

THE END OF SOCIALLY RESPONSIBLE BEHAVIOR TOO?

Brad Finney*

I. INTRODUCTION

There is much debate among legal and business scholars and practitioners concerning whether maximizing shareholder wealth is a principle that has truly been codified in the United States, as well as the resulting impact that the codification of this principle could have on corporations. Recent decisions, such as *eBay v. Newmark*,¹ and even a case decided nearly one hundred years ago, *Dodge v. Ford*,² have created confusion resulting in various analyses and opinions regarding these issues.³ Although the legal debate continues regarding whether corporations and directors of those corporations must make all decisions with the aim of maximizing shareholder wealth, shareholder primacy and the maximization of shareholder wealth remain foundational corporate doctrines taught in business and law schools around the country.⁴ This corporate doctrine is, and will continue to be, the underlying basis that informs most decisions made for corporations by legal advisors, directors, and other decision makers.⁵

Part II of this comment provides a view of the education provided in business and law schools concerning the goal of corporations, i.e.

* Brad Finney is scheduled to graduate from the University of Tennessee College of Law in 2018 and will join Norton Rose Fulbright's Houston office in September of 2018.

¹ See *Ebay Domestic Holdings v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

² See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

³ Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 439–40, 444–451 (2013); Jessica Chu, *Filling A Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 163–181 (2012).

⁴ Darrell West, *The Purpose of the Corporation in Business and Law School Curricula*, GOVERNANCE STUD. AT BROOKINGS 1, 2, 10–12 (July 2011).

⁵ See *id.*

how that goal—the maximization of shareholder wealth—has become a foundational corporate doctrine for many attorneys and businesspeople, and the impact the combination of that goal and benefit corporations has on deciding whether a corporation should take socially responsible action.

Part III of this comment examines the extent to which maximizing shareholder wealth is taught as a principle of corporations in business and law schools and discusses a recent survey of the specific corporate principles that are taught. It concludes by discussing the impact that those teachings have had on students that have gone on to become attorneys, businesspeople, and key decision makers.

Part IV of this comment discusses the influence that the proliferation of state statutes allowing for the formation of benefit corporations has on traditional corporations and its legal counsel, directors, and other key decision makers. It then discusses the possibility that decision makers of traditional corporations will become more averse to taking part in socially responsible actions as a result of the rise of benefit corporations.

II. MAXIMIZING SHAREHOLDER WEALTH IS TAUGHT AS A NORM IN BUSINESS AND LAW SCHOOL

Over the last several decades, as free-market economists from the University of Chicago and their ideas became more prominent, there has been a fundamental change in the way business and law schools viewed and taught students about the purpose of corporations.⁶ According to these economists, “economic analysis revealed the proper purpose of the public corporation clearly, and that purpose was to make money for its dispersed shareholder[s].”⁷ Further, professors teaching this “new-school” of thought declared that any action taken by agents of a corporation that pursued a goal outside of maximizing shareholder wealth was improper as the action was outside of the proper purpose of corpora-

⁶ See Lynn A. Stout, *The Problem of Corporate Purpose*, 48 ISSUES IN GOVERNANCE STUD. 1, 2 (June 2012).

⁷ *Id.*

tions.⁸ Schools shifted accordingly to emphasize stockholder primacy and the maximization of shareholder wealth as fundamental principles of business and corporate law.⁹ Further, business schools and law schools deemphasized the theory that a corporation's purpose is to provide employees with well-paying jobs, satisfy customer demands, be a good corporate citizen, and provide a return to investors.¹⁰

This shift in focus has now impacted generations of students, businesspeople, and attorneys as undergraduate business students, MBAs, and law students typically learn through their respective schooling that the mantra of maximizing shareholder wealth is a standard business practice that must inform business decisions.¹¹ Mr. Steve Denning, a lawyer who worked at the World Bank for several decades, stated that the idea of maximizing shareholder wealth "is now deeply embedded in the basic economics that is taught in business schools and economics faculties around the world."¹² Mr. Denning studied and analyzed the fundamental principles of managerial economics—a theory of economics that is taught in many undergraduate, graduate, and professional schools and the resulting implications that this theory has had on business practices.¹³ As part of this study, Mr. Denning examined several of the best-selling course textbooks on economics and discovered that all the course textbooks are "built on" the doctrines that corporations must maximize shareholder wealth and that "the whole job of the manager is to maximize profit for the company and its shareholders."¹⁴ Specifically, "the very

⁸ *See id.* at 1–3.

⁹ *See id.*; West, *supra* note 4, at 1.

¹⁰ *Id.*

¹¹ *See id.* at 1, 2, 10–12.

