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FOREWORD

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A toast to the Model Business Corporation Act (MBCA), and especially its forefathers, on its 60th Birthday! Now at age 60, the MBCA is still vibrant, meaningful, and it forms the bedrock for the health of the United States corporate economy.

When we first considered assembling a compilation of articles in *Law and Contemporary Problems* to celebrate the 60th Anniversary, we had no idea of the scope, scholarship, depth, and historical importance these articles would present—a real treasure trove. Moreover, and very importantly, they chart a course for future deliberations of the Committee on Corporate Laws to address.

A number of themes emerge from these articles. A central theme is that there is nothing as constant as change. Since 1950, the MBCA has undergone constant revisions and, in many instances, been the leader or catalyst for improvement in corporate law.

These articles reflect not only the history of the MBCA and its achievements, but carefully analyze the relationship of the MBCA with Delaware Corporate Law and the American Law Institute's Principles of Corporate Governance. There are obvious differences in these three, but the articles demonstrate that these tensions are both healthy and drive each to strive for greater effectiveness. The contrast between statutory specificity and judge-made corporate law are also examined and the positive and negative aspects of each dissected.

The MBCA's contributions to jurisprudence, appraisal remedies, duty of disclosure, financial provisions, confidentiality, indemnification, fiduciary duties of officers and directors, legal capital, and exculpation are chronicled, and serious recommendations are made on how they can be improved.

The work of the Committee in the area of corporate governance is also impressive. The various editions of the Corporate Director's Guidebook, published by the Committee, have had a substantial and affirmative impact on the development of corporate governance beginning with its then unheard of recommendation that non-management directors constitute a majority of the board of directors of publicly-held corporations. As a number of the articles

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reflect, open issues in the corporate governance arena still exist and they point the Committee to the continued exploration of, among others, the publicness of public corporations, the roles of shareholders and directors, and the communications between boards, management, and shareholders. Now, some specifics about the articles celebrating sixty years of the MBCA.

Not surprisingly, many of the contributions to this symposium focus on the orientation drafters should maintain in proposing corporate statutes that will stand, as the MBCA has, the tests of time. Drawing on insights from evolutionary economics and game theory, David McBride reflects on the contributions of corporation law, and particularly the role of statutes such as the MBCA. He concludes that although legislatures must allow on-going experimentation with new forms of business organizations, that experimentation must proceed with a healthy respect that a strong duty of loyalty is a central pillar to the social success of any corporate entity law. In the vein of experimentation and adaptation, Lisa Fairfax traces the MBCA's ability to nimbly keep pace with the ever-accelerating developments of shareholder activism—for example, majority vote, shareholder access, and broker voting. Even though shareholder initiatives are occurring in fairly rapid fire and dramatically changing the corporate landscape, her review reflects that the drafters of the MBCA have responded with relative alacrity with provisions that wisely accommodate the shifting landscape.

Enron and its progeny produced tectonic shifts in the corporate law landscape. Olson and Briggs examine how the Enron scandal led not only to responses in the MBCA, but most importantly, to a shift for the MBCA, so that many of its most recent revisions are not enabling and clarifying, but embrace important normative standards for directors. These normative standards are consistent with McBride's call that the duty of loyalty should continue to be woven throughout the fabric of corporate law. In doing so, one cannot lose sight that an over-arching goal of business law is to provide certainty. This should be a starting point for the drafters of commercial laws such as the MBCA. Mike Dooley, after providing an insightful contrast of the role of standards versus rules, closely analyzes the invaluable contributions the MBCA provides by blending both standards and rules, sometimes in safe harbors, to address uncertainty while at the same time raising standards of conduct in the corporate setting.

One of the biggest challenges facing drafters of corporate statutes is the explosion of different business forms. Bill Clark reviews this explosion of alternative business entity laws with close attention to the MBCA's embrace of cross-entity and share-exchange provisions. He provides a valuable peek into the future in his description of a "hub-and-spoke" approach to entity rationalization of the Business Organization Act. Clark opines that this act will likely influence drafters of alternative entity acts to follow the MBCA's approach of increasingly providing default rules to guide the organization and

operation of unincorporated entities. Again, the themes that pervade this comment are innovation, flexibility, and enabling.

