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Maine's Non-Shareholder Constituency Statute

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MAINE'S NON-SHAREHOLDER CONSTITUENCY STATUTE

I. INTRODUCTION

In 1985, the Maine Legislature enacted an amendment to section 716 of the Maine Business Corporation Act which added the following paragraph to the statute:

> In discharging their duties, the directors and officers may, in considering the best interests of the corporation and of its shareholders, consider the effects of any action upon employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors.[1]

This amendment, commonly referred to as a non-shareholder constituency provision, is seen by some as affecting no great change in Maine's corporate fiduciary duty law.[2] Two significant events have occurred, however, since the passage of this amendment which support a far broader interpretation of Maine's non-shareholder constituency provision.

First, in 1987 the Maine Legislature again amended section 716 by adding the following new section:

> A director shall not be held personally liable for monetary damages for failure to discharge any duty as a director unless the director is found not to have acted honestly or in the reasonable belief that the action was in or not opposed to the best interests of the corporation *or* its shareholders.[3]

This section, which creates a statutory business judgment rule,[4] when read in conjunction with the non-shareholder constituency portion of section 716, could allow directors to consider non-share-

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1. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991).

2. JAMES B. ZIMPRITCH, MAINE CORPORATION LAW AND PRACTICE § 7.7[g] at 286 (Supp. 1991). ("In practice, this likely is declaratory of existing law, implemented by invocation of the best 'long term' interests of the corporation and its shareholders. It is not authority to *prefer* the interests of other constituencies over the interests of the corporation and its shareholders.") (footnote omitted) [hereinafter ZIMPRITCH]. Although this Comment argues that Zimpritch underestimates the effects of Maine's non-shareholder constituency statute, it should be noted that this treatise is a comprehensive and valuable source regarding Maine corporation law. *E.g.*, Gregory S. Fryer, *Book Review: Maine Corporation Law & Practice*, 44 ME. L. REV. 223 (1992) (describing the value of ZIMPRITCH). *See also*, JOHN C. ORESTIS ET AL., FORMING THE MAINE CORPORATION 84-86 (1986) (failing to discuss the non-shareholder constituency amendment in its discussion of substantive amendments to title 13-A made by the 1985 Legislature).

3. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) (emphasis added).

4. *See supra* notes 62-71 and accompanying text. (analyzing the 1987 amendment to ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991)).

holder constituencies ahead of shareholders and still qualify for coverage under the business judgment rule.[5] Allowing directors to put the interests of non-shareholder constituencies ahead of shareholders without recourse effects a significant departure from "existing law."

Second, in 1989 the U.S. District Court for the District of Maine decided *Georgia-Pacific Corp. v. Great Northern Nekoosa Corp.*[6] which interpreted section 716. The court stated "Maine law suggests that the Directors of a corporation, in considering the best interests of the shareholders and corporation, *should* also consider the *interests* of the company's employees, its customers and suppliers, and communities in which offices of the corporation are located."[7] Although clearly an incorrect reading of the language of the statute, and dicta besides, this interpretation is significant in that it is the only published opinion interpreting Maine's non-shareholder constituency statute.[8] Neither the Maine Legislature nor the Maine Supreme Judicial Court has refuted the *Georgia-Pacific* interpretation, which comes close to creating a duty on directors to consider non-shareholder constituencies. This interpretation represents a significant departure from Maine fiduciary duty law.[9]

When considering these two events, especially in terms of how they would influence a Maine court attempting to interpret section 716, it becomes harder to argue that Maine's non-shareholder constituency statute has affected no change in Maine fiduciary duty law.

The purpose of this Comment is to examine Maine's non-shareholder constituency statute and predict its effects on corporate fiduciary duty law in Maine. In order to lay a foundation for this prediction, this Comment will discuss the development of the duty of loyalty and duty of care doctrines in Maine; the legislative history of

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5. *See supra* notes 62-65 and accompanying text (arguing that the "or" used in the 1987 amendment allows directors to qualify for coverage under the statutory business judgment rule if they have the reasonable belief that the action is in the best interests of the corporation, but not in the best interests of the shareholders).

6. 727 F. Supp. 31 (D. Me. 1989).

7. *Id.* at 33 (emphasis added).

8. Since *Georgia-Pacific* is the only instance in which a court has discussed this statute, any court faced with interpreting the statute would necessarily refer to that discussion. Although the *Georgia-Pacific* discussion was dicta, it has potential for affecting subsequent readings of the statute and therefore should not be dismissed lightly. This is particularly so because federal courts, exercising diversity jurisdiction, so frequently have occasion to interpret state corporation law. *E.g.*, Slattery v. Bower, 924 F.2d 6 (1st Cir. 1991); Twind Energy Corp. v. Maxaxam Corp., 751 F. Supp. 256 (D. Me. 1990) (both cases are instances in which 13-A ME. REV. STAT. ANN. § 716 duties were raised in Maine's federal courts).

9. *See supra* notes 49-53 and accompanying text (arguing that the case law does not support having non-shareholder constituencies as beneficiaries of directors' fiduciary duties).

section 716; the approaches other states have taken concerning these types of statutes; as well as the arguments that have been raised by other commentators supporting and opposing non-shareholder constituency statutes. Drawing from this analysis, this Comment will suggest that Maine's non-shareholder constituency statute creates troubling authority for a potentially significant, and unintended, departure from traditional fiduciary duty principles. In order to prevent such an unintended shift in Maine law, this Comment will conclude by suggesting an appropriate interpretation for courts as well as suggesting potential legislation which would clarify section 716.

II. The Duties of Directors and Officers

Traditionally, the fiduciary duties imposed upon directors and officers of corporations have been divided into the duty of loyalty and the duty of care.[10] Maine law, up to the present day, has adhered to this legal tradition.[11]

The duty of loyalty, although not traditionally termed as such by Maine courts,[12] has a solid history in Maine case law. In one of the early Maine cases on the subject, *European and North American Railway Co. v. Poor*,[13] the Supreme Judicial Court, sitting as the Law Court, described this duty of loyalty. The court explained that directors and managers of a corporation "place themselves in the situation of trustees. . . . All acts done by the directors officially should be for the [stockholders'] interests. Holding a fiduciary relation they cannot be permitted to acquire interests adverse to such relation."[14] As these early cases indicate, Maine's duty of loyalty doctrine was premised upon the assumption that officers and directors occupied positions as trustees and, as a result, common law rules were prescribed to make void any self-interested transactions,

10. *E.g.*, Edward Brodsky & M. Patricia Adamski, Law of Corporate Officers and Directors § 2.01 (1989) ("The legal obligations of directors and officers under state law fall into two broad categories: a duty of care and a duty of loyalty." (citing Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1341 (Del. 1987)).

11. Zimpritch, *supra* note 2, at 275. ("It is commonly understood in American jurisprudence that the fiduciary duties of directors are analytically broken down primarily into the duty of care and the duty of loyalty. Practitioners in Maine have normally been guided by this duality. . . ."); *cf.*, John C. Orestis et al., *supra* note 2, at 255-57 (discussing the duties of loyalty and care, although referring to the duty of care as the "prudent person rule").

12. Zimpritch, *supra* note 2 at 275 ("until 1988 no decision of the Supreme Judicial Court had ever used the phrase 'duty of loyalty' in a corporate director context").

13. 59 Me. 277 (1871).

14. *Id.* at 278. *See also* Trask v. Chase, 107 Me. 137, 77 A. 698 (1910) (majority of directors, who together owned minority of shares, breached their fiduciary duty in voting to issue more stock to one director, which caused majority of directors to become majority group of shareholders); Livermore Falls Trust and Banking Co. v. Riley, 108 Me. 17, 21-22, 78 A. 980, 981-82 (1911) (expressing support for rationale of *European and N. Am. Ry. Co. v. Poor*).

regardless of fairness.[15]

Early treatises on Maine corporation law indicate that this view of the duty of loyalty was the rule of law well into the early part of the twentieth century.[16] In pointing out how other jurisdictions were applying their own duties of loyalty, however, one author foresaw the shift that was about to occur in the Maine doctrine.[17]

This shift occurred in 1915 when the Law Court decided *Vermeule v. Hover*,[18] which stated that the earlier rule of *European and North American Railway Co. v. Poor* was too broad and restrictive. The *Vermeule* court held that "a director is not debarred, by reason of his office, from entering into a contract with the corporation, but the contract . . . will be closely scrutinized in equity, and set aside unless made in that entire good faith which the law demands of this species of fiduciary."[19] The duty of loyalty changed from one prohibiting virtually any dealings between the fiduciary and the corporation to one which allowed them if they were fair.[20] In other words, "[p]rohibition gave way to permission, contingent on good faith and substantive fairness."[21]

Today, the *Vermeule v. Hover* view of the duty of loyalty is embodied in section 716 which instructs that "[t]he directors and officers of a corporation shall exercise their powers and discharge their duties in good faith *with a view to the interests* of the corporation and of the shareholders . . . ."[22] In using the words "with the view to the interests" instead of, for example, "for the sole purpose of

15. ZIMPRITCH, *supra* note 2, at 274-75, 279. *But cf.* Symonds v. Lewis, 94 Me. 501, 48 A. 121 (1901) (holding that a director of an insolvent corporation owes trustee-like duties to the corporation's creditors and cannot convey company assets to secure a debt to himself, to the exclusion of other creditors).

16. ISAAC W. DYER, MAINE CORPORATION LAW § 46 (8th ed. 1913); HERBERT M. HEATH, A MANUAL OF MAINE CORPORATION LAW § 95 (Charles L. Andrews ed., 2d ed. 1917).

17. DYER, *supra* note 16, at 50 (". . . [directors and managers] cannot be permitted to acquire interests adverse to such [fiduciary] relation. But it is not every transaction of benefit or interest to the corporation made by directors which will be held as falling within the rule of *European & N.A. Railway v. Poor.*").