¹² Steve Denning, *How Modern Economics Is Built On 'The World's Dumbest Idea,'* FORBES, July 22, 2013, <https://www.forbes.com/denning/2013/07/22/how-modern-economics-is-built-on-worlds-dumbest-idea>.

¹³ *Id.*

¹⁴ *Id.*

foundation of managerial economics is . . . maximizing shareholder value.”¹⁵ In fact, the best-selling books assume that the corporate manager’s end-goal is to maximize the profits of the corporation’s shareholders.¹⁶

In 2011, Mr. Darrel M. West, the vice president and director of Governance Studies and a senior fellow at the Brookings Institution in Washington D.C., examined business and law school curriculum to determine which perspectives and guiding principles are taught in America’s higher education system.¹⁷ Further, Mr. West set out to determine student perceptions about the role business is supposed to play in society.¹⁸

Upon interviewing professors and faculty members at top business and law schools, analyzing the curriculum taught at these schools, reviewing course syllabi, and reviewing survey data of students’ views and perceptions, Mr. West came to several conclusions.¹⁹ First, in American business and law schools, great emphasis is put on the theory that the purpose of a corporation is to maximize shareholder wealth—this emphasis was especially acute in law schools that cover the purpose of a corporation.²⁰ Second, Mr. West found that after completing business school, students are far more likely to view maximizing shareholder wealth as the paramount focus of a corporation compared to when they started their education.²¹ Third, few business or law schools require courses that provide broader perspectives on the role or purpose of cor-

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ West, *supra* note 4, at 1.

¹⁸ *Id.* at 1–2.

¹⁹ *Id.* at 1, 3.

²⁰ *Id.* at 2, 4, 10–12.

²¹ *Id.* at 2, 14.

porations, and this lack of required education has impacted not only the business community but society at large.²²

Specifically, Mr. West found that, in regard to law schools, “[t]he dominant ‘law and economics’ conception taught in many schools emphasizes profit maximization and enhancing shareholder value.”²³ For example, Mr. Michael Kausner, a professor at Stanford Law School, instructs his students that the purpose of a corporation is to maximize shareholder wealth and teaches corporate social responsibility only in the context of accruing goodwill for the corporation, which can result in an overall increase in shareholder wealth.²⁴

Further, Mr. West discovered in his research that many business schools added corporate governance classes to its curriculum as a result of the many corporate scandals that occurred in the early 2000’s.²⁵ However, Mr. West found that these courses often did not actually address the purpose of corporations and the role that corporations should hold in society, but instead tended to focus on the arduous decisions individuals and organizations may face.²⁶ Mr. West appears to largely attribute this focus to business professors who are already indoctrinated into the shareholder wealth maximization theory.²⁷ For example, some professors at top business schools vehemently argue that teaching and discussing the idea that corporations should sometimes act in the interest of the public is “fundamentally flawed.”²⁸ In fact, Mr. Aneel Karnani, a professor at Michigan’s Ross School of Business, stated that the concept of corporations acting in the interest of the public could have detrimental

²² West, *supra* note 4, at 2, 5, 7–12.

²³ *Id.* at 4.

²⁴ *Id.* at 11–12.

²⁵ *Id.* at 4.

²⁶ West, *supra* note 4, at 5.

²⁷ *See id.* at 1, 5–6.

²⁸ *Id.* at 6.

effects on corporations since “in most cases, doing what’s best for society means sacrificing profits.”²⁹

Last, Mr. West analyzed an Aspen Institute study conducted of students at fifteen business programs over three years.³⁰ Among other questions, this study asked students what was the paramount function of a corporation.³¹ The study revealed that the vast majority of these “students believe the primary purpose of a corporation is to maximize shareholder value[.]”³² Further, these “students believe [maximizing shareholder wealth] is how current corporate leaders behave when they are making decisions.”³³

Ms. Lynn Stout, Distinguished Professor of Corporate and Business Law at Cornell School of Law, summarized the impact that business and law schools have had on societal views on the goal of corporations.³⁴ Professor Stout stated that “[m]ost people today would say corporations have but one proper purpose: maximizing their shareholders’ wealth” and that doing things that positively impact other stakeholders like “providing good jobs—are viewed as legitimate business ends only to the extent they increase ‘shareholder value.’”³⁵ Professor Stout concluded that “[t]his view prevails in large part because it’s what is taught in our nation’s classrooms.”³⁶

²⁹ *Id.* at 6 n.14 (quoting Aneel Karnani, *The Case Against Corporate Social Responsibility*,” WALL STREET JOURNAL, Aug. 23, 2010).

³⁰ *Id.* at 14.

³¹ West, *supra* note 4, at 14.

³² *Id.* at 18.

