Ch. 69, 90 A.2d 652 (1952).

Courts generally look with apprehension upon ratification of previous corporate acts after action has been instituted questioning validity of such acts. However, in the absence of fraud subsequent action by the board within director authority will be held to be valid. Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581 (1948).

Overcoming presumption requires particularized pleading. —Stockholder derivative complaint was subject to dismissal for failure to set forth particularized facts creating a reasonable doubt that the director defendants were disinterested and independent or that their conduct was protected by the business judgment rule. Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

Plaintiffs failed to overcome presumption. —Plaintiffs were required to rebut the presumption that the directors properly exercised their business judgment, including their good faith reliance on expert's advice, but what expert believed in hindsight that he and the Board should have done in the past does not provide that rebuttal. Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

To survive a rule 23.1 motion to dismiss in a due care case where an expert has advised the board in its decision-making process, the complaint must allege particularized facts, not conclusions. Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

Votes of interested directors cannot be counted to make up majority of the board and if a majority of the directors are adversely interested, any transaction between themselves and the corporation as represented by its board is a case of officers dealing with themselves. Italo-Petro. Corp. of Am. v. Hannigan, 40 Del. 534, 14 A.2d 401 (1940).

Director present but not voting counted in negative as to majority vote. —Where a statute requires a vote of a majority of directors present to pass a resolution, a director who is present and does not vote at all on the resolution is counted in the negative for the purpose of determining whether the resolution has been carried by a majority vote. Dillon v. Berg, 326 F. Supp. 1214 (D. Del.), aff'd, 453 F.2d 876 (3d Cir. 1971).

Evidence supports breach of fiduciary duty. —See Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

C. ELECTION.

Nomination of directors —In shareholder's suit against casino corporation in which it owned 49 percent of shares, shareholder was awarded right to nominate 2 directors (instead of 1); the charter's and bylaws' ambiguities, under contract construction principles, were resolved in favor of the right of a shareholder to participate in the board electoral process, restrictions of which (including consideration of external evidence) were enforceable only if they were clear and convincing. Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294 (Del. Ch. 2002).
Directors shall be elected at annual meeting of stockholders, and it is the duty of those holding proxies to attend the meeting as well as vote the stock they represent and the election should not be prevented by objections of a purely technical character interposed by stockholders who are disappointed or dissatisfied because of their inability to control the meeting. Duffy v. Loft, Inc., 17 Del. Ch. 376, 152 A. 849 (1930).
Directors' right to hold office. —Directors of Delaware corporations have no vested right to hold office in defiance of a properly expressed will of the majority of stockholders. Roven v. Cotter, 547 A.2d 603 (Del. Ch. 1988).
Stockholders, under Delaware law, do not have a fundamental right to be directors. Stroud v. Milliken Enters., Inc., 585 A.2d 1306 (Del. Ch. 1988), appeal dismissed, 552 A.2d 476 (Del. 1989).
Director qualifications. —The certificate of incorporation can provide for reasonable director qualifications. Stroud v. Milliken Enters., Inc., 585 A.2d 1306 (Del. Ch. 1988), appeal dismissed, 552 A.2d 476 (Del. 1989).
Acceptance on newly elected director's part is necessary and by reason of his refusal to serve on the board of directors he did not become a director and no notice of directors' meeting should have been given to him, and any action taken by the board without notice to him was valid. Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581 (1948).
Director need not be stockholder at time of election. —In the absence of express statutory provision, a director need not be a holder of any shares at the time of his or her election, but it will be sufficient if the director qualifies himself or herself by becoming a holder of the requisite number of shares before he or she enters upon the office of director. Triplex Shoe Co. v. Rice & Hutchins, Inc., 17 Del. Ch. 356, 152 A. 342 (1930).
Corporation need not provide in its certificate for staggered terms for its directors; this section is permissive. Essential Enters. Corp. v. Automatic Steel Prods., Inc., 39 Del. Ch. 93, 159 A.2d 288 (1960).
Actual written notice of resignation required. —The phrase "written notice to the corporation," used in subsection (b) of this section in connection with the resignation of a director, means actual written notice to each and every member of the board of directors or actual written notice to an agent of the corporation, such as its chairperson of the board, president or secretary. Dillon v. Berg, 326 F. Supp. 1214 (D. Del.), aff'd, 453 F.2d 876 (3d Cir. 1971).
When notice to agent of corporation sufficient. —Giving actual written notice to an agent of the corporation would, in the normal case, meet the requirements of this section, but not where the corporate agent's relation to the subject matter is substantially adverse to the corporation. Dillon v. Berg, 326 F. Supp. 1214 (D. Del.), aff'd, 453 F.2d 876 (3d Cir. 1971).

Number of directors may be fixed by board. —Delaware law allows the board to fix the number of directors within the restrictions imposed by the certificate of incorporation. Stroud v. Milliken Enters., Inc., 585 A.2d 1306 (Del. Ch. 1988), appeal dismissed, 552 A.2d 476 (Del. 1989).
Bylaws to prescribe number of directors. —Reasonably construed, this section explicitly authorizes the adoption of a bylaw provision which fixes a method of determining the number of directors to be elected. Ellin v. Consolidated Caribou Silver Mines, Inc., 31 Del. Ch. 149, 67 A.2d 416 (1949).
"Withhold authority" proxy cards were required to be counted. —Where the corporation's nominees were not re-elected because the "withhold authority" proxy cards were required to be counted, the nominees continued to be in office as holdovers and had a right to remain in office only until their successors were elected and qualified. North Fork Bancorporation, Inc. v. Toal, 825 A.2d 860 (Del. Ch. 2000), aff'd, 781 A.2d 693 (Del. 2001).
Board's actions entitled to protection of business judgment rule. —The plaintiffs failed to produce evidence creating a genuine issue of material fact regarding whether the board's actions were entitled to the protection of the business judgment rule where they produced no evidence; (1) that the independence or disinterestedness of the corporate directors was compromised, (2) that the board acted without due care or for improper purposes, or (3) that the defensive measures did not have a rational business purpose. In re Gaylord Container Corp. Shareholders Litig., 753 A.2d 462 (Del. Ch. 2000).
D. REMOVAL.
And may authorize method of director removal. —Where plaintiff stockholder has been properly removed as a director of defendant corporation under a bylaw adopted by defendant's incorporators and approved by defendant's directors, which is consistent with this section, she is in no position to attack its application to her. Everett v. Transnation Dev. Corp., 267 A.2d 627 (Del. Ch. 1970).
Automatic termination of directors upon failure to remain qualified. —Certificate of incorporation could provide for automatic termination of directors upon a predetermined occurrence, where only the failure to remain qualified would cause a director to be removed. Stroud v. Milliken Enters., Inc., 585 A.2d 1306 (Del. Ch. 1988), appeal dismissed, 552 A.2d 476 (Del. 1989).
Stockholder's right to remove directors for cause did not preclude the automatic termination of a director upon failure to be qualified under the categories set forth in proposed certificate of incorporation. Stroud v. Milliken Enters., Inc., 585 A.2d 1306 (Del. Ch. 1988), appeal dismissed, 552 A.2d 476 (Del. 1989).
The stockholders have power to remove directors for cause. Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852 (1957); Dillon v. Berg, 326 F. Supp. 1214 (D. Del.), aff'd, 453 F.2d 876 (3d Cir. 1971).
The stockholders have the power to remove a director for cause even where there is a provision for cumulative voting. Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852 (1957).
Shareholders may be given power to remove without cause. —Corporate bylaws may provide for removal of a director without cause by the shareholders. Dillon v. Berg, 326 F. Supp. 1214 (D. Del.), aff'd, 453 F.2d 876 (3d Cir. 1971).

Shareholders are permitted to amend a certificate of incorporation, thereby eliminating a bylaw establishing a classified board of directors, so that the stockholders can then remove a director without cause. Roven v. Cotter, 547 A.2d 603 (Del. Ch. 1988).

Director/member's ousting of his siblings could be viewed as exhibiting a lack of familial regard, but in his capacity as member and director of the foundation, he owed no fiduciary duties to other directors, only to the foundation, and as long as director's actions posed no threat to the foundation, director's status as member gave director the power to oust the siblings for any reason or even for no reason at all. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).
But allowing board to remove without cause violates shareholder rights. —To allow the board to remove 1 of its own members at any time without cause would seem to be completely violative of shareholder rights. Dillon v. Berg, 326 F. Supp. 1214 (D. Del.), aff'd, 453 F.2d 876 (3d Cir. 1971).
Boards subject to removal for cause only. —The phrase "classified as provided in subsection (d)", which is used in subsection (k)(1) but not in the last sentence of subsection (k), was meant to refer only to staggered boards (pursuant to the first sentence of subsection (d)) and not to specially designated directorships. Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257 (Del. Ch. 1987).
III. SALE OR PURCHASE OF ASSETS OR CONTROL.
Reimbursement by corporation for proxy solicitation expenses. —The incumbent board of directors of a corporation may look to the corporation for payment of expenses incurred by them in soliciting proxies where a question of policy is involved. Empire S. Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).
Business judgment rule weighs in favor of directors' decision to sell assets unless the complaining shareholders can prove fraud or a clearly inadequate sale price. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).
Unless shareholders can prove fraud. —It is incumbent on the shareholders to prove that the directors against whom relief is sought were either guilty of actual fraud or that the price fixed for the sale of assets was so clearly inadequate as constructively to carry the badge of fraud. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).
The burden is on the shareholders to establish some fraud, or what amounts to fraud, on the part of the corporation in order to prevail. Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973).
Actual fraud is not necessary. —Actual fraud, whether resulting from self-dealing or otherwise, is not necessary to challenge a sale of assets. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).
There are limits on business judgment rule which fall short of intentional or inferred fraudulent misconduct and which are based simply on gross inadequacy of price in the sale of assets. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974).
Showing necessary to prove fraudulent valuation of corporate assets. —In order to enjoin a proposed merger on the theory of constructive fraud based on a claimed discriminatory undervaluation or overvaluation of corporate assets, it must be plainly demonstrated that the overvaluation or undervaluation, as the case may be, is such as to show a conscious abuse of

discretion before fraud at law can be made out. Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973).

