Направление «Юриспруденция»

Профиль: «Корпоративный юрист» **КОД - 2100**

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1) Прочитайте статью*, сделайте ее критический анализ и напишите эссе на русском языке.

*A. Gold. The Entrepreneurial Business Judgment Rule// *in Forthcoming, The Handbook on Law and Entrepreneurship/ edited by D. Gordon Smith, Christine Hurt & Brian Broughman. Cambridge University Press, 2020/ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458647*

I. Introduction

The business judgment rule can be justified on multiple grounds, ranging from concerns with hindsight bias, to doubts about judicial expertise, to worries about excessive director caution (and this is an incomplete list). We can also understand this rule as a mechanism to facilitate entrepreneurial action. In part, this is a product of the normal operation of the rule, with its high level of judicial deference. It is also a consequence of the rule's limited exceptions, and the courts' reluctance in adding new ones. I will focus in particular on the rejection of external benchmarks for measuring the reasonableness of a business judgment.

The classic concerns about courts using their own, subjective judgment to review business decisions could be mitigated by the use of objective benchmarks. Courts might use such benchmarks – for example, the riskiness of a business decision, or the divergence between that decision and the customs in an industry – as a means to assess business decisions without imposing the court's subjective judgment on their substance. In doing so, courts need not be vulnerable to hindsight bias, nor would they have to risk substituting the judge's perhaps questionable expertise for the board's expertise. Yet these paths are not taken. And the avoidance of such benchmarks is a way of opening up space for innovation.[1]

[1] Before proceeding further, it may help to first think about what we mean by innovations. For example, entrepreneurship may implicate innovations in both a strong sense and a weak sense. *See* Darian Ibrahim and D. Gordon Smith, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1541-43 (2013). We may be looking at innovations that bring about creative destruction in Joseph Schumpeter's sense, *see id*. at 1541-42 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (Harper & Brothers 3d ed. 1950)(1942)), or we may instead be looking at more limited changes, such as placement of a restaurant "on a different corner". *See id*. at 1542 (quoting SCOTT SHANE, A GENERAL THEORY OF ENTREPRENEURSHIP: THE INDIVIDUAL-OPPORTUNITY NEXUS 8 (2003)). Likewise, there are debates whether entrepreneurial opportunities are created or discovered. *See id*. at 1542-45 (discussing these perspectives). And, for some, there may be a distinction between innovations from start-ups and innovations from established businesses. Wherever one falls on these definitional debates, the arguments developed below should play out in similar fashion. Accordingly, I will leave these definitional questions open for present purposes.

Part II will begin with an analysis of the business judgment rule and its relationship to innovation. This Part will focus in particular on the severe uncertainty that afflicts institutional comparisons in corporate law settings. As will be developed, that uncertainty provides a justification for the business judgment rule that has particular importance in entrepreneurial settings. Part III will consider whether there is nevertheless room for additional exceptions to the business judgment rule. This Part will assess three potential benchmarks that could offer exceptions: high levels of risk; industry standards; and shareholder preferences. I will argue that each of these benchmarks is poorly suited for cases involving innovations, as innovative business decisions will frequently involve high risk, deviation from industry custom, and shareholder dissent. By avoiding the use of such exceptions, corporate law is thus able to facilitate entrepreneurial action. Part IV will then conclude.

II. Innovation and the Business Judgment Rule

The business judgment rule is a mainstay of corporate law, and while it has evolved to some degree over the years, its broad contours are well-recognized.[2] As described by the Delaware Supreme Court, it is: "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[3] In its standard applications, the rule is strongly protective of a board's business decisions.

The justifications for the business judgment rule vary, and it is safe to say that this legal doctrine is overdetermined. Justifications for the rule include, among others: a concern that judges lack business expertise;[4] difficulties with hindsight bias;[5] the need to retain a proper balance between authority and accountability;[6] accommodation of distinct understandings of loyalty;[7] effects on incentives for director risk-taking;[8] and problems of severe judicial uncertainty.[9] Each of these bases is plausible, and in combination they make a very powerful case in favor of the rule.

[2] For helpful discussion of the business judgment rule's evolution, see D. Gordon Smith, *The Modern Business Judgment Rule*, *in* RESEARCH HANDBOOK ON MERGERS & ACQUISITIONS (Claire ~~A. Hill & Steven Davidoff Solomon~~, eds.) (Elgar Publishing, 2016).

[3] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[4] *See*, *e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (refusing to intervene in a decision regarding the expansion of a business, and noting "[t]he judges are not business experts").

[5] Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 621 (1998). *Cf.* Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 758 (2000) (suggesting that the business judgment rule reflects doubts about the quality of judicial decisionmaking).

[6] Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV (2004).

[7] *Accommodating Loyalty*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW (Paul B. Miller & Andrew S. Gold, eds.) (Oxford University Press, 2016).

[8] William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 455 (2002).

[9] Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007).

