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WHY I DO NOT TEACH *VAN GORKOM*

Lawrence A. Hamermesh[*]

In the eleven casebooks on the law of business organizations that grace my office shelves,[1] one case stands out among all others in the number of pages devoted to it—the 1985 opinion of the Delaware Supreme Court in *Smith v. Van Gorkom*.[2] These casebooks devote an average of twenty pages to this one case, which is without exception a central feature of the casebooks' treatments of the director's duty of care. By all accounts (particularly in accompanying teacher's manuals), *Van Gorkom* is a premier subject for study in an introductory business organizations course.

With somewhat more seriousness than Jonathan Swift, however, I too have a "modest proposal"[3]: that teachers of business organization law reconsider whether *Van Gorkom* truly deserves the high place it has attained in the pantheon of judicial opinions which law students must study, or whether it deserves any place at all in an

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* Associate Professor of Law, Widener University School of Law, Wilmington, Delaware. The very capable research assistance of Matthew DiClemente is acknowledged with gratitude, as are the helpful comments of Professor D. Gordon Smith, who should not be blamed for any of the views, heretical or otherwise, expressed herein. From 1985 to 1994 Professor Hamermesh was a partner in the Wilmington, Delaware law firm of Morris, Nichols, Arsht & Tunnell, which represented the corporate defendants in the *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), litigation. Professor Hamermesh had no personal role in the litigation.

1 WILLIAM CARY & MELVIN ARON EISENBERG, CORPORATIONS CASES AND MATERIALS 605-28 (7th ed. 1995); JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 94-109 (4th ed. 1995); MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 222-58 (1995); ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES, CASES AND MATERIALS 684-702 (6th ed. 1998); WILLIAM A. KLEIN & J. MARK RAMSEYER, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS 301-17 (3d ed. 1997); CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS, CASES AND MATERIALS 286-309 (3d ed. 1999); LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS 461-86 (3d ed. 1996); JOEL SELIGMAN, CORPORATIONS CASES AND MATERIALS 170-210 (1995); LARRY D. SODERQUIST & A.A. SOMMER, JR., CORPORATIONS CASES, MATERIALS, PROBLEMS 203-07 (3d ed. 1986); LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY, MATERIALS AND PROBLEMS 688-705 (4th ed. 1998); DETLEV F. VAGTS, BASIC CORPORATION LAW 212-24 (3d ed. 1989).

2 488 A.2d 858 (Del. 1985).

3 Jonathan Swift, *A Modest Proposal*, *in* JONATHAN SWIFT, IRISH TRACTS 1728-1733, at 109 (Herbert Davis ed., 1971).

introductory business organizations course.[4] I engaged in this inquiry when I prepared to teach the course for the first time in 1994. Perhaps alone among American corporate law professors, I decided not to assign *Van Gorkom* in that introductory course.

The purpose of this Essay is to explain my unique decision. Such an explanation serves several purposes. First, it is a vehicle for raising pedagogical issues: What should an introductory business law course teach? What should students take out of an assigned case? How effectively can students absorb complex facts and downright poor legal analysis?

A second purpose for examining the utility of teaching *Van Gorkom* in an introductory business organizations course is to consider whether the case conveys to students a meaningful picture of the corporate legal process. Presented as a vehicle for expounding the director's duty of care, does *Van Gorkom* convey an accurate picture of the scope and content of business litigation in the real world? This inquiry, therefore, is a useful vehicle for substantive analysis of the director's duty of care and the viability of litigation to enforce such a duty.

My own deliberations along these lines of inquiry led to two conclusions. First, given that student attention and the ability to absorb new concepts are scarce resources, *Van Gorkom* fails the "bang for the buck" test. The case is simply too involved factually, too dependent upon knowledge of complex factual and legal matters concerning mergers and acquisitions and valuation, and too light on good legal reasoning to justify an extended effort by students, especially when most students have no intention of representing business clients at all, let alone engaging in a mergers and acquisitions practice.[5]

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[4] By "introductory business organizations course," I refer to a course that (a) is required, *de jure* or because its content is tested on the bar exam, and (b) surveys the law of business organizations in general, including agency, partnership, limited liability company, and corporate forms of business enterprise.

[5] I acknowledge that there may be law schools in which an introductory business organizations course is neither required nor related to bar exam content. In such a course, a self-selected student population may well benefit from the challenges and deficiencies of *Van Gorkom*. Thus, for example, where an optional public corporations course follows a required course on closely held businesses, the pedagogical criticisms of *Van Gorkom* expressed here are much less pertinent, if at all.

In addition, *Van Gorkom* is not merely a diversion of scarce pedagogical resources in an introductory business organizations course. Introduced as an exposition of the director's duty of care, *Van Gorkom*'s greatest vice is that it conveys the inaccurate impression that claims for money damages against corporate managers for failure of attention constitute a common and viable form of litigation. Nothing could be further from the truth. Exculpatory charter provisions adopted pursuant to statutes, almost universally enacted since *Van Gorkom*, have rendered the damages claim for breach of the duty of care essentially non-existent.[6] *Van Gorkom* represents the reality of litigation regarding a breach of the duty of care only slightly better than a unicorn represents the animal kingdom.

These thoughts are amplified below. I submit that an effective introductory business organizations course need not, and arguably should not, include extended discussion of *Van Gorkom*, and that teachers should not thoughtlessly impose upon students a case that has been described as "atrocious"[7] and "one of the worst decisions in the history of corporate law."[8]

Why Assign a Case?

There are many reasons to teach a case. Ideally, in an introductory course, a case should be reasonably concise, given the limits on student time and attention. In addition, it should be factually accessible (interesting, but not too complex or unfamiliar). The legal issues in the case also should be accessible (challenging, but not complicated by extraneous legal background with which students

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[6] Delaware led the remarkably fast and pervasive embrace of statutes authorizing exculpatory charter provisions, with the adoption in 1986 of section 102(b)(7) of the Delaware General Corporation Law. DEL. CODE ANN. tit. 8, §102(b)(7) (1999). Since that time, the majority of states have adopted similar legislation. *See generally* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §7.19, at 256 n.4 (1994) (examining state laws limiting director liability); James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability*, 43 BUS. LAW. 1207 (1988) (assessing state legislation limiting director liability).

[7] Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After* Van Gorkom, 41 BUS. LAW. 1, 1 (1985).

[8] Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1455 (1985).

are unfamiliar). The legal analysis of the case should be thoughtful and, even if not clearly correct, at least cogent. Finally, the case should illustrate matters of continuing practical significance in the legal community. As discussed below, I have concluded that *Van Gorkom* fails to meet many of these basic indicia of utility.