18. 113 Me. 74, 93 A. 37 (1915).

19. *Id.* at 78, 93 A. at 39. *See also* Folsom v. Smith, 113 Me. 83, 88-89, 92 A. 1003, 1005 (1915) ("So far as the corporation itself was concerned, it was not unlawful for the directors to pay this particular debt, even if thereby they saved themselves as guarantors."); Woodman v. Butterfield, 116 Me. 241, 248, 101 A. 25, 28 (1917) ([I]t is inequitable for a director, whose position gives him an advantage in obtaining inside information of the affairs of the corporation, to protect his own claims against it to the detriment of its other creditors."). This case implies that directors can maintain claims against the corporation so long as their claims do not conflict with those of other creditors.

20. ZIMPRITCH, *supra* note 2, at 279.

21. *Id.* at 280.

22. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1991-1992) (emphasis added). *See* ZIMPRITCH, *supra* note 2, at 278.

benefitting only the interests," it is clear that the Legislature did not intend to foreclose all possible dealings between directors and officers and their corporations.[23] Zimpritch's treatise on Maine corporation law reiterates this view by stating that "[t]he duty of loyalty requires that the directors and officers act in a manner designed to promote the best interests of the corporation, rather than the interests of the director or officer."[24]

The duty of care is the second traditional duty imposed upon directors and officers of corporations. In the early case of *Bank of Mutual Redemption v. Hill*,[25] the Law Court described this duty as follows:

> 'those who are named by companies and corporations, to have the direction of their affairs . . . are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them.' The rule there is, that they must answer for ordinary neglect; and ordinary neglect is understood to be the omission of that care which every man of common prudence takes of his own concerns.[26]

The court held that this duty of care was not only violated by intentional mismanagement, but could be breached by failure of the directors to inquire into questionable dealings.[27] It is important to note that when *Bank of Mutual Redemption* was decided there was no judicial doctrine presuming adherence to "common prudence" as would be developed in later cases.[28] It was strictly a fact-based analysis.

There are relatively few Maine cases that analyze only the duty of care,[29] and even fewer that did so before the advent of the business judgment rule. One of these cases added to the duty of care the duty

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23. *E.g.*, ME. REV. STAT. ANN. tit. 13-A, § 717 (West 1981) (allowing certain transactions to take place between a director and the corporation); JOHN C. ORESTIS ET AL., *supra* note 2, at § III (IV) (referring to § 717's allowance of transactions between directors and the corporation).

24. ZIMPRITCH, *supra* note 2, at 275. (citing EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS, § 2.01 (1984)).

25. 56 Me. 385 (1868).

26. *Id.* at 388-89 (citations omitted) (quoting Scott v. Depeyster, 1 Edwards' Ch. R., 547).

27. *Id.* at 389. ("If [the directors] did not know . . . they were guilty of gross neglect in not making the inquiries, which they were bound officially to make."). The court also indicates that directors cannot be liable for breaches occurring before they took office. *Id. See also* Woodman v. Butterfield, 116 Me. 241, 248-49, 101 A. 25, 29 (1917) (holding that an individual is not a director unless he has notice of the election and accepts the position).

28. *See infra*, notes 34-42, and accompanying text (referring to the development of the business judgment rule).

29. ZIMPRITCH, *supra* note 2, § 7.7[b] at 277-78 ("most if not all of the decisions have involved loyalty issues as well") (citing Folsom v. Smith, 113 Me. 83, 92 A. 1003 (1915), as the only case which has dealt with the duty of care free of loyalty issues).

to know the financial condition of the corporation,[30] while another case held that a director could violate this duty of care by acquiescing to the mismanagement of others.[31]

The duty of care began to develop away from the traditional fact-based approach when Maine courts began to express support for positions that would eventually lead to the present day business judgment rule.[32] One of the first cases where this shift can be recognized is *Hyams v. Old Dominion Co.*,[33] where the court states "courts will not undertake to control the discretionary powers of the directors . . . [nor] undertake to pass upon the wisdom or unwisdom of such corporate acts."[34] The Law Court was becoming wary of the fact-intensive analysis required under the old duty of care and recognized the appropriateness of allowing discretion to enter the decisions of corporate directors and officers. This can be seen in a later case where the court was reluctant to hold a director liable to a corporation's creditors despite the director's reason to know of the corporation's insolvency when debts were incurred.[35] By 1931 this modification to the duty of care had developed to a point where it resembled the modern business judgment rule.[36]

The modern common law business judgment rule insulates officers and directors from liability for breaches of their duties of care or loyalty unless their actions are found to have been motivated by

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30. Clay v. Towle, 78 Me. 86, 89, 2 A. 852, 853 (1886) ("[The director's] duty required, that he should know the financial standing of the corporation . . . ."). *See* Folsom v. Smith, 113 Me. 83, 89, 92 A. 1003, 1006 (1915) ("The duty of a director to the corporation requires him to know its financial standing, and he is presumed to know it.") (citing *Clay v. Towle*, 78 Me. at 89, 2 A. at 853); DYER, *supra* note 16, § 94, at 51; HEATH, *supra* note 16, § 47, at 130.

31. Folsom v. Smith, 113 Me. at 90, 92 A. at 1006. *See also* HEATH, *supra* note 16, § 95, at 130-31.

32. *See infra* note 39 and accompanying text. The common law business judgment rule protects directors from liability for breaches of duty, absent fraud or bad faith.

33. 113 Me. 294, 93 A. 747 (1915).

34. *Id.* at 306, 93 A. at 752.

35. Woodman v. Butterfield, 116 Me. 241, 254, 101 A. 25, 31 (1917).

> We think it would be going too far, to hold that a director of a bankrupt corporation is liable to pay to its receiver . . . an amount equal to the payments which the corporation may have made in its usual course of business, although while it was in fact insolvent, to its outside creditors direct who had no knowledge of its insolvency, but upon indebtedness for which the director is secondarily liable as indorser or guarantor, when it does not appear that such payments were brought about by the procurement of the director . . . and even though it appears that the director ought to have known the corporation was insolvent during the period when such payments were made.

36. Bates St. Shirt Co. v. Waite, 130 Me. 352, 368, 156 A. 293, 302 (1931) ("If the directors acted in good faith, exercising their best judgment and honestly believing that what they did was for the benefit of the corporation, this court has no authority to review their act, unless some peculiar feature takes the case out of the general rule applicable to such a situation.").

fraud or bad faith.[37] Thus, the current duty of care in Maine requires "that degree of care and skill which ordinary prudent men would exercise under similar circumstances in like positions and . . . further requires the exercise of reasonable business judgment after reasonable factual inquiry."[38] This duty, embodied in section 716, was meant to create a flexible standard for officers and directors[39] and to keep courts from "inquir[ing] into and second-guess[ing] such business decisions."[40]

In addition to analyzing how case law has functionally defined these duties, it is also important to recognize *to whom* these duties are owed. The earliest Maine cases held that these duties were owed by the directors primarily to the corporation.[41] In addition, these early decisions indicate that the duties were not owed directly to the shareholders and, as a result, the shareholders had difficulty maintaining suits against directors.[42] As more cases arose, however, it became clear that the Law Court recognized that the beneficiaries of these duties were both the corporation and the shareholders.[43] This is reflected in section 716 which reads: "The directors and officers of

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37. Rosenthal v. Rosenthal, 543 A.2d 348, 353 (Me. 1988) ("it falls outside the proper judicial domain to inquire into and second-guess the prudence of particular business decisions honestly reached . . . . The business judgment rule does not, however, protect business decisions that result from fraud or bad faith."). *See* ZIMPRITCH, *supra* note 2, § 7.8[b] at 290 ("In the *Rosenthal* decision . . . the business judgement rule was expressed as a judicial rule of deference which posits that, in the absence of a showing that the directors acted primarily in bad faith or with fraud, it will be presumed that the directors discharged their duties to the corporation and to the shareholders . . . ."). *See* Gay v. Gay's Super Markets, Inc., 343 A.2d 577, 580 (Me. 1975) (holding that fraud, bad faith or an abuse of discretion are enough to eliminate applicability of the business judgment rule). The *Gay* court also looks to the totality of the circumstances to determine bad faith or abuse of discretion. *See also* Atlantic Acoustical & Insulation Co. v. Moreira, 348 A.2d 263, 267 (Me. 1975) (citing ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991)).

38. ZIMPRITCH, *supra* note 2, §7.7[b], at 276-76.1.

39. *Id.* § 7.7[b], at 277, n.170 (quoting *Comments to Proposed Act* § 7-16).

40. *Id.* § 7.8[b], at 290. (citing Rosenthal v. Rosenthal, 543 A.2d at 353); Gay v. Gay's Super Markets, Inc., 343 A.2d at 580.

41. Smith v. Poor, 40 Me. 415, 421 (1855) ("The directors of a corporation are . . . the agents of the corporation, and are responsible to it for official misconduct and fraud in the discharge of their duties.").

42. *Id.* at 422. ("The directors, who fraudulently abuse their trust, and misapply the funds of the corporation, are personally liable . . . . But the stockholders cannot maintain a bill to compel them to account, unless it first appear that the directors refuse to prosecute the suit . . . ."). *See* Rich v. Shaw, 23 Me. 343, 344 (1843).

43. Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988); Atlantic Acoustical & Insulation Co. v. Moreira, 348 A.2d 263, 267 (Me. 1975); Bates Street Shirt Co. v. Waite, 130 Me. 352, 358, 156 A. 293, 297 (1931); Hyams v. Old Dominion Co., 113 Me. 294, 307, 93 A. 747, 752 (1915); Livermore Falls Trust and Banking Co. v. Riley, 108 Me. 17, 21, 78 A. 980, 981 (1911); Trask v. Chase, 107 Me. 137, 144, 77 A. 698, 702 (1910); European and North American Ry. Co. v. Poor, 59 Me. 277, 278-79 (1871); *see also*, JOHN C. ORESTIS ET AL., *supra* note 2, at 255 ("fiduciary duties owned [sic] by the operators of the business to the corporation and the other shareholders.").

a corporation shall . . . discharge their duties in good faith with a view to the *interests of the corporation and of the shareholders* . . . ."[44]

There are also several decisions which allow specific duties to run from directors and officers *of an insolvent corporation* to the corporation's creditors.[45] Zimpritch's treatise reiterates this and describes the duty to creditors as a "fiduciary duty, of uncertain dimension, owed by directors and officers of insolvent corporations to creditors, which encompasses, at a minimum, the obligation not to misappropriate, convert or wrongfully divert corporate assets while the corporation is insolvent."[46]

One Maine case exists which found these duties of care and loyalty to be owed to parties other than shareholders, creditors, or the corporation.[47] These duties arose, however, because of the quasi-public nature of the corporation in that case and would not be applicable to most privately held corporations.[48] Other than this one isolated and unique case, there is no Maine case law that supports making "other constituencies" beneficiaries of these duties,[49] and section 716 literally allows directors and officers to consider other constituencies only while adhering to their duties to the shareholders and the corporation. The words of the statute do not impose upon the directors and officers the obligation to consider these other constituencies.[50] When reading the literal words of the statute in conjunction with the *Georgia-Pacific* court's interpretation,[51] however, it is harder to argue that no duties flow to other constituencies.

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44. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) (emphasis added).

45. Woodman v. Butterfield, 116 Me. 241, 248, 101 A. 25, 28 (1917); Symonds v. Lewis, 94 Me. 501, 505-06, 48 A. 121, 122-23 (1901); *In Re* Brockway Mfg. Co., 89 Me. 121, 126, 35 A. 1012, 1013 (1896); Clay v. Towle, 78 Me. 86, 89 (1886); Bank of Mutual Redemption v. Hill, 56 Me. 385, 388-89 (1868). *See* ISAAC W. DYER, *supra* note 16, at 51.

46. ZIMPRITCH, *supra* note 2, § 7.7[f], at 285.

47. Railroad Commissioners v. Portland and Oxford Cent. R.R. Co., 63 Me. 269, 282-83 (1872) (holding that a publicly chartered Railroad corporation was a quasi-public entity with duties to the public).

48. *Id.* at 277.

49. ZIMPRITCH, *supra* note 2, § 7.7[f], at 286.

50. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("In discharging their duties, the directors and officers *may*, in considering the best interests of the corporation and of its shareholders, consider the effects of any action upon employees, suppliers . . . .") (emphasis added). *But see* Georgia-Pacific Co. v. Great N. Nekoosa Co., 727 F. Supp. 31, 33 (D. Me. 1989) ("Maine law suggests that the Directors of a corporation, in considering the best interests of the shareholders and corporation, *should* also consider the *interests* of the company's employees, its customers and suppliers, and communities in which offices of the corporation are located.") (emphasis added).

51. Georgia-Pacific Co. v. Great N. Nekoosa Co., 727 F. Supp. at 33.

III. SECTION 716 OF THE MAINE BUSINESS CORPORATION ACT

The current Maine statute that defines the duties of directors and officers reads:

> The directors and officers of a corporation shall exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. . . .
>
> In discharging their duties, the directors and officers may, in considering the best interests of the corporation and of its shareholders, consider the effects of any action upon employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors.
>
> A director shall not be held personally liable for monetary damages for failure to discharge any duty as a director unless the director is found not to have acted honestly or in the reasonable belief that the action was in or not opposed to the best interests of the corporation or its shareholders.[52]

The second paragraph of this section, the "other constituency" section, was added by the Legislature in 1985. It allows directors and officers to consider "other constituencies" as they discharge their fiduciary duties to the corporation and the shareholders. Nevertheless, "[i]t is not authority to *prefer* the interests of other constituencies over the interests of the corporation and its shareholders."[53]

The legislative history of this Act indicates that this section was part of a larger Act entitled, "AN ACT to Protect Shareholders in Maine Corporations."[54] This larger bill contained provisions aimed at protecting shareholder equity during hostile takeover situations.[55] The statement of fact that accompanied this piece of legislation described its intention to

> provide protection to minority shareholders in publicly-held Maine corporations . . . [and to] . . . clarif[y] the rights and duties of officers and directors by allowing them to consider the effects of corporate decisions upon employees, suppliers, and customers of the corporation, as well as communities in which the corporation may be located."[56]

Also, the floor debate indicates that the bill's intention was to protect shareholders during hostile takeover situations.[57] No discussion

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52. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991).
53. ZIMPRITCH, *supra* note 2, § 7.7[g], at 286.
54. P.L. 1985, ch. 394.
55. *Id.* § 3.
56. L.D. 965, Statement of Fact (112th Legis. 1985).
57. II Legis. Rec. 921-23 (1st Reg. Sess. 1985). Both majority and minority reports

occurred during this debate to alter radically the fiduciary duties of directors or officers of corporations.[58]

In comparing the "other constituency" portion of section 716 with its legislative history, some important issues arise. It appears that the Legislature only considered the effects of this Act in the context of a corporate merger and the intention was to protect corporate shareholders. The statute as it appears is not limited to merger situations, however, and therefore is currently applicable to all corporate decisions. In addition, despite the intention of the Legislature in enacting this statute, this Comment asserts that it may actually reduce the protections available to shareholders.

The third paragraph of section 716 was effective in 1988.[59] It creates a statutory business judgment rule different from the common law business judgment rule articulated in *Rosenthal v. Rosenthal.*[60] First, the statutory business judgment rule applies in situations where a director fails to discharge *any* duty (not just the duty of care or loyalty as in *Rosenthal*).[61] Second, it creates immunity where the director acts honestly and the director reasonably believes that the action is in the best interests of the corporation or shareholders.[62] This statutory standard is different from the *Rosenthal* (common law) standard, which allows immunity unless there is fraud or bad faith by a director.[63]

In using "honesty or reasonable belief" instead of "fraud or bad faith," the Legislature, in enacting this statutory business judgment rule, sought to "eliminate the . . . tests of reasonable inquiry and reasonable business judgment in determining . . . the availability of indemnification."[64] The "reasonable belief" standard created by section 716[65] is more subjective and less difficult for a director to meet

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of the reporting legislative committee supported the "other constituency" version of the bill. A member of the majority stated, "[a]ll we are trying to do is to protect those present shareholders in Maine corporations from the intentions of those who would come in to make a quick buck. . . ." *Id.* at 923. A member of the minority stated that the "primary purpose of the bill . . . allows . . . for management to consider the community, suppliers, customers and employees of a company when acting to determine whether a corporate merger will take place." *Id.* at 922.

58. *Id.*

59. P.L. 1987, ch. 663 § 1.

60. 543 A.2d 348 (Me. 1988). *See supra* notes 39-42 and accompanying text.

61. *Contra* ZIMPRITCH, *supra* note 2, at 297 (arguing that "it is more likely that the 1988 amendment . . . refers to any duties *under* Section 716") (emphasis added). If Zimpritch is mistaken, however, in this prediction concerning the statutory business judgment rule, the "other duties" include the duties to creditors, etc. Also, note that the statutory business judgment rule only applies to directors and not to officers.

62. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991).

63. Rosenthal v. Rosenthal, 543 A.2d at 353.

64. ZIMPRITCH, *supra* note 2, at 297.

65. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("A director shall not be held personally liable . . . unless the director is found not to have acted honestly or *in the reasonable belief* that the action was in or not opposed to the best

than the *Rosenthal* "bad faith" standard which requires "reasonable inquiry and reasonable business judgment."[66]

Another significant aspect of the 1988 amendment to section 716 is that it can be read to allow directors to qualify for the statutory business judgment rule as long as they consider the interests of the corporation *or* the shareholders.[67] This differs from the other two paragraphs of section 716 which refer to the interests of the corporation *and* the shareholders.[68] If this allows the statutory business judgment rule to be available where a director has a reasonable belief that an action is in the best interests of the corporation, but not the shareholders, then it significantly expands the common law business judgment rule.

In summary, when reading the second and third paragraphs of section 716 together, a director could consider non-shareholder constituencies, if in the best interests of the corporation and shareholders, without violating his statutory duty of care. If the director's consideration of non-shareholder constituencies was *not* in the best interests of the shareholders, however, but was made in the reasonable belief that it was in the best interest of the corporation, the new statutory business judgment rule would provide immunity from breach of the duty of care. This expansion of the business judgment rule makes the duty of care to shareholders virtually a dead letter.[69]

As previously indicated, the *Georgia-Pacific Corp. v. Great*

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interests of the corporation or its shareholders.") (emphasis added).

66. Rosenthal v. Rosenthal, 543 A.2d at 353.

67. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("A director shall not be held personally liable . . . unless the director is found not to have acted honestly or in the reasonable belief that the action was in or not opposed to the best interests of the corporation *or* its shareholders.") (emphasis added). The use of double, and perhaps even triple negatives, in the drafting of this section makes interpretation of its meaning difficult. Although this section may be read as requiring both interests to be considered (i.e., if it is read so that the "or not opposed to" makes the second "or" inclusive instead of exclusive), just as strong an argument can be made that the words "corporation or its shareholder" are meant to be exclusive. This Comment suggests a legislative amendment to clarify this wording.

68. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("The directors . . . shall . . . discharge their duties . . . with a view to the interests of the corporation *and* of the shareholders . . . .") (emphasis added) ("[T]he directors . . . may, in considering the best interests of the corporation *and* of its shareholders . . . .") (emphasis added).

69. Examples of instances in which a decision could be in the best interests of the corporation and non-shareholder constituencies but not in the best interests of the shareholders include the following: 1) when a corporation declines a good offer from a bidder for the corporation that would result in potential restructuring and/or reduction of workforce; 2) when directors decide, instead of issuing dividends to shareholders, to divert the monies to non-shareholder interests that may enhance the corporation's public image; and, 3) when directors refuse to spend funds modernizing and automating a manufacturing facility that would enhance the value of the corporation's stock in order to prevent layoffs that automation would necessitate and in order to keep the corporation's public image strong.