Yet there is another justification worth considering. Courts also regularly tie the business judgment rule to the importance of innovations and entrepreneurship. A good example is found in Judge Winter's opinion in *Joy v. North*, a classic business judgment rule case. As the Court argued in support of the rule: "The entrepreneur's function is to encounter risks and to confront uncertainty, and a reasoned decision at the time made may seem a wild hunch viewed years later against a background of perfect knowledge."[10] While Joy v. North is justly famous for its analysis of the business judgment rule more generally, and its supportive assessment of shareholder diversification, the entrepreneurship component merits further discussion.[11]

Not all businesses involve high levels of risk or uncertainty, but in the case of entrepreneurship both are commonplace features of board decision making.[12] Risk and uncertainty are not identical problems, however. With risk, we are concerned with probabilities of outcomes.[13] The chances of failure or subpar results may be very high when we confront innovative business plans or products, but sometimes the associated probabilities can still be known. Uncertainty involves something different: in this setting, we are no longer able to assess probabilities adequately, although in the less extreme cases probabilities will occupy a band of likely percentages.[14] In the more extreme cases, probabilities may simply be unknown.[15]

The risk and uncertainty that haunt entrepreneurial business decisions are inevitably going to produce director mistakes. Large numbers of start-ups fail for this reason. But the same features that produce director error are also an invitation for judicial error, particularly if we take seriously the hindsight bias concern. Director decisions that were reasonable when made are frequently going to look very foolish after the fact, even if they were a product of a careful board, acting in good faith. This might be viewed as a sufficient argument in favor of the business judgment rule, in light of entrepreneurial interests, but we should pause before adopting that view. Problems of uncertainty are actually more profound in this case.

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[10] 692 F.2d 880, 886 (2d Cir. 1982).

[11] Recent work has drawn a connection between the business judgment rule and entrepreneurship concerns. *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 598-99 (2016); Charles R.T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 776-77 (2006).

[12] I am grateful to Gordon Smith for emphasizing the role of uncertainty in entrepreneurial decision making as it relates to the business judgment rule.

[13] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 171 (2006) ("Decisions under risk refer to decisions in which the decisionmaker knows both the payoffs of various outcomes and the probabilities attached to those outcomes.").

[14] *See id*. ("Uncertainty, by contrast, denotes the class of situations in which the decisionmaker knows the payoffs associated with various outcomes but not the probabilities that the possible outcomes will come to pass."). For helpful discussion of uncertainty in which probabilities occupy a band of likely percentages, see Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 885 (2006) (giving an example of such a case). For the classic discussion of risk versus uncertainty, see FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921).

[15] *See* JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 10-11(Cambridge: Cambridge University Press, 1989) ("Uncertainty here means radical ignorance, the lack of ability to assign numerical probabilities to the possible outcomes associated with the various options."). *See also* Gold, *supra* note 9, at 455

It is not enough to conclude that courts are bad at assessing entrepreneurial business decisions ex post. The problem that courts need to figure out, or part of it,[16] is not just whether they will do a good job or a poor job in isolation, but which institution is best in relation to the other options. Ultimately, when we assess the business judgment rule in the entrepreneurial setting, we need to confront the same challenge that the business judgment rule presents in other settings: a comparative institutional analysis.[17]

In this context, a comparative institutional analysis turns out to be a very intricate puzzle. We may, in fact, be layering one area of severe uncertainty (the institutional comparison of courts and directors) on top of another area of severe uncertainty (the outcomes the entrepreneur faces in making a given business decision).[18] As I have noted in prior work on the business judgment rule:

> When courts review other decisionmaking institutions, multiple variables are at issue, and they can be difficult to measure accurately. Not only probabilities, but the values assigned to outcomes, may be unavailable. Furthermore, the relevant institutional actors are not static—a change in one institution's authority can readily alter the behavior of another institution.[19]

Unsurprisingly, adequate empirical data are lacking. [20] The comparative institutional analysis here is an incredibly difficult one, and it may not have answers that are realistically available to judges. In these cases of comparative institutional analysis, the problem may actually be "trans-scientific": it may not be a problem that can be resolved within a useful time frame, if ever.[21]

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16 *Cf.* Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 993 (1997) (contending that "[c]ourts, as they presently operate, are not in the business of 'choosing institutions'; they decide cases."). If one views the problem purely in terms of pre-existing allocations of institutional authority rather than in terms of policy, the problem may turn out to raise a distinct set of issues. I am assessing the policy side for purposes of this paper, on the assumption that this has bearing on how courts will assess the scope of the business judgment rule if the possibility of revision arises.

17 On this type of inquiry, see NEAL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

18 *Cf.* Goshen & Hamdani, *supra* note 11, at 599 ("The asymmetric information and differences of opinion between the controller-entrepreneur and the court are more severe than between investors and controller-entrepreneurs because courts require verifiable facts as the basis for their rulings.")

19 *See* Gold, *supra* note 9, at 455. Cf. ELSTER, supra note 15, at 14 ("Uncertainty and strategic interaction, taken separately, create problems for rational belief formation. When both are present, they wreak havoc.").

20 *Cf.* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 8 n.16 (2005) (indicating that the debate over the proper balance of board authority and accountability "depends on empirical evidence that currently does not exist"); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1201 (2002) ("Whether the social losses from shareholder primacy outweigh the social losses from allowing greater director discretion is an extraordinarily complex question. Moreover, the answer is likely to vary from firm to firm and from one historical period to another.").