Mere inadequacy of price will not reveal fraud, but rather the disparity must be so gross as to lead the court to conclude that it was not due to an honest error of judgment, but rather to bad faith, or to reckless indifference to the rights of others interested. Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973).

Directors entitled to presumption. —Where the evidence did not establish that the board of directors of the acquiring corporation failed to make an informed judgment when the merger plan was presented, they were entitled to the presumption of having made an informed judgment in good faith which could be attributed to a rational business purpose. Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973).

Controlling shareholders have no inalienable right to usurp the asset sales authority of boards of directors that they elect, since a central premise of the 8 Del. C. § 141 vests most managerial power over the corporation in the board (and not in the stockholders); that the majority of a company's voting power is concentrated in one stockholder does not mean that that stockholder must be given a veto over board decisions when such a veto would not also be afforded to dispersed stockholders who collectively own a majority of the votes. Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (Del. Ch. 2004).

The responsibility of the directors in a sale of corporate control is to get the highest value reasonably attainable for the shareholders. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988).

Tender offer and sale of corporate assets held protected by business judgment rule. —See Thompson v. Enstar Corp., 509 A.2d 578 (Del. Ch. 1984).

Decision regarding poison pill not protected by business judgment rule. —Board's decision to keep the poison pill in place was not reasonable in relationship to any threat posed and, therefore, the board's decision is not protected by the business judgment rule. Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988).

Postponement of annual meeting. —A board's decision to defer the annual meeting to a later time in conformity with the company's bylaws and this section is not a decision that threatens the legitimacy of the electoral process and the propriety of such decision is to be measured by the permissive business judgment form of review. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990).

IV. STOCKHOLDERS.

Procedure for redress of perceived wrong against corporation. —In the usual case, a shareholder's remedy for a perceived wrong against the corporation is limited to a demand upon the board that the corporation pursue redress. The board, in the exercise of its statutorily conferred managerial powers, then makes the ultimate decision of whether or not to prosecute the claim. Heineman v. Datapoint Corp., 611 A.2d 950 (Del. 1992).

Stockholders' recourse is to bring derivative suit. —When stockholders are dissatisfied with a decision of the directors with respect to the corporation, their recourse is to bring a stockholder's derivative suit. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

Stockholder's individual right to bring derivative action does not ripen until the stockholder has made a demand on the corporation which has been met with a refusal by the corporation to assert its cause of action or unless the stockholder can show a demand to be futile. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

Review upon refusal of stockholder demand. —Stockholders who make a demand upon the board of directors which is refused, subject the board's decision to judicial review according to the traditional business judgment rule. Spiegel v. Buntrock, 571 A.2d 767 (Del. 1990).

Director response to stockholder demand. —The task of a board of directors in responding to a stockholder demand letter is a 2-step process: First, the directors must determine the best method to inform themselves of the facts relating to the alleged wrongdoing and the considerations, both legal and financial, bearing on a response to the demand; second, the board must weigh the alternatives available to it, including the advisability of implementing internal corrective action and commencing legal proceedings. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

Where demand would be futile. —A court should not apply the Aronson v. Lewis, Del. Supr., 473 A.2d 805, 814 (1984) test for demand futility where the board that would be considering the demand did not make a business decision which is being challenged in the derivative suit; this situation would arise in three principal scenarios: (1) Where a business decision was made by the board of a company, but a majority of the directors making the decision have been replaced; (2) where the subject of the derivative suit is not a business decision of the board; and (3) where the decision being challenged was made by the board of a different corporation. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

Demand futility in a double derivative suit. —A plaintiff in a double derivative suit is still required to satisfy the Aronson v. Lewis, Del. Supr., 473 A.2d 805, 814 (1984) test in order to establish that demand on the subsidiary's board is futile. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

The Aronson v. Lewis, Del. Supr., 473 A.2d 805, 814 (1984) test does not apply in the context of a double derivative suit where the board was not involved in the challenged transaction. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

Shareholders' burden in derivative suit challenging executive stock option plan. —Shareholders in a derivative suit alleging that allowance and acceptance of payments under executive stock option compensation plan were breaches of fiduciary duty had the burden of demonstrating that the compensation plan itself, having been added by a majority of disinterested directors and later ratified by shareholders with no allegation of inadequate disclosure in proxy materials, was so devoid of legitimate corporate purpose as to be a waste of assets. Pogostin v. Rice, 480 A.2d 619 (Del. 1984).

Stockholder ratification in self-interested deals. —Where management seeks and receives approval of a self-interested transaction from a majority of disinterested stockholders, the Chancery Court will defer to the stockholders' endorsement. In re Walt Disney Co. Derivative Litig., 731 A.2d 342 (Del. Ch. 1998). But see Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

Directors cannot compel dismissal of pending stockholder's derivative suit which seeks redress for an apparent breach of fiduciary duty by merely reviewing the suit and making a business judgment that it is not in the best interests of the corporation. Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980), rev'd on other grounds, 430 A.2d 779 (Del. 1981).

Motion by special litigation committee to dismiss derivative suit. —For case discussing motion generated by special litigation committee to dismiss stockholders' derivative suit under the authority of Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), see Kaplan v. Wyatt, 484 A.2d 501 (Del. Ch. 1984), aff'd, 499 A.2d 1184 (Del. 1985).
Special litigation committee powers to oppose suit dismissal. —Voluntary dismissal of an action by derivative plaintiff stockholders was denied where the corporation appointed a special litigation committee, as dismissal of the action would impinge on the committee's range of action, and would usurp its function. In re Oracle Corp. Derivative Litig., 808 A.2d 1206 (Del. Ch. 2002).
Mismanagement depressing stock value must be remedied through derivative action. — Mismanagement which depresses the value of stock is a wrong to the corporation, and therefore to the stockholders collectively, and thus is one which must be remedied through a derivative action. Reeves v. Transport Data Communications, Inc., 318 A.2d 147 (Del. Ch. 1974).

Annotations
CASE NOTES – UNREPORTED
Commitment to private ordering by charter. — Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review. Subdivision (b)(1) of Section 102 and subsection (a) of this section are therefore logically read as important provisions that embody Delaware's commitment to private ordering in the charter. By their plain terms, they are sections of broad effect, which apply to a myriad of issues involving the exercise of corporate power. Jones Apparel Group v. Maxwell Shoe Co., 2004 Del. Ch. LEXIS 74, No. 365-N (May 27, 2004).
Unanimity of entire board.—Action by written consent under subsection (f) of this section requires unanimity of the entire board, not just the unanimity of the disinterested directors. There is no exception to this rule, even if a director has an interest in the transaction at issue. Solstice Capital II, Ltd. P'shp v. Ritz, 2004 Del. Ch. LEXIS 39 , No. 278-N (April 6, 2004).
Waste.—The Delaware Supreme Court has implicitly held that committing waste is an act of bad faith. It is not necessarily true, however, that every act of bad faith by a director constitutes waste. For example, if a director acts in bad faith (for whatever reason), but the transaction is one in which a businessperson of ordinary, sound judgment concludes that the corporation received adequate consideration, the transaction would not constitute waste. In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, No. 15452 (August 9, 2005).
The fiduciary duty of due care requires that directors of a Delaware corporation "use that amount of care which ordinarily careful and prudent men would use in similar circumstances," and — "consider all material information reasonably available" in making business decisions, and that deficiencies in the directors' process are actionable only if the directors' actions are grossly negligent. In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, No. 15452 (August 9, 2005).
Bad/Good faith.—Decisions from the Delaware Supreme Court and the Court of Chancery are far from clear with respect to whether there is a separate fiduciary duty of good faith. Good faith