The Opinion is Long

The length of the *Van Gorkom* opinion alone is daunting, even when edited down to the average twenty single-spaced pages in a casebook. Even in the hands of one already trained in corporate law and already familiar with the case, the opinion takes a minimum of two or three hours to read carefully. In the hands of an uninitiated law student, one should expect the case to require at least two or three times that effort. If only out of fairness to my colleagues who teach other courses to the same students at the same time, I would be loath to ask students to read much more than the *Van Gorkom* opinion itself in preparation for any single class. Yet, as discussed below, assigning just the opinion alone would require that substantial class time be devoted to supplemental explanation of the many factual and legal issues implicated but not explained or even addressed in the opinion. Those who follow Professor William Cary's example and spend only one class on the subject of the duty of care[9] will be exceedingly pressed for time if that class attempts to include a serious treatment of *Van Gorkom*.

The Opinion is Factually Complex

One eminent Delaware jurist aptly concluded that the *Van Gorkom* opinion "is burdened by overkill and by needless, and often erroneous, legal and factual excess."[10] With respect to factual complexity, *Van Gorkom* cannot be fully grasped without understanding factual matters that must surely be alien to most law

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[9] According to the Preface to the fourth edition of Professor Cary's casebook, he devoted no more than one class to the duty of care. William L. Cary, *Preface*, *in* WILLIAM L. CARY, CASES AND MATERIALS ON CORPORATIONS xi (4th ed. 1969).

[10] William T. Quillen, *Trans Union, Business Judgment, and Neutral Principles*, 10 DEL. J. CORP. L. 465, 470 (1985).

students. In my experience, law students do not generally arrive from college knowing the difference between reported earnings and cash flow. They do not know what investment tax credits and accelerated depreciation are, and how these concepts affect cash flow and reported earnings. Thus, the beginning of *Van Gorkom*'s recitation of facts,[11] which refers to these concepts, is a discouraging start for a novice approaching the case. These concepts, however, are indispensable to understanding the condition of Trans Union, and the motivations underlying the sale of the company. The dampening effect of accelerated depreciation upon that leasing company's reported earnings may have weakened the performance of its stock in the market and rendered it unable to use its investment tax credits because of insufficient taxable income. Trans Union's ability to realize the value of those tax credits by selling them to an acquirer, however, goes far in explaining the motives of the company's directors in determining that a sale of the company would be in the stockholders' best interests. That ability may also explain why a leveraged buyout, rather than an acquisition by an independent enterprise capable of using the credits against its own income, might not have been a viable alternative to the merger approved by the directors. Explaining these accounting and tax concepts requires considerable classroom time and cannot be dispensed with if the teacher genuinely expects the students to analyze the case critically.

The *Van Gorkom* opinion also is riddled with comments distinguishing what the court calls a pertinent "valuation study" from a study merely prepared to evaluate a leveraged buyout. A leveraged buyout analysis, however, was found to be downright "irrelevant" to the decision to approve the sale of the company because it "did not purport to be a valuation study."[12] Students new to business law and practice will surely wonder what a "valuation study" is, as the Delaware Supreme Court used that term. These students will probably also wonder what a "leveraged buyout" is, and why and how a study prepared to evaluate a leveraged buyout differs from a "valuation study" in ways that are material to evaluating the quality

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[11] Smith v. Van Gorkom, 488 A.2d 858, 864 (Del. 1985).
[12] *Id.* at 875.

of the Trans Union directors' deliberations on the sale of the company. The opinion itself does not explain the nature of a "valuation study" or a "leveraged buyout." Therefore, a teacher who fails to take the considerable time necessary to explain this background cannot expect students to gain a full understanding of the opinion.

Related to the preceding concern is the manner in which the court handles Van Gorkom's own knowledge of valuation techniques. The court first acknowledges that Van Gorkom was "familiar with acquisition procedures, valuation methods, and negotiations . . . ."[13] In the very next paragraph, however, the court states flatly—despite Van Gorkom's support of the merger—that "the record is devoid of any competent evidence that $55 represented the per share intrinsic value of the [c]ompany."[14] A careful student could easily be confused about what constitutes evidence of "intrinsic value," when the determination of a sophisticated businessman to support the merger still left the record "devoid" of proof on that point.

Finally, the court's critique of the "market test" employed by the Trans Union directors implicates a variety of complex background matters.[15] For instance, the court several times notes the million-share option granted to the acquirer at just above the prevailing market price of Trans Union's stock.[16] Experienced corporate lawyers instinctively understand the deterrent significance of such a leg-up stock option to potential competing bidders, but the point requires substantial elaboration for a student unfamiliar with the details of mergers and acquisitions.

The Opinion is Legally Complex

Beyond its factual complexities, *Van Gorkom* forces one to confront a bewildering (and for the advanced student, ultimately

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[13] *Id.* at 866.

[14] *Id.*; *cf.* Chesapeake Corp. v. Shore, 2000 WL 193119, at *31 (Del. Ch. Feb. 11, 2000) (director experience sufficient, without outside financial advice, to justify determination that hostile tender offer was inadequate).

[15] *Van Gorkom*, 488 A.2d at 884-85.

[16] *Id.* at 879-80, 883.

fascinating) array of legal and economic issues. First, to understand the case, one must understand what a merger is. Students must understand the mechanical requirements of a merger, including the preparation and execution of a written merger agreement specifying how shares are to be converted in the merger, the subsequent approval by the board of directors, and final submission to stockholders for approval at a meeting.[17] The importance of the directors' approval of the merger cannot fully be understood without appreciating that a merger can result in the involuntary conversion of stock into the right to receive cash or other specified merger consideration. Given *Van Gorkom*'s placement in the casebooks—in a section addressing the director's duty of care, and well before any treatment of mergers and acquisitions—a proper treatment of the case requires a great deal of preliminary education about the operation of the merger device.

In addition, a vitally important part of the *Van Gorkom* opinion is the court's enigmatic instruction to the lower court on remand, directing the court to "determine the fair value of the shares" and authorizing an award of damages "to the extent that the fair value of Trans Union exceeds $55 per share."[18] This terse mandate raises a host of complicated legal issues. What does the court mean when it refers to "intrinsic value"? This question cannot be answered without reference to the extensive body of case law arising under the Delaware appraisal statute, with its adoption of a "going concern" premise for valuation.[19] Doing justice to this valuation question requires still more preparatory work, including acquainting the students with the efficient capital markets hypothesis, as well as explanations of the phenomenon of discounts and market premiums in acquisitions.[20] Without such preparation, discussion of the

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[17] DEL. CODE ANN. tit. 8, § 251 (1994).