Adding to the voices celebrating the clarity with which the MBCA speaks is Bryn Vaaler's comparative analysis of Delaware's and the MBCA's immunity shields. He carefully traces the uncertainty that surrounded (and to some extent continues to surround) the scope of section 102(b)(7) of the Delaware General Corporation Law, particularly the slender divide between gross negligence on the one hand and on the other, conduct not in "good faith," or a breach of the "duty of loyalty." The MBCA steered clear of these ambiguous, albeit historic expressions. The comment also offers a sobering reminder about the limits of any comparison between Delaware and the MBCA; because Delaware's richer jurisprudence provides a veneer not found in other states, one must be careful to consider the case law when making such comparisons. This also means that, since most states lack such a deep case law, more refined and specific terminology that distinguishes the MBCA should have more appeal to those states and likely explains why it is the MBCA, and not Delaware, that is copied by three-fourths the states. This latter point appears in Norm Veasey's analysis of the contours of the duty of care as set forth by the MBCA and the American Law Institute's Principles of Corporate Governance. He emphasizes that case law is the "life blood" of the Delaware Corporate law and, as such, is more flexible and balanced than could be expected from a corporate statute. Delaware's statute is the obvious source to compare to the MBCA.

Within the realm of corporate law, the Delaware General Corporation Law and the MBCA are without peers. Even though there continues to be a lively debate regarding the competition for corporate charters, Gorris, Hamermesh, and Strine's close analysis of several reform efforts supports the view that symbiosis, not competition, best characterizes the relationship of these two acts. They offer praise for each body's drafters—Delaware's drafters for their innovation and the MBCA's drafters for their refinements.

Many of the contributors to this symposium stress the benefits of the deliberative process that surrounds the work of the Committee on Corporate Laws in keeping the MBCA abreast with the rapid developments that pervade corporate practice. Larry Scriggins documents the enduring benefits of the Committee's procedures by closely examining the multiple steps the Committee pursued in casting aside the former surplus/impairment of capital regime for regulating distributions and embracing a radically different regime that, as he points out, has not only been widely adopted, but has needed only minor tinkering with the language initially introduced in1980.

The Committee on Corporate Laws has made innumerable contributions aside from the MBCA. Marshall Small provides an important historical note by tracing the forces and the leadership of several former committee members in producing one of the most significant mediums shaping director behavior, the Corporate Director's Guidebook. Like many forces, the Corporate Director's

Guidebook arose from the troubling reports of weak governance in public companies that poured forth post-Watergate. Congress acted by passing the Foreign Corrupt Practices Act, and the ABA acted more deliberately through years of effort to identify and then implement a medium to improve director oversight. That medium was the publication in 1978 of the Corporate Director's Guidebook (which is about to enter its sixth edition).

Hillary Sale reminds us that there is more to the meaning of being a public corporation than having ownership broadly held and, hence, the forces that govern such corporations are broader than their ownership base. We might add here that some institutions, namely financial institutions, are so interwoven with each other and with the national economy that their governance, as we have seen, is a matter of national interest. But even outside the large financial institutions, consumers, government, labor, and other organized bodies increasingly focus public attention on the behavior of the large corporation. This in turn, as she points out, provides an additional hand on the corporate governance tiller and is a force that will continue to be reckoned with in future drafting efforts of the MBCA and equally so for the Corporate Director's Guidebook. Indeed, governance is moving faster than other areas within the purview of the modern corporate statute. On this point, John Wilcox provides an interesting approach for directors to better respond to the publicness of their oversight of a public company. He sets forth a self-operating approach whereby directors will not just undertake certain steps to carry out their oversight functions, but will do so in a very public way. In essence, it would not be sufficient to merely meet standards for independence and carrying out the corporate interests—the directors collectively will be expected to explain annually just how they assured their independence and how they believed they acted to advance the corporation's interests. The contributions of Hillary Sale and John Wilcox underscore the web of social forces that surround the governance of the American corporation.

