**recent DEVELOPMENTS in**

**OKLAHOMA business and corporate law ‑ 2021**

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### Introduction

As we meet for this subject, we are gradually recovering from the COVID-19 pandemic: the most profound public health crisis in our lives. The pandemic also stretched the domestic and worldwide economies in unprecedent ways. According to the U.S. Bureau of Economic Analysis, the pandemic shrank the U.S economy at an average annualized rate of 32.9% in second quarter 2020, which was the largest quarterly decline in U.S. GDP recorded over the past 70 years.[[1]](#footnote-1) The mandatory shutdowns in the first quarter 2020 threw a record 22.36 million people out of work.[[2]](#footnote-2) The employment of 25- to 54-year-olds in the U.S. workforce fell below 70% for the first time in nearly 50 years.[[3]](#footnote-3) Approximately 743,000 people have died from the disease in the U.S.[[4]](#footnote-4)

The U.S. experience largely mirrored global outcomes. According to the International Monetary Fund, the global economy contracted 3.1% in 2020, which is a 7.0% loss relative to the forecasted 3.4% growth. That contraction is the largest since World War II.[[5]](#footnote-5) In contrast, the great recession in 2008 and 2009 shrank the world economy by just 0.1%.

Fortunately, with substantial government fiscal support, the U.S. is recovering relatively well.[[6]](#footnote-6) The Bureau of Economic Analysis said GDP rebounded at a historic average rate of 18.3% between the second and fourth quarter of 2020. As of August 2021, the U.S. unemployment rate was 5.4%.[[7]](#footnote-7) The global economy is projected to grow 5.9% in 2021 and 4.9% in 2022 after the 3.1% contraction in 2020.[[8]](#footnote-8)

That said, the pandemic has reshaped our lives in many ways. It evoked a consensus need for governmental response.[[9]](#footnote-9) The breadth of the response is shown in the numbers. Global health and fiscal support in 2020 were estimated at nearly $16 trillion or about 15% of global GDP.[[10]](#footnote-10) Its impacts will have medium and long-term effects on the world and U.S. economy as well as social and political effects.[[11]](#footnote-11) The pandemic has reshaped many areas of our lives. I shall suggest today that the impacts will influence business and corporate law. Just as we turned to the government in the face of the pandemic, we are turning to government and the financial markets to accelerate a trend for stronger corporate governance.

### The Trend for Stronger Corporate Governance

The business and corporate area has experienced a long-term trend for stronger corporate governance. The trend arguably began in 2002 in the wake of Enron and other notable corporate scandals, such as WorldCom, Adelphia and Tyco.[[12]](#footnote-12) Congress responded with the Sarbanes-Oxley Act, which implemented a number of corporate governance reforms and stronger financial controls.[[13]](#footnote-13) The financial crisis that morphed into the great recession[[14]](#footnote-14) was addressed by the Dodd-Frank Act, which made further structural changes to the financial markets.[[15]](#footnote-15)

#### ESG

The markets are increasingly using environmental, social and corporate governance or ESG factors in their investment analyses to identify material risks, sustainability and growth opportunities.[[16]](#footnote-16) ESG evaluates the impact a company has on its employees, the environment, and the communities where it operates. ESG can be considered a measure of corporate responsibility.

Institutional investors increasingly believe that various forms of corporate responsibility are intangible assets that can build enterprise value.[[17]](#footnote-17) To measure ESG, financial analysts develop metrics that assess a company’s level of ESG commitment. Sensing the market trends and financial benefits, companies are engaging in self-evaluations and issuing reports that aid in ESG quantification and rankings.[[18]](#footnote-18)

In the environmental area, analysts and companies attempt to measure the impact that a company’s operations have upon the air, water, ecosystems and human health. With the increasing recognition of the hazards of climate change, they will measure greenhouse gas emissions, the impact on biodiversity, and waste and water management practices. ESG will assess the sustainability of a company’s operations, including its long-term access to resources and raw materials and future markets for its production.

The social factors include employee diversity, safe working conditions and consumer protection. For agriculture and food producers, social factors would include animal welfare practices.

Corporate governance has a longer history than environmental and social factors. Reforms after the Enron and similar corporate collapses emphasized the need for stronger internal controls and checks on management actions. This led to greater board independence, disclosures relating to executive compensation, and stronger auditing practices. The growing influence of institutional investors, the guidance by proxy advisory firms, and more activist shareholders have encouraged better corporate governance.

The Business Roundtable, which represents many of America’s largest companies, issued a statement in 2019 on “the purpose of a corporation”. It said businesses should no longer advance only the interests of shareholders, but must also invest in their employees, support their communities, protect the environment and deal fairly with their suppliers.[[19]](#footnote-19) A statement from Larry Fink, CEO of BlackRock, the world’s largest investment management firm, soon followed. In a letter to the companies in which it invests, BlackRock says that companies must do more than make profits. They must contribute to the betterment of society if they want BlackRock’s support.[[20]](#footnote-20) These shifting attitudes indicate a belief that profits and social responsibility are not incompatible, but are complimentary. A company’s better treatment of its employees, customers, community and the environment improve its chances for long-term sustainability.

