Fordham Journal of Corporate & Financial Law

Volume 18 | Issue 1 Article 2

2012

The Eugene P. and Della S. Murphy Conference on Corporate Law

Jack B. Jacobs

The Eugene P. and Della S. Murphy Conference on Corporate Law

Cover Page Footnote

Justice, Supreme Court of Delaware. The lecturer's remarks reflect his personal views and not those of his court or his colleagues on the bench.

VOLUME XVIII 2012 NUMBER 1

FORDHAM

JOURNAL OF
CORPORATE & FINANCIAL LAW

LECTURE

THE EUGENE P. AND DELIA S. MURPHY
CONFERENCE ON CORPORATE LAW

DOES THE NEW CORPORATE SHAREHOLDER
PROFILE CALL FOR A NEW CORPORATE LAW
PARADIGM?

LECTURE

Justice Jack B. Jacobs

LECTURE

THE EUGENE P. AND DELIA S. MURPHY CONFERENCE ON CORPORATE LAW†

DOES THE NEW CORPORATE SHAREHOLDER PROFILE CALL FOR A NEW CORPORATE LAW PARADIGM?

LECTURER

*Justice Jack B. Jacobs**

INTRODUCTION

I am greatly honored to be invited to speak to such a distinguished audience of scholars at this highly regarded law school. Because I am not an academic, and, in the scholarly realm, more of a dilettante, my comments may more appropriately be regarded as light luncheon entertainment. All I bring to the table is the perspective of a judge. For eighteen years, before I went on the Delaware Supreme Court, I was a Court of Chancery trial judge, where many of the cases I decided were corporate law, and more specifically, fiduciary duty disputes. I still do that, but not as much, since the Court of Chancery is only one of three courts from which my current court hears appeals. The upside, though, is that being an appellate judge gives one the luxury of more time to think deeply. Appellate courts, unlike trial courts, do not have to operate in "real time."

From that perspective, I would like to share with you some thoughts about a subject that I hope will interest you as legal scholars.

---

† This lecture was held at Fordham University School of Law on May 8, 2012. It was edited to remove minor cadences of speech that appear awkward in writing and to provide light references to explanatory materials.

* Justice, Supreme Court of Delaware. The lecturer's remarks reflect his personal views and not those of his court or his colleagues on the bench.

The subject is the ongoing vitality of the implicitly empirical corporate law model (or profile) of the shareholder base of publicly held U.S. companies. What do I mean by that? For a long time, courts have implicitly assumed a portrait of shareholders that has driven our corporate law jurisprudence. Our decisions often speak of "the shareholders," and the duties that officers and directors owe to "the shareholders."[1] But those cases rarely, if ever, explicitly identify precisely whom we are talking about. Shareholders, as we all know, come in many sizes, shapes, and flavors.

Since the early 1930s when the federal securities laws were enacted, the implicit portrait or model underlying our corporate law decisions has been that of a diffuse, disaggregated group of retail ("mom and pop") shareholders who, although educated and intelligent, are financially unsophisticated and lack the power and motivation to influence corporate governance or policy. Implicit in that picture was the notion that those shareholders were long-term oriented, meaning they were content to receive a return on their risk capital over the longer term. It is that implicit, unstated portrait—that public company shareholders as a group are unable to act collectively to protect themselves[2]—which underlies the cardinal corporate law principle that courts must be the agency to protect shareholders against overreaching fiduciaries.

My thesis today is that, however accurate that model may have been in the past, it is now inconsistent with the reality on the ground and has been for some time. Our capital markets are now "deretailized." Today, the shareholder base of U.S. public companies consists of highly-sophisticated institutions that have the resources and power—both economic and legal—to act collectively and influence governance. These institutions are also highly short-term oriented. The question becomes: what implications does this new reality have for the formulation and application of judge-made fiduciary duty principles? My hope is to persuade you, as corporate law scholars, that this subject merits your attention.

---

1. *See, e.g.,* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994), *aff'd sub nom*, Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995).

2. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 409–11 (1983).

My talk comes in two parts. The first will flesh out this new shareholder reality and how it came about. The second will ponder what effect, if any, it may have for corporate law theory and judicial decision-making.