has been said to require an "honesty of purpose," and a genuine care for the fiduciary's constituents, but, at least in the corporate fiduciary context, it is probably easier to define bad faith rather than good faith. This may be so because Delaware law presumes that directors act in good faith when making business judgments. Bad faith has been defined as authorizing a transaction "for some purpose other than a genuine attempt to advance corporate welfare or [when the transaction] is known to constitute a violation of applicable positive law." In other words, an action taken with the intent to harm the corporation is a disloyal act in bad faith. In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, No. 15452 (August 9, 2005).
Good faith standard.—Upon long and careful consideration, the chancery court is of the opinion that the concept of intentional dereliction of duty, a conscious disregard for one's responsibilities, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith. Deliberate indifference and inaction in the face of a duty to act is conduct that is clearly disloyal to the corporation. It is the epitome of faithless conduct. In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, No. 15452 (August 9, 2005).
Inapplicability of business judgment rule protections.—Even if the directors have exercised their business judgment, the protections of the business judgment rule will not apply if the directors have made an "unintelligent or unadvised judgment." Furthermore, in instances where directors have not exercised business judgment, that is, in the event of director inaction, the protections of the business judgment rule do not apply. Under those circumstances, the appropriate standard for determining liability is widely believed to be gross negligence, but a single Delaware case has held that ordinary negligence would be the appropriate standard. In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, No. 15452 (August 9, 2005).
Construction with foreign laws. – Maryland statutory enactments that would mandate changes in the number and qualifications of directors of a health care service holding company with which a Delaware health care service corporation was affiliated necessarily affected the protections of the Delaware corporation and its subscribers by changing provisions contained in the bylaws; this fact was an important component in a reviewing court's determination that substantial evidence supported Delaware's Insurance Commissioner's decision to withdraw the approval previously given to the affiliation. In re Proposed Affiliation of BCBSD, Inc. with CareFirst, Inc., 2004 Del. Super. LEXIS 333 (Oct. 4, 2004).
Amendment to voting trust. – Shareholder agreement amended a voting trust agreement by obligating the voting trustees to vote their shares in a specific manner that would guarantee that the 4 shareholder groups subject to the shareholder agreement: (1) had equal director representation on the corporation's board; (2) had combined director representation that would constitute a majority of the corporation's board; and (3) had a veto fixing the number of directors at 6, unless each of the 4 shareholder groups consented; these rights and obligations had the effect of altering the original terms of the voting trust, and therefore the shareholder agreement was considered an amendment to the voting trust agreement. President & Fellows of Harvard Coll. v. Glancy, 2003 Del. Ch. LEXIS 25 (Mar. 21, 2003).
Court dismissed (for failure to adequately state a claim upon which relief could be granted) a 35 percent shareholder's claim that a 45 percent shareholder/director/officer (SDO) breached the SDO's fiduciary duty, by not including an alleged 15 percent permissible profit margin in the corporation's government contract bids, based on insufficient showings: (1) that the SDO's and

the corporation's interests differed; and (2) of the negative effect, factually, on the corporation. Ronsdorf v. Jacobson, 2004 Del. Ch. LEXIS 137 (Sept. 16, 2004).

Voting trustee removal. – Although voting trustees may have extremely broad discretion in the management of the trust, where they have given preferential consideration to the interests of certain beneficiaries without considering the interest of the disfavored beneficiary, then these alleged facts give rise to an inference that the voting trustees have acted in such a manner as to have negligently discharged their duties, which can be grounds for removing a voting trustee. President & Fellows of Harvard Coll. v. Glancy, 2003 Del. Ch. LEXIS 25 (Mar. 21, 2003).

Secretly obtained consent to remove. – Although 2 directors of a family corporation secretly obtained 8 Del. C. § 228 written stockholder consents and utilized them to remove a third director and his sons as officers under 8 Del. C. § § 141(k), 142(b), the consents were deemed valid where they conformed to the strict requirements of 8 Del. C. § 228 and were made by consenting shareholders who had received adequate disclosures; it was unreasonable for insiders of a private family corporation, when faced with removal by written consents under 8 Del. C. § 228, to insist that those seeking their removal under 8 Del. C. § 141(k) were required to meet a higher disclosure standard that was more akin to that of a public company. Unanue v. Unanue, 2004 Del. Ch. LEXIS 153 (Nov. 3, 2004).

Improper procedure for removal of CEO. – CEO's' motion for partial summary judgment was granted in an action pursuant to 8 Del. C. § 225, and it was determined that CEO retained the position; directors' attempt to remove the CEO failed as the board of directors did not unanimously consent to the action in writing, as required by subsection (f) of this section. Solstice Capital II, Ltd. P'ship v. Ritz, 2004 Del. Ch. LEXIS 39 (Apr. 6, 2004).

Repricing inference not shown. — Shareholder's allegations of ownership and repricing of stock options did not provide a basis to support an inference that there was a repricing scheme or conspiracy; the award of options was a form of director compensation authorized under subsection (h) of this section. Cal. Pub. Employees Ret. Sys. v. Coulter, 2002 Del. Ch. LEXIS 144 (Dec. 18, 2002).

Charter provision was valid and its plain terms established the record date for consent solicitation. Both subdivision (b)(1) of Section 102 and subsection (a) of this section of the Delaware General Corporation Law ("DGCL") provide authority for charter provisions to restrict the authority that directors have to manage firms, unless those restrictions are "contrary to the laws of this State." The charter provision is a valid exercise of authority under those sections and is not contrary to law, in the sense that our courts have interpreted that phrase. A consideration of subsection (b) of Section 213's terms and legislative history, as well as of the related statutory section governing consent solicitations, Section 228, reveals that no public policy set forth in the DGCL (or in Delaware's common law of corporations) is contravened by the charter provision at issue. Given the absence of any conflict with a mandatory aspect of Delaware corporate law, the charter provision's restriction on the board's authority to set a record date was valid. Jones Apparel Group v. Maxwell Shoe Co., 2004 Del. Ch. LEXIS 74, No. 365-N (May 27, 2004).

§ 144. Annotations.

CASE NOTES — REPORTED

Purpose of section. – This section merely removes an "interested director" cloud when its terms are met and provides against invalidation of an agreement "solely" because such a director or officer is involved. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

Legislative intent of subsection (a)(1). – Subsection (a)(1) appears to be a legislative mandate that an approving vote of a majority of informed and disinterested directors shall remove any taint of director or directors' self-interest in a transaction. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

Limitation of stockholder's power to nullify transactions. – The enactment of this section limited the stockholders' power to nullify an interested transaction in two ways: First, a committee of disinterested directors may approve a transaction and bring it within the scope of the business judgment rule; and second, where an independent committee is not available, the stockholders may either ratify the transaction or challenge its fairness in a judicial forum, but they lack the power automatically to nullify it. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

Exclusiveness of validation provisions. – This section is not exclusive means by which interested director contract can be validated. Robert A. Wachsler, Inc. v. Florafax Int'l, Inc., 778 F.2d 547 (10th Cir. 1985).

Subsection (a) does not provide the only validation standard for interested transactions. Marciano v. Nakash, 535 A.2d 400 (Del. 1987).

Nothing in this section sanctions unfairness to corporation or removes transaction from judicial scrutiny. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

Business opportunities of no interest to corporation may be utilized by director or officer. – When a business opportunity comes to a corporate officer or director in his or her individual capacity rather than in his or her official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his or her corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his or her own, and the corporation has no interest in it, if, of course, the officer or director has not wrongfully embarked the corporation's resources therein. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941); Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954); Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (1956).

If a business opportunity comes to a corporate director in his or her individual capacity, and if the opportunity is not essential to his or her corporation and in which his or her corporation has no interest, and if the corporate resources have not been wrongfully embarked therein, the corporate director is free to treat the opportunity as his or her own. Kaplan v. Fenton, 278 A.2d 834 (Del. 1971).

Better employment not an interest under this section. – The alleged hope of better employment opportunities does not constitute the kind of interest covered by this section. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134 (Del. Ch. 1994), aff'd, 663 A.2d 1156 (Del. 1995).

But opportunities of interest must not be accepted. – If there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which

the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his or her corporation, the law will not permit him or her to seize the opportunity for himself or herself. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941); Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (1956); Equity Corp. v. Milton, 43 Del. Ch. 160, 221 A.2d 494 (1966); David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427 (Del. Ch. 1968); Kaplan v. Fenton, 278 A.2d 834 (Del. 1971).

If the essential of a corporate opportunity is reasonably within the scope of a corporation's activities, latitude should be allowed for development and expansion. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941).

Or director will have breached his or her fiduciary obligation. – Where directors of a corporation are required to answer for wrongful acts of commission by which they have enriched themselves to the injury of the corporation, a court of conscience will not regard such acts as mere torts, but as serious breaches of trust, and will point out the moral and make clear the principle that corporate officers and directors, while not in strictness trustees, will, in such case, be treated as though they were in fact trustees of an express and subsisting trust, and without the protection of the statute of limitations. Bovay v. H.M. Byllesby & Co., 27 Del. Ch. 381, 38 A.2d 808 (1944).

Test of officer's or director's capacity at time of business opportunity seems to be whether there was a specific duty on the part of the officer or director sought to be held liable to act or contract in the particular matter as the representative of the corporation. Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954).

Effect of corporation's rejection of corporate opportunity. – Evidence indicated that the chance to acquire certain claims was a corporate opportunity which should have been and was offered to the corporation. Because the corporation was not in a position, either financially or legally, to accept the opportunity at that time, the president of the corporation and other persons associated with the corporation were entitled to acquire it for themselves after the corporation rejected it. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

Profits from breach of trust belong to corporation. – If an officer or a director of a corporation, in violation of his or her duty as such, acquires gain or advantage for himself or herself, the law charges the interest so acquired with a trust for the benefit of the corporation and its directors while it denies to the betrayer all benefit and profit. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941); Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954).