#### The Marketplace Embraces Public Benefit Companies

The shift to greater corporate social responsibility is evidenced by the rapid spread of public benefit companies. These companies are for-profit corporations and LLCs that also have a stated public purpose. They balance the need to make money for their owners with the pursuit of an express public purpose or benefit. Every benefit company has a statutory purpose to produce a “general public benefit”, which is defined as creating a “material positive impact on society and the environment.”[[21]](#footnote-21) This is sometimes referred to as the “triple bottom line”: for “people, planet and profit”.[[22]](#footnote-22) In addition to its general public benefit purpose, the company may add a “specific public benefit”, which it must describe in its certificate of incorporation. A specific public benefit may include services to low-income persons, economic development, environmental protection, healthcare improvement, or promoting the arts and sciences.[[23]](#footnote-23)

Since the initial adoption in 2010, legislatures in 37 states including Oklahoma have authorized public benefit corporations and LLCs.[[24]](#footnote-24) Many public benefit companies are closely held businesses, but not all. The more prominent benefit companies include Patagonia, Ben & Jerry’s and Kickstarter. Demonstrating their marketplace acceptance, some of the most successful initial public offerings or IPOs in 2020 and 2021 have been public benefit companies.[[25]](#footnote-25) Other public benefit companies, such as Allbirds, Warby Parker, Rent the Runway and Chobani, have gone public or are planning IPO’s this fall.[[26]](#footnote-26) Commenting on public benefit companies in the marketplace, John Chirico, co-head of North American banking, capital markets and advisory at Citigroup Inc. says, “Thirty years ago, the goal of a company was to serve shareholders. That’s evolved. Everyone is trying to be mission-driven these days.”[[27]](#footnote-27)

#### The Corporate Transparency Act

The governance trend is seen in the push for greater corporate transparency. The 2021 Corporate Transparency Act (the “*CTA*”)[[28]](#footnote-28) is the result of more than a decade of effort to require the reporting of U.S. beneficial ownership for business entities. The reporting is intended to “crack down on anonymous shell companies, which have long been the vehicle of choice for money launderers, terrorists, and criminals.”[[29]](#footnote-29)

The CTA will require “reporting companies” to report their beneficial ownership to the Department of Treasury’s Financial Crimes Enforcement Network (“*FinCEN*”). Reporting companies are any companies formed or conducting business in the U.S.,[[30]](#footnote-30) except for:

* publicly traded companies,
* regulated financial institutions or investment companies,
* insurance companies,
* public utilities,
* tax-exempt Section 501(c) organizations, and
* entities with a physical presence in the United States, employing more than 20 people, and having filed Federal income tax returns showing more than $5,000,000 in revenue.[[31]](#footnote-31)

The reports are not open to general public, but will be accessible to (a) Federal or state agencies engaged in national security, intelligence, or law enforcement activity; (b) Federal agencies acting on behalf of certain foreign authorities; (c) U.S. financial institutions “subject to consumer due diligence requirements” with the consent of the reporting company;[[32]](#footnote-32) or (d) a “Federal functional regulator” or other regulatory agency to assess or otherwise ascertain compliance of financial institutions.[[33]](#footnote-33)

The reports cover (e) beneficial owners with “substantial control” over the entity or ownership or control of 25% or more of the ownership interest,[[34]](#footnote-34) and (f) each individual with “significant responsibility to control, manage, or direct” the entity, including “an executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer), or any other individual who regularly performs similar functions.”[[35]](#footnote-35) The reports will disclose each beneficial owner’s full legal name, date of birth, residential or business street address and unique identifying number from an acceptable source, such as a passport, driver's license or other government issued identifying number.

The FinCEN will implement the CTA’s reporting requirements by regulations due January 1, 2022. A reporting company formed after adoption of the implementing regulations must report upon formation. A reporting company formed before January 1, 2021, must report within two years.[[36]](#footnote-36) If the beneficial ownership information changes, the reporting company must file an amended report within one year. Reporting companies and beneficial owners may face fines and jail time for willfully failing to report or falsely reporting.[[37]](#footnote-37)

The CTA’s reporting requirements will not impose a duty directly upon attorneys or other professionals advising entities to make the reports. The duty to report lies with the reporting company. But reporting will impact attorneys who form business entities. If an attorney files the formation documents for a reporting company, the attorney may be an “applicant” under the CTA.[[38]](#footnote-38) In its report, the reporting company must identify the applicant and furnish the applicant’s name, date of birth, residential or business street address, and unique identifying number from an identification document (e.g, passport or driver’s license).[[39]](#footnote-39) In other words, if the attorney is an applicant, the report will include the attorney’s person identifying information.

To limit exposure for false filings and disclosure of personal information, attorneys may take steps to avoid being an applicant. Instead of filing as the incorporator or organizer, attorneys may insist that a corporate representative sign the formation documents.

Regardless of whether they are applicants, attorneys practicing business law will likely add CTA reporting to the other tasks in forming business entities. That means they will make professional judgments about who is a reporting company and beneficial owner and will collect the information required by the report. Since the CTA database is not publicly available, attorneys may be asked to confirm a client’s CTA compliance in financing, acquisitions and other business transactions. That will require professional due diligence and officer certificates from the client. At the least, companies must implement systems for updating their CTA reporting and will be expected to demonstrate CTA compliance. Attorneys will assist in that process.

### Other Developments

The drive for stronger corporate governance is also seen in the state legislatures and courts. For example, the Oklahoma Legislature authorized public benefit LLCs this year. The Delaware courts have been active, particularly in the *Caremark* decision[[40]](#footnote-40) and its progeny, which expanded director responsibilities. We have covered some of these developments previously,[[41]](#footnote-41) but have a new *Caremark* case to discuss later in this paper. We also have Oklahoma and Delaware cases addressing corporate governance that we shall cover today.