THE NEW REALITY

Our current shareholder model evolved from a reality that arose in the wake of World War II. After 1945, the U.S. economy experienced its historically highest level of growth. That led to the emergence of the American middle class, which, in turn, generated unprecedented and widespread investments in our capital markets by retail, "mom and pop," investors who typically purchased shares in relatively small blocks. As noted, those shareholders were widely dispersed, were unable to act collectively to influence management or governance policy,[3] and had a long-term investment horizon. That is, they were content to leave managements to grow the firm over the longer term, and with it, the value of their investments, with the goal of funding their retirement and their children's college education.

Beginning in the late 1960s, that reality began to change. A confluence of events and forces gradually transformed the public company shareholder base I have just described into what it is today, notably a concentrated group of activist, institutional investors with a short investment horizon. These institutions are empowered—and willing to use that power—to influence their portfolio companies' managements to govern in a manner consistent with their short-term horizons. There is no single cause of that transformation. Several developments combined to cause it.

One of those developments was the "deretailization" of the American securities market.[4] That came about because retail investors also had full-time jobs and little time or expertise to manage their own investment portfolios. In response to that need, a new industry arose: professional, institutional investment managers, who performed that

---

3. *Id.*

4. "Deretailization" was coined by Brian Cartwright, former General Counsel of the SEC, in an address to the University of Pennsylvania Law School Institute for Law and Economics. *See* Brian G. Cartwright, Gen. Counsel, SEC, Address at the University of Pennsylvania Law School Institute for Law and Economics: The Future of Securities Regulation (Oct. 24, 2007) (transcript available at http://www.sec.gov/news/speech/2007/spch102407bgc.htm).

service for, and ultimately supplanted, the retail investors as the direct shareholders of our publicly held corporations.

To illustrate, in 1951, individual retail investors owned over 75% of all outstanding corporate equities in the United States; by 1979, institutional investors as a group owned over 36%.[5] Today, institutional investors, including public and private pension and retirement funds, mutual funds and hedge funds, control nearly 70%. Those institutions are managed by persons or firms whose compensation depends on generating short-term returns from the portfolio company stocks that these institutions manage. Those compensation arrangements create incentives for institutional investors to exert pressure on portfolio corporate managements and boards to deploy corporate assets and to develop business strategies to yield short-term profits, often at the expense of profits over the longer term.

Those incentives have been enhanced and amplified at the portfolio company level by executive compensation arrangements, and also by pressures from the stock analyst community. As we know, corporate executives are typically compensated with a package of cash and stock, weighted (primarily for tax reasons) in favor of stock and stock options. That creates incentives for corporate executives to manage their companies in a way designed to increase (or at least not lower) their companies' stock price. Amplifying these incentives is the stock analyst industry, which scrutinizes reported corporate quarterly earnings statements to see if the quarterly results meet management projections. If they do not, management gets an adverse report (the equivalent of a bad grade) that is often followed by a sell recommendation that sends the stock price downward.

But other factors also drive the short-term perspective of these powerful institutions, wearing their hats as portfolio company shareholders. Another factor is that those institutions hold their portfolio shares only for a short period of time. Today, the rate of turnover of invested portfolio stock is extremely high. At actively managed mutual funds, which constitute the primary investor in U.S. 401(k) retirement funds, the annual turnover is about 100%. From a broader perspective, the average turnover of all stocks traded on the New York Stock Exchange reached 138% per year in 2008, and

5. John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 240 (2011).

currently sits around 73% per year.[6] The annual investment turnover by hedge funds is about 300%.[7] My point is that today's shareholder base consists primarily of institutional investors that have no long-term commitment to the corporations in which they invest. Clearly, the model of the passive, patient retail investor has given way to a new reality.

To round out this picture, one other important fact must be considered: these institutional shareholders have become both economically and legally empowered. They are economically empowered because voting control is concentrated in a relatively small group. As a former SEC General Counsel once observed, the representatives of the institutions holding a majority of the shares of U.S. public corporations could fit into a room smaller than this one.[8] And, they have become legally empowered because of structural changes in the legal environment that occurred during the last fifteen years or so. Those legal changes have given public company shareholders the tools to influence corporate boards and managements to be more responsive to their agendas.