Northern Nekoosa Corp. case stands as the only instance in which a court has interpreted the non-shareholder constituency portion of section 716.[70] In this case, Georgia-Pacific made a tender offer for the shares of Great-Northern Nekoosa Corporation.[71] After twice rejecting the proposal, the directors of Great Northern scheduled a shareholders' meeting, at which the shareholders would vote on the plan, on the last possible day available for such a meeting.[72] Reacting to this delay, Georgia Pacific sued in federal district court seeking a temporary restraining order and a preliminary injunction requiring acceleration of the shareholder referendum. In its opinion rejecting Georgia Pacific's requested relief, the court reasoned:

> Certainly, 120 days is not a patently unreasonable amount of time for the directors to marshal and present to the shareholders the information on their position regarding the offer. This is particularly so when Maine law suggests that the Directors of a corporation, in considering the best interests of the shareholders and corporation, *should* also consider the *interests* of the company's employees, its customers and suppliers, and communities in which offices of the corporation are located.[73]

The above portion of the court's opinion raises two issues. First, the court's reading that directors *should* consider other constituencies significantly expands the statute, which merely says that directors *may* consider other constituencies.[74] "Should" implies that directors might be violating their duties if they refuse to consider these constituencies, while "may" indicates that directors can refuse to consider these constituencies altogether.

Second, the court further expands upon the language of the statute by referring to *interests* of other constituencies instead of *effects*, as appears in the statute.[75] The court's use of "interests" im-

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70. 727 F. Supp. 31 (D. Me. 1989).

71. *Id.* at 32.

72. *Id.*

73. *Id.* at 33 (emphasis added).

74. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("[t]he directors and officers *may*, in considering the best interests of the corporation and of its shareholders, consider the effects of any action upon employees . . . .") (emphasis added).

75. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("[t]he directors and officers may, in considering the best *interests* of the corporation and of its shareholders, consider the *effects* of any action upon employees . . . .") (emphasis added). *See*, James J. Hanks, Jr., *Non-Stockholder Constituency Statutes: An Idea Whose Time Should Never Have Come*, INSIGHTS, Dec. 1989, at 21 [hereinafter Hanks] ("Authorizing consideration of the effects of an action upon a group is more limited than authorizing consideration of the group's interests, which may be extensive."); *e.g.*, Robert M. Hart and Carol M. Degener, *Non-Stockholder Constituency Statutes*, 203 N.Y. L.J. 1, 4 (1990) [hereinafter Hart and Degener] ("To the extent such statutes create enforceable rights for non-stockholder constituencies or permit directors to consider their interests without regard to maximizing stockholders' values they may lead to radically new definitions of the corporation as an amalgam of interest groups

plies that consideration of other constituencies should be on a parity with consideration of shareholders and the corporation. This parity can be recognized later in the opinion where the court states:

> This discussion is of *great concern to the public, and the public's interest as well as that of the shareholders* is served by letting the discussion mature. . . . [H]arm may accrue to Great Northern and the public if the deal is rushed to completion and it is then determined that the newly formed corporation is in violation of the anti-trust laws.
>
> Since Georgia-Pacific has shown no irreparable harm from the proposed delay, and *the public's, shareholders', and corporation's interests* are to some extent fostered by allowing time for both public discussion and the anti-trust litigation to mature, the Court will not grant the requested preliminary injunctive relief.[76]

This portion of the opinion suggests that directors, when making a decision, should consider the interests of shareholders, the corporation, and non-shareholder constituencies. However, the framework of section 716 indicates that the directors must consider the interests of the shareholders and the corporation and, only after that consideration, can they consider how the corporation's action will affect other constituencies. The statute does not put the consideration of non-shareholder constituencies on parity with consideration of shareholders and the corporation. The interpretation of the *Georgia-Pacific* court may undermine this portion of the statute.

Both of these issues raised by the *Georgia-Pacific* court, albeit as dicta, suggest possible interpretive expansion of section 716 and create troubling precedent for future courts.

IV. Consideration of Non-Shareholders by Other States

A. *States with Non-Shareholder Constituency Statutes*

More than half of the states have passed laws that allow some form of director consideration of non-shareholder constituencies.[77]

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in which non-stockholder interests have new rights to be heard on fundamental corporate matters . . . .").

76. Georgia-Pacific Corp. v. Great N. Nekoosa Corp., 727 F.Supp. at 34 (emphasis added).

77. Ariz. Rev. Stat. Ann. § 10-1202 (Supp. 1990); Conn. Gen. Stat. Ann. § 33-313 (West Supp.1992); Fla. Stat. Ann. § 607 (West Supp. 1990); Ga. Code Ann. § 14-2-202(b)(5) (1989); Haw. Rev. Stat. § 415-35 (1991); Idaho Code § 30-1702 (Supp. 1991); Ill. Ann. Stat. ch. 32 para. 8.85 (Smith-Hurd Supp. 1991); Ind. Code Ann., § 23-1-35-1 (Burns 1989); Iowa Code § 490.1108 (1991); Ky. Rev. Stat. Ann. § 271B.12-210 (Michie/Bobbs-Merrill Supp. 1992); La. Rev. Stat. Ann. § 12:92(G) (West Supp. 1992); Me. Rev. Stat. Ann. tit. 13-A, § 716 (West Supp. 1991-1992); Mass. Gen. Laws Ann. ch. 156B § 65 (1992); Minn. Stat. Ann. § 302A.251 (West Supp. 1992); Miss. Code Ann. § 79-4-8.30 (Supp. 1992); Mo. Ann. Stat. § 351.347 (Vernon 1991); Neb. Rev. Stat. § 21-2035 (1991); N.J. Stat. Ann. § 14A:6-1 (Supp. 1989); N.M. Stat. Ann. § 53-11-35 (Michie Supp. 1992); N.Y. Bus. Corp. Law § 717(b) (McKinney Supp.

There are many variations in the statutes, but common elements of the statutes provide a framework for analyzing them as a group. This analysis provides insight as to how restrictive or expansive Maine's statute is in comparison to those of other states. Next, such an analysis can serve to provide "prototypes" for possible amendments to Maine's statute if the Legislature deems an amendment is warranted. Finally, in recognizing how courts in other states view these statutes, we will be better able to predict how Maine courts will interpret section 716. The common issues arising in all of the statutes are as follows:

1) *Officers/Directors.* Most of the statutes apply only to decisions made by directors of corporations while a small minority extend to decisions of directors and officers (as the Maine statute does).[78]

2) *Best Interests of Corporation/Shareholders.* Most states allow non-shareholder constituencies to be taken into account only when considering the best interests of the corporation. Only a few states, like Maine, add the best interests of the shareholder into this consideration.[79]

3) *May/Shall.* All but one statute gives the directors (and officers if applicable) the *discretion* to consider the non-shareholder constituencies. Connecticut's statute *requires* that these constituencies be considered.[80]

4) *Interests/Effects.* Some statutes allow consideration of the *interests* of non-shareholder constituencies when making corporate decisions, while others (such as Maine) limit consideration to the *effects* such actions would have on them.[81]

1992); Ohio Rev. Code Ann. §§ 1701.13, 1701.59 (Baldwin Supp. 1991); Or. Rev. Stat. § 60.357 (1991); 15 Pa. Cons. Stat. Ann. §§ 516, 1716, 5761 (Supp. 1992); R.I. Gen. Laws § 7-5.2-8 (1992); S.D. Codified Laws Ann. § 47-33-4 (1991); Tenn. Code Ann. § 48-35-204 (1988); Wis. Stat. Ann. § 180.0827 (1992); Wyo. Stat. §§ 17-18-201, 17-16-830 (1989).

78. Those states whose statutes apply only to directors are: Connecticut, Florida, Idaho, Indiana, Kentucky, Minnesota, Missouri, Nebraska, New Mexico, New York, Pennsylvania; those which apply to both directors and officers are: Illinois, Maine, Wisconsin. *See* Hart and Degener, *supra* note 75, at 1, col. 2; American Bar Association Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 Bus. Law. 2253, 2261 (1990) [hereinafter Committee on Corporate Laws]; Hanks, *supra* note 77, at 20.

79. Those states with statutes considering only the best interests of the corporation are: Connecticut, Idaho, Illinois, Kentucky, Minnesota, Nebraska, Indiana, Pennsylvania; those considering both the best interests of the corporation and the shareholders are: Florida, Maine, New Mexico. *See* Hart and Degener, *supra* note 75, at 4; Committee on Corporate Laws, *supra* note 78, at 2261, 65.

80. Hart and Degener, *supra* note 75, at 1, col. 2; Committee on Corporate Laws, *supra* note 78, at 2261; Hanks, *supra* note 75, at 20.

81. Those states with statutes considering only interests are: Connecticut, Idaho, Kentucky, Minnesota; those considering only effects are: Florida, Illinois, Indiana, Missouri, Nebraska, New York, Pennsylvania, Wisconsin; (New Mexico allows consideration of both the interests and effects.); *see supra*, notes 75-76 and accompanying

5) *Any Decision/Particular Instance.* Most states allow consideration of non-shareholder constituencies during any corporate decision (like Maine), while a few states limit consideration to only merger-type situations.[82]

6) *Continued Independence of Corporation.* A few statutes specifically state that the interests of these other constituencies may be best served by the continued independence of the corporation.[83] Maine's statute does not contain such a provision.

7) *Presumption of Validity.* A few states have included sections that create presumptions of validity on determinations concerning non-shareholder constituencies.[84] Maine's statute does not have such a provision.