#### New Oklahoma Legislation

The Legislature passed this year Senate Bill 228,[[42]](#footnote-42) which made changes in the Oklahoma General Corporation Act (the “*OGCA*”)[[43]](#footnote-43) the Oklahoma Limited Liability Company Act (the “*LLC Act*”),[[44]](#footnote-44) and the Uniform Limited Partnership Act of 2010 (the “*ULPA*”).[[45]](#footnote-45)

The bill continued the expanded use of electronic databases and digital forms of communication for Oklahoma corporations under the OGCA. [[46]](#footnote-46) The bill provided statutory authority for corporations to use networks of electronic databases, such as “distributed ledgers” or a “blockchain”, for the creation and maintenance of their corporate records, including their stock ledgers. The bill introduced a non-exclusive, safe harbor method providing that corporate acts or transactions evidenced by a written document may be evidenced by an electronic document, and documents may be signed and delivered manually or electronically.[[47]](#footnote-47) The safe harbor does not apply to certain documents, such as documents filed with the Secretary of State, stock ledgers, stock certificates, notices under the OGCA, or shareholder ballots. The exception for these documents does not imply that they cannot be effected electronically. The exception is made because the electronic delivery and execution of these documents is addressed expressly in the OGCA statutes dealing with these documents.[[48]](#footnote-48)

The safe harbor provisions are designed to complement the provisions in the Oklahoma Uniform Electronic Transactions Act[[49]](#footnote-49) and the Federal Electronic Signatures in Global and National Commerce Act.[[50]](#footnote-50)

Other OGCA amendments clarified the ratification of defective corporate acts and standardized terminology in the merger sections of the OGCA.[[51]](#footnote-51) The conversion sections were amended to confirm that a domestic corporation may convert into a foreign corporation and vice versa. Most of these amendments were drawn from recent changes to the Delaware General Corporation Law, which is the statutory source for the OGCA.

Changes to the LLC Act provided for the formation and operation of public benefit limited liability companies.[[52]](#footnote-52) These LLCs are intended to produce a public benefit and to operate in a responsible and sustainable manner. Authorizing public benefit LLCs comes on the heels of public benefit corporations, which Oklahoma authorized in 2019.

Other LLC Act changes clarified that a foreign LLC may convert to a domestic LLC and vice versa. The changes revised the definition of a “foreign jurisdiction” to include “the United States, a state, a tribal government, a foreign country or a political subdivision of a foreign country.” The reference to “tribal government” is new, which confirms that entities formed under tribal law can convert into Oklahoma entities and Oklahoma entities can convert into tribal entities.

Lastly, Senate Bill 228 clarified that all types of partnerships can serve as registered agents under the ULPA and LLC Act, including limited liability partnerships and limited liability limited partnerships.

The amendments in Senate Bill 228 became effective November 1, 2021.

#### New Oklahoma Cases

*Trugreen Ltd. v. Okla. Landscape, Inc*.[[53]](#footnote-53) involved Trugreen’s attempt to stop some former employees from competing against it, soliciting its customers and using alleged confidential information. The individual defendants worked at LawnAmerica when Trugreen bought LawnAmerica’s assets. The assets included non-compete/non-solicitation agreements with the employees. After the purchase, most of the individual employees continued to work for Trugreen and signed additional non-compete/non-solicitation and confidentiality agreements. These employees eventually quit and started their own lawn care servicing businesses. Trugreen sued claiming breach of contract, violation of trade secrets and tortious interference.

The court first addressed the choice of law. The LawnAmerica agreements provided for Oklahoma law. The Trugreen agreements provided for Tennessee law. The court applied Oklahoma law because the non-compete provisions violate Oklahoma public policy. Public policy transcends the other standards for applying choice of law. Oklahoma law must control.[[54]](#footnote-54)

The Oklahoma statutes clearly ban non-compete provisions.[[55]](#footnote-55) The statutes provide, however, a narrow exception for employee non-solicitations. A non-solicitation clause is permissible if the employee is only restricted from directly soliciting the sale of goods or services from the established customers of the employer.[[56]](#footnote-56) The Trugreen non-solicitation clause was much broader. It would prohibit “indirect” solicitations, such as general advertising, and the sale of goods to any former customer, whether solicited or not. The court held that this broader clause violated Oklahoma public policy.

The court then considered whether it should reform the Trugreen provisions to avoid a violation. It declined to do so since reforming the agreement would require the deletion and substitution of material terms that the court could not presume would reflect the intent of the parties. Thus, the court held that the Trugreen agreements were void as against public policy and incapable of reformation.

The court turned next to the LawnAmerica agreements, which were governed by Oklahoma law. Trugreen contended that it acquired the agreements when it purchased the LawnAmerica assets. The defendants argued that the agreements were personal and not assignable without an express provision permitting assignment. The court agreed. It held that noncompete and nonsolicitation agreements are personal and may be assigned only with the consent of the parties. The individual defendants had not consented to the assignment to Trugreen, and Trugreen could not enforce the agreements. The court further held that the terms of the agreements – four years for the noncompete and perpetual for the nonsolicitation – were unreasonable and unenforceable.

The *Trugreen* opinion is significant for the breadth of the issues addressed. It covers choice of law, the permissible scope of nonsolicitation agreements, the standard for contract reformation, and the assignability of noncompete and nonsolicitation agreements. The court’s opinion does so in a thorough and persuasive way.