These developments have been both judicial and statutory, and they have occurred at both the state and the federal levels. Ironically, these developments, if viewed in isolation, are reforms that have laudable merit and were warmly welcomed by both the shareholder and academic communities. My purpose here, however, is not to debate the merits of these developments, but merely to describe them and put them into perspective. To sharpen this point, I focus on only two recent developments: first, the increased use of the shareholder by-law process to limit the power of boards to adopt governance rules, including takeover defenses; and second, the new rules providing for shareholder proxy access and proxy expense reimbursement.

For several years, the activist shareholder community has sought to influence the governance of publicly held corporations through the by-law amendment process. The legal predicate for that effort is the fact that the Delaware General Corporation Law authorizes shareholders to

---

6. *NYSE Share Turnover Since 1900*, AVONDALE ASSET MANAGEMENT (Oct. 10, 2012), http://www.avondaleam.com/2012/06/nyse-share-turnover-since-1900.html.

7. Alliance Bernstein, *Hedge Funds: Finding the Right Allocation*, THE BERNSTEIN JOURNAL: PERSPECTIVES ON INVESTING AND WEALTH MANAGEMENT, Fall 2005, at 12, 14, *available at* https://www.alliancebernstein.com/Research-Publications/CMA-created-content/PrivateClient/PDFs/Bernstein_Journal_Fall05.pdf.

8. *See* Cartwright, *supra* note 4.

adopt and amend by-laws, and provides that the board cannot eliminate or limit that power.[9] For over a decade, institutional shareholders have invoked that authority to limit the board's power to adopt poison pills.[10] Typically proposed and passed is a by-law providing that any board-adopted pill will have a fixed duration, and that a shareholder vote will be required to adopt any new pill or revive one that has expired.[11] That effort has, by and large, been successful: a large percentage of public companies have dismantled their poison pills.

Institutional shareholders have also used the by-law amendment process to reform the proxy election system to require the corporation to reimburse the expenses of any shareholder group that nominates a "short slate" of board candidates who are then successfully elected. That has significantly leveled the playing field by reducing the expenses of dissident groups seeking to wage a proxy contest. In 2008, the Delaware Supreme Court held that proxy reimbursement was a proper subject for shareholder action and would not impermissibly infringe the board's statutory power to manage the affairs of the corporation so long as the by-law does not restrict the board from discharging its fiduciary duties.[12] As a consequence of that decision, the shareholder by-law process was legitimated as a matter of Delaware law, as a tool to enable activist shareholders to alter the composition of the board and thereby exert leverage to influence board decisions.

These proxy reform tools have recently been codified into legislation at both the state and federal levels. In 2009, the Delaware General Assembly adopted Sections 112 and 113 of the General Corporation Law.[13] Like the Delaware Supreme Court's decision in *CA Inc. v. AFSCME*, these statutes operate to reduce the cost of waging a proxy contest by a dissident shareholder group. Section 112 enables a

---

9. DEL. CODE ANN. tit. 8, § 109(a) (2012).

10. *See* Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 205 (2005). *See also id.* at 209 ("The poison pill is "the most potent of antitakeover defenses. If a corporation has a poison pill and a hostile bidder acquires enough of the corporation's shares to trigger the pill, other shareholders will have the right to buy more shares at below-market prices, meaning that the bidder must buy those shares as well. Alternatively, the pill could trigger the right to purchase more shares of the bidder at low prices after a merger has occurred, diluting the value of the bidder's current shareholdings.").

11. *Id.* at 210.

12. CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 238 (Del. 2008).

13. DEL. CODE ANN. tit. 8, §§ 112, 113.

corporation to adopt by-laws that prescribe the conditions and procedures for including dissident shareholder groups' proxy materials in the management proxy materials—which support the board's director nominee slate—at company expense.[14] For dissident shareholders that wish to conduct their own proxy solicitation (think Pershing Square or Icahn), Section 113 permits the adoption of by-laws that authorize the corporation to reimburse the dissident group's proxy solicitation expenses under conditions prescribed in the by-law.[15] Importantly, these statutes provide that, where shareholders adopt such by-laws, the directors cannot repeal them.

What the Delaware Legislature made optional, the U.S. Congress made mandatory one year later in the Dodd-Frank Act.[16] Section 971 of Dodd-Frank authorizes the SEC to adopt proxy access rules. Although to date the SEC's rulemaking process has had a rocky start,[17] at some point we may have to contend with a preemptive federal "one size fits all" regulation that mandates public companies to include shareholder proposals in their company proxy materials.