21.*See* VERMEULE, *supra* note 13, at 158 (describing trans-scientific problems as empirical, yet "unresolvable at acceptable cost within any reasonable time frame.").

As Adrian Vermeule's work indicates, there are ways to make institutional choices under difficult conditions like these. [22] But such decisions must be made in light of what is reasonable, and not based on what is rationally required.[23] Strategies for dealing with these contexts include a range of options, including the principle of insufficient reason, the maximin criterion, or even just "picking" among alternatives. Just picking is not a very appealing approach for courts to adopt – and many of the other common techniques are similarly uninspiring – but the principle of insufficient reason and the maximin criterion have purchase, and I will focus on these two approaches.

Under the principle of insufficient reason, the various unknowable outcomes are dropped from the picture, and decisions are made based on the probabilities that are accessible to us.[24] Under the maximin approach, decisions are made so as to provide the least bad worst-case scenario.[25] Given the high decision costs associated with corporate litigation, a strong argument can be made that the principle of insufficient reason and the maximin criterion support judicial deference regarding ordinary business decisions, at least in the ordinary case.[26] Significantly, while a proper comparison of the costs and benefits of each institutional choice is beyond the reach of judges (or anyone else), the decision costs component is manageable.[27] This same argument applies when we are dealing with judicial review of entrepreneurial action.

Admittedly, the business judgment rule has a handful of exceptions, most notably an exception for self-dealing cases. It might be thought that these exceptions undermine the above arguments: if comparative institutional analysis is so difficult under these conditions of uncertainty, then why is an exception to the rule appropriate for self-dealing cases? The answer is to recognize that not all uncertainty is the same. While we may not have precise probabilities at our fingertips, there is a prevailing sense that self-dealing cases invite opportunism.[28] Yes, it would lower decision costs further if the business judgment rule applied even in these contexts, but in the ordinary case it seems doubtful that these lowered costs would be worth it. Nor, for that matter, should we just be aiming to lower decision costs to the bare minimum possible.

[22] *See id*. at 168-81 (describing techniques courts might use to address severe empirical uncertainty in the interpretive context).

[23] *See* VERMEULE, *supra* note 13, at 176 (describing how decisionmakers under these conditions "can aspire to nothing more than a rough sort of reasonableness."). *See also id*. at 182 (suggesting, in the interpretive setting, that "[c]oncretely, the choices are that judges use some repertoire of weakly reasonable techniques, on the one hand, or nothing at all, on the other."); ELSTER, *supra* note 15, at 135 (describing a decision that "although not ideally rational from the perspective of an omniscient observer, will at least be as rational as can be expected").

[24] *See* DAVID M. KREPS, NOTES ON THE THEORY OF CHOICE 146 (1988) (describing the principle of insufficient reason, "which says that if I have no reason to suspect that one outcome is more likely than another, then by reasons of symmetry the outcomes are equally likely, and equally likely probabilities may be ascribed to them.").

[25] *See* VERMEULE, *supra* note 13, at 176 (describing maximin as "choose the option whose worst possible outcome is better than the worst possible outcomes of the alternatives").

[26] I develop this argument in detail at Gold, *supra* note 9, at 467-70. This account draws on a similar argument that Adrian Vermeule has applied to statutory interpretation. *See generally* VERMEULE, *supra* note 13.

[27] *See* Gold, *supra* note 9, at 469 ("The decision costs of corporate litigation should be well-known to the judiciary. As far as orders of importance, these costs are hardly trivial, and could plausibly outweigh the benefits offered by a more involved judicial review of business judgments."). For analysis of maximin concerns if the business judgment rule is modified, *see id*. at 469-70.

[28] *Cf. id*. at 471 ("There are some empirical hunches that observers can comfortably follow, despite the difficulties in directly testing their systemic effects. To use Vermeule's example: jurors should not be authorized to hear cases involving close relatives.") (citing VERMEULE, *supra* note 13, at 162-63).

Were that the aim, judicial decisions might be made by a coin flip.[29] An exception for self-dealing is reasonable, given what we know of human nature.[30]

Even so, the example of self-dealing could suggest another view. As noted, where self-dealing is involved, it is less necessary to worry about the difficulties posed by trans-scientific problems, because the apparent likelihood that directors will be making a poor decision in these cases is sufficiently high to counterbalance that worry. This argument, it might be claimed, gives us a reason to consider adding other exceptions to the business judgment rule. Maybe there are additional settings that should set off judicial alarm bells, or at least provide courts with confidence that they are the appropriate decision making institution.