**Contract interpretation is also at issue in *Penn Grand Management, LLC v. HomeRiver Group, LLC*,** [[57]](#footnote-57) **which involved the enforceability of a forum selection clause. Penn Grand owned an apartment complex and retained HomeRiver to manage the apartments under a property management agreement. Penn Grand also retained HomeRiver to supervise a construction project at the apartments under a separate contract. Penn Grand grew unhappy with HomeRiver’s work and terminated the relationships. It then sued HomeRiver in Oklahoma alleging breach of contract and other claims. HomeRiver filed a motion to dismiss arguing that the property management agreement required that claims must be brought in Tennessee. The district court agreed and granted dismissal.**

**On appeal, the court wrote that enforcement of a forum selection clause starts with a review of the scope of the clause. Does the clause cover the asserted claims? The court should not consider a party’s private interests, such as whether the forum is convenient. The private interests were resolved when the parties agreed to the forum selection.**

**In the instant case, a review of the scope was dispositive. Only the property management agreement had a forum selection clause. The construction management agreement contained no such clause, and the bulk of plaintiff’s claims related to construction management. Penn Grand could pursue those claims in Oklahoma. As to claims under the property management agreement, they must be pursued, if at all, in Tennessee.**[[58]](#footnote-58)

***KP Trucking v. Dept of Transportation***[[59]](#footnote-59) **deals with whether a Federal agency can disregard the separate legal existence of two related companies and combine them when it appears one was formed to circumvent the penalties imposed on another. The case begins with Eagle Iron & Metal, a trucking company that had registered with the Federal Motor Carrier Safety Administration. The Safety Administration had cited Eagle for safety violations and suspended its registration. The Safety Administration then found that an Eagle affiliate, KP Trucking, had assumed Eagle’s operations. The Safety Administration cited KP Trucking for safety violations, ordered both Eagle and KP Trucking to cease operations and consolidated their records finding that KP had continued Eagle’s operations to avoid the penalties imposed on Eagle. KP Trucking challenged the Safety Administration’s findings.**

**The Safety Administration’s based its findings largely upon the common ownership of Eagle and KP Trucking. It also found that the two companies used the same drivers, trucks, shippers, telephone numbers, mailing addresses and email addresses. The companies shared management and the same facilities. Upon review, the court determined that the Safety Administration’s findings were adequately supported by the record and that a consolidation of the two companies was proper.**

#### New Delaware Cases

In the seminal Caremark[[60]](#footnote-60) decision, the Delaware court established the directors’ fiduciary duties to implement and monitor internal systems or controls designed to preserve corporate assets and avoid liabilities that might arise from illegal conduct. *Caremark* claims were relatively rare until 2019, when the Delaware Supreme Court allowed Caremark claims to proceed against the Blue Bell Creameries directors for a listeria outbreak at their company’s ice cream manufacturing plants.[[61]](#footnote-61) Other *Caremark* claims followed. The Delaware courts have applied *Caremark* to, among other cases, a in biopharmaceutical company’s failure to comply with FDA regulations and an auto parts company’s failure to properly monitor its financial reporting.[[62]](#footnote-62)

The most recent iteration of *Caremark* involves the board of the Boeing Company. [In re the Boeing Company Derivative Litigation](https://courts.delaware.gov/Opinions/Download.aspx?id=324120)*[[63]](#footnote-63)* arose following two crashes of Boeing 737 Max planes, which were caused by faulty sensors and software. The sensors were vulnerable to false readings and, if triggered, the software could “correct” the aircraft by pushing the nose down. Numerous investigations and legal actions followed, including criminal proceedings, with Boeing ultimately agreeing to pay penalties and other compensation exceeding $2.5 billion.

The Court of Chancery denied the directors’ motion to dismiss holding that the directors had (a) failed to “establish a reporting system for airplane safety” and (b) “turn[ed] a blind eye to a red flag representing airplane safety problems.”[[64]](#footnote-64) Accepting the allegations as true for purposes of the motion, the court found a reasonable inference that the directors acted with scienter, meaning with “conscious disregard for [their] responsibilities,” such that they cannot be entitled to a presumption of good faith and thus are denied the protections under the business judgement rule.[[65]](#footnote-65) Ample evidence indicated that management was aware of the 737 Max’s safety issues, but the issues were not shared with the board, and the directors lacked board-level systems for reporting airplane safety issues. The board had no committee dedicated to safety, no protocols for mandatory and regular management reporting, and no agenda items dedicated to safety.

The Delaware Supreme Court recently delivered two important decisions clarifying key doctrines relating to derivative shareholder litigation. The first, Brookfield Asset Management, Inc. v. Rosson,[[66]](#footnote-66) overruled Gentile v. Rossette*[[67]](#footnote-67)* and eliminated Gentile’s carve-out exception to the test for direct versus derivative claims under Tooley v. Donaldson, Lufkin & Jennette, Inc.*[[68]](#footnote-68)* Under *Tooley*, a shareholder’s claim is direct if the shareholder can prevail without showing an injury to the corporation. The test asks whether the claim and remedy are unique to the shareholder/claimant. *Gentile* had muddied the water by suggesting some claims could be both direct and derivative. Having struggled to apply *Gentile*, the Court overruled it saying that the *Tooley* test could give shareholders the equity they deserve without *Gentile*’s confusion.

The *Brookfield* decision is particularly important in Oklahoma because the *Gentile* precedent was cited in the prior Oklahoma case of *Watkins v. Hamm*.[[69]](#footnote-69) The Oklahoma Court of Appeals had noted the dubious position that *Gentile* held under Delaware law and wrote that Oklahoma has never recognized direct claims under *Gentile*. It further said, “If Oklahoma is to follow Delaware law in recognizing direct claims by corporate stockholders because Oklahoma’s corporate law is patterned after Delaware law, we should wait until Delaware decides what its law is.”[[70]](#footnote-70) The Oklahoma court correctly anticipated that Delaware might overrule *Gentile* and thus it has occurred.

The second significant derivative case was the Delaware Supreme Court’s decision in *United Food and Commercial Workers Union v. Zuckerberg et al*.[[71]](#footnote-71) The Court updated the “universal test for assessing whether demand should be excused as futile.” In so doing, it blended the two traditional demand futility tests from *Aronson v. Lewis*[[72]](#footnote-72) and *Rales v. Blasband*.[[73]](#footnote-73)

Under *Aronson*, demand might be futile when the board is evaluating its own prior decision. In those cases, demand is futile if the complaint raised a reasonable doubt that the directors were disinterested and independent, or if the challenged transaction was otherwise the product of a valid business judgment. The test under *Rales* deems the demand futile if there is reasonable doubt that a majority of the demand board could exercise its independent and disinterested business judgment in responding to the demand.