Or receiver of insolvent corporation. – Where a director received fraudulently issued stock and was paid a dividend thereon and then sold the stock to an innocent purchaser, who also received dividends, the director was liable to the receiver of the insolvent company for the dividends both he and the innocent purchaser had received. Cahall v. Burbage, 14 Del. Ch. 55, 121 A. 646 (1923).

Whether or not director has appropriated corporate opportunity is factual question. – Whether or not the director has appropriated for himself or herself something that in fairness should belong to his or her corporation is a factual question to be decided by reasonable inference from objective facts. Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (1956).

Where a corporation is engaged in a certain business, and an opportunity is presented to it embracing an activity as to which it has fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion, it may be properly said that the opportunity is in the line of the corporation's business. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941).

And burden of proof is on director. – It is incumbent upon a director to show that his or her every act in dealing with a corporate opportunity presented was in the exercise of the utmost good faith to his or her corporation; and the burden cast upon him or her satisfactorily to prove that the offer was made to him or her individually. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939), aff'd, 25 Del. Ch. 363, 19 A.2d 721 (1941).

Where directors deal with another corporation of which they are sole directors and officers, they assume the burden of showing the entire fairness of the transaction. Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904 (1938).

Paragraph (2) of subsection (a) of this section does not remove from certain corporate officers the burden of proving that a transaction in which the corporation acquired a second corporation in which they held a significant interest was intrinsically fair. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

Directors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all stockholders generally. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988).

Ratification by shareholders. – Where a majority of the shares of a corporation voted in favor of exercising an option to purchase a second corporation were voted by persons alleged to have acted detrimentally to the first corporation for purposes of personal gain, ratification of the option by the shareholders did not affect the burden of showing the intrinsic fairness of the transaction. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

In no case has the court held that stockholder ratification automatically extinguishes a claim for breach of the directors' duty of loyalty. Rather, the operative effect of shareholder ratification in duty of loyalty cases has been either to change the standard of review to the business judgment rule, with the burden of proof resting upon the plaintiff, or to leave "entire fairness" as the review standard, but shift the burden of proof to the plaintiff. In re Wheelabrator Technologies, Inc. Shareholders Litig., 663 A.2d 1194 (Del. Ch. 1995).

Stockholder ratification in self-interested deals. – Because of subsection (a)(2), where an interested transaction is between the corporation and a director or the director's affiliates, rather than the majority stockholder, stockholder ratification does not shift the burden of persuasion to the plaintiff under entire fairness. In re Walt Disney Co. Derivative Litig., 731 A.2d 342 (Del. Ch. 1998). But see Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

Prerequisites for finding self-interest. – At the very least, subsection (a) protects corporate actions from invalidation on grounds of director self-interest if such self-interest is: (1) disclosed to and approved by a majority of disinterested directors; (2) disclosed to and approved by the

shareholders; or (3) the contract or transaction is found to be fair as to the corporation. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

One director's self-interest may not be problematic. – One director's colorable interest in a challenged transaction is not sufficient, without more, to deprive a board of the protection of the business judgment rule presumption of loyalty. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

Interested transactions by charitable corporations. – The fact that a corporation is to be managed on behalf of charitable beneficiaries rather than stockholders, does not alter the basic premise that interested transactions are not inherently wrong. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

There is no reason why independent directors and courts should not also have the power to evaluate the fairness of an interested transaction undertaken by a charitable corporation. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

The Attorney General holds the power and bears the duty of invoking the jurisdiction of the courts to evaluate the fairness of any interested transaction that has not been approved by an independent committee and that the Attorney General feels is detrimental to a charitable corporation. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

By failing to challenge a given transaction of a charitable corporation, the Attorney General would effectively ratify it on behalf of the beneficiaries, for he represents their interests. Oberly v. Kirby, 592 A.2d 445 (Del. 1991).

This section is not applicable where the approval of the transaction did not take place at a formal board meeting or necessarily after full disclosure of all material facts. Lewis v. Fuqua, 502 A.2d 962 (Del. Ch. 1985).

Responsibility of controlling shareholder setting terms of self-dealing transaction. – Whenever a controlling shareholder sets out to exercise his or her power to set the terms of a self-dealing transaction and compel its effectuation, such shareholder assumes a new and significant responsibility of establishing to an independent body, whether a court in litigation, an independent committee of the board under subsection (a)(1) of this section, or disinterested ratifying shareholders on full and complete information, that the transaction is fully fair. Should a reviewing court be required to pass upon the fairness of such a transaction, the self-dealing fiduciary may be required to respond in damages or with another appropriate remedy if the transaction, despite any good faith on the fiduciary's part, is found to be not an entirely fair one to the corporation or to minority shareholders. Merritt v. Colonial Foods, Inc., 505 A.2d 757 (Del. Ch. 1986).

Dealings with corporation to be viewed with reasonable strictness. – Sound public policy requires the acts of corporate officers and directors in dealing with the corporation to be viewed with a reasonable strictness. Bovay v. H.M. Byllesby & Co., 27 Del. Ch. 381, 38 A.2d 808 (1944).

A transaction between the dominating director and his or her corporation is subject to strict scrutiny, and the director has the burden of showing that it was fair. Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (1956).

Judicial scrutiny of transaction on basis of subsection (a)(1) not precluded. – Where disinterested director did not participate at board meeting in which it was resolved to exercise option in which the corporation would purchase assets of a second corporation in which many of the acquiring

corporation's shareholders and officers held an interest, fact that the director was not interested in the transaction and approved of the acquisition of the option did not preclude judicial scrutiny of the transaction on the basis of paragraph (1) of subsection (a) of this section. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

Compliance with section shifts burden to plaintiff. – Compliance with the terms of this section does not restore to the board the presumption of the business judgment rule; it simply shifts the burden to plaintiff to prove unfairness. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134 (Del. Ch. 1994), aff'd, 663 A.2d 1156 (Del. 1995).

In determining the intrinsic fairness of 1 corporation's option to acquire a second corporation in view of the fact that certain persons owned stock and held positions in both corporations, the transaction would be examined as of the date on which shareholder approval was given. Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976).

Standard of review of parent-subsidiary merger is entire fairness. – In a parent-subsidiary merger context, shareholder ratification operates only to shift the burden of persuasion, not to change the substantive standard of review which should be entire fairness; nor does the fact that the merger was negotiated by a committee of independent, disinterested directors alter the review standard. Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490 (Del. Ch. 1990).

Business judgment rule applied over the entire fairness rule. – The shareholder pled facts from which it was reasonable to question the independence and disinterest, to overcome initially the business judgment rule presumption, of a majority of the 11-member corporate board; the entire fairness rule did not apply since the control group (comprising 2/3 of the majority voters) did not stand on both sides of the transaction. Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002).

The directors' responsibility in a sale of corporate control is to get the highest value reasonably attainable for the shareholders. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988).

Merger not unfair. – Where the merger-targeted corporation was well-equipped to defend itself against any hostile effort to gain control over it, and the corporation selecting merger was an independent third party with no power to force the initiation of a deal, there was no basis for a finding that the transaction was unfairly initiated. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995), aff'd, 663 A.2d 1156 (Del. 1995).

Annotations

CASE NOTES — UNREPORTED

Good faith.—Under subsection (a) a transaction between a corporation and its directors or officers will be deemed valid if approved by a majority of the independent directors, assuming three criteria are met: 1) the approving directors were aware of the conflict inherent in the transaction; 2) the approving directors were aware of all facts material to the transaction; and 3) the approving directors acted in good faith. In other words, the inside transaction is valid where the independent and disinterested (loyal) directors understood that the transaction would benefit a colleague (factor 1), but they considered the transaction in light of the material facts (factor 2 — due care) mindful of their duty to act in the interests of the corporation, unswayed by loyalty to the interests of their colleagues or cronies (factor 3 — good faith). On the other hand, where the evidence shows that a majority of the independent directors were aware of the conflict and all material facts, in satisfaction of factors 1 and 2 (as well as the duties of loyalty and care), but

acted to reward a colleague rather than for the benefit of the shareholders, the Court will find that the directors failed to act in good faith and, thus, that the transaction is voidable. In such a case, the duties of care and loyalty, as traditionally defined, might be insufficient to protect the equitable interests of the shareholders, and the matter would turn on the good faith of the directors. In re Walt Disney Co. Derivative Litig., 2005 Del. Ch. LEXIS 113, No. 15452 (August 9, 2005).

Summary judgment was denied to a corporation seeking to rescind a sale of its subsidiary's stock in a transaction involving self-dealing by a principal of the seller and buyer, where there were several unresolved fact issues regarding the fairness of the transaction: (1) the effect of the principal's attempts to market the subsidiary and develop a corporate restructuring plan; (2) the sale price's exceeding an independent valuation of the subsidiary; and (3) several questions affecting the fairness of the price. Summit Metals, Inc. v. Gray, 2002 U.S. Dist. LEXIS 15599 (Aug. 20, 2002).

§ 211. Annotations.