[18] *Van Gorkom*, 488 A.2d at 893.

[19] *See, e.g.*, Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989) (citing Tri-Continental Corp. v. Battye, 74 A.2d 71 (Del. 1950)). The *Van Gorkom* opinion mandates a valuation "in accordance with *Weinberger v. UOP, Inc.*," *Van Gorkom*, 488 A.2d at 893, which in turn cites *Tri-Continental* and embraces "[t]he basic concept of value under the appraisal statute . . . ." Weinberger v. UOP, Inc., 457 A.2d 701, 713 (Del. 1983).

[20] For examples of effective preparatory material introducing these concepts, see, e.g., Reinier Kraakman, *Taking Discounts Seriously: The Implications of "Discounted" Share Prices as an Acquisition Motive*, 88 COLUM. L. REV. 891 (1988); Lynn A. Stout, *How Efficient*

merger premium over the pre-existing market price, and the significance of the directors' reliance on that premium in approving the merger, would be empty.

Finally, the Trans Union directors' reliance on the favorable stockholder vote on the merger implicates a number of complex legal issues. Despite its finding of "gross negligence," the court holds that an "informed" stockholder vote would preclude liability because the directors' flawed approval of the merger was "a voidable, rather than a void, act."[21] Should a teacher simply gloss over this holding without attempting to explain the difference between "void" and "voidable" acts? This putative difference, along with the varying effects of a stockholder vote, is a subject that remains troublesome today.[22] Worse yet from the standpoint of the potentially bewildered student, the court does not merely reject the directors' stockholder vote defense. The directors' shortcomings with respect to disclosure that are identified by the court emerge as a distinct and independent breach of fiduciary duty.[23] Again, should a teacher simply gloss over this holding without examining the nature and source of this fiduciary disclosure duty? If not, can this subject be grasped without delving into the relationship between federal disclosure requirements and liabilities and disclosure obligations under state common law?[24]

Markets Undervalue Stocks: CAPM and ECMH Under Conditions of Uncertainty and Disagreement, 19 CARDOZO L. REV. 475 (1997); Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235 (1990).

[21] *Van Gorkom*, 488 A.2d at 889.

[22] *See* Solomon v. Armstrong, No. CIV-A-13515, 1999 WL 182569, at *8 (Del. Ch. Mar. 25, 1999), *aff'd*, 2000 WL 140072 (Del. Jan. 26, 2000) (indicating that some acts that may relate to breaches of fiduciary duty appear on "voidable list" by "simple judicial fiat"); *In re* Wheelabrator Technologies, Inc. Shareholders Litig., 663 A.2d 1194, 1200 (Del. Ch. 1995) (dismissing plaintiff's due care claim).

[23] *Van Gorkom*, 488 A.2d at 893; *see* Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1125 (1996) (citing Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1166 (Del. 1995) (stating that *Van Gorkom* court noted Trans Union directors violated duty of disclosure)).

[24] *See* Hamermesh, *supra* note 23, at 1088-91 (discussing development of parallel disclosure obligations under federal statutory and state common law). During the presentation of this paper, participants in the Symposium inquired whether the introductory course should also include *Malone v. Brincat*, 722 A.2d 5 (Del. 1998). Certainly, any treatment of *Van Gorkom* and its disclosure analysis would be incomplete without discussing *Malone* as well. Although Professor Kahn and I disagree on the scope of the director's fiduciary disclosure duty (*compare* Hamermesh, *supra* note 23, at 1174-77, *with* Faith

Given these extensive factual and legal complexities, teaching *Van Gorkom* requires a great deal of foundational explanation that can only come from in-class discussion or additional outside reading.[25] Indeed, *Van Gorkom* is such a formidably complex case—far more complex than the court's own analysis even acknowledges—that the teacher who assigns it disserves her students by relegating discussion of the case to just one or two hours of class time.

The Legal Analysis in the Opinion is Weak or Even Misleading

The previously discussed burdens of teaching *Van Gorkom* should not necessarily render it ineligible for use in an introductory business organizations course. If there were genuinely useful insights bursting from the opinion, one might patiently develop the legal and factual foundation necessary to understand the case. Here, however, *Van Gorkom* must again be found wanting, and my quarrels with the adequacy of *Van Gorkom*'s legal analysis are neither original nor controversial.

At the outset of its legal analysis of the concept called "the business judgment rule,"[26] the court in *Van Gorkom* explains that the "rule" is simply a "presumption" that directors do right.[27] Other commentators have already pointed out the error in describing the "business judgment rule" as a mere presumption, subject to being

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Stevelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 519-28 (2000)), we surely agree that the disclosure aspect of *Van Gorkom* implicates extended analysis ranging well beyond traditional concepts of the duty of care.

[25] In an informal poll of colleagues during the presentation of these remarks, however, a substantial minority of teachers acknowledged that they do not cover one or more of these foundational matters, such as statutory merger mechanics, leveraged buy-outs, share valuation theories, bidding contests, and auction deterrents.

[26] At the point in the opinion when the court first discusses the business judgment rule, it only identifies the rule as an "offspring" of the statutory mandate of management by the board of directors. *Van Gorkom*, 488 A.2d at 872 (citing DEL. CODE ANN. tit. 8, §141(a) (1999)). As discussed *infra* at notes 51-60 and accompanying text, the court offers essentially no explanation as to why a "business judgment rule" exists at all.

[27] *Id.* (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). "Do right," as described in *Van Gorkom*, is short for "act[ing] on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.*

overcome by a preponderance of evidence.[28] A specific presumption of due care raises no obstacle whatsoever to a plaintiff seeking damages for a director's lack of attention, since such a litigant has a burden of proving all elements of her claim in any event. Predictably, as its critics demonstrate, the formulation in *Van Gorkom* of the business judgment rule as a presumption has already yielded a "rich harvest of confusion" among courts and commentators.[29] Can we realistically expect it to cause less confusion among students in an introductory course?