Applying the *Aronson* test could be difficult when the board’s composition had shifted between the initial decision and the demand response. Was it the “same” board for purposes of applying *Aronson*? *Aronson* also did not say how to assess the directors’ disinterestedness and independence when the directors’ personal liability was limited by statute and thus they faced no financial exposure.

Under the new *Zuckerberg* test, the court determines demand futility by asking three questions:

1. did the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
2. does the director face a substantial likelihood of personal liability on any of the claims that are the subject of the demand; and
3. does the director lack independence from someone who received a material personal benefit from the alleged misconduct or who would face a substantial likelihood of liability on any of the claims that are the subject of the demand.

If the answer to any question is “yes” for at least half of the board, demand is excused as futile.

To appreciate the significance of these two cases, we should revisit the rules for shareholder derivative actions. In the *Brookfield* case, the characterization of a claim as direct or derivative is important since a direct claim does not allege an injury to the shareholders generally. It claims a special injury to a particular shareholder or group of shareholders. Thus, the direct claim is not a corporate asset. It belongs to the injured shareholder and not the corporation. The shareholder/claimant can sue without making demand on the corporation’s board.

A shareholder’s derivative action is premised on an alleged injury to the shareholders generally. If a claim exists, it is an asset of the corporation and presumably subject to board control. A shareholder’s ability to bring a derivative action – to represent the corporation in court – is an exception to the assumption that the board of directors, not the shareholders, manage the corporation’s affairs.

To protect the presumption of board control, the law imposes several prerequisites on derivative actions. A shareholder must show continuous stock ownership and that demand to pursue the claim first was directed to and rejected by the corporation’s board. A shareholder can avoid making demand if she or he can show that demand would be futile under the new *Zuckerberg* test.

Both the direct/derivative distinction and demand futility relate to the larger question of whether a shareholder has standing to bring the claim. This resolution of these issues can mean the difference between a favorable judgment and claims being dismissed. The clarifications in *Brookfield* and *Zuckerberg* are important guidance in corporate litigation.

**In *Manichaean Capital, LLC v. Exela Tech., Inc.*,**[[74]](#footnote-74) **the Court of Chancery ruled as a matter of first impression in Delaware that plaintiffs could pursue “reverse veil piercing” claims against the subsidiaries of a parent defendant accused of abusing the corporate form to avoid paying an appraisal judgment from the Delaware courts. The court acknowledged that reverse veil piercing claims would not be appropriate in all cases, and established a multi-part test for permitting reverse veil piercing claims to proceed.**

The court first considers the same factors used in a traditional veil-piercing analysis, including insolvency, undercapitalization, commingling of corporate and personal funds, the absence of corporate formalities, and alter ego. It will also determine whether the owner is utilizing the corporate form to perpetuate a fraud or injustice. The court then identified factors unique to reverse piercing that it should analyze.[[75]](#footnote-75) These factors relate generally to the consequences that the reverse piercing may have on innocent third parties, who have not assisted in perpetrating the wrongs.

The court concludes by stating, “Fundamentally, reverse veil-piercing, like traditional veil-piercing, is rooted in equity, and the court must consider all relevant factors, including those just noted, to reach an equitable result.”[[76]](#footnote-76)

The ***Manichaean Capital*** case is interesting in part because the court’s analysis and applied factors are very similar to a recent Oklahoma case, *The Mattingly Law Firm, P.C., v. Henson.*[[77]](#footnote-77) *Mattingly* was also a case of first impression, both for piercing the veil of an LLC and for allowing reverse piercing – to hold the LLC liable for the obligation of its member. The Oklahoma Court of Appeals held that reverse piercing begins with a traditional veil piercing analysis. Then the court should ask whether other remedies, such as fraudulent conveyance or conversion, would offer adequate protections. It must also ensure that other innocent members of the LLC are not impacted by the remedy.

The final Delaware case has a local connection. In *The Williams Companies Stockholder Litigation*,[[78]](#footnote-78) the Delaware Chancery enjoined The Williams Companies, Inc. (“*Williams*”), a Tulsa-based natural gas processor and transporter, from enforcing its stockholder rights plan, or so-called “poison pill” (the “*plan*”). The plan was an anti-takeover device that would allow existing shareholders a right to purchase additional shares at a deep discount if a hostile acquirer appeared. The discounted shares would dilute the hostile acquirer’s ownership and thus discourage a takeover. Williams adopted the plan in 2020 after precipitous declines in natural gas prices and its stock price, which the board believed made Williams susceptible to a possible hostile takeover.

Some shareholders contested the plan derivatively, and the court considered two issues. First was the appropriate standard for reviewing the plan’s validity. The defendant board argued that the business judgment rule should apply and with it a presumption that the board’s decision was valid. The court held, however, that the law is well-settled that poison pill challenges must be scrutinized under the higher *Unocal* standard.[[79]](#footnote-79) Under *Unocal*, the board must first show that it had reasonable grounds for concluding that a threat to the corporate enterprise existed. The court found that the plan was enacted after good faith and reasonable investigation, but concluded that the threats where hypothetical and general concerns about shareholder activism were not sufficient justification for plan’s adoption.