Annotations
CASE NOTES — REPORTED
Delaware corporation law requires that an annual meeting of stockholders must be held for the election of directors. Tweedy, Browne & Knapp v. Cambridge Fund, Inc., 318 A.2d 635 (Del. Ch. 1974); Saxon Indus., Inc. v. NKFW Partners, 488 A.2d 1298 (Del. 1984).
Mandate of subsection (b) of this section is that an annual meeting of stockholders "shall be held for the election of directors" and alternative procedures are provided to assure that there is corporate compliance therewith. Coaxial Communications, Inc. v. CNA Fin. Corp., 367 A.2d 994 (Del. 1976).
In the absence of certificate provisions providing otherwise, directors, including those designated by a special class of stock, must be elected annually pursuant to this section. Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257 (Del. Ch. 1987).
Purpose of this section is to provide relief to a stockholder who makes a showing that a meeting to elect directors has not been held for more than 13 months. Coaxial Communications, Inc. v. CNA Fin. Corp., 367 A.2d 994 (Del. 1976).
No distinction between stockholders. – This section does not distinguish between large and small stockholders, nor between those in accord with and those in opposition to existing management. Each has the right to invoke judicial aid to compel compliance with this section. Coaxial Communications, Inc. v. CNA Fin. Corp., 367 A.2d 994 (Del. 1976).
No right of shareholder to insist that meeting be held at particular time. – While the right of a shareholder to compel an annual meeting under this section may be virtually absolute, a shareholder has no similar right to insist that it be held at any particular time. Savin Bus. Machs. Corp. v. Rapifax Corp., 375 A.2d 469 (Del. Ch. 1977).
Discretion of court. – The timing of the mandated meeting clearly falls within the discretionary authority of the court. Savin Bus. Machs. Corp. v. Rapifax Corp., 375 A.2d 469 (Del. Ch. 1977).
The use of the term "may summarily order" in subsection (c) of this section obviously reposes a discretion in the court to be exercised in light of the existing circumstances. Savin Bus. Machs. Corp. v. Rapifax Corp., 375 A.2d 469 (Del. Ch. 1977)Hoschett v. TSI Int'l Software, LTD., 683 A.2d 43 (Del. Ch. 1996).
Although satisfying the statutory elements for relief, the court refused to order an annual meeting because of the shareholders' plan to make an "end run" around federal rules and regulations governing public trading of securities. Clabault v. Caribbean Select, Inc., 805 A.2d 913 (Del. Ch. 2002).
Postponement of annual meeting. – The business judgment rule does not confer any presumption of propriety on the acts of the directors in postponing an annual meeting. Aprahamian v. HBO & Co., 531 A.2d 1204 (Del. Ch. 1987).
A board's decision to defer the annual meeting to a later time in conformity with the company's bylaws and this section is not a decision that threatens the legitimacy of the electoral process and the propriety of such decision is to be measured by the permissive business judgment form of review. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990).

The action of deferring the company's annual meeting because of a proposed proxy contest where no meeting date has yet been set and no proxies solicited did not impair or impede the effective exercise of the corporate franchise; thus, the majority shareholder had no legal right to compel the holding of the company's annual meeting. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990).

Acquiescence to practice of not holding meetings. – Mere acquiescence in the failure to hold earlier meetings, or indeed actual connivance to avoid earlier meetings, ought not deprive shareholders generally of the right to elect directors at an annual meeting. Speiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987).

Written consents insufficient. – The mandatory requirement that an annual meeting of shareholders be held is not satisfied by shareholder action by written consents pursuant to § 228 of this title. Hoschett v. TSI Int'l Software, LTD., 683 A.2d 43 (Del. Ch. 1996).

Call for meeting issued by de facto officer is valid call, provided of course it would be if the officer were a de jure one. Moon v. Moon Motor Car Co., 17 Del. Ch. 176, 151 A. 298 (1930).

Special shareholder meeting. – Bylaw amendment extending from 35 to 60 the minimum time period for calling a shareholder-initiated special meeting to remove the board of directors in response to a hostile takeover threat was a reasonable response since earlier meeting could have threatened shareholders' interest in making an informed decision about a possible merger and since the response was proportionate to the threat as it only delayed but did not preclude a shareholder vote. Kidsco Inc. v. Dinsmore, 674 A.2d 483 (Del. Ch. 1995).

Stockholders may elect chairperson, other than the president, whenever they deem it necessary to do so. Duffy v. Loft, Inc., 17 Del. Ch. 376, 152 A. 849 (1930).

The presence of a corporation's president ready and willing to preside cannot be said to oust the stockholders of their right to choose a chairperson on any such theory that the president's presence makes such choice unnecessary, when the bylaws give the stockholders the right to choose a chairperson. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

Motion for election of chairperson may be made by stockholder. – When the corporation president refuses to put the motion to elect a chairperson for the stockholders' meeting to a vote, the stockholders can resort to a vote on the motion when put to them by one of their fellows. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

And choice may be made by voice vote or ballot. – When the stockholders have the right to choose a chairperson, the choice may be made by a viva voce vote rather than by a vote of shares and by ballot, if the bylaws contain a provision which so provides. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

Change of control. – The objection to holding a stockholders' meeting -- that one person will likely be voted out of office as a director and the company will fall under the complete domination of another -- would not be a reason to enjoin the meeting and cannot be a reason to excuse compliance with subsection (b). Speiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987).

Notice need not be given as to proposed resolutions. – It was not necessary that advance notice of the proposed resolutions to be voted upon at an annual stockholders' meeting be set forth. Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954).

Duty of court to ensure that meeting and election are prompt. – The spirit of subsection (c) of this section indicates that where more than 13 months have elapsed without a meeting of shareholders to elect directors and application is made by a shareholder for Court intervention because of this, the Court has a duty to make sure that such a meeting and election take place as promptly as possible. Normally this can only be guaranteed by the entry of an order fixing a definite date for the event to take place. Tweedy, Browne & Knapp v. Cambridge Fund, Inc., 318 A.2d 635 (Del. Ch. 1974).

Stockholder's request for a summary judgment compelling a company to hold an annual stockholder's meeting pursuant to this section was granted, where the company failed to take reasonable steps to hold a meeting within 13 months of the last meeting; the fact that the company set a date for the meeting within the 13 month period did not satisfy the statutory requirements, as the meeting had to actually be held within the 13 month period. MFC Bancorp LTD v. Equidyne Corp., 844 A.2d 1015 (Del. Ch. 2003).

Prima facie case for relief under this section was made by plaintiff because it proved that: (1) Plaintiff is a stockholder of defendant; and (2) there had not been a meeting of stockholders for election of directors during a period of more than 13 months. Coaxial Communications, Inc. v. CNA Fin. Corp., 367 A.2d 994 (Del. 1976); Saxon Indus., Inc. v. NKFW Partners, 488 A.2d 1298 (Del. 1984).

Not all delays in holding annual meeting are necessarily inexcusable, and certainly if there are mitigating circumstances explaining the delay or failure to act, they can be considered in fixing the time of the meeting or by such other "appropriate" order. Tweedy, Browne & Knapp v. Cambridge Fund, Inc., 318 A.2d 635 (Del. Ch. 1974).

Directors may convene meeting if annual meeting is not held. – If no annual meeting is held for the election of directors, the directors in office can nevertheless convene a meeting for the election. In re Tonopah United Water Co., 16 Del. Ch. 26, 139 A. 762 (1927).

When it becomes evident that the annual meeting cannot possibly be held in obedience to the bylaws of the company, the board of directors can proceed to call the meeting for another date, and their act in so doing does not amount to an attempted change of the annual meeting date. In re Tonopah United Water Co., 16 Del. Ch. 26, 139 A. 762 (1927).

Receiver for stockholder may act. – When a receiver has a valid order of appointment by the United States District Court wherein the receiver is given broad powers of management of corporate affairs, there can be no question about such receiver's authority to proceed with an action under this section. Prickett v. American Steel & Pump Corp., 251 A.2d 576 (Del. Ch. 1969).

Where a receiver for a majority stockholder makes out a prima facie case both as to status under this section and as to his or her right to relief, the court cannot deny him or her relief based upon what is in its essence a collateral attack upon the receiver's authority and status as receiver. Prickett v. American Steel & Pump Corp., 251 A.2d 576 (Del. Ch. 1969).

Special elections for newly created director positions are not prevented. – Statutory provisions referring to an annual meeting for the purpose of electing directors pertain to regular elections and were not meant to prevent a special election for newly created positions. Burr v. Burr Corp., 291 A.2d 409 (Del. Ch. 1972).

Right to select directors during insolvency. – Where the corporation remains in control of its affairs while undergoing reorganization pursuant to the Bankruptcy Code, insolvency does not divest the stockholders of their right to elect directors. Saxon Indus., Inc. v. NKFW Partners, 488 A.2d 1298 (Del. 1984).

Courts try to sustain conclusiveness of stockholder meetings. – Where an extensive campaign has been carried on by rival groups for the votes of stockholders and the arguments pro and con have been made, the parties interested should submit to a count and let the majority prevail, so that the court should indulge in every reasonable intendment in favor of the conclusiveness of the meeting. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

When election has been validly held court cannot order another one. – When an election has in fact been held either on the day designated by the bylaws, or at some other day prior to the application to the Court of Chancery under this section, then the Court of Chancery has no power to order an election. Schultz v. Commonwealth Mtg. Co., 12 Del. Ch. 104, 107 A. 774 (1919); In re Tonopah United Water Co., 16 Del. Ch. 26, 139 A. 762 (1927).