Students do learn from *Van Gorkom* that the court will only find that the "critical eye" directors must cast upon the information they do gather is wanting if it fails a standard of care described as "gross negligence."[30] Preliminarily, the court's reference to a "critical eye" is quite peculiar, since the focus of the court's finding of "gross negligence" is the directors' failure to become sufficiently informed, rather than any failure in examining information gathered. In any event, learned commentators have vigorously attacked the utility of the "gross negligence" formulation.[31] There is no analysis in *Van Gorkom* to give the "gross negligence" concept any precise content.[32]

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[28] R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1345-46 (1993); Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271, 1283-84 (1993). The Delaware Supreme Court continues to recite the "presumption" concept, but its latest recitation immediately strengthens that tepid concept by insistence upon judicial deference to director action in the absence of a "grossly negligent" decisional process or an act to which no "rational business purpose" can be attributed. Brehm v. Eisner, 2000 WL 174619, at *14 n.66 (Del. Feb. 9, 2000).

[29] Balotti & Hanks, *supra* note 28, at 1346.

[30] *Van Gorkom*, 488 A.2d at 873. The Delaware Supreme Court recently and helpfully clarified that substantive judicial review of the directors' decisions is "foreign to the business judgment rule," and "[d]ue care in the decisionmaking context is process due care only." *Brehm*, 2000 WL 174619, at *14.

[31] *See* Quillen, *supra* note 10, at 497-98 (describing gross negligence as "practically meaningless" concept rejected by leading tort scholars); Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787, 811 n.135 (1999).

[32] Justice Joseph T. Walsh of the Delaware Supreme Court has from time to time attempted in various contexts to explicate the concept of "gross negligence." *See* Saunders v. Sullivan, No. 373, 1991, 1992 WL 53423, at *2 (Del. Feb. 26, 1992) (defining gross negligence as "failure to perceive a risk of such a nature and degree that the failure to perceive such risk constitutes a gross deviation from the standard of care exercised by a reasonable person"); Knoll v. Wright, No. 15, 1988, 1988 WL 71446, at *1 (Del. June 28, 1988) ("Although the concepts of gross negligence and wanton conduct are not identical, each requires a showing of more than mere inattention or carelessness."); Jardel Co. v. Hughes,

Yet one can hardly blame students for seizing upon this concept as the only useful guidance *Van Gorkom* supplies to explain how it is that director liability for lack of care is any less stringent than the analogous liability of motorists or doctors.

Students next learn from *Van Gorkom* that directors must "inform[ ] themselves, prior to making a business decision, of all material information reasonably available to them."[33] This sounds like a real legal rule at first blush, until one recognizes that (a) it is qualified by the holding that only a "grossly negligent" failure to become informed will violate the duty of care, and (b) the notion of gathering all "reasonably available" information is completely unrealistic in a world in which information is essentially limitless, and in which that limitless supply is becoming increasingly "available" at the stroke of a key.[34]

Still another shortcoming in *Van Gorkom*'s legal analysis is its failure to address the concept of causation. Students reading the opinion might well be left with the impression that once a breach of the duty of care is established, an award of damages is mandated, without regard to whether the plaintiff establishes that the breach in any way caused the action or injury. Indeed, it may be that the court's lack of focus on the causation issue laid the groundwork for its subsequent and widely criticized determination in *Cede & Co. v. Technicolor* that a plaintiff in a duty-of-care case need not establish a causal relation between the failure to exercise care and the injury.[35] This lack of a need for causal proof is not a matter that

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523 A.2d 518, 530 (Del. 1987) ("Gross negligence, though criticized as a nebulous concept, signifies more than ordinary inadvertence or inattention.").

[33] *Van Gorkom*, 488 A.2d at 872.

[34] *See, e.g.*, Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477, 1486 (1984) ("At all times and in all circumstances, the scope of investigation actually undertaken on a matter, whatever it is, will always be, less than the possible scope and depth of investigation that could have been undertaken."). As Peter Atkins, an experienced corporate practitioner, has recently pointed out, the proliferation of information through the Internet has exposed the meaninglessness of the concept of gathering all "reasonably available" information. Even more clearly now than ever, there will always be more pertinent information "reasonably available" than any human decisionmaker can hope to gather, let alone comprehend. Symposium, *The Next Century of Corporate Law*, 25 DEL. J. CORP. L. 1 (forthcoming 2000).

[35] Cede & Co. v. Technicolor, 634 A.2d 345, 371 (Del. 1993); *see* Johnson, *supra* note 31, at 799-801; Charles Hansen, *The* Technicolor *Case – A Lost Opportunity*, 19 DEL. J. CORP. L. 617, 636-38 (1994) (calling *Technicolor* approach "illegal" because it may result in entire-

should go unexplored, yet nothing in *Van Gorkom* itself addresses the question and gives the student any notice of the issue.

Van Gorkom's articulation of a remedy is stunningly truncated: damages equal "fair value" minus the merger consideration of $55 per share.[36] A casual reader of this mandate is likely to overlook some remarkably difficult legal issues it raises—issues that call into question whether a court would have awarded any damages at all on remand. The court's citation to *Weinberger v. UOP, Inc.*[37] explains little to one not versed in Delaware valuation law. To the more sophisticated observer, however, that reference suggests that the "fair value" standard derived from statutory appraisal proceedings was to be applied to determine the "fair value" of Trans Union for purposes of the damages calculation.[38]

This is a highly debatable and significant proposition. It is debatable because some have cogently suggested that *Van Gorkom* is best understood as a crude precursor to *Revlon, Inc. v. MacAndrews & Forbes Holdings*[39]—that is, as a case imposing heightened scrutiny upon directors who approve a sale of control of the corporation.[40] If that view is correct, the appropriate measure of damages would focus more plausibly on what the directors could have achieved in an unfettered auction of the company, in which values associated with the accomplishment or expectation of the merger are taken into account.[41]

Under the appraisal "fair value" standard suggested by the *Van Gorkom* court, however, such merger-dependent values would have

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fairness hearing even absent any proof that challenged action resulted in corporation receiving less than fair value); Jay P. Moran, Comment, *Business Judgment Rule or Relic:* Cede v. Technicolor *and the Continuing Metamorphosis of Director Duty of Care*, 45 EMORY L.J. 339, 380-82 (1996) (criticizing ruling as creating "almost impossible burden for directors" to prove their non-feasance did not cause plaintiffs' harm).

[36] *Van Gorkom*, 488 A.2d at 893.

[37] 457 A.2d 701 (Del. 1983).

[38] *See supra* note 19 and accompanying text (discussing Delaware caselaw determining value under damages calculation).

[39] 506 A.2d 173 (Del. 1986).

[40] Gagliardi v. Tri-foods Int'l, Inc., 683 A.2d 1049, 1052 n.4 (1996) (citing Jonathan Macey & Geoffrey Miller, *Trans Union Reconsidered*, 98 YALE L.J. 127 (1988)).