The second prong of *Unocal* requires a board to show that the defensive measures were “reasonable in relation to the threat posed.” Here the court did not hesitate. It found the plan was overly aggressive. For example, the plan was triggered when an acquirer acquired only 5% or more of the shares. The board’s financial advisor had compared the plan to other poison pill plans and said that the trigger was an outlier among plans generally. The court cited other plan features that it called “extreme”. In concluding, the court found that the plan was beyond the range of reasonable responses. It held that the directors breached their fiduciary duties in adopting the plan and the court invalidated it.

### Conclusion

This paper’s premise is that our business entities are trending toward greater corporate social responsibility. The trend is long-standing. It is evidenced in Federal and state laws, by judicial decisions and, perhaps most importantly, in the marketplace. And the trend is accelerating.

As lawyers, we are uniquely positioned to guide our business clients and to encourage greater corporate social responsibility. With our guidance, more businesses might adopt a expanded role in improving the lives of their employees, their customers and people within their communities, if not the nation and the world. Business owners will, in the long-term, benefit from building better relationships.

Greater corporate social responsibility makes for a better marketplace.[[80]](#footnote-80) Markets are more efficient where transparency and trust are found, and transactional risk decreases. The resulting economic benefits help us all.

Gary W. Derrick
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6. GDP returned to its pre-pandemic level in the second quarter of 2021. Mitchell Barnes, Lauren Bauer and Wendy Edelberg, “11 Facts on the Economic Recovery from the COVID-19 Pandemic”, *The Brookings Institute* (Sept. 29, 2021). [↑](#footnote-ref-6)
7. Bureau of Labor Statistics, “[The Employment Situation](https://www.bls.gov/news.release/pdf/empsit.pdf)” (at https://www.bls.gov/news.release/ pdf/empsit.pdf). [↑](#footnote-ref-7)
8. International Monetary Fund, *World Economic Outlook: Recovery During a Pandemic* (Oct. 2021) (at https://www.imf.org/en/Publications/WEO/Issues/2021/10/12/world-economic-outlook-october-2021) (“*Oct. 2021 WEO Report*”). [↑](#footnote-ref-8)
9. Eduardo Levy Yeyati and Federico Filippini, “Social and Economic Impact of COVID-19”, *The Brookings Institute* (June 8, 2021). “As discussed in the April 2021 WEO, without the direct fiscal actions and liquidity support policies implemented across Group of Twenty economies in 2020, the contraction in global activity could have been at least three times worse than the actual outcome.” *Supra*, Oct. 2021 WEO Report. [↑](#footnote-ref-9)
10. *Id*. [↑](#footnote-ref-10)
11. The IMF estimates that the continued COVID-19 impact could reduce global GDP by $5.3 trillion over the next five years. *Id*. [↑](#footnote-ref-11)
12. Coffee, Jr., John C., “What Caused Enron? A Capsule Social and Economic History of the 1990s”, 89 Cornell L. Rev. 269 (2003-2004).

 [↑](#footnote-ref-12)
13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).(“*SOX*”). SOX required each public company to have an audit committee composed of independent directors and prohibited company loans to certain executives and directors. It required attorneys for public companies to report material violations of law to the company’s chief legal advisor and/or the CEO. One of the most controversial aspects of SOX was Section 404, requiring management certification of internal controls over financial reporting. *See* Gary W. Derrick, Recent Developments in Oklahoma Business and Corporate Law – 2003, OBA (2003). [↑](#footnote-ref-13)
14. Extreme volatility affected stock markets worldwide, with most suffering record declines. The U.S. unemployment rate rose to over 10% by October 2009, and remained at 9% or higher until the end of 2011. In 2012, government data revealed that the median net worth of American families plunged almost 40% from 2007 to 2010. [↑](#footnote-ref-14)
15. Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“*Dodd Frank*”) in response to the financial crisis that began in 2008. It granted the Federal government new authority to seize and wind down large troubled financial firms, established a council of Federal regulators to monitor threats to the financial system, and mandated oversight of the derivatives market. It also gave the PCAOB authority to oversee the auditors of SEC-registered securities broker-dealers. In addition, Dodd Frank permanently exempted non-accelerated filers (more than 5,500 small public companies) from Section 404(b) of the Sarbanes-Oxley Act, which required an independent auditor to attest to management’s assessment of the effectiveness of the company’s internal control over financial reporting rule requiring companies to hold a shareholder vote on executive compensation at least every three years. [↑](#footnote-ref-15)
16. The major financial markets all provide ESG ratings indexes, such as the Dow Jones Sustainability Indices, Bloomberg ESG data, the FTSE4Good Index, and the MSCI ESG Indices. [↑](#footnote-ref-16)
17. The financial markets historically assumed that ethically or socially motivated investment would by its nature reduce returns. Recent research has rebutted that assumption, and many institutional investors, including BlackRock, the world’s largest investment firm, has concluded that greater corporate responsibility equates to higher long-term investment returns. *See* BlackRock, “Sustainable investing: resilience amid uncertainty” (at https://www.blackrock.com/corporate/about-us/sustainability-resilience-research). [↑](#footnote-ref-17)
18. *See e.g*., Microsoft, “Corporate Social Responsibility Report” (2020) (at https://www.microsoft.com/en-us/corporate-responsibility/); ExxonMobil, “Sustainability Report” (Jan. 2021) (at https://corporate.exxonmobil.com/Sustainability/Sustainability-Report); and Coca-Cola, “Business & Environmental, Social and Governance Report” (2020) (at https://www.coca-colacompany.com/reports/business-environmental-social-governance-report-2020). [↑](#footnote-ref-18)
19. The statement was endorsed by business leaders, including the Chairman and CEO of JPMorgan Chase, the former CEO of Vanguard, and the President of the Ford Foundation. (at https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans). [↑](#footnote-ref-19)
20. *See* Larry Fink’s 2019 Letter to CEO’s, “Purpose & Profits” (at https://www.blackrock.com/ corporate/investor-relations/2019-larry-fink-ceo-letter); and Larry Fink’s 2021 Letter to CEO’s (at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter).