Master to conduct meeting not appointed. – Where plaintiff stockholders have sought judgment on the pleadings, and where there was nothing alleged in the complaint which attributed any improper conduct or purpose to the present directors of defendant corporation or which would indicate futility in requiring the present management to hold the stockholders' meeting to elect directors, the Court would not appoint a master to conduct the meeting. Tweedy, Browne & Knapp v. Cambridge Fund, Inc., 318 A.2d 635 (Del. Ch. 1974).

Preliminary injunction enjoining holding of corporate meeting or election of directors will not be granted unless the denial thereof would cause an "irreparable injury." Hauth v. Giant Portland Cement Co., 33 Del. Ch. 496, 96 A.2d 233 (1953).

Shareholder's motion for a preliminary injunction to stop the corporation's annual meeting was granted because the corporation's proxy statement was false and misleading, where the corporation and its board of directors breached their fiduciary duty to disclose fully and fairly to stockholders all material information in seeking stockholder approval of the amendments to the corporation's bylaws; the threat of an uninformed stockholder vote constituted irreparable harm. ODS Techs., L.P. v. Marshall, 832 A.2d 1254 (Del. Ch. 2003).

Director's application for preliminary injunctive relief postponing holding of corporation's scheduled annual meeting was denied where the equities in favor of the holding of the meeting as regularly scheduled outweighed those implicit in the director's belated efforts to wage a proxy fight designed to preserve his status as a director of the corporation and to bring about the removal of the corporation's chief executive officer. Lenahan v. National Computer Analysts Corp., 310 A.2d 661 (Del. Ch. 1973).

Annotations

CASE NOTES — UNREPORTED

Right to select directors during insolvency. – On remand from the state supreme court, the chancery court clarified its decision that it denied a request from shareholders who held stock in a bankrupt corporation for permission to elect directors because it thought the shareholders were involved in a scheme to evade federal securities law. Clabault v. Caribbean Select, Inc., 2003 Del. Ch. LEXIS 93 (Aug. 28, 2003).

§ 212. Annotations.

Annotations
CASE NOTES — REPORTED
One vote for 1 share general not special right. – The provision that each stockholder shall, at every meeting of stockholders, be entitled to 1 vote for each share of the capital stock held by him or her is declaratory of a general, not a special right. Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co., 26 Del. Ch. 411, 24 A.2d 315 (1942).
Who may vote at stockholders' meeting is to be determined by delaware constitution and statutes as same are construed by its courts. Bouree v. Trust Francais, 14 Del. Ch. 332, 127 A. 56 (1924).
Charter restrictions on voting. – In the absence of any express provision in subsection (a) of § 151 of this title, or elsewhere in the law, prohibiting charter restrictions on voting, the provisions of subsection (a) of this section control in determining the validity of those restrictions. Providence & Worcester Co. v. Baker, 378 A.2d 121 (Del. 1977).
The absence in subsection (a) of this section of a cross reference to subsection (a) of § 151 of this title is indicative of the absence of any legislative intent to prohibit, by subsection (a) of § 151 of this title, charter restrictions upon stockholders' voting rights. Providence & Worcester Co. v. Baker, 378 A.2d 121 (Del. 1977).
Right to vote shares of corporate stock having voting powers has always been incident to its legal ownership. In re Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941); Drob v. National Mem. Park, 28 Del. Ch. 254, 41 A.2d 589 (1945); Tracy v. Brentwood Village Corp., 30 Del. Ch. 296, 59 A.2d 708 (1948).
The right to vote shares of stock issued by a Delaware corporation is an incident of legal ownership. Norton v. Digital Applications, Inc., 305 A.2d 656 (Del. Ch. 1973).
Only record holders can vote shares at stockholders' meetings. Drob v. National Mem. Park, 28 Del. Ch. 254, 41 A.2d 589 (1945).
The real owner of corporate stock does not have the right to vote it at stockholders' meetings if it be registered on the corporate books in the name of another person. Tracy v. Brentwood Village Corp., 30 Del. Ch. 296, 59 A.2d 708 (1948).
No one but a registered stockholder is, as a matter of right, entitled to vote and if an owner of stock chooses to register his or her shares in the name of a nominee, such stockholder takes the risks attendant upon such an arrangement, including the risk that he or she may not receive notice of corporate proceedings, or be able to obtain a proxy from his or her nominee. The corporation is entitled to recognize the exclusive right of the registered owner to vote. American Hdwe. Corp. v. Savage Arms Corp., 37 Del. Ch. 59, 136 A.2d 690 (1957).
Owners of preferred stock could not vote at a meeting to approve a proposed merger even though an amendment to be voted on at the meeting would give voting rights to preferred stockholders. Mariner LDC v. Stone Container Corp., 729 A.2d 267 (Del. Ch. 1998).
But ownership of voting stock imposes no legal duty to vote at all. Ringling Bros. – Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947).
If corporation has power to hold stock, it has incidental power to vote it notwithstanding its certificate of incorporation confers no special power to that end. Bouree v. Trust Francais, 14 Del. Ch. 332, 127 A. 56 (1924).

That a stock certificate was filled in with a person's name does not alone create legal ownership in such person. Norton v. Digital Applications, Inc., 305 A.2d 656 (Del. Ch. 1973).
Record holder could vote stock without direction and real owner. McLain v. Lanova Corp., 28 Del. Ch. 176, 39 A.2d 209 (1944).
And consent of unrecorded owner presumed. – The actual consent of the holder of the certificate is ordinarily not essential to the right of the record owners to vote stock standing in their names, and at any rate, in the absence of an objection consent would ordinarily be presumed. In re Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941).
The right to vote shares of stock having voting powers is ordinarily an incident of its legal ownership, and in the absence of some peculiar inequitable circumstances affecting the rights of the real beneficial owner, the record owner can vote the stock and the beneficial owner must be taken to know this, and can protect his or her rights by demanding a proxy, or otherwise. McLain v. Lanova Corp., 28 Del. Ch. 176, 39 A.2d 209 (1944).
But as between transferor and transferee equities with transferee. – As between a transferor who has parted with all beneficial interest in stock and his or her transferee, the broad equities are all in favor of the latter in the matter of its voting and while the transferee may not himself or herself be qualified to vote because he or she had not caused the stock to be registered in his or her name, it does not necessarily follow that the transferor may exercise the voting right in defiance of the transferee's wishes. In re Canal Constr. Co., 21 Del. Ch. 155, 182 A. 545 (1936).
Transferee can protect himself or herself by having transferor give proxy. – The owners of certificates of stocks can usually protect their rights by recording the transfers and having new certificates issued; but, even though that cannot be done because the corporate transfer books are closed at the time of the assignments, they can compel the record owners to give them proxies to vote the stock standing in their names. In re Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941).
A proxy must state that it is irrevocable, which means that the word "irrevocable," or perhaps a synonym, must appear in the proxy. Eliason v. Englehart, 733 A.2d 944 (Del. 1999).
Stockholder is not forbidden from voting on question of corporate policy simply because he or she is related to person who favors or opposes such policy. Du Pont v. Du Pont, 256 F. 129 (3d Cir.), cert. denied, 250 U.S. 642, 39 S. Ct. 492, 63 L. Ed. 1185 (1919).
Stockholder has right to vote his or her stock from whatever motive he or she may choose. Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 14 Del. Ch. 1, 120 A. 486 (1923).
Stockholders have the right to exercise wide liberality of judgment in the matter of voting and may admit personal profit or even whims and caprice into the motives which determine their choice, so long as no advantage is obtained at the expense of their fellow stockholders. Heil v. Standard Gas & Elec. Co., 17 Del. Ch. 214, 151 A. 303 (1930); Ringling Bros. – Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947); Beach v. KDI Corp., 336 F. Supp. 229 (D. Del. 1971).
The motive that the stockholder may have for not attending the meeting or voting his shares is irrelevant. Even if petitioner deliberately failed to attend because he did not want to create a quorum, his reason for abstaining, if relevant, is not of a character which should preclude the relief requested. In re Pioneer Drilling Co., 36 Del. Ch. 386, 130 A.2d 559 (1957).

Stockholder may vote selfishly or altruisticly. – When a stockholding director is called upon to decide at a stockholders' meeting between his or her own interest as an individual and what may be his or her interest along with other stockholders in benefiting the corporation, he or she is free to exercise his or her own judgment, and to act in accordance with selfish rather than altruistic motives. Du Pont v. Du Pont, 251 F. 937 (D. Del. 1918), aff'd, 256 F. 129 (3d Cir.), cert. denied, 250 U.S. 642, 39 S. Ct. 492, 40 S. Ct. 12, 63 L. Ed. 1185 (1919).

And his or her motives may not be inquired into. – Where a stockholder was fully informed of the questions involved, he or she had a right to give his or her proxy to whomsoever he or she desired, and his or her motives for voting could not be inquired into. Du Pont v. Du Pont, 251 F. 937 (D. Del. 1918), aff'd, 256 F. 129 (3d Cir.), cert. denied, 250 U.S. 642, 39 S. Ct. 492, 40 S. Ct. 12, 63 L. Ed. 1185 (1919).