[41] *See, e.g.*, Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1993) (finding that board's duty in sale of control is "to seek the transaction offering the best value reasonably available to the stockholders").

to be excluded.[42] This exclusion—and the debatable holding that the appraisal "fair value" standard should govern—likely would have been highly significant in *Van Gorkom*. Given the substantial value of Trans Union's unused investment tax credits in the hands of an acquirer—and their worthlessness in the hands of Trans Union as a free-standing going concern—a "fair value" determination governed by a "going concern" standard probably would have excluded the significant auction value of the investment tax credits. This result occurs because the value of the investment tax credits in the hands of an acquirer would constitute an element of value attributable to the accomplishment or expectation of a merger.[43] This valuation problem, however, is not addressed in any thoughtful way in *Van Gorkom* itself.

The Opinion Fails to Address the Reality of Corporate Litigation

Students for whom *Van Gorkom* is presented as the central authority on the duty of care of the corporate director could understandably develop the notion that it is reasonably common to sue disinterested directors and recover damages due solely to a lapse of attention. As one of the justices subscribing to the majority opinion in *Van Gorkom* said afterwards, however, "[t]here will never be another *Van Gorkom*."[44] Of course, one could say that this is true about any case: there never will be another one exactly like it. This response is too glib, though—in ways that the justice who predicted *Van Gorkom*'s uniqueness perhaps did not foresee—the opinion is already well on the way to derelict status, if it is viewed purely as a duty-of-care case.

As any sophisticated student of corporate law knows, judgments allowing recoveries against directors based solely on a claimed breach of the duty of care were few and far between even before *Van*

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[42] DEL. CODE ANN. tit. 8, § 262(h) (1999). *But see* Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 299 (Del. 1996) (declining to apply "very narrow" exclusion of § 262(h) to valuation of Technicolor stock and remanding for higher evaluation excluding only speculative elements associated with impending merger).

[43] DEL. CODE ANN. tit. 8, § 262(h).

[44] Justice Andrew G.T. Moore II, during oral argument in *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985) (May 21, 1985).

Gorkom.[45] Since *Van Gorkom*, another change in applicable law has rendered the kind of claim prosecuted in *Van Gorkom* essentially obsolete. After *Van Gorkom* was decided in 1985, the overwhelming majority of states followed Delaware's lead and adopted statutes that either (i) permit the articles or certificate of incorporation to eliminate a director's personal liability in damages for breach of the duty of care or (ii) eliminate such liability directly.[46] Charter provision enabling statutes like Delaware's section 102(b)(7), moreover, have been almost universally implemented by corporations to which such laws apply.

For example, out of one hundred "Fortune 500" companies, ninety-eight of the stock corporations that incorporated in jurisdictions allowing for exculpatory charter provisions have adopted such provisions.[47] In addition, every one of the Delaware corporations in this sample had adopted such a provision.

Furthermore, out of a sample of one hundred small- and mid-capitalization companies, all but one (a Delaware corporation) of those incorporated in a jurisdiction authorizing exculpatory charter provisions have included such a provision in their articles or certificate of incorporation.[48]

The effect of these exculpatory provisions, while certainly unclear in some respects, is incontestable with regard to what was at issue in *Van Gorkom*. Beyond any dispute, these provisions absolutely

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[45] *See* Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 612 (1994) (citing PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: ANALYSIS AND RECOMMENDATIONS § 4.01(a), cmt. h (1994)); Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1099-1100 (1968) (describing search for such cases as "a search for a very small number of needles in a very large haystack").

[46] *E.g.*, IND. CODE ANN. § 23-1-35-1(e) (1999); WIS. STAT. ANN. § 180.0828 (1999).

[47] Appendix A. The sample includes a few firms incorporated in jurisdictions in which a statute automatically truncates director liability rather than requiring the firm to implement such a provision in its articles or certificate of incorporation.

[48] Appendix A. These sample results are even more compelling than the results reported in 1990 by Roberta Romano, indicating that over ninety percent of a 180-member sample of Delaware corporations had adopted exculpatory provisions pursuant to section 102(b)(7). Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160-61 (1990).

preclude recovery on the legal theory relied upon in *Van Gorkom*.[49] In short, "there never will be another *Van Gorkom*" if only because statutory evolution and nearly universally adopted charter provisions have made the result in that case practically unrepeatable. When one teaches *Van Gorkom* as a central component of teaching the director's duty of care, one must disclose that the liability the court attached in the case has always been rare and is now surely even rarer than being struck by lightning.[50]

The Opinion Fails to Explore the Rationale for Deference to Disinterested Director Action

Perhaps the most disappointing aspect of *Van Gorkom*, however, is what is missing from the opinion. There is virtually no explanation for treating corporate directors differently than, say, automobile drivers or doctors in regard to liability for failure to exercise some requisite level of attention.[51] The court's only comment about the rationale for the relatively lenient treatment of directors—a practice reduced to shorthand as the "business judgment rule"—is a conclusory assertion of a need "to protect and promote the full and free exercise of the managerial powers granted to Delaware directors."[52]

However stirring this wording initially sounds, it does little to explain or justify deferential judicial treatment of director decisionmaking. Whom does "full and free exercise of managerial power" protect? Why does that exercise of power deserve encourage-

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[49] Emerald Partners v. Berlin, 726 A.2d 1215, 1224 (Del. 1999) (citing Zirn v. VLI Corp., 681 A.2d 1050, 1061 (Del. 1996); Arnold v. Society for Savings Bancorp, 650 A.2d 1270, 1288 (Del. 1994)).

[50] *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) (suggesting that "piercing the corporate veil" is like being struck by lightning: it is "rare, severe and unprincipled"). As I suggest in the text, director monetary liability for breach of the duty of care is now even rarer. It is always severe, since it involves a monetary recovery from directors who gain no countervailing personal benefit. *See* Alfred F. Conard, *A Behavioral Analysis of Directors' Liability for Negligence*, 1972 DUKE L.J. 895, 913. Furthermore, for reasons suggested below, such liability is largely unprincipled, at least where it is sought with respect to action or inaction other than failure to observe the most basic and objectively definable managerial rules.

[51] For a thoughtful exploration of this topic, see Arkes & Schipani, *supra* note 45, at 587.

[52] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

ment? If "full and free" exercise of managerial power is mandated by statute, what limits on such exercise of power do or should exist, if any? The *Van Gorkom* opinion offers no answers to these questions, and the quoted rationale, on close inspection, proves little more than vacuous.