 [↑](#footnote-ref-20)
21. 18 O.S. §1202.3. [↑](#footnote-ref-21)
22. *See* John Montgomery, “Mastering the Benefit Corporation”, *Business Law Today* (July 20, 2016). [↑](#footnote-ref-22)
23. *See* 18 O.S. §1202.5. [↑](#footnote-ref-23)
24. *See* https://benefitcorp.net/policymakers/state-by-state-status.

 [↑](#footnote-ref-24)
25. Belonick**,** Alexa**,** Susan H. Mac CormacandAlfredo B. D. Silva, “Morrison & Foerster Discusses Publicly Traded Public Benefit Corporations”, *The CLS Blue Sky Blog* (Sept. 16, 2020) (at https://clsbluesky.law.columbia.edu/2020/09/16/morrison-foerster-discusses-publicly-traded-public-benefit-corporations); and /Kennedy, Ellen, “What Are Public Benefit Corporations (PBCs)”, *Kiplinger* (Oct. 15, 2021) (at https://www.kiplinger.com/investing/ esg/603598/what-are-public-benefit-corporations-pbcs). [↑](#footnote-ref-25)
26. Driebusch, Corrie, “For Allbirds, Warby Parker, Other Fall IPOs, Greed Is Out. Do-Gooding Is In”, *Wall St. Jour.* (Sept. 8, 2021). Driebusch writes “Forget Gordon Gekko. The hottest companies launching IPOs are branding themselves as do-gooders.” [↑](#footnote-ref-26)
27. *Id*. [↑](#footnote-ref-27)
28. On January 1, 2021, Congress passed the Corporate Transparency act as part of the Anti-Money Laundering Act of 2020 (“*AMLA*”), which was included within the National Defense Authorization Act of 2021 (“*NDAA*”); codified at 31 U.S.C. §5336. [↑](#footnote-ref-28)
29. Office of Representative Carolyn Maloney, Press Release, “Maloney Celebrates Inclusion of Corporate Transparency Act in FY2021 NOAA” (Nov. 19, 2020). [↑](#footnote-ref-29)
30. The CTA clearly covers corporations and LLCs and does not cover general partnerships. It is unclear whether it cover limited partnerships, unincorporated associations, business trusts or non-U.S. entities that resemble corporations and LLCs. This scope will presumably be defined by regulation.

 [↑](#footnote-ref-30)
31. 31 U.S.C. §5336(a)(11)(B). Note that the last exemption applies to operating companies and would not apply to newly formed entities.

 [↑](#footnote-ref-31)
32. Financial institutions are required to identify and verify beneficial owners through the Bank Secrecy Act’s customer due diligence requirements. [↑](#footnote-ref-32)
33. *Supra* at §5336(c)(2). [↑](#footnote-ref-33)
34. Determining 25% or more of the ownership interest is relatively easy with a single class of interest. For entities with multiple classes of interests, distribution preferences and varying voting and consent provisions, the determination is more difficult. [↑](#footnote-ref-34)
35. *Supra* at §5336(a)(3). [↑](#footnote-ref-35)
36. Filing reports for all active companies formed before 2022 is an enormous undertaking. The sheer volume is daunting, and many older companies may struggle to assemble the required information, such as personal identification information about an applicant (see fn. 38 below).

 [↑](#footnote-ref-36)
37. *Supra* at §5336(h)(3)(A). [↑](#footnote-ref-37)
38. The regulations may define “applicant” better. One may argue that an applicant is the individual on whose behalf the filing is made and not the attorney (or paralegal) that drafted the constituent documents and made the filing. It is also unclear whether an applicant includes corporate service companies, which facilitate many Secretary of State filings.

 [↑](#footnote-ref-38)
39. *Supra* at §5336(b)(2)(A). An applicant is “any individual who files an application to form a corporation, limited liability company or similar entity under the laws of a State or Indian Tribe.” [↑](#footnote-ref-39)
40. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (“a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable”). [↑](#footnote-ref-40)
41. *See* Derrick, Gary W., “Recent Developments in Oklahoma Business and Corporate Law – 2019”, OBA 2017 Recent Developments (Day Two). [↑](#footnote-ref-41)
42. Authored by Senator John Michael Montgomery and Representative Terry O’Donnell. [↑](#footnote-ref-42)
43. 18 O.S. §§1001 *et seq*. [↑](#footnote-ref-43)
44. *Id*., §§2000 *et seq*. [↑](#footnote-ref-44)
45. 54 O.S. §§500-101A *et seq*. [↑](#footnote-ref-45)
46. Since 2001, the OGCA has authorized electronic notices and virtual shareholder and director meetings. The authorizations were critical in 2020, when corporations turned to virtual meetings in the face of the COVID -19 pandemic. [↑](#footnote-ref-46)
47. The safe harbor is found in OGCA Section 1014.3.A, which is based on analogous provisions in Section 1075.2 and the Oklahoma Uniform Electronic Transactions Act (Article 15 of Title 12A). [↑](#footnote-ref-47)
48. *E.g*., documents filed with the Secretary of State are governed by Section 1007.H, documents comprising part of the stock ledger are governed by Section 1064, notices are governed by Section 1075.2, in the case of shareholder meetings, waivers of notice are governed by Section 1074, and actions taken by directors, shareholders or incorporators are governed by Sections 1027.F, 1073.D and 1012.C, respectively. [↑](#footnote-ref-48)
49. 12A O.S. §§15-101, *et seq*. [↑](#footnote-ref-49)
50. 15 U.S.C. §§7001, et seq. [↑](#footnote-ref-50)
51. The term “organized” refers to the incorporation of a corporation. The term “formed” refers to the formation of a non-corporate entity. The term “domestic corporation” refers to a corporation organized under Oklahoma law. The term “foreign corporation” refers to a corporation organized under the laws of any jurisdiction other than Oklahoma. The term “surviving” corporation refers to the corporation existing after a merger. The term “resulting” corporation refers to the corporation existing after a consolidation. [↑](#footnote-ref-51)
52. The public benefit LLC provisions are codified at 18 O.S. §§2061 through 2067. [↑](#footnote-ref-52)
53. Case No. 20-CV-71-TCK-CDL (N.D. Okla. Mar. 17, 2021). [↑](#footnote-ref-53)
54. *Id*. Courts would typically apply the law of the state chosen by the parties, the law where the contract was made, or the place of performance. These standards will not apply when the public policy of a state voids the contract.