Granted, we should be careful to carve out exceptions to the business judgment rule that have relatively clear and predictable boundaries, so that the temptation to intervene ex post does not swallow up the protections of the rule. Delaware courts have been wise to avoid the sliding scale approach to deference that some commentators suggest.[31] Equity needs to work as a safety valve here, and sufficiently contextualized exceptions to the business judgment rule could jeopardize that feature.[32] But perhaps courts could find benchmarks that have relatively fixed boundaries, and relatively predictable settings for their application. In that case, we might be open to a more circumscribed business judgment rule – even when dealing with entrepreneurs.[33]

Indeed, the business judgment rule could operate like a catalog, by providing a list of given exceptions and an invitation for courts to find analogous exceptions when appropriate cases arise.[34] By way of comparison, the fiduciary duty of good faith has been elaborated through a catalog-like structure. Several accepted categories of bad faith conduct are currently recognized as examples of bad faith, but courts retain the option of recognizing new categories where appropriate.[35] Yet this is not how the business judgment has functioned in practice. While the exceptions to the business judgment rule are not perfectly static, courts almost never add new exceptions to the rule. Not only have the Delaware courts avoided the use of benchmarks for the assessment of director business decisions, they have shown no sign that this is going to change in the future. And this avoidance, I would argue, is a very good thing for entrepreneurial action.

[29] For discussion, and rejection, of judicial coin flips, see Gold, *supra* note 9, at 471; VERMEULE, *supra* note 13, at 196. For a less skeptical view on coin flips, see ELSTER, supra note 15, at 123-74

[30] This is a claim about the ordinary case. It may well be that entrepreneurial settings will provide business reasons to get around that exception, particularly in the context of start-up firms. The availability of the LLC form, with its substantial freedom for waivers of fiduciary duties, offers a response to this concern.

[31] *See*, *e.g.*, Claire Hill & Brett McDonnell, Disney, *Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 855-56 (2007). For additional concerns about a sliding scale approach, see Gold, *supra* note 9, at 468-69.

[32] On equity as a safety valve to address opportunism, see Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism*, available at: https://ssrn.com/abstract=2617413. For an extension of this anti-opportunism account to fiduciary law, see Henry E. Smith, *Why Fiduciary Law is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261 (Andrew S. Gold & Paul B. Miller, eds.) (Oxford: Oxford University Press, 2014). As Smith notes, the exceptions to the business judgment rule are versions of the equitable proxies for opportunism. *See id*. at 274 n.61

[33] Bracketing the potential difficulties in defining entrepreneur status.

[34] For elaboration on the idea of catalogs (and their differences from ordinary rules and standards), see Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165 (2015).

[35] *See* In re The Walt Disney Co. Deriv. Litig., 906 A2d 27, 67 (Del. 2006) (providing a list of examples of bad faith, and then concluding that "there may well be other examples of bad faith yet to be proven or alleged, but these three are the most salient.") (*quoting* In re The Walt Disney Co. Deriv. Litig., 907 A.2d 693, 756 (Del.Ch. 2005)).

There are several potential exceptions that could allow courts to review business decisions without requiring courts to impose their own subjective viewpoint on the merits of a business judgment. In each case, these are settings in which courts might adopt external benchmarks. Courts might adopt objective standards for risk, or they might follow industry custom, or they might look to shareholder preferences for guidance. Moreover, the benchmarks at issue cross a plausibility threshold – they are not obviously mistaken measures to apply. Still, each of these benchmarks would pose threats to successful innovation and entrepreneurship. Part of what makes the business judgment rule a powerful support for entrepreneurial action is the courts' unwillingness to adopt such benchmarks.

III. Of Benchmarks and the Business Judgment Rule

A. Entrepreneurship and Risk

First, consider the business judgment rule's application to high-risk decisions. The rule famously protects conduct that is "foolishly risky! stupidly risky! egregiously risky!", to borrow language from Chancellor Allen.[36] But why not draw the line at egregiously risky? We might worry that looking to a decision's riskiness would raise a slippery slope problem – courts might end up imposing their ex post views, using their sense of risk as a proxy for their sense that a business decision was foolish.

Yet slippery slopes are not inevitable. Courts might develop a doctrine that only allows for review when especially great risks were taken, risks that fall far outside the norm in a way that is recognizable ex ante.[37]

Innovation does not fit well with this template. Truly innovative conduct can involve a very high level of risk or uncertainty – and it will often involve substantially more of each than non-innovative alternatives. Were egregiously risky decisions subject to review, much innovation would be subject to doubts about ex post second-guessing in the courts. A robust business judgment rule shelters these innovations, should the risks ultimately result in losses.

In ordinary business settings, proponents of a risk-related exception to the business judgment rule might question why a company should be taking on truly egregious levels of risk. In cases of uncertainty, they might ask whether that uncertainty goes too far. Even if the exact line is somewhat hard to draw, one might think that when risk-levels are high enough, at some point a justification becomes doubtful.[38] A similar

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[36] *See* Gagliardi v. Trifoods International Inc., 683 A.2d 1049, 1052 (Del.Ch. 1996) ("If, however, corporate directors were to be found liable for a corporate loss from a risky project on the ground that the investment was too risky (foolishly risky! stupidly risky! egregiously risky!—you supply the adverb), their liability would be joint and several for the whole loss (with I suppose a right of contribution)."). *But cf.* David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-taking and the Business Judgment Rule*, 6 BERKELEY BUS. L.J. 216 (2009).