If one were interested in giving students grist for a meaningful discussion of why directors should be less susceptible than others to damages liability through hindsight judicial scrutiny, one might more profitably focus on material from *Joy v. North*[53] or *Gagliardi v. Tri-foods International, Inc.*[54] The courts in *North* and *Gagliardi* engage in deliberate analysis to justify the relatively favorable treatment of directors in regard to liability for lack of care. In these cases, the courts point out the value to investors of encouraging managerial risk-taking in widely held corporations whose stockholders can diversify such risks through portfolio selection.[55] In a further attempt to justify judicial deference to disinterested director decisions, the *North* court points out the voluntary nature of the stockholders' choice of managers and the inadequacy of after-the-fact litigation as an efficient and predictable means to assess the reasonableness of director decisions.[56]

This latter concern about the adequacy of the litigation process to assess director decisionmaking in hindsight is a compelling one, which offers a teacher the opportunity to explore a rich vein of inquiry. In a claim for damages against directors for lack of care, the court evaluates past conduct that resulted in the loss. The litigation therefore necessarily poses the problem of hindsight bias, the phenomenon that "[w]hen retrospectively considering the occurrence of a past event, people tend to exaggerate the extent to which it could have been correctly predicted beforehand."[57] Is hindsight bias worse and litigation, therefore, less efficient when director conduct is at issue rather than when medical care or other conduct is at issue? Is director negligence less susceptible to meaningful and fair after-the-fact judicial scrutiny than physician

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[53] 692 F.2d 880, 884-86 (2d Cir. 1982).
[54] 683 A.2d 1049, 1052 (Del. Ch. 1996).
[55] *Id.*; *Joy*, 692 F.2d at 884-86.
[56] *Joy*, 692 F.2d at 885-86.
[57] Arkes & Schipani, *supra* note 45, at 588, 591-93.

negligence because there is less potential for consensus about what constitutes reasonable care in a particular case?[58] Conversely, does the relatively greater ability to define basic monitoring procedures in financial institutions explain why director negligence liability has historically been more accepted for directors of financial enterprises who fail to adopt such procedures?[59] Does concern about hindsight bias in damages cases suggest that judicial scrutiny of director care might be more tolerable in connection with efforts to enjoin transactions asserted to be the product of lack of due care?[60]

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[58] *See id.* at 624-25 (describing medical treatment protocols and contrasting absence of "accepted notions of what directors should do in a particular instance").

[59] *See, e.g.*, Hoye v. Meek, 795 F.2d 893, 897 (10th Cir. 1986) (finding director liable for failure to monitor and limit risks in GNMA investments); Gamble v. Brown, 29 F.2d 366 (4th Cir. 1928) (finding directors liable for failure to follow meeting and loan review procedures prescribed in by-laws); Heit v. Bixby, 276 F.Supp. 217 (E.D. Mo. 1967) (finding that insurance company directors' "total[] abdicat[ion]" of duty to manage led to failure to discover skimming of 40% of management fees); Rankin v. Cooper, 149 F. 1010 (E.D. Ark. 1907) (finding director liable for failure to arrange for examination of bank resources resulting in failure to discover excessive loans to president and affiliated businesses); Lutz v. Boas, 171 A.2d 381, 396 (Del. Ch. 1961) (finding director liable for failure to monitor mutual fund's portfolio decisions or compliance with investment policies); Lyons v. Corder, 162 S.W. 606 (Mo. 1913) (finding director liable for failure to adopt bank audit procedures that would have disclosed embezzlement). It is striking how many of these cases involve liability for failures of oversight, rather than failure to make an informed decision. It is also striking how well these cases support a standard that prescribes liability only for a "sustained or systematic failure of a director to exercise reasonable oversight," which is the standard articulated by Chancellor Allen in *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 971 (Del. Ch. 1996).

An alternative or supplemental explanation for enhanced liability of directors of financial enterprises for failure of attention may be the courts' solicitude for the interests and expectations of depositors or clients of such enterprises. *See, e.g.*, Billman v. State Deposit Ins. Fund Corp., 593 A.2d 684, 698 (Md. App. 1991) (approving jury instruction in breach of duty suit against former officers and directors of savings-and-loan that emphasized trustee-like responsibilities of lenders management); Francis v. United Jersey Bank, 432 A.2d 814, 825-26 (N.J. 1981) (holding that clientele of insurance company can reasonably expect directors to safeguard their money with "fidelity and good faith" appropriate to fiduciary relationship).

[60] Gimbel v. Signal Companies, 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974); Thomas v. Kempner, 1973 WL 460 (Del. Ch. Mar. 22, 1973). In both of these cases, the court preliminarily enjoined a transaction without proof of self-dealing or bad faith. Since the transactions at issue could be said to have involved a break-up of the company, these decisions, like *Van Gorkom*, may have been precursors to *Revlon* and *QVC*. *See supra* note 39 and accompanying text. On the other hand, the cases may reflect a greater judicial willingness to examine the substance of director action where injunctive relief is sought against the transaction rather than damages relief against the directors. *See, e.g.*, Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361, 1374 (Del. 1995) (citing Joseph Hinsey IV, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule,*

Unfortunately, *Van Gorkom* itself fails to raise any of these questions. Worse yet, it implicitly rejects, without explanation, any of the cautionary observations about hindsight bias against which the business judgment rule has historically provided protection. Moreover, this rejection is now out of alignment with the prevailing statutory approach adopted after *Van Gorkom*. Section 102(b)(7) and its counterparts solve the hindsight bias problem by allowing the corporation to eliminate altogether *post hoc* damages liability for a director's lack of care. For all practical purposes, director liability for damages as a mechanism to control and punish a lack of care that is untainted by self-dealing, bad faith, or wilful misconduct is now a thing of the past.

Conclusion

The basis for my decision not to teach *Van Gorkom* in the introductory business organizations course can be quickly summarized. The case simply does not efficiently or adequately convey to the student the meaning and significance of the corporate director's duty of care. If one were to teach about mergers and acquisitions and the law of director duties in the context of a sale of control, *Van Gorkom* would be a more natural fit. For those teachers whose introductory business organizations course does not delve at length into mergers and acquisitions, however, I reiterate my invitation to reconsider whether *Van Gorkom* belongs in the course at all.