³³ *Id.*

³⁴ Stout, *supra* note 6, at 1–2 (2012).

³⁵ *Id.* at 1.

³⁶ *Id.*

The focus of business and law schools in regard to the purpose of corporations has drastically changed over the last several decades.³⁷ Business and law schools now instruct students that maximizing shareholder wealth is a fundamental principle of corporations and that key decision makers and legal advisors should follow this tenet.³⁸ This instruction has had a tremendous impact on the corporate environment as maximizing shareholder wealth has become a standard principle that informs people making business and legal decisions while advising corporations and their key decision makers.³⁹

III. BENEFIT CORPORATIONS MAKE KEY DECISION MAKERS AT TRADITIONAL CORPORATIONS MORE AVERSE TO APPROVING CSR ACTIVITY

Part II illustrates what business and law students have been taught over the last several decades—maximizing shareholder wealth is the paramount goal of traditional corporations, and that this mantra has become a foundational corporate doctrine. This section argues that because business people already view corporate decisions from a lens of maximizing shareholder wealth, creating new structures like benefit corporations that authorize socially responsible actions and a viewpoint towards other stakeholders will make legal counsel, directors, and other key decision makers in traditional corporations even more averse to considering all stakeholders and taking socially responsible actions. This distinction reinforces the principle that traditional corporations should maximize shareholder wealth.

With the advent and proliferation of benefit corporations, the specific statutory language that grants the ability for organizations to form as benefit corporations and the repeated mantra by journalists, scholars, and businesspeople of benefit corporations as corporations that “do good,” it appears that if a corporation wants to engage in socially

³⁷ See West, *supra* note 4, at 1–2.

³⁸ *Id.* at 17–18; see Denning, *supra* note 12.

³⁹ See West, *supra* note 4, at 1, 17–18.

responsible actions, the corporation must first reorganize as a benefit corporation.⁴⁰

Many states have passed statutes that allow for the formation of benefit corporations.⁴¹ Some state statutes allowing for the formation of benefit corporations require the name of all benefit corporations to include the term “benefit corporation” or a similar variation.⁴² This name requirement provides immediate differentiation between benefit corporations and traditional corporations, which allows consumers and the public to easily distinguish corporations that are considering goals outside of maximizing shareholder wealth. This differentiation likely impacts the mindset of key corporate decision makers and advisors by reaffirming the proper goal of traditional corporations—maximizing shareholder wealth, and benefit corporations—considering action that benefits society.

As benefit corporations have gained popularity, and states have enacted statutes allowing for them, there has been an inundation of published works that discuss benefit corporations, including the purpose of this new entity type. Newspapers, magazines, and online articles, as well as scholarly works with titles like “With a Public Benefit Corporation, Profit and Good Karma Can Coexist[.]” “A Benefit Corporation Can Have a Positive Impact on the World -- and Still Make a Profit[.]” “Public benefit corporations: A new option for Minnesota companies that do good[.]” “The Benefit Corporation: A Tool For Building A Sustainable Brand[.]” and “Creating a class of ‘do good’ companies” make it clear that many mainstream business publications view benefit corporations as distinct from traditional corporations since benefit corporations can “do

⁴⁰ See MD. CODE ANN., CORPS. & ASS'NS § 1-502(a)(2); Gene Bulmash, *A Benefit Corporation Can Have a Positive Impact on the World*, ENTREPRENEUR MAGAZINE (Nov. 2, 2015), <https://www.entrepreneur.com/article/252259>.

⁴¹ Ben Schiller, *Should Your Company Be A Benefit Corporation, A B Corp, Or What?*, FAST COMPANY (Mar. 27, 2017), <https://www.fastcompany.com/3069192/should-my-company-be-a-benefit-corporation-a-b-corp-or-what>.

⁴² See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 1-502(a)(2).

good.”⁴³ These publications also likely influence the overall mindset of key corporation decision makers and advisors by increasing the apparent differentiation between these two entities. For example, when stating why Warby Parker eschewed the traditional corporate form, one of Warby Parker’s cofounders, Neil Blumenthal, stated “[w]e wanted to build a business that could make profits. But we also wanted to build a business that did good in the world.”⁴⁴

States’ statutory language requiring differentiation in the name of the corporation along with business publications and scholarly articles declaring that benefit corporations are for corporations that “do good” have the combined effect of further reinforcing the principle that traditional corporations must always maximize shareholder wealth. Essentially, among for-profit companies, benefit corporations likely create a binary view for decision makers—traditional corporations exist to maximize shareholder wealth and prohibit any action that does not do so, including socially responsible actions; benefit corporations are the proper structure for corporations that want to engage in socially responsible actions.⁴⁵ This reinforces the mantra that traditional corporations *must* attempt to always maximize shareholder wealth because if a traditional corporation