8) *Specified Constituencies.* All of the statutes give examples of the constituencies intended to be considered. Some statutes limit application to those specified, while others are not limited. Examples of those constituencies used are: employees, customers, creditors, suppliers, communities, economies, and others. Maine's statute includes several of these and contains an "all other pertinent factors" clause that does not limit the constituencies to those specified.[85]

9) *Bondholders.* Wyoming "permits certain publicly-traded Wyoming corporations to provide by charter for bondholder approval of a merger or acquisition."[86]

10) *Articles of Incorporation.* Georgia's statute does not automatically apply to corporations, but allows corporations to include provi-

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text (discussing the *Georgia-Pacific* interpretation of the Maine statute as applying to *interests* of non-shareholder constituencies.). *See also* Hart and Degener, *supra* note 75, at 4, col. 3; Committee on Corporate Laws, *supra* note 78, at 2261.

82. Those states with statutes that allow it on "any" decision are: Florida, Idaho, Illinois, Indiana, Kentucky, Minnesota, Nebraska, New Mexico, New York, Pennsylvania, Wisconsin; those which limit it to particular instances are: Connecticut (sale of substantially all assets) and Missouri (acquisitions). *See* Hart and Degener, *supra* note 75, at 4; Committee on Corporate Laws, *supra* note 78, at 2262-63.

83. Those states with such statutes are: Connecticut, Idaho, Kentucky, Minnesota, New Mexico. *See* Hart and Degener, *supra* note 75, at 4; Committee on Corporate Laws, *supra* note 78, at 2261 (although the authors of the article may be incorrect in stating, "the directors may consider the possibility that the best interests of the *corporation and its stockholders* may be best served by remaining independent.") (emphasis added); Hanks, *supra* note 75, at 21.

84. Those states are: Indiana (allowing presumption if approval of a majority of disinterested directors, unless not made in good faith after reasonable investigation); Pennsylvania ("absent breach of fiduciary duty, lack of good faith or self-dealing, actions taken as a director shall be presumed to be in the best interests of the corporation."). *See* Hart and Degener, *supra* note 78, at 4, col. 3; Hanks, *supra* note 75, at 20-21.

85. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) ("employees, suppliers, and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors.").

86. Hanks, *supra* note 78, at 21.

sions for non-shareholders in the articles of incorporation.[87]

Upon reviewing these statutes, it is clear that Maine's statute provides less protection for non-shareholder constituencies than some other states' statutes. Unlike other states' statutes, Maine's is discretionary, deals only with the *effects* of other constituencies, specifies the best interests of the corporation *and shareholders*, and does not have a presumption of validity. On the other hand, the Maine law does provide more protection for non-shareholder constituencies than other states. This is evident in that Maine's law applies to any corporate decision, is available to officers and directors, and is not restrictive in how it defines other constituencies.[88]

Despite the fact that so many states have enacted non-shareholder constituency statutes, very few courts discuss them.[89] One such case is *Baron v. Strawbridge & Clothier*[90] which deals with Pennsylvania's statute. In the context of denying an injunction sought by a tender offeror against the target company's board of directors, the court found that the directors' consideration of non-shareholder constituencies did not breach the duty owed to shareholders. The court held, "it was proper for the company to consider the effects the . . . tender offer would have, if successful, on the Company's employees, customers and community."[91] At the time of this decision, Pennsylvania had a statute, similar to Maine's, which allowed directors to " 'consider the effects of any action upon employees, suppliers and customers of the corporation, communities in which the offices or other establishments of the corporation are located and all other pertinent factors.' "[92] Although the court did not discuss the statute further, it is clear that it found that the statute was operative and that the statute was one component to consider in determining whether the directors had satisfied their duties.

Amanda Acquisitions Corp. v. Universal Foods Corp.[93] was, like *Baron*, a case in which a tender offeror sought to enjoin the actions of the board of directors of the target corporation. Citing the Wisconsin statute,[94] the court stated that the decision of the board was "a business judgment call not to be second-guessed by this or any

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87. GA. CODE ANN. § 14-2-202(b)(5) (1989); Committee on Corporate Laws, *supra* note 78, at 2263.

88. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1991-1992).

89. Committee on Corporate Laws, *supra* note 78, at 2267; Alexander C. Gavis, *A Framework For Satisfying Corporate Directors' Responsibilities Under State Nonshareholder Constituency Statutes: The Use Of Explicit Contracts*, 138 U. PA. L. REV. 1451, 1466 (1990).

90. 646 F. Supp. 690 (E.D. Pa. 1986) (interpreting Pennsylvania law).

91. *Id.* at 697.

92. Committee on Corporate Laws, *supra* note 78, at 2267 (quoting 15 PA. CONS. STAT. ANN. § 1408(B) (Purdon Supp. 1986) (repealed 1986)).

93. 708 F. Supp. 984 (E.D. Wis. 1989) (interpreting Wisconsin law).

94. *Id.* at 1012 (citing WIS. STAT. § 180.305).

other court. The board has the *responsibility* to exercise its business judgment in accord with the best *interests* of the shareholders, the company, and the other constituencies."[95] Wisconsin's statute at that time stated, like Maine's, that directors *could* consider the *effects* of actions on constituencies.[96] In *Amanda*, the court expanded the scope of the statute in much the same way that the literal meaning of Maine's statute was expanded in *Georgia-Pacific*.[97] The *Amanda* court placed the interests of the other constituencies on a par with those of the shareholders, despite the limited scope of the statute. This is clear when the *Amanda* court concluded that "the board ha[d] acted in accord with its fiduciary responsibilities in a manner reasonably related to the perceived threat to the corporation, its shareholders, and other constituencies."[98]

Amanda was appealed to the Seventh Circuit which affirmed the decision of the lower court.[99] Although not focusing on the lower court's discussion of non-shareholder constituencies, the circuit court seemed to agree with this discussion.[100] This agreement can be inferred from the circuit court's statement that "[s]tates could choose to protect 'constituencies' other than stockholders. Creditors, managers, and workers invest human rather than financial capital. . . . [N]o evidence of which we are aware suggests that bidders confiscate workers' and other participants' investments to any greater degree than do incumbents . . . ."[101]

The above cases illustrate how courts interpret non-shareholder constituency statutes. First, it is clear that courts have recognized these statutes as legitimate, particularly in the context of hostile takeovers. Second, the U.S. District Court in *Amanda* demonstrated that courts can broadly interpret these statutes.[102] Finally, the circuit court's opinion in *Amanda* illustrated that individual judges have their own views regarding corporate governance which are bound to influence their interpretations of non-shareholder constituency statutes.

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95. *Id.* at 1013 (emphasis added).

96. *See also* Hanks, *supra* note 78, at 21 (Wisconsin statute "substantially similar" to that of Maine).

97. *See supra* notes 70-76 and accompanying text.

98. Amanda Acquisitions Corp. v. Universal Foods Corp., 708 F. Supp. at 1016.

99. Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989).

100. *Cf.* Hanks, *supra* note 78, at 24 ("It is not clear that Judge Easterbrook was talking about non-stockholder constituency statutes rather than simply protecting specific constituencies, fraudulent conveyance statutes and plant-closing statutes.").

101. Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d at 500, n.5; *see also* Hanks, *supra* note 78, at 24.

102. Note that two courts so far have read discretionary statutes to create a requirement for directors to consider the interests of other constituencies. Thus, it becomes harder to argue that the court's reading of the Maine statute in *Georgia-Pacific* was just a mistake.

B. *States Without Non-Shareholder Constituency Statutes*

Some states have failed to enact non-shareholder constituency statutes. Delaware is one such state. Since Delaware enjoys prominence in corporate law issues, it is useful to recognize how the courts of that state have dealt with the interests of non-shareholder constituencies. This examination will help to determine whether it would be possible for Maine courts to employ principles used by the Delaware courts in interpreting Maine's non-shareholder constituency statute.

The first Delaware case to deal with this subject was *Unocal Corp. v. Mesa Petroleum Co.*[103] In this case, a shareholder, who was making a hostile tender offer for the shares of his own corporation, challenged the actions of the corporation's board which made a counter tender offer excluding the shareholder. In evaluating this defensive measure, the court held that

> [i]f a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and time of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally). . . ."[104]

In comparing this statement with the court's recognition that the directors' duties oblige them to act in the best interest of the corporation and shareholders,[105] it is clear that the court only intended consideration of the effects on non-shareholder constituencies in the limited instance of determining whether a defensive measure fell within the ambit of the business judgment rule. It could be argued that by leaving "shareholders" out of the previously cited passage from the opinion, the directors' action could fall under the business judgment rule as long as it was in the best interests of the corporation, regardless of the shareholders' interests. Since the court defines "corporate enterprise" to include stockholders,[106] however, and indicates that in addressing a takeover bid the directors have the duty to determine whether it is in the best interests of the corporation *and* the shareholders,[107] it is clear that such an argument is unsup-

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103. 493 A.2d 946 (Del. 1985).

104. *Id.* at 955.

105. *Id.* ("basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders").

106. *Id.* at 954 ("[T]he board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source.").

107. *Id.* ("When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation *and* its share-

portable. The holding is very narrow in terms of allowing consideration of other constituencies and does not suggest that directors can consider the impact on non-shareholder constituencies at the expense of shareholders (with the exception of a shareholder initiating a hostile tender offer).[108]

In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[109] the Delaware court explicitly indicated that a limited reading of the *Unocal* holding is justified. In the context of a takeover situation, the court stated:

> Although such consideration [of non-shareholder constituencies] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress . . . .[110]

Thus when viewing *Unocal* and *Revlon* together, it is clear that the Delaware court did not intend for the consideration of non-shareholder constituencies to preempt consideration for shareholders.[111]

In *Paramount Communications, Inc. v. Time, Inc.*[112] the court revisited its *Unocal* and *Revlon* decisions, and although it did not discuss non-shareholder interests specifically, it "strongly affirmed the right of directors to look beyond the short-term interests of shareholders in determining a course of action in the face of an attractive

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holders.") (emphasis added).