But stockholders have fiduciary duty to other stockholders. – When, in the conduct of the corporate business, a majority of the voting power in the corporation join hands in imposing their policy upon all, they are to be regarded as having placed upon themselves the same sort of fiduciary character which the law impresses upon the directors in their relation to all the stockholders. Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 14 Del. Ch. 1, 120 A. 486 (1923).

Shares have not been "issued" for purposes of voting until custody and control of the certificate has passed to the stockholder. Norton v. Digital Applications, Inc., 305 A.2d 656 (Del. Ch. 1973).

Delivery, actual or constructive, is required to complete the transfer of the shares. Norton v. Digital Applications, Inc., 305 A.2d 656 (Del. Ch. 1973).

Legal ownership of escrowed shares does not pass to the stockholder until they are delivered to him or her by the bank out of escrow. Norton v. Digital Applications, Inc., 305 A.2d 656 (Del. Ch. 1973).

Delivery of stock or stock certificates into escrow is not a sufficient delivery for voting purposes. Norton v. Digital Applications, Inc., 305 A.2d 656 (Del. Ch. 1973).

This section permits stockholders to give proxies which by their terms may be irrevocable for a period. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957).

Irrevocable proxy to be coupled with interest. – A proxy is revocable even though irrevocable in form, unless the Court of Chancery finds that it was coupled with an interest. Brady v. Mexican Gulf Sulphur Co., 32 Del. Ch. 372, 88 A.2d 300 (1952).

A proxy power must be coupled with an "interest" in order to be irrevocable. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957).

Sufficiency of interest. – The interest that a seller of stock retains as the senior executive officer of that company is sufficient to render specifically enforceable an express contract for an irrevocable proxy. Haft v. Haft, 671 A.2d 413 (Del. Ch. 1995).

In determining the validity of a claimed security interest in securities for purposes of subsection (e) of this section, one must turn first to Article 9 of the Delaware version of the Uniform Commercial Code. Haft v. Haft, 671 A.2d 413 (Del. Ch. 1995).

Period of validity. – The 60-day time period for submission of written consents pursuant to § 228 of this title should not be confused with the 3-year period of validity for proxies pursuant to this section. Viele v. Devaney, 679 A.2d 993 (Del. Ch. 1996).

Evidence of agency relationship. – To be accepted as valid evidence of an agency relationship, a proxy must evidence that relationship in some authentic, genuine way; proxies meeting that fundamental requirement will enjoy a presumption of validity. Parshalle v. Roy, 567 A.2d 19 (Del. Ch. 1989).

Person acting as proxy for another is but latter's agent and owes to the latter the duty of acting in strict accord with those requirements of a fiduciary relationship which inhere in the conception of agency. Rice & Hutchins, Inc. v. Triplex Shoe Co., 16 Del. Ch. 298, 147 A. 317 (1929), aff'd, 17 Del. Ch. 356, 152 A. 342 (1930).

The producing of a proxy is not the creation of the agency, only proof of it to the satisfaction of others. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

The holder of a proxy to vote stock is an agent, and within the scope of his or her authority, has a certain fiduciary relation toward his principal. McLain v. Lanova Corp., 28 Del. Ch. 176, 39 A.2d 209 (1944).

The relation between the stockholders and the holders of their proxies is that of principal and agent, and where the powers given were merely to vote the stock "as my proxy at any election." The power to act for them and in their names in calling a special stockholders meeting cannot be implied from the general authority given to vote their stock. Josephson v. Cosmocolor Corp., 31 Del. Ch. 46, 64 A.2d 35 (1949).

The person designated in a proxy has a fiduciary obligation to carry out the wishes of the stockholders to the best of his or her ability. Hauth v. Giant Portland Cement Co., 33 Del. Ch. 496, 96 A.2d 233 (1953).

Agent's act for own aggrandizement does not bind principal. – General proxies given to an agent cannot be used by the holder to commit the principals to acts done by the agent for his or her own aggrandizement so as to estop the principal from complaining thereat, unless the principal was advised of the proposed action in advance and expressly or impliedly approved thereof. Blair v. F.H. Smith Co., 18 Del. Ch. 150, 156 A. 207 (1931).

Paper writing called proxy is nothing more than evidence of relationship; it is not the relationship. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

Conflicting proxies. – All identical but conflicting proxies must be rejected when the conflict cannot be resolved from the face of the proxies. Concord Fin. Group, Inc. v. Tri-State Motor Transit Co., 567 A.2d 1 (Del. Ch. 1989).

Later proxy revokes former proxy. – When two proxies are offered bearing the same name, the proxy that appears from the evidence to have been last executed will be accepted and counted under the theory that the latter proxy constitutes a revocation of the former although the signatures do not appear to be in the same handwriting. Standard Power & Light Corp. v. Investment Assocs., 29 Del. Ch. 593, 51 A.2d 572 (1947).

Clearly a later proxy revokes an earlier one when such instructions appear on the face of the later proxy; and there is no question but that a later proxy revokes an earlier one where the total

number of shares registered in the name of the person giving the proxies is included in each proxy. Schott v. Climax Molybdenum Co., 38 Del. Ch. 450, 154 A.2d 221 (1959).

Where two identical proxies having differing dates, the later-dated proxy will be given effect; thus where two proxies were submitted on behalf of the same record holder, purported to vote the same number of shares, and, each proxy was regular on its face; specifically, neither bore any facial indication that the person executing the proxy was unauthorized, both proxies were entitled to a presumption of validity, but the later-dated proxy would prevail. Parshalle v. Roy, 567 A.2d 19 (Del. Ch. 1989).

Later postmark determines valid proxy if all have same execution date. – If a stockholder mails a proxy to one group after he or she has mailed one to the opposing group, the later mailing must be taken to show his or her intention in the matter. Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (1946), aff'd, 29 Del. Ch. 593, 51 A.2d 572 (1947); Concord Fin. Group, Inc. v. Tri-State Motor Transit Co., 567 A.2d 1 (Del. Ch. 1989).

As to proxies without an execution date or with the same execution date given by the same person to both the management and the opposition, but containing postmarks bearing the same date but a different time of day, the inspectors should under such a state of facts recognize the postmark time as determining the later executed and therefore the valid proxy. Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (1946), aff'd, 29 Del. Ch. 593, 51 A.2d 572 (1947).

Otherwise later execution date supersedes postmark. – The later execution date presumably written by the party herself must supersede the postmark date appearing on other proxies. Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (1946), aff'd, 29 Del. Ch. 593, 51 A.2d 572 (1947).

A later postmark date on a proxy is sufficient evidence of expressed intent so as to repeal a proxy containing a later execution date but an earlier postmark date. Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (1946), aff'd, 29 Del. Ch. 593, 51 A.2d 572 (1947).

Abandonment of agency. – It cannot be held that stockholders who give proxies notwithstanding the assumption of an intent on their part that the proxies would be acted upon, by the mere entertaining of such an intent can permanently fasten the relationship of agency upon those named in the proxies so that the latter cannot refuse to act. Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 A. 223 (1930), aff'd, 17 Del. Ch. 376, 152 A. 849 (1930).

Proxy signed in partnership name. – The practical considerations of business suggest that if a proxy is signed in the name of a partnership which is the registered holder of the stock, and the only criticism of it is that it was neither signed by all the members of the firm nor by one who affixes his or her own name as the representative of all, it nevertheless is entitled to be taken as presumptively genuine. Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 A. 136 (1933).

When corporate stock is recorded in the name of a partnership, and a proxy purporting to be signed in the partnership name is sent out by the stockholder, it is prima facie evidence that the signature thereto was authorized. McLain v. Lanova Corp., 28 Del. Ch. 176, 39 A.2d 209 (1944).

Where names of 2 tenants by the entirety appear on proxy it is prima facie valid, and one attacking a proxy bearing the names of both tenants must be prepared to assume the burden of

demonstrating to the court that the person signing the proxy, assuming 1 person signed both names, was not authorized to sign for the other or that such signature was not adopted by the other person. Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A.2d 501 (1946), aff'd, 29 Del. Ch. 593, 51 A.2d 572 (1947).

Appearance of prima facie authenticity. – When a firm in whose name stock is registered sends in a proxy signed in its name, it is reasonable to say that enough appears to give it the appearance of prima facie authenticity. Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 A. 136 (1933).

Whatever reasonably purports to be a proxy of a shareholder entitled to vote at an election is entitled to a prima facie presumption of validity. Standard Power & Light Corp. v. Investment Assocs., 29 Del. Ch. 593, 51 A.2d 572 (1947).

Absence of signer's authority. – Proxy signed by person in whose name stockholder stock was registered in care of on corporation's book was valid to vote stock even though the proxy did not indicate the signor's authority to sign the proxy card. Concord Fin. Group, Inc. v. Tri-State Motor Transit Co., 567 A.2d 1 (Del. Ch. 1989).

Use of initial instead of spelling out of christian name did not deprive proxy of appearance of authenticity. Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. 1, 20 A.2d 743 (1941).