⁴³Tim Howes, *With a Public Benefit Corporation, Profit and Good Karma Can Coexist*, ENTREPRENEUR MAGAZINE (Dec. 11, 2015), <https://www.entrepreneur.com/article/253059#>; Gene Bulmash, *A Benefit Corporation Can Have a Positive Impact on the World -- and Still Make a Profit*, ENTREPRENEUR MAGAZINE (Nov. 2, 2015), <https://www.entrepreneur.com/article/252259>; Sarah Duniway & Julia Offenhauser, *Public benefit corporations: A new option for Minnesota companies that do good*, THE STAR TRIBUNE (Feb. 6, 2015), www.startribune.com/public-benefit-corporations-a-new-option-for-minnesota-companies-that-do-good/291104881/; Jen Friedman, *The Benefit Corporation: A Tool For Building A Sustainable Brand*, CMO BY ADOBE (April 22, 2015), <http://www.cmo.com/opinion/articles/2015/4/20/the-benefit-corporation-a-tool-for-building-a-sustainable-brand.html>; Jena McGregor, *Creating a class of ‘do good’ companies*, WASH. POST (Sept. 20, 2013), <https://www.washingtonpost.com/news/2013/09/20/creating-a-class-of-do-good-companies/?c507522e8003>.

⁴⁴ James Surowiecki, *Companies with Benefits*, THE NEW YORKER (Aug. 4, 2014), <https://www.newyorker.com/magazine/2014/08/04/companies-benefits>.

⁴⁵ McGregor, *supra* note 44; See West, *supra* note 4, at 1, 2, 5, 10–12, 14 (2012).

wanted to engage in actions like considering the environment or providing a livable wage, the mindset is that these are actions that should be taken by a benefit corporation, not a traditional corporation.⁴⁶

Key decision makers at traditional corporations already must consider the potential legal implications of engaging in corporate social responsibility activity because of the unclear legality of the doctrine of maximizing shareholder wealth for corporations.⁴⁷ *eBay* and other similar cases likely provide some concern for advisors and decision makers in traditional corporations when those corporations decide to engage in socially responsible activities that could be construed as not maximizing shareholder wealth.⁴⁸ As states continue to adopt benefit corporation statutes and grow in popularity, decision makers at traditional corporations will likely become increasingly concerned about advising a corporation to engage in any behavior that could be interpreted as not maximizing shareholder wealth.⁴⁹ This is because regardless of the actual legal implications of traditional corporations and benefit corporations, from a business and societal standpoint, it appears as though traditional corporations should not engage in any behavior that does not maximize shareholder wealth, as traditional corporations are not the proper entity for such actions or considerations.⁵⁰

If traditional corporations severely limit socially responsible behavior, this could dramatically reduce the positive impact that corporations have and would likely curb any further growth in socially responsible behavior. For example, many traditional corporations currently use the buy one, give one model made popular by TOM's Shoes, Inc., in which TOM's gives away a pair of shoes to someone who could not oth-

⁴⁶ See West, *supra* note 4, at 1, 2, 10–12.

⁴⁷ Johnson, *supra* note 3, at 405, 439–40, 444–451 (2013); Chu, *supra* note 3, at 155, 163–181 (2012).

⁴⁸ *Id.*

⁴⁹ See West, *supra* note 4, at 1, 2, 10–12.

⁵⁰ See *id.*

erwise afford them.⁵¹ However, as benefit corporations become more prevalent, and if legal questions still remain with respect to requiring a traditional corporation to always maximize shareholder wealth, corporate decision makers will likely become more concerned with non-profit maximizing behavior, which will result in less corporations “doing good.”

IV. CONCLUSION

The specific requirements of state statutes allowing for benefit corporations and the view of the purpose of benefit corporations espoused by business and scholarly publications, combined with the education received in business and law schools reinforces the idea that traditional corporations exist only to maximize shareholder wealth.⁵² This reinforcement, coupled with the questions from case law surrounding whether traditional corporations must always maximize shareholder wealth, will likely lead to a decrease in traditional corporations engaging in socially responsible behavior.⁵³

⁵¹ John Converse Townsend, *A Better Way To 'Buy One, Give One'*, FORBES (Oct. 8, 2014), <https://www.forbes.com/sites/ashoka/2014/10/08/a-better-way-to-buy-one-give-one/#39cece7a485e>.

⁵² See MD. CODE ANN., CORPS. & ASS'NS § 1-502(a)(2); Schiller, *supra* note 40.

⁵³ Johnson, *supra* note 3, at 405, 439–40, 444–451 (2013).