 [↑](#footnote-ref-54)
55. 15 O.S. §219A. [↑](#footnote-ref-55)
56. *Id*. [↑](#footnote-ref-56)
57. **2021 OK CIV APP 15, \_\_\_P.3d \_\_\_.** [↑](#footnote-ref-57)
58. *Cf*. ***Rawdon v. Starwood Capital Group*, 2019 OK CIV APP 70, 453 P.3d 516 (a forum selection clause covering “any action or proceeding arising out of, or relating to, [the parties’ LLC agreement]” was broad enough to cover claims for fraud, breach of fiduciary duties, and conspiracy).**

 [↑](#footnote-ref-58)
59. No. 20-9508 (10th Cir., Mar. 9, 2021). [↑](#footnote-ref-59)
60. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (“a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable”). [↑](#footnote-ref-60)
61. [*Marchand v. Barnhill*](https://www.courts.delaware.gov/Opinions/Download.aspx?id=291200), 212 A.3d 805 (Del. 2019). [↑](#footnote-ref-61)
62. #  Kotler, Marcogliese and Tracy, “Recent Delaware Court of Chancery Decision Sustains Another Caremark Claim at the Pleading Stage”, *Harv. Law School Forum on Corporate Governance* (May 25, 2020).

 [↑](#footnote-ref-62)
63. 2021 WL 4059934 (Del. Ch. Sept. 7, 2021). [↑](#footnote-ref-63)
64. *Id*., at \*1. [↑](#footnote-ref-64)
65. *Id*. (citing *In re Walt Disney Co. Deriv. Litig*., 906 A.3d 27, 66 (Del. 2006)). [↑](#footnote-ref-65)
66. No. 406, 2020 (Del. Sept. 20, 2021). [↑](#footnote-ref-66)
67. 906 A.2d 91 (Del. 2006). [↑](#footnote-ref-67)
68. 845 A.2d 1031 (Del. 2004). [↑](#footnote-ref-68)
69. **2018 OK CIV APP 2, 419 P.3d 353**. *See* Gary W. Derrick, “Recent Developments in Oklahoma Business and Corporate Law – 2017”, OBA 2017 Recent Developments (Day Two) (Nov. 19, 2017). [↑](#footnote-ref-69)
70. *Watkins*, *id.* at 18. [↑](#footnote-ref-70)
71. No. 404, 2020 (Del. Sept. 23, 2021). [↑](#footnote-ref-71)
72. 473 A.2d 805 (Del. 1984). [↑](#footnote-ref-72)
73. 634 A.2d 927 (Del. 1993). [↑](#footnote-ref-73)
74. C.A. No. 2020-0601-JRS (Del. Ch. May 25, 2021). [↑](#footnote-ref-74)
75. The factors are:

“the degree to which allowing a reverse pierce would impair the legitimate expectations of any adversely affected shareholders who are not responsible for the conduct of the insider that gave rise to the reverse pierce claim, and the degree to which allowing a reverse pierce would establish a precedent troubling to shareholders generally;

the degree to which the corporate entity whose disregard is sought has exercised dominion and control over the insider who is subject to the claim by the party seeking a reverse pierce;

the degree to which the injury alleged by the person seeking a reverse pierce is related to the corporate entity's dominion and control of the insider, or to that person's reasonable reliance upon a lack of separate entity status between the insider and the corporate entity;

the degree to which the public convenience, as articulated by [the Delaware General Corporation Law and Delaware's common law], would be served by allowing a reverse pierce;

the extent and severity of the wrongful conduct, if any, engaged in by the corporate entity whose disregard is sought by the insider;

the possibility that the person seeking the reverse pierce is himself guilty of wrongful conduct sufficient to bar him from obtaining equitable relief;

the extent to which the reverse pierce will harm innocent third-party creditors of the entity the plaintiff seeks to reach; and

the extent to which other claims or remedies are practically available to the creditor at law or in equity to recover the debt.” [↑](#footnote-ref-75)
76. [citing Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate* Standards, 16 J. Corp. L. 33, 69 (1990). [↑](#footnote-ref-76)
77. 2020 OK CIV APP 19, 466 P.3d 590 (discussed in Gary W. Derrick, Recent Developments in Oklahoma Business and Corporate Law – 2020, OBA (2020). [↑](#footnote-ref-77)
78. C.A. No. CV 2020-0707-KSJM, 2021 WL 754593, at \*2 (Del Ch. Feb. 26, 2021). [↑](#footnote-ref-78)
79. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). [↑](#footnote-ref-79)
80. *See* “Down on the Street: A Special Report on American’s Capital Markets”, *The Economist* (Nov. 25, 2006) (“In theory, a higher standard of corporate governance should result in a higher valuation, since listing in a well-regulated market shows a commitment from a company that it will not abuse investors.”). [↑](#footnote-ref-80)