[37] Lest this sound like a strange role for courts, note the prudent investor rule in trust law. Courts have long experience in assessing risk-taking by fiduciaries

[38] A distinct risk-related exception might involve the "no-win" context of high risks that do not correspond to a market rate of return. For example, consider the reading of *Litwin v. Allen*, 25 N.Y.S.2d 667 (N.Y. Sup. Ct. 1940), developed in Richard A. Booth, *A Minimalist Approach to Corporation Law*, 34 GA. L. REV. 431, 441 (2000).

point applies for severe uncertainty, or uncertainty that could implicate very large potential losses. And, after all, truly excessive spending can implicate the doctrine of corporate waste, despite the comparable difficulty of line-drawing in that context. Arguably, an analogous point could apply to risk (or uncertainty), when levels are thoroughly beyond the pale.

But how do we reach that conclusion in the entrepreneurial setting? While entrepreneurs do not always take extremely high risks, they frequently enough are willing to bet the farm on a promising venture. Innovators may risk their entire fortune on a new idea when they are sufficiently excited about its potential, and have sufficient faith in their belief that it could pay off. Corresponding to high risk and uncertainty (often) is a high potential return. High risks can result in devastating losses for the entrepreneur, but on those occasions that the risks do pay off, the resulting innovations can be well worth it. Moreover, in many such cases, if the entrepreneur isn't willing to take great risks or face great uncertainty over a new idea, that new idea will never see the light of day.

The courts do recognize a context in which risk-taking implicates an exception to the business judgment rule, and that is when risk-taking involves bad faith. Consider Chancellor Chandler's analysis in the *Disney* litigation. There, the court described conduct that went beyond gross negligence:

> These facts, if true, do more than portray directors who, in a negligent or grossly negligent manner, merely failed to inform themselves or to deliberate adequately about an issue of material importance to their corporation. Instead, the facts alleged in the new complaint suggest that the defendant directors *consciously and intentionally disregarded their responsibilities,* adopting a "we don't care about the risks" attitude concerning a material corporate decision.[39]

This is a way that risk-taking can bring us outside of the business judgment rule.

But we need to be very careful to avoid confusing this situation with judicial second-guessing of the board's choice to take risks. A board that considers high risks and concludes they are worth it is not engaging in a "we don't care about the risks" attitude. Nor, for that matter, is a board that confronts uncertainty and decides that it makes sense to accept that uncertainty. Indeed, entrepreneurs must confront uncertainty with regularity, and this doesn't tell us their hearts aren't in the right place. Someone who decides that risks don't matter is not taking seriously the best interests of the corporation; someone who decides that risks or uncertainties are worth it is taking those interests seriously, or at least can be. The mere choice to accept high risks or even severe uncertainty does not mean that a director is consciously disregarding her responsibilities.[40]

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[39] *In re The Walt Disney Co. Deriv. Litig*., 825 A.2d 275, 289 (Del.Ch. 2003).

[40] Likewise, we should recognize the difference between risk-taking and risk-management – although the two may readily overlap. For helpful discussion, see Christine Hurt, *The Duty to Manage Risk*, 39 J. CORP. L. 253 (2014); Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009).

The specter of uncertainty looms especially large here. David Rosenberg has argued that "the obligation of good faith requires that directors not make decisions that they know are 'too risky' (in that the potential payoff is not justified by the likelihood of failure) or where they know that they are ill-informed about the nature of the risks that they are authorizing."[41] But what counts as being knowingly ill-informed about risks? And how can this be reviewed reliably after the fact? Given the degree of uncertainty that entrepreneurs face, it does not take much to imagine cases in which a failed (yet good faith) business decision will be describable in terms of being uninformed about the risks. Directors are hardly unaware of this uncertainty when they make their decisions. And, in such cases, an entrepreneur's basis for her business decisions may be hard to communicate. As Zohar Goshen and Assaf Hamdani note, "[t]he entrepreneur's idiosyncratic vision will often include elements that outsiders, including the firm's minority shareholders, cannot observe or verify."[42] All she may be able to offer is "her strong conviction concerning the value of her idea." [43] Directors convinced of an entrepreneur's vision will have an equally difficult time communicating what convinced them, and certainly so in cases where risks are hard to quantify. Judicial review of risk-taking or of choices made under conditions of uncertainty is a recipe for less entrepreneurship.

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[41] *See* Rosenberg, *supra* note 36, at 219.
[42] *See* Goshen & Hamdani, *supra* note 11, at 579.
[43] *See id*. It should also be noted that shareholders may have the ability to sort themselves according to a firm's appetite for risk. *See* Hurt, *supra* note 40, at 290 (suggesting that "[s]hareholders sort themselves into low- or high-risk forms or industries."). Of course, there is the added complexity that risk levels may change midstream. *See id*. (noting this concern).

B. Entrepreneurship and Industry Custom

Let's suppose instead that our primary concern is with judicial expertise. There is another possibility to consider in this setting. Notice that in some fields, conduct is characteristically reviewed in light of the standards adopted by participants in the industry.[44] Medical malpractice litigation regularly raises concerns about standard practices in the medical field.[45] In contrast, the business judgment rule quite clearly allows directors to pursue business plans that break dramatically with the plans adopted by their peers. For example, in *Shlensky v. Wrigley*,[46] the court did not hesitate in applying the business judgment rule to the question whether the Chicago Cubs should play night games – irrespective of the quite different approaches among other professional baseball teams. The rather different practices of the Chicago White Sox were irrelevant.

