WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 60 NUMBER 2 1982

INTRODUCTION

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It is with pride and confidence that I recommend this issue of the *Washington University Law Quarterly* to readers interested in corporation and business law. The editors of the *Quarterly* have done a splendid job of assembling for this issue a number of timely, useful, scholarly and well-written articles.

One of the most important and difficult issues in developing corporation law is whether, and if so, under what circumstances, directors not charged in a derivative action, and supposedly independent and disinterested, can terminate the derivative action by determining, in the exercise of their business judgment, that terminating the action is in the corporation's best interests. In recent years, it has become a common practice for a corporation's board of directors, faced with the derivative action seeking to impose liability on some of the directors or officers, to designate a special litigation committee composed of disinterested, independent directors to investigate the alleged wrongful conduct and determine whether continuing the litigation is in the corporation's best interests. The special committee is generally provided with a distinguished former judge or a prominent lawyer as special counsel to assist with the investigation. Most judicial decisions passing on a special litigation committee's determination that a derivative action should be terminated hold that judicial scrutiny of the committee's decision is sharply restricted by the business judgment rule.

The *Quarterly* is indeed fortunate to have two of the most able,

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thoughtful and articulate commentators in the country address the question of what role a court should play in reviewing a decision of disinterested directors or a litigation committee to terminate a derivative action. The lead Article in this issue, entitled *The Business Judgment Rule and Shareholder Derivative Suits: A View from the Inside* is authored by Richard W. Duesenberg, Vice President, General Counsel and Secretary of Monsanto Company. The Article defends an expansive application of the business judgment rule to decisions by disinterested directors and litigation committees.[1] Drawing on his extensive experience in a large corporate law department and his long-term interest in and study of corporate governance problems, Mr. Duesenberg urges that the business judgment rule, as used to dismiss derivative actions, should not be so encumbered by restrictions as to destroy its vitality.[2] He points out that an expansive application of the rule avoids the cost, time, and loss of attention to business that litigation demands and provides a speedy process for settling the controversies.[3]

In a Commentary on the Duesenberg Article, Robert W. Hamilton, Benno C. Schmidt Professor of Law at the University of Texas and John S. Lehmann Distinguished Visiting Professor of Law during the spring 1982 semester at Washington University, has a different point of view of how the business judgment rule should be applied to decisions of disinterested directors to terminate shareholder litigation. Professor Hamilton believes that the derivative suit provides an important control over corporate conduct. He asserts that "some kind of judicial control has to be imposed on the otherwise unlimited power of litigation committees to dismiss derivative litigation."[4] He sees the fundamental substantive issue as being "whether corporate management (broadly defined) should be given complete and essentially unreviewable discretion to decide which claims or breach of fiduciary duty may be investigated by the adversary judicial system and which may not."[5] The problem, he states, is "to articulate a middle ground, which encourages courts to accept reasonable business decisions not to pursue litigation without binding them to accept all such decisions in all cases merely on

1. Duesenberg, *The Business Judgment Rule and Shareholder Derivative Suits: A View from the Inside,* 60 WASH. U.L.Q. 311 (1982).

2. *Id.* at 343.

3. *Id.*

4. Hamilton, *Commentary,* 60 WASH. U.L.Q. 347, 357 (1982).

5. *Id.* at 354.

the basis that minimum procedural requirements were followed."[6]

Professor Hamilton notes that the draft American Law Institute study on Corporate Governance follows a path blazed by the Supreme Court of Delaware in the *Maldonado* decision[7] in recommending that a court should exercise its own independent judgment to evaluate whether the justification for dismissal given by a litigation committee is outweighed by other considerations relating to the corporation's best interests. He also discusses an article by two practicing lawyers[8] which takes the position that in some extraordinary cases the courts should do more than require good faith, independence and due care on the part of directors deciding to terminate a shareholder action. The courts should examine the merits of the directors' decision to ascertain whether their decision was within the bounds of a reasonable exercise of discretion. Professor Hamilton concludes that this intermediate position has much to recommend it.

Much more will undoubtedly be said on this subject before courts, legislatures and commentators reach anything approaching a consensus. In the meantime, the issues are sharply drawn and ably discussed in Mr. Duesenberg's Article and Professor Hamilton's Commentary.

Two Chicago practitioners, Jonathan T. Howe and Leland J. Badger, offer a valuable discussion of antitrust problems involved in "product certification," which the authors define as "a process of product evaluation, including testing and analysis, administered and managed by a third-party certification agency. It allows manufacturers to attest that their products satisfy the applicable standards and related procedural requirements of the certification program."[9] The Article, entitled *The Antitrust Challenge to Nonprofit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, discusses two important questions, namely: (1) What coherent basis exists for viewing nonprofit certification programs as structural elements in the marketplace hierarchy to advance urgent antitrust goals, including increased competition and productivity? (2) Does a distinct duty exist

6. *Id.* at 355.

7. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

8. Block & Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata*, 37 BUS. LAW 27 (1981).

9. Howe & Badger, *The Antitrust Challenge to Nonprofit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 WASH. U.L.Q. 359, 364 (1982).

to safeguard certification organizations against conflicts of interest that, if met, would demonstrate that a certification organization under antitrust scrutiny in court should be found to be without conspiratorial intent.[10] The authors conclude that:

> the unique benefits of certification programs in building industry-wide competition and productivity can be maximized only when a practical rule of reason approach is used to scrutinize certification organizations charged with antitrust abuses relating to conflicts of interest of certain of their decisionmaking representative members. Defining a distinct duty of certification organizations to provide safeguards against conflicts of interest, and the means to meet that duty, represents a step forward in the exposition of such a practical rule of reason approach.[11]

During the last decade there has been a great deal of interest in criminal prosecution of corporations and their officers and directors. This increased interest is due in considerable part to a perceived need for effective mechanisms to regulate corporate behavior. In a fascinating Article, titled *Corporate Criminal Accountability: A Brief History and an Observation*, Kathleen F. Brickey, Professor of Law, Washington University, traces the historical development of corporate criminal liability in England and in this country. By artfully weaving apt quotations from judicial opinions into her text, Professor Brickey not only provides the reader with an accurate and concise statement of the changes in doctrine as they took place but also imparts something of the flavor of the times in which the judges were speaking.

Professor Brickey notes that "the early doctrine through which corporations and their managers were held criminally liable developed with little or no heed to traditional notions of culpability. . . . Corporate criminal liability was, then, at the outset, strict liability. Only in the relatively recent past did we stray from the strict liability model of corporate criminality to a *mens rea* model."[12] Professor Brickey concludes that historical facts suggest "that recognition of corporate criminal accountability constituted a more effective response to problems created by corporate business activities than did existing private remedies"[13] and that when "institutional and managerial liability for regulatory offenses is placed in historical perspective there seems little reason

10. *Id.* at 360.
11. *Id.* at 393.
12. Brickey, *Corporate Criminal Accountability: A Brief History and Observation,* 60 WASH. U.L.Q. 395, 423-24 (1982).
13. *Id.* at 425.

to fret over what has been cast as an 'extraordinary expansion of the legal concept of corporate crime.' "[14] The common-law of corporate criminal liability, she says, "was wholly unconcerned with moral blame and only partly concerned with punishment."[15]

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14. *Id.*
15. *Id.*