To conclude this first part, our current public company shareholder profile has eclipsed the model that came into existence after World War II. A new reality has evolved that differs profoundly from what existed before. Yet—and the critical fact is—that outdated portrait is still the model that continues to underlie our corporate fiduciary law jurisprudence. That brings me to my second and final topic, which is: what are the implications of that new reality for crafting judge-made fiduciary law decisions? More specifically, should our shareholder profile model be modified to conform to the new reality, and if so, then how and to what extent? For me, this is a brand new conceptual area. I therefore freely confess that what I offer today are more questions than answers. But even so, I hope to persuade you, as scholars, that this question is worthy of your attention.

---

14. Id. § 112.

15. Id. § 113.

16. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

17. Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (finding thatthe SEC "acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule.").

A NEW MODEL

If I were you, I would probably be asking myself: is this really a problem? That is a good question, and I would respond to it in this way: legal theory, like scientific theory, inescapably rests upon, and is tested by, an empirical foundation—that is, by some view of how the world actually works.[18] In science, it is axiomatic that if the empirical data does not support a theory, then the theory must be modified to conform to the data. By analogy, a corporate fiduciary legal theory is grounded upon an empirical model or assumption about how human beings actually behave and react to events. Building on that analogy, I would suggest that if the model no longer corresponds to the reality, then the theory may no longer be sound and should be reexamined. That is my position. If you disagree, then you will probably find the rest of this talk of minimal value.

But (and as I hope), if you do agree, we would reach the second question: even if the current shareholder model no longer conforms to the current reality, how do we go about determining whether, and if so how, the shareholder model needs to be changed? As a cautious, risk-averse judge, my answer would be: one small step at a time.

What do I mean? That is, how might one go about performing a fiduciary analysis that takes this new shareholder profile into account? At this very preliminary stage in my own thinking, I would suggest the following thought experiment: let us consider three separate, well-understood fact paradigms that have arisen in Delaware corporate law. I will briefly walk you through each of them, and then conclude.

The first fact paradigm is classic *Unocal*[19]: a board adopts defenses against a hostile takeover. A shareholder class (and the hostile bidder) sues, claiming the board breached its fiduciary duty by interfering with the shareholders' right to sell their shares at a premium above current market price.[20] In this area, our case law is quite paternalistic, in the sense that it is highly shareholder protective. Beginning with *Unocal* in 1985, Delaware courts have consistently held that the target company board has not only the power but also the duty to protect the shareholders against hostile offers that the board reasonably believes

18. *See generally* Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations,* 27 DEL. J. CORP. L. 499 (2002).

19. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

20. *See id.* at 949–52.

pose a threat to corporate policy. And, the board may do that by adopting proportionate defensive measures.[21]

The *Unitrin* case exemplifies this paternalistic approach.[22] There, the Delaware Supreme Court held that a target board has the prerogative to determine that the market undervalues the target company's stock, and may protect its shareholders from offers that do not reflect the corporation's long term value under management's business plan.[23] But, the *Unitrin* Court went even further. It held that the target company board's entitlement to defend, and thereby prevent the shareholders from deciding on their own whether or not to accept the hostile bid, could be justified on a theory of "substantive coercion."[24] I refer to the concept that the shareholders might accept the hostile bidder's inadequate offer "because of 'ignorance or mistaken belief' regarding the Board's assessment of the long term value of [the target company's] stock."[25]

Clearly that paternalistic fiduciary duty approach rests on a model of target company shareholders as being diffuse, financially unsophisticated, and powerless to protect themselves—in the words of one Delaware judge, as having "rube-like qualities."[26] The question is whether, given the reality of today's shareholder profile, the shareholder-protective premise that underlies the *Unocal* doctrine in paradigm takeover defense cases has continued vitality.