Still, even my colleagues who acknowledge *Van Gorkom*'s flaws caution that the case merits a place in the introductory course simply because it is an important part of the legal culture in the relevant field. For a number of reasons, however, I claim that this argument fails. First, it is an insidiously self-perpetuating argument. It asserts that teachers should continue to emphasize a case simply because previous students have learned it, regardless of

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the Doctrine, and the Reality, 52 GEO. WASH. L. REV. 609 (1984)). This distinction has not fully blossomed in Delaware jurisprudence, however, and the Delaware Supreme Court has in the past pointedly declined to exploit it. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 n.10 (Del. 1986) (refusing to draw distinction between "business judgment rule" insulating officers and directors versus "business judgment doctrine" insulating challenged decision itself).

whether the case continues to be seen as well-reasoned or relevant to current practice. Second, it is possible to communicate the existence and significance of *Van Gorkom* without requiring students to read it or discuss it in class. Although I do not assign the case, I do refer to it by name in describing the history of exculpatory charter provisions, and the case is referred to in the duty-of-care case I do assign (*Caremark*). No student of mine can fairly claim to be surprised by hearing about *Van Gorkom* when subsequently encountering it in the legal community.

There may come a time in the history of a well-known case like *Van Gorkom* when statutory and other evolutionary developments so diminish its continuing importance that it ceases to merit extended treatment in the basic curriculum. For example, in its 1969 edition, the then (and perhaps still) leading corporation law casebook prominently featured a pair of cases from 1908[61] and 1909[62] involving Old Dominion Copper Mining & Smelting Co., in a section dealing with promoter liability in connection with the issuance of new shares.[63] Even in the 1969 edition, however, the author acknowledged that such liability was then "becoming largely vestigial"[64] due to the role of the Securities Act of 1933 and its requirements of disclosure of promoter transactions.[65] It cannot be surprising, then, that the *Old Dominion* cases no longer appear as principal cases in the current edition of this casebook. The cases are now barely mentioned at all, except in a section dealing with promoter liability for pre-incorporation transactions generally rather than for breach of fiduciary duty in connection with the issuance of shares.[66]

Van Gorkom is now about fifteen years old, and it may be premature to expect its disappearance as a principal case in the casebooks. Nonetheless, it may not be too early to question whether

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[61] Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U.S. 206 (1908).

[62] Old Dominion Copper Mining & Smelting Co. v. Bigelow, 89 N.E. 193 (Mass. 1909), *aff'd*, 225 U.S. 111 (1912).

[63] WILLIAM L. CARY, CASES AND MATERIALS ON CORPORATIONS 1043, 1046 (4th ed. 1969) (reproducing both cases in unabridged form).

[64] *Id.* at 1042.

[65] *Id.* at 1384.

[66] CARY & EISENBERG, *supra* note 1, at 139; HAMILTON, *supra* note 1, at 224-25; O'KELLEY & THOMPSON, *supra* note 1, at 948.

Van Gorkom continues to deserve a prominent role in teaching about the duty of care in the introductory business organizations course. Given the statutory changes that followed it, *Van Gorkom*'s treatment of the duty of care might also be described as "vestigial" in significance. Perhaps some day *Van Gorkom*, like the *Old Dominion* cases, will be relegated to a historical mention in the casebooks.

APPENDIX A

ARTICLES OF INCORPORATION THAT INCLUDE EXCULPATORY PROVISIONS LIMITING DIRECTOR MONETARY LIABILITY

	COMPANY NAME	STATE OF INCORPORATION	ARTICLES CONTAIN EXCULPATORY CLAUSE
	FORTUNE 500 COMPANIES		
1	Abbott Laboratories	IL	Yes
2	Aetna	CT	Yes
3	Alcoa, Inc.	PA	Yes
4	American Home Products	DE	Yes
5	American International Group	DE	Yes
6	AMR	DE	Yes
7	Atlantic Richfield	DE	Yes
8	Bank One Corp.	DE	Yes
9	Bankers Trust Corp.	NY	Yes
10	Bell Atlantic Corp.	DE	Yes
11	BellSouth	GA	Yes
12	Bergen Brunswig	NJ	Yes
13	Berkshire Hathaway	DE	Yes
14	Boeing	DE	Yes
15	CBS	PA	Yes
16	Chevron Corp.	DE	Yes
17	Cigna	DE	Yes
18	Circuit City Group	VA	Yes
19	Cisco Systems	CA	Yes
20	Coca-Cola	DE	Yes
21	Compaq Computer Corp.	DE	Yes
22	ConAgra	DE	Yes
23	CSX	VI	Yes
24	Dana	VA	Yes
25	Dayton Hudson Corp.	MN	Yes

26	Deere	DE	Yes
27	Dell Computer Corp.	DE	Yes
28	Delta Air Lines	DE	Yes
29	Edison International	CA	Yes
30	Emerson Electric	MO†	No
31	Enron	DE	Yes
32	Exxon	NJ	Yes
33	Farmland Industries	KA	Yes
34	First Union Corp.	NC	Yes
35	Fleet Financial Group	RI	Yes
36	Fleming	OK	Yes
37	Ford Motor	DE	Yes
38	Foundation Health Systems	DE	Yes
39	Fred Meyer	DE	Yes
40	General Electric	NY	Yes
41	General Motors	DE	Yes
42	Georgia-Pacific	GA	Yes
43	Gillette	DE	Yes
44	H.J. Heinz	PA	Yes
45	Hartford Financial Services	DE	Yes
46	Hewlett-Packard	DE	Yes
47	Home Depot, Inc.	DE	Yes
48	Household International	DE	Yes
49	IBP	DE	Yes
50	Ingram Micro	DE	Yes
51	Intel	DE	Yes
52	Intl. Business Machines Corp.	NY	Yes
53	J.C. Penney	DE	Yes
54	J.P. Morgan & Co.	DE	Yes
55	Johnson & Johnson	NJ	Yes
56	Johnson Controls	WI†	No
57	Kimberly-Clark	DE	Yes
58	Kmart	MI	Yes
59	Kroger Co.	OH†	No
60	Lear	DE	Yes
61	Loews	DE	Yes
62	Loral Corporation	NY	No