Strict proof must be presented to prove forgery. – Whenever a charge of forgery is asserted pertaining to the validity of a proxy the court should exercise due care, demanding of the accuser strict proof in support of his or her challenge. The shareholder whose signature was allegedly forged should preferably be produced, and in any event the proof should be convincing to warrant a holding that there was a forgery. Corporate elections often produce heated arguments resulting in bitter accusations, and the Court must safeguard the shareholder in this respect; otherwise, he or she might be disenfranchised without cause. Standard Power & Light Corp. v. Investment Assocs., 29 Del. Ch. 593, 51 A.2d 572 (1947).

Fact that signature on proxy is not in handwriting of shareholder does not invalidate proxy. Standard Power & Light Corp. v. Investment Assocs., 29 Del. Ch. 593, 51 A.2d 572 (1947).

Use of proxies not to be restricted so as to prohibit use. – The use of proxies in corporate elections should not be hedged about by restrictions which, because of practical considerations, are almost prohibitive. Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. 1, 20 A.2d 743 (1941).

And general proxies have right to vote on all matters. – When stockholders give general proxies to their representatives and place no limitations upon the extent of the power conferred thereby, it must be assumed that the proxies were authorized to vote upon all matters that might come before the meeting in the ordinary and usual course. Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 A. 136 (1933).

Effect of execution of limited proxy. – Unless the certificate of incorporation provides to the contrary, the legal and practical effect of executing a limited proxy is that a stockholder will contribute to the establishment of a quorum and will be bound by a majority decision of the voting power present on a proposal from which he or she has withheld the authority to vote. Berlin v. Emerald Partners, 552 A.2d 482 (Del. 1988).

Agent presumed to express will of stockholder. – When a stockholder gives an unrestricted proxy, naming an attorney-in-fact to act in his or her stead, it must be presumed that what the

attorney does in the proper exercise of the power conferred expresses the will of the stockholder. Hexter v. Columbia Baking Co., 16 Del. Ch. 263, 145 A. 115 (1929); Chandler v. Bellanca Aircraft Corp., 19 Del. Ch. 57, 162 A. 63 (1932).

It will be presumed that what the attorney does in the proper exercise of the power conferred expresses the will of the stockholders. Hauth v. Giant Portland Cement Co., 33 Del. Ch. 496, 96 A.2d 233 (1953).

When proxies were solicited by the management and their authority was unrestricted, and it is not established that there was any misrepresentation or fraud in their solicitation, it must be assumed that the stockholders expected that their proxies would be voted in accordance with the wishes of the majority of the board of directors, since they represent the management. Hauth v. Giant Portland Cement Co., 33 Del. Ch. 496, 96 A.2d 233 (1953).

So stockholder cannot repudiate acts of agent. – When a meeting of stockholders has been held, and corporate action authorized by the use of general proxies permitting the exercise of unlimited discretion by the proxy holder, and that action is duly taken, the stockholder ordinarily cannot later repudiate the action of his or her agent. Dolese Bros. Co. v. Brown, 39 Del. Ch. 1, 157 A.2d 784 (1960).

In the absence of fraud the fact that the management failed to notify the stockholders of its intention to vote the proxies which it received for someone other than the plaintiff is not sufficient ground to warrant the issuance of a preliminary injunction. Hauth v. Giant Portland Cement Co., 33 Del. Ch. 496, 96 A.2d 233 (1953).

Unless agent uses proxy to commit fraud. – The rule that a stockholder cannot repudiate action taken under a general proxy has no application to a case in which the dominating director is charged with using the proxies to commit a fraud concealed from the stockholders whose vote is necessary to accomplish it, and in which no rights of third parties are affected. Dolese Bros. Co. v. Brown, 39 Del. Ch. 1, 157 A.2d 784 (1960).

But stockholder can limit proxy's power in instrument. – If a stockholder is not content to authorize his or her proxy to act generally in his or her stead upon all such matters, he or she should restrict the proxy's power by the instrument defining it. Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 A. 136 (1933).

Failure to submit proxies held by persons in attendance did not defeat quorum. – When it is clear that a majority of the stock of the corporation was present, either in person or by proxy, at a meeting of stockholders regularly called for the purpose of electing directors, and that an election was held, it should not be declared invalid because certain stockholders holding proxies for stock necessary to make a quorum, and in attendance at the meeting, declined to submit their proxies to the meeting. Duffy v. Loft, Inc., 17 Del. Ch. 376, 152 A. 849 (1930).

Board of directors was sole body empowered to make proxy solicitations on behalf of management. Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853 (D. Del. 1972).

Corporation is proper complainant in action seeking to enjoin persons from soliciting proxies, and thereafter from voting them when such solicitations are purportedly made pursuant to the authority of the board of directors contrary to the fact. Empire S. Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).

Stockholder not estopped by proxy to assert certain rights. – Where stockholder had no knowledge of the fact that the resolution in question was to be presented at the annual meeting

and was informed that the management of the corporation intended to present no other items of business at the meeting, he or she is not estopped from asserting any right which he or she may have had relative thereto prior to the execution of his or her proxy. Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954).

Telecopies, facsimile copies or datagram copies of proxies. – One-sided telecopies of proxy which did not appoint anyone to vote the shares because that information was contained on the other side of the proxy card not proper and attempt to vote shares properly refused. Concord Fin. Group, Inc. v. Tri-State Motor Transit Co., 567 A.2d 1 (Del. Ch. 1989).

Datagram proxies lacked the fundamental indicia of authenticity and genuineness needed to accord them a presumption of validity where the datagrams lacked any written signature or signature equivalent (such as a signature stamp or facsimile), or other identifying mark or characteristic that would verifiably link the proxy to a specific shareholder of record. Parshalle v. Roy, 567 A.2d 19 (Del. Ch. 1989).

Proxy overvoting stock it represents. – Where a proxy overvoted the stock it represented, and that error could not be corrected by looking at the face of the proxy or the books and records of the corporation, the proxy should have been disregarded with no votes attributable to that proxy being cast for either management or the opposition board candidates. Concord Fin. Group, Inc. v. Tri-State Motor Transit Co., 567 A.2d 1 (Del. Ch. 1989).

Annotations

CASE NOTES — UNREPORTED

Subsection (b) of this section simply gives a board the power to set a record date. All the charter provision in the instant case does is eliminate that power and put in its place a rule set forth in subsection (b) itself as one of the default rules that govern when the board does not exercise that power. By its plain terms, subsection (b) does not in any way indicate that its grant of authority may not be altered by a certificate provision. And subsection (b) also enables stockholders filing consents as to subjects not requiring prior board action – such as plaintiff's consent solicitation to remove directors – to preempt the board's discretion simply by filing a one-share consent. Jones Apparel Group v. Maxwell Shoe Co., 2004 Del. Ch. LEXIS 74, No. 365-N (May 27, 2004).

Charter provision was valid and its plain terms established the record date for consent solicitation. Both subdivision (b)(1) of Section 102 and subsection (a) of Section 141 of the Delaware Corporation Law ("DGCL") provide authority for charter provisions to restrict the authority that directors have to manage firms, unless those restrictions are "contrary to the laws of this State." These statutory provisions are important expressions of the wide room for private ordering authorized by the DGCL, when such private ordering is reflected in the corporate charter. The charter provision is a valid exercise of authority under those sections and is not contrary to law, in the sense that our courts have interpreted that phrase. A consideration of subsection (b) of this section's terms and legislative history, as well as of the related statutory section governing consent solicitations, Section 228, reveals that no public policy set forth in the DGCL (or in Delaware's common law of corporations) is contravened by the charter provision at issue. Given the absence of any conflict with a mandatory aspect of Delaware corporate law, the charter provision's restriction on the board's authority to set a record date was valid. Jones Apparel Group v. Maxwell Shoe Co., 2004 Del. Ch. LEXIS 74, No. 365-N (May 27, 2004).

§ 216. Annotations.

2006 Revisor's Note. – Section 8 of 75 Del. Laws, c. 306, provides that this section shall become effective on August 1, 2006.

Blackline Showing Effect of 2006 Amendments. – Subject to this chapter in respect of the vote that shall be required for a specified action, the certificate of incorporation or bylaws of any corporation authorized to issue stock may specify the number of shares and/or the amount of other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting, except that, where a separate vote by a class or series or classes or series is required, a quorum shall consist of no less than one-third of the shares of such class or series or classes or series. In the absence of such specification in the certification of incorporation or bylaws of the corporation:

(1) A majority of the shares entitled to vote, present in person or represented by proxy, shall constitute a quorum at a meeting of stockholders;
(2) In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders;
(3) Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors; and
(4) Where a separate vote by a class or series or classes or series is required, a majority of the outstanding shares of such class or series or classes or series, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter and the affirmative vote of the majority of shares of such class or series or classes or series present in person represented by proxy at the meeting shall be the act of such class or series or classes or series.

<u>A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors.</u>

SYNOPSIS OF 2006 AMENDMENTS

2006, C. 306, Sec. 5. — Section 5 amends § 216 to provide that a bylaw adopted by a vote of stockholders that prescribes the required vote for the election of directors may not be altered or repealed by the board of directors. This amendment does not address any other situation in which the board of directors amends a bylaw adopted by stockholder vote.