At least one Chancery case has addressed that question, although not at the theoretical level. In *Chesapeake Corporation v. Shore*,[27] then Vice Chancellor (now Chancellor) Strine was confronted with a substantive coercion argument. In *Chesapeake*, the target board adopted, as a takeover defense, a supermajority voting rule for shareholder-proposed amendments to the by-laws. The board justified that defense on the basis that the bid was inadequate and posed the threat that the shareholders and the capital markets would not fully understand the superior dollar value of management's business plan as compared to the hostile offer. The Chancellor rejected that argument, not on theoretical grounds, but on the basis that the board had produced no evidence that there was any risk of shareholder confusion. That is,

21. *Id.* at 957–58.
22. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).
23. *Id*.
24. *See id.* at 1383–85.
25. *Id.* at 1385.
26. Chesapeake Corp. v. Shore, 771 A.2d 293, 328 (Del. Ch. 2000).
27. *Id.*

the court did not consider itself bound to accept without question a defense based on an abstract fiduciary theory that was untethered to empirical facts. *Chesapeake* may be viewed as one example of a court rejecting, on empirical grounds, the traditional shareholder model that implicitly justified the exercise of fiduciary power to defend against a hostile bid. Whether the Supreme Court would have validated that approach will never be known, because *Chesapeake* was never appealed.

But suppose it had been? In that event, my court might have been called upon to reexamine an underlying theoretical premise of *Unocal*—that courts must give deference to a target board's determination that a hostile bid poses a threat that justifies a defensive response. *Chesapeake* rejected that deferential approach insofar as it refused to credit the claimed substantive coercion threat solely on the basis of the target board's say-so. *Chesapeake,* I would suggest, can be viewed as obliquely challenging the validity of the shareholder profile model on which the substantive coercion theory rests. That case also illustrates one way a court might respond analytically to the disjunction between fact and theory. Is such a response the best approach? At this point my own thinking is too undeveloped to say. But what I can say is that *Chesapeake* gives effect to the view that the new shareholder profile reality has overtaken the empirical model that implicitly undergirds an important theoretical premise of *Unocal*.

I next turn to a second fact paradigm, which is rooted in *Revlon*.[28] A target board decides to sell the target company as a response to a hostile bid. That provokes a bidding war, and the target board agrees to sell the company to the low bidder that (for whatever reason) the board prefers to deal with. A shareholder class (and the disfavored high bidder) sue, claiming a breach of fiduciary duty under *Revlon* and its progeny. Those cases hold that the courts must protect shareholders from fiduciary decisions to sell the company in a transaction that will not yield the highest available value. Again, the question for us is whether, given the new shareholder profile reality, the degree of shareholder protection afforded in *Revlon*-type cases is still appropriate.

In this setting, unlike *Unocal*, a good argument can be made that the new shareholder reality should not matter either to the analysis or the result. Why? Because in this scenario, the directors have contractually

28. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

committed the company to a sale transaction that involves deal protection measures. Those measures would be triggered if an offeror with a superior bid prevails over the favored bidder that is offering less. As a result, the unsuccessful bidder, even if it loses the company, will reap the benefits of the deal protection measures.

QVC[29] is the quintessential example. Under the merger agreement there, the favored bidder, Viacom, had contractual deal protections that would enable Viacom to walk away with over $1 billion of target company assets if the competing bidder, QVC, won the bidding war for the company. In those circumstances, only the courts, and not the institutional shareholders—however empowered or sophisticated they might be—have the power to prevent that from happening. So, the answer for the *Revlon* fact paradigm may differ from that in *Unocal*-type cases.

But, I do not mean to oversimplify. There may be other forms of *Revlon*-type M&A transactions where the need for shareholder protection is less compelling. Time does not permit me to explore or elaborate that thought here, except to say that the relevant inquiry would be whether, given the new shareholder profile reality, the shareholders as a group are able and motivated to protect themselves without court intervention. In cases where the answer is yes, the courts will be challenged, doctrinally speaking, either to formulate an exception to *Revlon* in those cases or to articulate a new governing theoretical concept.

The third, and final, paradigm situation I will address involves the "going private" transactional cases. A controlling stockholder acquires the minority shares in a merger or an economically equivalent set of transactions. For our purposes, these going private cases may be divided into two subcategories. In the first—a long-form merger of the target company into an entity controlled by the controlling shareholder—the profile of the stockholder base is probably irrelevant. In the second—a two-step transaction consisting of a tender offer designed to elevate the controlling stockholder's interest to 90%, followed by a short-form merger—the composition or profile of the shareholder base may be highly relevant to the fiduciary analysis.