Perhaps there are some cases (cases that are more clear cut than night baseball games) in which the decisions of rival businesses can tell us a great deal about the merits of a business decision. It may not always be easy to differentiate these cases from their fellows, but even if this insight carries weight in limited contexts, it does not work well for innovations. It is a commonplace feature of innovation cases that the entrepreneurial business is doing something different from its rivals, assuming that rivals in the area even exist. Ex post review based on industry custom would cast a cloud over novel choices. Innovative decisions are protected by a business judgment rule that rejects exceptions for companies that don't follow the herd.

It might be countered that innovations still successfully arise in non-corporate settings (such as medicine), despite the absence of a business judgment rule. For example, doctors innovate with regularity, yet they are generally assessed according to the standards of their industry. The merits of this comparison are difficult to determine, given that we may wish to reward innovation to a different degree in different settings (or at least be less willing to trade off various associated costs against the benefits of innovation). Let's assume, however, that our views on facilitating innovation are identical across these settings; in that case, variations in the level of judicial deference may at least *prima facie* raise questions concerning the need for a business judgment rule. But even with this starting point, there is a problem with the argument.

[44] Notice also that the gap between judicial expertise and the expertise of the regulated parties may be similarly large. *See* Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 307 (1994) (suggesting that an alleged lack of judicial expertise does not distinguish business judgment cases from other contexts, such as medical practice claims, which apply negligence standards).

[45] For helpful discussion of the issues, see Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice vs. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587 (1994).

[46] 237 N.E.2d 776 (Ill.App. 1968).

Assuming these different legal backdrops are analogous, we still should not assume that this is an argument that cuts *against* the business judgment rule: this may, instead, be an argument for extending a business judgment rule-like deference to other legal contexts.

For comparison, consider a recent argument by Gideon Parchomovsky and Alex Stein. As they suggest, in the tort law setting, “custom constitutes the benchmark against which defendants’ conduct is evaluated.”[47] The manner varies with tort law settings – for example, negligence law, products liability, and medical malpractice – but in each setting custom plays a role in the determination of what should count as appropriate precautions against harm. In the negligence law arena, they argue that reliance on custom may substantially chill entrepreneurial action. [48] The same concern arises in medical malpractice cases. As it is the review of medical treatments which is classically compared to the review of business judgments, I will focus on medical malpractice law here.

Although medical malpractice law is somewhat different from other areas in tort law, the broader pattern of custom’s importance holds up. Parchomovsky and Stein note that for medical malpractice law, custom provides “a default rule around which parties can contract.”[49] This contractual freedom might cause us to think that the risk of chilling innovations will be somewhat limited. Yet they suggest that custom will likely be difficult to contract around in a way that avoids a chilling effect. The signaling effect of labeling a treatment as “experimental”, for example, may pose sizable ex ante and ex post costs for medical innovators.[50] Some defaults are sticky defaults, and this appears to be one of them.

There are also two contexts in which tort law poses concerns. The first is the ex post context, where risks of liability may result in higher pricing for innovations. Given the effects of this higher pricing on the market, the consequence is that innovators may abandon their innovation or undersupply it. As Parchomovsky and Stein argue: “the use of custom in the torts system increases the cost of commercializing innovations after their development.”[51] The second is the ex ante context, where risks of liability may be high enough that they prevent the development of new technologies from the start. In that case, the technology or service never comes into existence. Furthermore, “since innovation in many technological areas is cumulative, with new inventions building on preexisting ones, the dynamic efficiency loss occasioned by the custom rules may be far greater than it seems.”[52]

Unfortunately, it is not clear how to quantify these effects. Much of this analysis is necessarily conjecture – it is hard to know what innovations would have occurred if our tort law looked different from its current format. If the chilling effect of tort law in the medical malpractice setting is sizable, however, then reliance on customary approaches may not be something that corporate law should imitate. To the contrary, the field that (perhaps) should be borrowing legal templates is tort law, which may look to corporate law as an exemplar. Comparisons between corporate law and other fields such as tort law are at best indeterminate in their significance, but it is evident that a push toward industry custom can chill innovation. In short, if we want to facilitate entrepreneurship, customary behavior is not a promising candidate for an exception to the business judgment rule.

[47] *See* Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 286 (2006).
[48] *See id*. at 291-98 (discussing the significance of custom for negligence law).
[49] *See id*. at 302.
[50] *See id*. at 303 (discussing these costs).
[51] *See id*. at 306.
[52] *See id*. at 308.