108. *Id.* at 958 ("The board continues to owe Mesa [a shareholder and tender offeror] the duties of due care and loyalty. But in the face of the destructive threat Mesa's tender offer was perceived to pose, the board had a supervening duty to protect the corporate enterprise, which includes the other shareholders, from threatened harm.") *See also* Committee on Corporate Laws, *supra* note 78, at 2258-59. *See* Gavis, *supra* note 89, at 1467-68; *but see* Frank J. Garcia, *Protecting Nonshareholder Interests In The Market For Corporate Control: A Role For State Takeover Statutes*, 23 U. MICH. J.L. REFORM 507, 518 (1990) [hereinafter Garcia] (implying that the board is *required* to consider the effects on the corporation, including other constituencies).

109. 506 A.2d 173 (Del. 1986).

110. *Id.* at 182 (citations omitted).

111. *See* Gavis, *supra* note 89, at 1467-68; Committee on Corporate Laws, *supra* note 78, at 2259; Trevor S. Norwitz, *"The Metaphysics of Time": A Radical Corporate Vision*, 46 BUS. LAW. 377, 378 (1991). *But cf.* Martin Lipton, *Corporate Governance In The Age Of Finance Corporatism*, 136 U. PA. L. REV. 1, 40-41 (1987) ("Although *Revlon* should not restrict the capacity of a target's board to act for broader constituencies when the target is not yet for sale, *Revlon* does not make the scope of the *Unocal* concern for nonshareholder constituencies less certain."); Garcia, *supra* note 108, at 519 ("Because this limitation [to the consideration of non-shareholder constituencies] applies only when the breakup of the corporation is inevitable, it does not squarely reverse *Unocal*, though it does call into question the extent of protection nonshareholders' interests will receive.").

112. 571 A.2d 1140 (Del. 1989).

tender offer."[113] While the *Time* decision is read by some as expanding *Unocal* and restricting *Revlon*,[114] nowhere does the court indicate support for considering the interests of non-shareholder constituencies over the best interests of shareholders.

When viewing the above cases together, we see that the Delaware court allows for consideration of interests of non-shareholder constituencies in the context of takeover situations. Thus, an accurate restatement of the Delaware law on this issue is that:

> [D]irectors have fiduciary responsibilities to share-holders which, while allowing directors to give consideration to the interests of others, compel them to find some reasonable relationship to the long-term interests of shareholders when so doing. . . . [t]his principle is modified when the decision is made to sell the company, at which time the directors may consider only the interests of shareholders.[115]

V. Arguments Concerning Non-Shareholder Constituency Statutes

In order to get a good sense as to the justifiability of Maine's non-shareholder constituency statute, it is instructive to look at the arguments that have been presented favoring and opposing such statutes. This examination provides a basis for predicting the potential benefits and/or harms created by Maine's statute. Also, it shows the issues that appear to have been overlooked by the Maine Legislature when they enacted the 1985 amendment to section 716.

A. Arguments Supporting Non-Shareholder Constituency Statutes

One argument raised, implicating general corporate governance issues, concerns the role that the modern corporation plays in society. In a famous essay, E. Merrick Dodd, Jr., expressed this argument as follows:

> [T]he association . . . takes its place in a business world with certain ethical standards which appear to be developing in the direction of increased social responsibility. . . . [W]e may then . . . conceive of it as a person, which, like other persons engaged in business, is affected not only by the laws which regulate business but by the attitude of public and business opinion as to the social obligations of business. If a business is tending to become a profession, then a corporate person engaged in business is a professional even though its stockholders, who take no active part in the conduct of business, may not be. Those through whom it acts may

113. Committee on Corporate Laws, *supra* note 78, at 2260 (citing Communications, Inc. v. Time, Inc., 571 A.2d at 1150).
114. Norwitz, *supra* note 111, at 381-82 (1991).
115. Committee on Corporate Laws, *supra* note 78, at 2261.

therefore employ its funds in a manner appropriate to a person practising a profession and imbued with a sense of social responsibility without thereby being guilty of a breach of trust.[116]

Drawing from views similar to Dodd's, supporters of non-shareholder constituency statutes argue that due to the far-reaching effects of corporate action,[117] many constituencies make up the modern corporation, of which shareholders are just one constituency.[118] This view leads to the conclusion that corporations have social, as well as profit-making, responsibilities to all of their constituencies[119] and that non-shareholder constituency statutes allow the directors to satisfy these responsibilities.

Another argument raised in support of these statutes deals with the effects of corporate action and the differences between shareholders and non-shareholder constituencies. This argument begins by recognizing that the nature of a shareholder's investment in a corporation is generally short-term while that of non-shareholder constituencies is long-term.[120] Due to this difference, negative effects of major corporate action (especially hostile takeovers) have a greater impact upon the long-term interests of these non-shareholder constituencies than upon the short-term interests of the shareholders.[121] Thus, since non-shareholder constituencies are less able than shareholders to protect themselves from these negative effects (shareholders can protect themselves through diversification, selling their stock, etc.), proponents argue that these statutes provide much-needed protection[122] and allow a more even distribution

116. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1161 (1932). *But see* A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (arguing the opposite view in the same law review volume).

117. *See, e.g.*, Gavis, *supra* note 89, at 1453 n.11 ("Employee layoffs by corporations impact upon local communities by reducing the demand for goods, services, and housing. Increased local unemployment rates may effect local communities' ability to provide social and educational services as a result of reduction in tax revenues.").

118. *Cf.* Norwitz, *supra* note 111, at 385 (exploring a possible policy behind the Delaware Supreme Court's *Paramount v. Time* decision).

119. Committee on Corporate Laws, *supra* note 78, at 2254-55.

120. *Id.* at 2268 ("Often the shareholder's interest in the corporation is transitory, frequently a matter of days or weeks, while that of a manager or other employee may embrace a career and that of a community far longer . . . . [a] supplier may be almost wholly dependent upon one corporate customer . . . ."); Norwitz, *supra* note 111, at 387; Gavis, *supra* note 89, at 1451, 1470-71.

121. Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 25-28 (1987); Garcia, *supra* note 108, at 507, 522-25; Gavis, *supra* note 89, at 1451, 1452-54.

122. Norwitz, *supra* note 111, at 387; Gavis, *supra* note 89, at 1451, 1453-54 (adding that non-shareholder constituency's ability to contract with corporation is an inadequate protection); Garcia, *supra* note 108, at 507, 518, 523-25 (adding that takeovers offer incentive for shareholders to breach contracts with non-shareholder constituencies); Lyman Johnson & David Millon, *Missing The Point About State Take-*

of the gains and losses that accompany these situations.[123]

Next, proponents claim that these statutes allow flexibility in management's responses to hostile takeovers (e.g., management is not limited to focusing on the short-term interests of shareholders) which will allow them to compete more effectively with German and Japanese companies, which are focused on the long term.[124] A similar argument is that these statutes will "help protect the directors from liability and thus encourage them to resist takeover offers."[125]

Finally, proponents argue that due to the effects takeovers have on all the constituencies of corporations, including the economy and society as a whole, legislation of this type reflects a legitimate public policy concern.[126] Legislative bodies are asserted to be the proper forums for effecting economic and social change.

B. *Arguments Opposing Non-Shareholder Constituency Statutes*

In 1990, the Committee on Corporate Laws on the Section of Business Law of the American Bar Association voiced its opposition to non-shareholder constituency statutes.[127] The committee reasoned:

> The Committee has concluded that the [Revised] Model [Business Corporation] Act should not be so amended. If and to the extent that other constituencies statutes are interpreted to impose new powers and duties on directors, the Committee believes that they may radically alter some of the basic premises upon which corporation law has been constructed in this country without sufficient attention having been given to all of the economic, social, and legal ramifications of such a change in the law. The Committee believes that other constituencies statutes may create opportunities for misunderstanding and thus pose potential for mischief unless

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over Statutes, 87 MICH. L. REV. 846, 848 (1989); Hart and Degener, *supra* note 78, at 4; Lipton, *supra* note 121, at 36.

123. Hanks, *supra* note 78, at 20.

124. Hart and Degener, *supra* note 78, at 4.

> By encouraging directors to resist hostile takeovers, proponents argue, such legislation grants managements greater freedom from the constraints of maximizing short-term profits and therefore greater flexibility to pursue longer term strategic goals. This in turn, it is claimed, helps corporations protected by such statutes to compete more effectively with corporations in countries such as Japan and Germany, which tend to operate with a longer term perspective.

(citing *Management and Labor Join Forces to Stiff-Arm Raiders in Pennsylvania, Corporate Control Alert*, Jan. 1990 at 1).

125. Hanks, *supra* note 78, at 20. *See* Edward F. Greene, *Regulatory and Legislative Responses to Takeover Activity in the 1980s: The United States and Europe*, 69 TEX. L. REV. 1539, 1564 (1991).

126. Garcia, *supra* note 108, at 517 ("some takeovers may function as claimed, but . . . takeovers also create risks and losses for shareholders and nonshareholders as well as for the economy and American society as a whole. These risks and losses are considered legitimate concerns in the formulation of public policy.")

127. Committee on Corporate Laws, *supra* note 78.

> the courts carefully construe them consistently with existing law.[128]

This disapproval, coming from an influential committee on the subject of corporate law, deserves substantial weight.

Opponents argue that general principles of corporate governance support their position. In 1932, A. A. Berle, Jr., responding to the views of E. Merrick Dodd, Jr.,[129] argued that traditional views of corporate governance were inconsistent with notions allowing consideration of non-shareholder interests.[130] This argument persists today.

Berle's traditional view provides that only shareholders have property interests in the corporation and are, as a result, entitled to fiduciary duties arising from their ownership. Adherents of this view believe that the interests of other constituencies are adequately protected by contract and statutes other than non-shareholder constituency provisions.[131] In holding that the primary aim of the corporation is to maximize profits for the shareholders, this traditional model asserts that the interests of non-shareholders will be likewise enhanced as a result of shareholder profit maximization.[132] In recognizing that these statutes allow (and in some instances require) directors to consider non-shareholder constituencies, opponents of these statutes argue that the traditional model is radically altered without much thought on the part of legislatures.[133] Opponents fear

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128. *Id.* at 2253.