To better understand why, consider the classic "long-form" merger. Here the controlling shareholder, a fiduciary, has the raw power to force the minority shareholders to accept the merger on whatever financial terms, however unfair, the controller desires. In these circumstances,

---

29. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).

the shareholders, whether they be institutions or individuals, are powerless to change the result by self-help, since the majority stockholder has the voting power to dictate the result. In this setting, the nature of the shareholder profile would appear irrelevant. The only protection available is through the courts, which would require the fiduciary to prove that the merger is objectively and entirely fair, both as to process and price.[30]

But now consider a second transactional form through which a buyout of the minority interest may be accomplished. Under that form the nature of the shareholder profile may matter greatly. I refer to a two-step *Siliconix*-type transaction, where the controlling shareholder first makes a tender offer for enough minority shares to raise its ownership to the 90% level, and then follows up with a "short-form" merger. Under Delaware law, neither step, if considered separately, is subject to entire fairness review.[31] The question is: should the courts view these two steps separately, in which case there would be no fairness review, even though the economic result is precisely the same as a single step going private merger? Or, should the courts disregard the separateness of the two transactions and treat them collectively as if they were a single acquisition requiring fairness review? The Supreme Court has not yet addressed this question; the Court of Chancery has.

This development began only recently, in 2001, with the *Siliconix* decision, which treated each transactional step separately, with each step governed by different review standards prescribed by Supreme Court precedent.[32] Later Chancery cases embroidered and modified *Siliconix*. In all these cases the Court of Chancery was fully mindful of the risk that this novel two-step approach could deprive shareholders of the protections afforded by classic fairness review. Therefore, in post-*Siliconix* decisions, that court imposed, on a case-by-case basis, additional disclosure requirements and structural protections that

30. *See generally* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

31. Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001) (holding there is no fairness review required in a short-form merger); Solomon v. Pathe Commc'ns Corp., 672 A.2d 35 (Del. 1996) (holding there is no fiduciary duty to offer a fair price in a tender offer involving full disclosure and no coercion).

32. *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001).

incorporated *de facto* certain elements of fairness review.[33] Since the Supreme Court has yet to address the merits of this alternative doctrinal pathway to achieving the identical economic result as the classic going private merger, I disclaim any comment on the merits. I describe this transactional form merely to illustrate, on a hypothetical basis, how the new shareholder reality might factor into a fiduciary duty analysis in a concrete setting.

This two-step acquisition format differs from the classic one-step long form merger in one important respect: it requires the minority shareholders to tender enough shares for the controller to reach the 90% level. If, as the traditional model assumes, the shareholders are disaggregated, unsophisticated retail investors unable to protect themselves, then the types of shareholder procedural protections reflected in the *Siliconix* line of cases would be justified. But, if the minority shares are held primarily by sophisticated institutions, then all those institutions need do to prevent the controller from reaching the 90% level is refuse to tender their shares. Under that hypothesis, perhaps the inquiry should be: (i) do the institutions have sufficient shares to prevent the offer from succeeding, and (ii) if so, are the institutions motivated to withhold their shares in order to force a better price, and are there any obstacles to their doing so? One might advance a counterargument that this kind of analysis is too costly and imposes undue case management burdens on the courts. But that would be a debate for another day. My modest proposition is only that the new shareholder profile is an irrefutable reality that justifies inquiring into whether courts should take that into account in formulating and applying fiduciary duty principles.

****

I will stop at this point and leave you with one final thought. If there is merit to the notion that courts should take into account the new shareholder reality in formulating and applying fiduciary doctrine, it is also true that courts can accomplish that only on a case-by-case basis. A downside of the common law process is that it risks balkanizing into small pieces, a larger set of issues that are perhaps better viewed in more

---

33. *In re* Pure Resources, Inc., S'holders Litig., 808 A.2d 421 (Del. Ch. 2002); *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604 (Del. Ch. 2005); *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397 (Del. Ch. 2010).

comprehensive theoretical terms. That is why, in my opinion, the judiciary would profit by having the benefit of a systemic academic analysis of these conceptual questions, rather than addressing them on an *ad hoc* basis. That important endeavor will require a degree of analytical firepower that the legal academy is uniquely situated to provide.