C. Entrepreneurship and Shareholder Preferences

There is also another possibility, for courts might base liability on evidence that director choices were inconsistent with known shareholder preferences. This approach would give us an objective benchmark, avoiding concerns about judicial expertise or hindsight bias; this approach might also allow shareholders to serve as a check on director opportunism. Yet this is not the approach under current law. In *In re Lear Corporation Shareholder Litigation*, then-Vice Chancellor Strine rejected this idea in very clear terms:

> Directors are not thermometers, existing to register the ever-changing sentiments of stockholders. Directors are expected to use their own business judgment to advance the interests of the corporation and its stockholders. During their term of office, directors may take good faith actions that they believe will benefit stockholders, even if they realize that the stockholders do not agree with them.[53]

While *Lear* describes a standard of conduct, its analysis has implications for standards of review as well.[54] In light of the director role, the business judgment rule does not make an exception for cases in which director choices are contrary to known shareholder preferences.

Again, innovative choices can readily differ from the choices shareholders desire. Genuine innovations will often be high-risk, they will by definition differ from what other competitors are doing, and, perhaps in part for these reasons, they can easily run counter to shareholder preferences. In some cases, shareholders are risk averse, or have a simple preference for the familiar. If so, allowing directors to pursue a different perspective from their shareholders will enable them to act in a higher risk yet more innovative fashion.[55]

Shareholder preferences may thus echo the objective standards described earlier – standards concerning excessive risk or industry custom – and in those cases deferring to shareholder preferences will have analogous effects.

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[53] 967 A.2d 640 (Del.Ch. 2008).

[54] For helpful discussion of the distinction, see Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993).

[55] This is not to say that shareholders will inevitably prefer the non-innovative option, nor is it to rule out cases in which shareholders desire innovations and boards are more risk-averse. Consider, for example, a hostile takeover case in which an acquirer has innovative plans for the business but the incumbent board would prefer to have the company pursue a pre-existing, low-risk path.

It might be argued in response that questions regarding shareholder choices get at the intended allocation of authority within the corporation, and that this is a distinctive kind of problem. These cases do not just raise policy concerns about which institution will be more likely to produce successful innovations or profitable business plans. Instead, they raise structural concerns about the party that is properly in charge, directors or shareholders. One difficulty for this response is that it is well-established that directors simply aren't agents for shareholders – it is a core feature of corporate law doctrine that loyal directors are expected to exercise their own business judgment.[56] But there is also a further difficulty: entrepreneurs may have a reasonable expectation that control over a corporation comes with the authority to advance their entrepreneurial ideas.

In many cases, entrepreneurs retain substantial control over a corporation, often through sizable shareholdings. This, in turn, is a means for the entrepreneur to pursue his or her idiosyncratic vision, however unique that vision may be. Zohar Goshen and Assaf Hamdani have recently argued that such control is effectively part of the corporate contract:

> The ownership structure reflects a contractual agreement in which minority investors do not get any say in the management of the firm in exchange for the substantial equity investment staked by the controller-entrepreneur. In other words, the business judgment was sold to the controller-entrepreneur. Thus, a suit brought to court by a minority investor asking for judicial intervention in the controller-entrepreneur's nonconflicted business decision runs contrary to the implicit contractual agreement embedded in the controlling ownership structure.[57]

In these cases, the business judgment rule is actually respecting the arrangement reached between entrepreneurs and the investors in the businesses they control.

In rejecting a shareholder preferences benchmark, the Delaware courts may facilitate entrepreneurial action, at least where the board seeks to advance an entrepreneur's vision. It is true that divides between shareholders and directors can have a variety of bases, and an entrepreneurial vision will not always be at stake when agreement breaks down. But sometimes it surely is at stake. We are again operating in an area of uncertainty, and it is hard to say what proportion of cases look this way. Yet entrepreneurs and sympathetic directors frequently do have control over corporations, and it is reasonable to expect that a business judgment rule that made exceptions for contrary shareholder preferences would interfere with their vision for the firm. By avoiding this type of benchmark, the courts make room for such entrepreneurs to innovate.

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56 Directors, in other words, have a different kind of loyalty obligation. The loyalty of agents, by contrast, is closely tied to obedience. *See* Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321 (Andrew S. Gold & Paul B. Miller, eds.) (Oxford: Oxford University Press, 2014) (discussing the connection between interpretation of a principal's instructions and the duty of loyalty). In fact, it is possible to conceptualize obedience as a particular type of loyalty. *See* SIMON KELLER, THE LIMITS OF LOYALTY vii (2007) ("If you are loyal to something, then you probably favor it, in one way or another, in your actions. You might promote its interests, treat it with respect or veneration, follow its orders, or act as its advocate."); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 559 (2015) (noting that following instructions "may be described as an element of loyalty").

57 See Goshen & Hamdani, supra note 11, at 599.

IV. Conclusion

While courts already face severe uncertainty in assessing which institution is best for making or reviewing ordinary business decisions, the problem is compounded in the setting of innovations. With ordinary business decisions, the assessment of judicial error rates versus board error rates is quite difficult, and the institutional comparison is rife with unknowns. Where innovations are at stake, it is unclear how a court could reliably judge what was ex ante plausible as opposed to ex ante foolish. Although someone who discovers the equivalent of penicillin may assess that this innovation will succeed – and there are some poorly contrived innovations that are genuinely laughable – the value of many innovations will only be apparent after they have been tested by the market. The robustness of the business judgment rule increases the odds that this testing will occur.