63	Lowe's	NC	Yes
64	Lucent Technologies, Inc.	DE	Yes
65	May Department Stores	DE	Yes
66	McDonald's	DE	Yes
67	MCI Communications Corp.	DE	Yes
68	Merrill Lynch	DE	Yes
69	Microsoft Corp.	WA	Yes
70	Mobil	DE	Yes
71	Monsanto	DE	Yes
72	Morgan Stanley Dean Witter & Co.	DE	Yes
73	Motorola	DE	Yes
74	Nike	OR	Yes
75	Northwest Airlines	DE	Yes
76	PacifiCare Health Systems	DE	Yes
77	PacifiCorp	OR	Yes
78	PepsiCo	NC	No
79	Pfizer	DE	Yes
80	Philip Morris	VA	Yes
81	Raytheon	DE	Yes
82	Safeway	DE	Yes
83	SBC Communications, Inc.	DE	Yes
84	State Farm Insurance Cos.	IL‡	No
85	Sun Microsystems	DE	Yes
86	Tenet Healthcare	NV	Yes
87	Texaco	DE	Yes
88	Texas Instruments	DE	Yes
89	Textron	DE	Yes
90	Toys 'R' Us	DE	Yes
91	Union Pacific	UT	Yes
92	United Technologies	DE	Yes
93	Walt Disney	DE	Yes
94	Warner-Lambert	DE	Yes
95	Washington Mutual	WA	Yes
96	Waste Management	DE	Yes
97	Weyerhaeuser	WA	Yes
98	Whirlpool	DE	Yes

99	Winn-Dixie Stores	FL†	No
100	Xerox	NY	Yes
	OTHER COMPANIES		
1	3Com Corp.	DE	Yes
2	Abovenet Communications, Inc.	DE	Yes
3	Ace Ltd.	MD	Yes
4	Ackerley Group	DE	Yes
5	Actuate Corporation	CA	Yes
6	Adelphia Communications Corp.	DE	Yes
7	Advanced Fibre Comm, Inc.	DE	Yes
8	Allstate Corp.	DE	Yes
9	America Online, Inc.	DE	Yes
10	American Management Systems, Inc.	DE	Yes
11	American Waterworks Company, Inc.	DE	Yes
12	Amerisource Health Corp.	DE	Yes
13	Ametek, Inc.	DE	Yes
14	Amsouth Bancorporation	DE	Yes
15	AOM Acquisition Co.	DE	Yes
16	Avis Rent A Car	DE	Yes
17	Bancwest Corp.	DE	Yes
18	Beringer Wine Estates Holdings, Inc.	DE	Yes
19	Block Financial Corp.	DE	Yes
20	Broadcom Corp.	CA	Yes
21	Broadvision, Inc.	DE	Yes
22	C.R. Bard, Inc.	NJ	Yes
23	C-Cube Microsystems, Inc.	DE	Yes
24	Charles Schwab Corp.	DE	Yes
25	Ciena Corp.	DE	Yes
26	Clarify, Inc.	DE	Yes
27	Combanc, Inc.	DE	Yes
28	Commscope, Inc.	DE	Yes
29	COMPS Infosystems, Inc.	DE	Yes

30	Computer Associates International, Inc.	DE	Yes
31	Computer Literacy, Inc.	DE	Yes
32	Computer Network Technology Corporation	MN	Yes
33	Coulter Pharmaceutical, Inc.	DE	Yes
34	Cullen Frost Bankers, Inc.	TX	Yes
35	Cytec Industries, Inc.	DE	Yes
36	Dean Foods	DE	Yes
37	Del Monte Foods	DE	Yes
38	Devon Energy	OK	Yes
39	Diamond Daves of Minneapolis, Inc.	MN	Yes
40	Diamond Offshore Drilling, Inc.	DE	Yes
41	Duke-Weeks Realty Corp.	IA	Yes
42	Earthgrains Co.	DE	Yes
43	Edify Corp.	DE	Yes
44	Excel Switching Corp.	MA	Yes
45	Fair Isaac & Company	DE	Yes
46	FBR Group, Inc.	VA	Yes
47	Galileo International, Inc.	DE	Yes
48	General Instrument Corp.	DE	Yes
49	General Semiconductor, Inc.	DE	Yes
50	Gentex Corp.	MI	Yes
51	Geon Company	DE	No
52	Granite Construction, Inc.	DE	Yes
53	Harrah's Entertainment, Inc.	DE	Yes
54	Heller Financial, Inc.	DE	Yes
55	Horizon Offshore, Inc.	DE	Yes
56	Hutchinson Technology, Inc.	MN	Yes
57	I2 Technologies, Inc.	DE	Yes
58	Idaho Power Holding Corp.	ID	Yes
59	Image Entertainment, Inc.	CA	Yes
60	IMS Health, Inc.	DE	Yes
61	Infospace.com, Inc.	DE	Yes
62	Inktomi Corp.	DE	Yes
63	Interco, Inc.	DE	Yes

64	Intervu, Inc.	DE	Yes
65	Jefferson-Pilot Corp.	NC	Yes
66	Kellogg Company	DE	Yes
67	Lamar Advertising Co.	DE	Yes
68	LSI Logic Corp.	DE	Yes
69	Maxim Integrated Products, Inc.	DE	Yes
70	Mead Corp.	OH†	No
71	Mesaba Holdings, Inc.	MN	Yes
72	Metromedia Fiber Network, Inc.	DE	Yes
73	Mettler-Toledo International, Inc.	DE	Yes
74	Midway Airlines Corp.	DE	Yes
75	MIPS Technologies, Inc.	DE	Yes
76	Network Solutions, Inc.	DE	Yes
77	Omnicom Group, Inc.	NY	Yes
78	Peregrine Systems, Inc.	DE	Yes
79	Powerwave Technologies, Inc.	DE	Yes
80	Premier Parks, Inc.	DE	Yes
81	Protective Life Corp.	DE	Yes
82	Providian Corp.	DE	Yes
83	Qwest Communications International, Inc.	DE	Yes
84	Sanmina Corp.	DE	Yes
85	SCB Computer Technology, Inc.	TN	Yes
86	SCI Systems, Inc.	DE	Yes
87	Scripps Financial Corp.	CA	Yes
88	SPD Holdings, Inc.	DE	Yes
89	Splash Technology Holdings, Inc.	DE	Yes
90	Staten Island Bancorp, Inc.	DE	Yes
91	Tera Computer Company	WA	Yes
92	The Keller Manufacturing Company, Inc.	IN†	No
93	Tiffany & Co.	DE	Yes
94	United Rentals Holdings, Inc.	DE	Yes

95	USA Interactive, Inc.	DE	Yes
96	Verio, Inc.	DE	Yes
97	Veritas Software Corp.	DE	Yes
98	VISX, Inc.	DE	Yes
99	Wyndham International, Inc.	DE	Yes
100	Yahoo, Inc.	DE	Yes

†Applicable state law does not allow for exculpatory charter provision.

‡Company is a mutual company rather than a stock company.