The symposium benefits from valuable contributions focused on specific issues covered by the corporate statutes. With business organizations becoming increasingly complex, the necessity of directors and officers to rely on others has risen exponentially. Such reliance, however, comes with risks when that reliance is misplaced. Balotti and Shaner closely study the divergent approaches the Delaware General Corporation Law and MBCA take in their "reliance safe harbors." In their analysis, they raise an important policy issue of whether officers, like directors, should enjoy a reliance safe harbor. Deborah DeMott provides a close review of several recent judicial decisions interpreting the right of "agents" to obtain indemnification or advancement of expenses. She concludes there is a serious misfit of the concept of agent in the indemnification context, so that outcomes in these cases have not been well served by attempts to apply common-law agency doctrines within the indemnification-corporate context.

Directors and officers face serious disclosure issues when undertaking corporate transactions, particularly those involving public companies, and even more so with transactions conditioned on stockholder approval. Stan Keller's article provides a close analysis of the rapidly-developing Delaware case law surrounding state-based disclosure obligations. Even though articles elsewhere in this issue praise the certainty provided by the MBCA in other regulated areas, Stan Keller offers a compelling thesis that in the disclosure area, statutes are better to provide baseline requirements, leaving it to the case law to provide textured responses to highly fact-based disputes on whether additional disclosure is required.

A central feature of being a fiduciary is the duty of confidentiality; even though confidentiality underlies the well-received view of what it means to be a fiduciary, this dimension of the fiduciary obligations of directors heretofore has been largely unexplored. Cyril Moscow provides a much needed analysis of the sources of the obligation of confidentiality and the demands it makes on the director. In doing so, he explores the difficulties to be encountered when one serves dual-competing directorships or as a director for an identified constituency.

Jim Hanks's contributions are multiple. He shines a much needed light on the circuit split regarding whether cash payments to the target company's stockholders following an acquisition are to be viewed as a disguised "distribution" subject and regulated by the distribution provision in section 6.40 of the MBCA. Hanks also provides a compelling case that the balance sheet test for lawful dividends that is embraced by the MBCA in many contexts adds little. To this end, while critical of the reasoning in *Lerner v. Lerner Corp.*,[1] where the court appears to have confused its application of the solvency and balance sheet tests, overall he makes the case that the solvency test, alone, has much to commend itself to drafters of corporate statutes. Finally, Hanks provides a warm, endearing description of one of the giants of corporate law, Dean Bayless Manning.

Two of the comments in this symposium focus on the appraisal remedy and provide a close comparative study of the appraisal remedy in the MBCA and the Delaware General Corporation Law, but more importantly, identify why they each believe the MBCA's approach embraces sounder public policy. Mary Siegel compares the Delaware and the MBCA appraisal remedies in four distinct categories: transactions giving rise to the remedy, timing of the corporation's payment pursuant to the remedy, the allocation of costs of the proceeding, and the market-out exception. Bob Thompson, focusing particularly on the changes introduced to the MBCA in 1999, celebrates the clarity of purpose, certainty, and policy choices now embodied in the MBCA's appraisal remedy. In doing so, he nonetheless questions some important

1. Lerner v. Lerner Corp., 711 A.2d 233 (Md. Ct. Spec. App. 1998).

features of both the MBCA and the Delaware provision, particularly the wisdom of removing the surviving company's shareholders from the scope of the appraisal statute.

As we approach the seventh decade of the MBCA, and as one of the articles recommends, the Committee must be mindful of its obligation to provide sound corporate law for non-public corporations and examine the relationship of the MBCA to other entities' laws.

Finally, we wish to thank each of the authors for their valuable contributions and the excellent editorial work provided by the staff of *Law and Contemporary Problems.* In closing, it has been a real privilege for one of us, Herb, to serve as Chair, and the other, Jim, to be among the members, of this unique Committee dedicated to improving corporate law in America.