There is an additional way that the business judgment rule facilitates entrepreneurship, and this stems from the very limited exceptions to the rule. In the abstract, the exceptions to the business judgment rule could be more expansive without jeopardizing the rule itself. Concerns with subjective judgments and hindsight bias could easily be avoided if business decisions were weighed against objective, external benchmarks. For example, courts might look to external standards for excessive risk-taking, or they might consider industry custom for certain business decisions, or they could defer to known shareholder preferences. In each case, these are cabined exceptions that would leave the business judgment rule largely intact, and with relatively predictable applications.

Whatever the merits of such benchmarks may be in other settings, these approaches are ill-suited to entrepreneurial action. Risk-taking is characteristic of entrepreneurship, and judgment under uncertainty is commonplace. Ex post assessments for high levels of risk, or for conduct taken when the board is unsure what levels of risk they face, will inevitably deter innovations. The use of industry custom is similarly problematic – innovative business decisions are, by definition, going to be novel in some respect. Moreover, while industry custom does play a significant role for judicial review in other settings where innovation is valuable – think of medical treatments – reliance on custom may be harmful for innovation in these other settings. In the case of shareholder preferences the picture is complex, but it is not hard to envision fact patterns where shareholders will prefer less innovation if it means safer (albeit lower) returns. Whether or not such shareholder preferences are wise in a given context, judicial deference to these preferences could dramatically curtail entrepreneurial choices.

There is still a policy analysis to be made here, if we think that the benefits from facilitating entrepreneurship could be outweighed by the effects of agency costs, or other systemic harms.[58] Notice also that non-entrepreneurs benefit from the same business judgment rule doctrine that makes space for genuine entrepreneurs. Perhaps non-entrepreneurs will take very high risks for their own reasons, with unacceptably high social costs. Or, perhaps the negative consequences of failed entrepreneurship are very large in aggregate. Determining that an allowance for high risk taking will facilitate entrepreneurship is a distinct concern from determining that the resulting entrepreneurship will outweigh its costs. My focus here is just on the linkage between the business judgment rule's exceptions and the facilitation of entrepreneurship. There is reason to think that facilitating entrepreneurship in this way is worthwhile overall, but that is a different question.

[58] *But cf. id.* at 578 n.55 ("To justify the law's need to balance between facilitating the pursuit of idiosyncratic vision and curtailing the pursuit of private benefits, all we need to accept is that many entrepreneurs in many industries are motivated by the pursuit of idiosyncratic vision and some of them will be successful.").

What we should understand about the business judgment rule is that its current form provides a major support for entrepreneurial action. This is not solely because of the way that business judgment rule deference works, but also because of judicial reluctance to carve away at the rule where external benchmarks are available. So understood, the rule responds to two different levels of uncertainty: the uncertainty that entrepreneurs must face on a regular basis, and the uncertainty that courts must inevitably confront when they compare decision-making institutions. Courts can be good at producing innovations – indeed, this is how the common law evolves – but they are less well-suited for judging innovations.

2. Решите задачу.

Организация (лизингодатель) передала транспортное средство в лизинг другой организации (лизингополучателю). По договору лизинга право собственности на автомобиль переходило к лизингополучателю только после полной оплаты всех лизинговых платежей. Однако до окончания действия договора организация-лизингополучатель была признана несостоятельной (банкротом).

По мнению организации – лизингодателя, в ходе конкурсного производства были подделаны документы о выплате всех лизинговых платежей, что дало возможность зарегистрировать транспортное средство в ГИБДД на имя организации – лизингополучателя, а затем продать это транспортное средство другому юридическому лицу в порядке, предусмотренном законодательством о несостоятельности (банкротстве).

По заявлению организации – лизингодателя по факту подделки документов было возбуждено уголовное дело в отношении конкурсного управляющего, которое впоследствии было прекращено в связи с истечением двухгодичного срока давности. При этом в ходе следствия следователь передал транспортное средство как вещественное доказательство в соответствии с уголовно-процессуальным законодательством на ответственное хранение юридическому лицу – покупателю.

Однако, директор этого юридического лица, действуя от его имени, продал автомобиль гражданину, на имя которого, в конечном итоге, данное транспортное средство и было зарегистрировано в ГИБДД.

Соответственно возник вопрос о защите имущественных прав организации – лизингодателя.

Ответьте на следующие вопросы:

1) можно ли в данном случае оспорить сделку по продаже транспортного средства гражданину? Какой факт будет иметь решающее значение?

2) можно ли в данном случае истребовать транспортное средство у гражданина – последнего покупателя как из чужого незаконного владения (предъявить виндикационный иск)? Что необходимо будет доказывать?

3) можно ли в данном случае предъявить требование к юридическому лицу - хранителю о возмещении убытков в связи с утратой переданной на хранение вещи? Доказывание какого факта приобретает основное значение? Можно ли считать утраченной вещь, если владелец транспортного средства и его местонахождение известны?

4) как соотносятся перечисленные выше требования?

5) какую имущественную ответственность несет директор юридического лица, заключивший от имени юридического лица сделку по продаже находящегося на ответственном хранении транспортного средства гражданину?