129. *See supra* note 116 and accompanying text.

130. A. A. Berle, Jr., *supra* note 116, at 1365.

> When the fiduciary obligation of the corporate management and "control" to stockholders is weakened or eliminated, the management and "control" become for all practical purposes absolute. . . . [Y]ou cannot abandon emphasis on "the view that business corporations exist for the sole purpose of making profits for their stockholders" until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else. . . . Either you have a system based on individual ownership of property or you do not.

Id. at 1367-68.

131. Hanks, *supra* note 75, at 25.

> [M]any of the groups sought to be protected by these statutes are already protected by other statutes or are parties to contracts defining their interests against the corporation. The economic interests of employees, for example, are protected by minimum wage, safety and health and plant-closing laws in addition, in many cases, to collective bargaining agreements. Creditors are protected by fraudulent conveyance, preference and bulk transfer statutes as well as by contract. Furthermore, many of these groups are politically well-organized and influential in the legislative process.

Id.

132. Norwitz, *supra* note 111, at 377 (describing Adam Smith's invisible hand theory).

133. *See, e.g.*, Committee on Corporate Laws, *supra* note 78, at 2253.

> If and to the extent that other constituency statutes are interpreted to impose new powers and duties on directors, the Committee believes that they

that these statutes will evolve into allowing these constituencies' interests to preempt traditional concerns for shareholder interests, to create enforceable rights, and to provide standing for a new type of plaintiff.[134] One commentator poses the question: If the rationale behind these statutes is sound for application to corporations, why not apply it to trusts, limited partnerships or sole proprietorships?[135] Finally, decisions concerning wealth allocation are better left to political bodies rather than to corporate directors.[136]

Another argument raised by opponents is that these statutes are not needed. First, they claim that if these statutes are only aimed at allowing consideration of non-shareholder constituencies solely in connection with considering the corporation's best interests, then these statutes do not change the status of current law.[137] Second, the opponents argue that the interests of the non-shareholder constituencies are adequately protected by other means.[138]

> may radically alter some of the basic premises upon which corporation law has been constructed in this country without sufficient attention having been given to all of the economic, social, and legal ramifications of such a change in the law.

Id.; *see also* Hart and Degener, *supra* note 75, at 4, col. 4; Hanks, *supra* note 75, at 20, 22. In Maine, the Legislature amended § 716 without considering fully the implications of its actions. *See supra* notes 54-58 and accompanying text (referring to the fact that the Maine Legislature only considered the non-shareholder constituency statute in the context of hostile takeovers).

134. Hanks, *supra* note 75, at 25 ("By permitting directors to consider other constituencies, these statutes may give those constituencies rights enforceable against the board . . . . If the board actually decides to consider the interests of a non-stockholder group but does a poor job, . . . is it liable to that group for either equitable relief or money damages?").

135. *Id.*

136. Committee on Corporate Laws, *supra* note 78, at 2270; Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 43 (1987) ("Encouraging corporations, a powerful group not directly accountable to or representative of our society, to take positions on the controversial . . . issues of the day also has dangerous anti-democratic implications. The proper forum for the consideration of such issues is the legislature.") (footnote omitted). *See also* Garcia, *supra* note 108, at 517 (corporate directors " 'lack political legitimacy' . . .") (quoting Christopher J. Smart, *Takeover Dangers and Non-shareholders: Who Should Be Our Brothers' Keeper?*, 1988 COLUM. BUS. L. REV. 301, 338 (authored by Christopher J. Smart)). *But see*, Norwitz, *supra* note 111, at 389 ("I would suggest . . . [that] the nation's *courts* would be capable of rising to the task of striking a balance between the efficient use of capital and other social goals like employment and stability—goals which would be better for all society and not only those on Wall Street.") (emphasis added).

137. Hanks, *supra* note 75, at 21 (arguing that thus, "the real purpose of non-stockholder constituency statutes must be to enable directors to provide benefits to non-stockholder groups even when doing so would not benefit the stockholders").

138. Committee on Corporate Laws, *supra* note 75, at 2268 ("puts" to protect bondholders, "golden parachutes," "tin parachutes," collective bargaining agreements); Hart and Degener, *supra* note 75, at 4 (private contracts); Hanks, *supra* note 75, at 25 (private contracts; minimum wage, safety and health and plant closing laws;

These critics also claim that the non-shareholder constituency statutes are confusing to directors and courts. They argue that these laws are vague in neglecting to define key terms and as a result provide "standard-less" direction.[139] Finally, the opponents argue that courts will be confused in trying to apply this vague standard to cases that arise around it.[140] One commentator argues that "it is difficult enough to determine the best interests of the corporation and its stockholders; it will be even more difficult for directors of corporations . . . to determine the interests of other constituencies, much less weigh the often-competing claims of these groups."[141] One result predicted to flow from this vagueness is an increase in poorer, more arbitrary decisions by corporate directors.[142] Another predicted result is that these statutes will deter persons from accepting positions as directors of corporations.[143]

Another criticism of these statutes is that they will further reduce the ability of shareholders to hold directors accountable for their actions.[144] These provisions could allow outside directors, who by their nature are less accountable than inside directors, to become even less so.[145] Next, "[a]ny benefit in increased latitude for board decision-making is more than offset by countervailing costs. This is especially true in light of the enactment in more than 40 states of statutes designed to reduce the risk of directors' liability for money damages."[146]

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collective bargaining agreements; political influence); Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 37 (1987) (private contract); Gavis, *supra* note 89, at 1475 (contracts, successorship clauses, "silver" or "tin parachutes," employee stock ownership plans).

139. Hart and Degener, *supra* note 75, at 4 ("opponents blame lack of guidance such statutes give as to how such interests should be prioritized and . . . overly expansive nature of the statutory language"); Hanks, *supra* note 75, at 24-25 (arguing the lack of several substantive and procedural standards); Gavis, *supra* note 89, at 1464-65 ("None of the statutes, however, provide a coherent framework to guide directors in satisfying their duties to these constituencies.").

140. Committee on Corporate Laws, *supra* note 78, at 2253; Hanks, *supra* note 75, at 24.

141. Hanks, *supra* note 75, at 24.

142. Committee on Corporate Laws, *supra* note 78, at 2269; Hanks, *supra* note 75, at 24; Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 36-37 (1987).

143. Committee on Corporate Laws, *supra* note 75, at 2270; *cf.* Edward F. Greene, *Regulatory and Legislative Responses to Takeover Activity in the 1980s: The United States and Europe*, 69 TEX. L. REV. 1539, 1564 (1991) ("[I]t would be very difficult for a director to place the interests of those constituencies ahead of those of the [shareholders] and still remain in office.").

144. Committee on Corporate Laws, *supra* note 75, at 2270 ("diminish the ability of shareholders to monitor appropriately the conduct of directors").

145. Hart and Degener, *supra* note 75, at 4.

146. Hanks, *supra* note 75, at 20 (*citing generally*, Hanks, *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207 (1988)); *see also supra* notes 56-63 and accompanying text (dis-

The final argument presented by opponents to this type of legislation is that the corporation will be adversely affected. First, some commentators contend that these acts will undermine investor confidence in the market, making it more difficult for potential investors to predict the degree of risk associated with a corporation's stock, and as a result will discourage capital investment in corporate stock.[147] Furthermore, while commentators admit that hostile takeovers in certain circumstances can produce beneficial results for both shareholders and non-shareholder constituencies by replacing inefficient management and encouraging efficient allocation of resources,[148] opponents claim that these statutes make it more difficult to oust poor management and thus promote inefficiency and undermine competitiveness.[149]

VI. POSSIBLE WAYS FOR MAINE COURTS TO INTERPRET MAINE'S STATUTE

Before beginning this analysis, it is important to recognize that courts, in interpreting statutes, are not necessarily restricted to the exact language or legislative history of a statute. Whether intentionally or not, courts can change key terms in the statutes and can interpose their own views of corporate governance into their analysis.[150] With this concept in mind, we can explore possible ways Maine courts could interpret section 716. This Comment contends that there are three different scenarios of possible interpretation. The courts could interpret the statute as not effecting any change to prior law, as a broad expansion of the duties of directors, or as only a limited expansion.

A. *No Change Was Intended*

One possible interpretation a court could make, which is made in Zimpritch's treatise on Maine corporate law,[151] is that the Maine non-shareholder constituency statute merely restates existing common law. Under such an interpretation, the statute is read as consistent with Maine common law in allowing consideration of non-

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cussing Maine statute reducing the risk of directors' liability for money damages).

147. Hart and Degener, *supra* note 75, at 4; Hanks, *supra* note 75, at 25.

148. Gavis, *supra* note 89, at 1457.

149. Hart and Degener, *supra* note 75, at 4.

150. *See* Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989); Georgia-Pacific Corp. v. Great N. Nekoosa Corp., 727 F. Supp. 31 (D. Me. 1989).

151. ZIMPRITCH, *supra* note 2, at 286 ("In practice, this likely is declaratory of existing law, implemented by invocation of the best 'long term' interests of the corporation and its shareholders"). *See also* Committee on Corporate Laws, *supra* note 78, at 2253 ("The Committee believes that other constituencies' statutes may create opportunities for misunderstanding and thus pose potential for mischief unless the courts carefully construe them consistently with existing law.").

shareholder constituencies as part of the "exercise of reasonable business judgment after reasonable inquiry into the facts" required to satisfy the good faith standard of the common law business judgment rule.[152] Thus, a director could consider the interests of non-shareholder constituencies, but would run the risk of losing immunization from the business judgment rule thus violating the duty of care if this consideration were not for the benefit of the corporation and its shareholders.[153] Maine's common law and the statute itself are consistent with such an interpretation in that neither vests duties in these non-shareholder constituencies.

Such an interpretation is supported by the legislative history of the Act which does not state any intent to alter the scope of directors' fiduciary duties. In fact, the stated intention of the Act was to "*clarif[y]* the rights and duties of officers and directors. . . ."[154]

This interpretation is also supported by looking to the experiences of other states. First, by comparing section 716 to the statutes of other states, it becomes apparent that support exists for an inference that the Legislature did not intend to alter the fiduciary duties of directors and officers. This inference arises from the fact that the Maine Legislature did not go as far as other states in seeking to protect non-shareholder concerns.[155] Second, the decisions of the Delaware courts are persuasive common law authority for this interpretation. These cases show that consideration of non-shareholders' concerns can occur within the ambits of traditional fiduciary duty principles, provided there are some rationally related benefits to the shareholders.

On the other hand, there is authority for the argument against the interpretation of Maine's non-shareholder constituency statute as affecting no change in Maine law. First, such an interpretation would require dismissal of the dicta of the *Georgia-Pacific* case as an incorrect reading of the statute.[156] Second, the fact that "[s]ection 716 also affords a basis for admitting a wide spectrum of

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152. ZIMPRITCH, *supra* note 2, § 7.7[b] at 276-77 & 277 n.170.

153. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) (para. 1). *But see supra* note 67 (arguing that the statutory business judgment rule embodied in ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991) could be read as allowing consideration of the corporation *or* the shareholders).

154. L.D. 965, Statement of Fact, *supra* note 56 at 11 (emphasis added).

155. *See supra* note 58 and accompanying text. Maine's statute is discretionary; deals only with the effects, not interests, of other constituencies; specifies the best interests of the corporation and shareholders; and does not contain a presumption of validity.

156. *See supra* notes 70-76 and accompanying text. (Also, the court could reiterate that the *Georgia-Pacific* court was a federal, not a state, court so the dicta has even less persuasive authority.). *See also* ZIMPRITCH, *supra* note 2, at 287 n.203 ("the court, in *dicta*, seemed to overstate the burden of the 1985 amendment to section 716, observing that it suggests directors 'should' consider the interests of other constituencies.").

evidence on the effects of director action on various other constituencies"[157] would diminish a court's ability to say that this amendment does not alter the common law in any meaningful way. Another issue a court would probably want to minimize is the action of the Legislature itself; if the Legislature was not interested in changing the status quo, why did it pass the amendment. In addition, since the Legislature passed another amendment three years later that broadened the immunity available to directors, it is more difficult to argue that no alteration to the status quo was intended.[158]

B. A Broad Change Was Intended

A Maine court might also interpret this statute as effecting a broad change in traditional fiduciary duty doctrine. First, in looking at the legislative history of this statute, it is clear that the Legislature was reacting to what it perceived as a threat—hostile takeovers. This history supports reading the statute as an attempt to change existing law.[159] The fact that the Legislature enacted a further amendment that broadened the availability of the business judgment rule and allowed preemption of shareholder interests also supports such a broad interpretation of this statute. By interpreting the statute as effecting a broad change in traditional fiduciary duty law, it reconciles the apparent contradictions currently existing at common law.

Georgia-Pacific provides persuasive authority for such an interpretation. That court stated: "Maine law suggests that the Directors of a corporation, in considering the best interests of the shareholders and corporation, *should* also consider the interests of the company's employees, its customers and suppliers, and communities in which offices of the corporation are located."[160] Persuasive authority arises from the *Amanda* cases, where other federal courts made similar interpretations of state non-shareholder constituency statutes. In addition, the arguments supporting non-shareholder constituency statutes can provide policy justification for such a broad interpretation.

One issue that must be addressed under this interpretation is the somewhat mild language employed by the drafters of section 716

157. ZIMPRITCH, *supra* note 2, at 286 n.201.

158. *See supra* notes 60-70 and accompanying text (referring to the 1987 amendment to ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991)).

159. *See supra* notes 54-58 and accompanying text; L.D. 965, Statement of Fact (112th Legis. 1985) ("[The bill] clarifies the rights and duties of officers and directors by allowing them to consider the effects of corporate decisions upon employees, suppliers, and customers of the corporation . . . ."); Legis. Rec. 922 (1985) ("primary purpose of the bill. . . allows . . . management to consider the community, suppliers, customers, and employees of a company when acting to determine whether a corporate merger will take place").

160. Georgia-Pacific Corp. v. Great N. Nekoosa Corp., 727 F. Supp. at 33 (emphasis added).

compared with the language of other states' statutes. There is also a contradiction raised by this broad interpretation of the statute in that the legislative history for section 716 indicates that this amendment was considered primarily in the context of hostile takeovers, even though the version of the bill enacted contained no such limitation.

C. *Limited Expansion of Fiduciary Duties*

Finally, a Maine court could interpret this statute as slightly broadening the discretion available to directors and officers of Maine corporations as they react to takeover situations. This interpretation would allow directors and officers to consider other constituencies, in takeover situations, as long as the directors are acting in the best interests of the corporation and its shareholders. Such an interpretation would not allow directors to put the interests of these other constituencies ahead of the corporation or shareholders, nor grant enforceable duties to these other constituencies. This is the view that this Comment endorses as most supportable.

The development of Maine's common law of fiduciary duty would support such an interpretation. What began as rigid, trustee-like duties developed over time into relationships that allowed directors a good degree of flexibility in their dealings and decisions. This development is consistent with a reading of the statute that recognizes a slight broadening of the considerations that directors and officers can take into account in making certain types of decisions. In addition, the fact that Maine case law does not recognize instances in which the duties flow to other constituencies[161] lends further support for such an interpretation.

The legislative history of this statute supports this interpretation more than it does the other two possible readings. First, the fact that the Legislature enacted this bill is evidence indicating that the lawmakers did not intend to restate the status of existing law, since legislation is normally enacted to effect change. Second, the legislative history indicates that consideration of this measure occurred exclusively in the context of preventing hostile takeovers and no mention of an intent to significantly alter fiduciary duty principles exists. Finally, since the Act was debated as a measure intended to protect shareholders, this interpretation would provide shareholders with protection from the perceived damage done to corporations in the event of a hostile takeover. At the same time, it would protect the duties owed to them by directors and officers from substantial dilution.

161. *See supra*, notes 41-49 and accompanying text. Only one Maine case allows duties to flow to other constituencies, and this was in a unique situation where a corporation was found to be quasi-public.

The experiences of other states provide persuasive authority for such a limited interpretation of the statute. First, a comparison of Maine's statute to those of other states, supports an interpretation that allows, but does not require, directors to consider other constituencies.[162] Second, since Maine included in the language provision for "the best interests of the corporation *and of its shareholders*,"[163] unlike other states that mention only the corporation, an inference arises that the Legislature did not intend for consideration of other constituencies to preempt the interests of shareholders. Finally, Maine's statute refers to consideration of the *effects*[164] (a limited term) on non-shareholder constituencies instead of *interests* (a broader term) employed by some other states, providing support for the limited reading of the statute.[165]

Under such an interpretation, *Georgia-Pacific Corp. v. Great Northern Nekoosa Corp.*[166] would be incorrect in its reading of section 716. This would not be a disastrous finding since (1) the legislative history and language of the statute itself do not seem to support the *Georgia-Pacific* interpretation; and (2) *Georgia-Pacific* was a decision of a federal court and therefore has only persuasive, not binding, influence on Maine state courts.

Following this interpretation, the question remains, however, why the Legislature neglected to limit the statute's applicability to hostile takeover situations. Perhaps the only response is that there is no evidence of an intent to make it applicable to non-takeover situations.

D. Recommended Legislative Action

Although this Comment argues that the most supportable interpretation of this statute is one allowing a limited expansion of the fiduciary duty doctrine limited to hostile takeover situations, there is a very real threat that a court could adopt a far broader interpretation.

To prevent such a broad change in fiduciary duty law, which this author argues was unintended, the Legislature should consider clarifying the statute as follows.

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162. *See supra* note 79 and accompanying text. If Maine wanted to make consideration mandatory it could have employed language, as Connecticut did, that would require directors to consider other constituencies.

163. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1991-1992) (emphasis added).

164. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1990-1991).

165. ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1991-1992) refers to *interests* of shareholders and the corporation while only referring to the *effects* on non-shareholder constituencies. This leads to an inference that the drafters did not intend the shareholders to be preempted by consideration for non-shareholders.

166. 727 F. Supp. 31, 33 (D. Me. 1989).

> The directors and officers of a corporation shall exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.
>
> In discharging their duties *as they respond to control-shifting situations*, the directors and officers may, *but are not required*, in considering the best interests of the corporation and of its shareholders, consider the effects of any action upon employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors.
>
> A director shall not be held personally liable for monetary damages for failure to discharge any duty as a director unless the director is found not to have acted honestly, *not to have acted in the reasonable belief that the action was in the best interests of the corporation and its shareholders, or not to have acted in the reasonable belief that the action was not opposed to the best interests of the corporation and its shareholders.*

Such an amendment would clarify the statute and bring it in line with the Legislature's intent. It would limit the explicit allowance of consideration of non-shareholder constituencies to hostile takeover-type situations—as the Legislature intended. It would clarify the statutory business judgment rule so that consideration of non-shareholder constituencies would not be allowed to preempt a director's duties to the shareholders or to the corporation. Finally, this amendment would reduce the potential for confusion that exists as a result of the *Georgia-Pacific* interpretation of section 716.

In conclusion, Maine's non-shareholder constituency statute is vague and, as a result, has the potential for being read expansively. Since the only court that has interpreted this statute has read it expansively, the likelihood of future expansive interpretations becomes even greater. Only through a narrow interpretation, or through amendment, can this statute be brought into harmony with its legislative intent and with common law.

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