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BUSINESS LAW—CORPORATE PURPOSE AND BENEFIT CORPORATIONS—MAKING BENEFIT CORPORATION LEGISLATION WORK FOR SOCIALLY MINDED INVESTORS

Cody McKinney*

I. INTRODUCTION

When it comes to business, there is money in morality. In 2018, according to The Forum for Sustainable and Responsible Investment¹, sustainable and responsible investment assets expanded to \$12.0 trillion in the United States.² However, what happens when a company fails—or potentially fails—to follow through with its promise of social impact? What recourse do investors have? The sale of Ben & Jerry's to the mega-corporation Unilever in 2000 offers some insight.³

Ben & Jerry's began as a Vermont company in 1978 and became an exemplar social enterprise.⁴ Ben & Jerry's built a reputation for being environmentally conscious, taking care of its employees, and ensuring that its dairy sources operated humanely.⁵ Ben & Jerry's earned this reputation through practices such as rarely firing employees.⁶ Ben Cohen and Jerry Greenfield, the founders and majority shareholders of Ben & Jerry's, were as concerned with improving the community as making a profit.⁷

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¹ A membership association that advances sustainable, responsible, and impact investing.

² The Forum for Sustainable and Responsible Investment, *Report on US Sustainable, Responsible and Impact Investing Trends*, USSIF (Oct. 31, 2018, 7:50:42 AM), https://www.ussif.org/blog_home.asp?Display=118.

³ Antony Page & Robert A. Katz, *The Truth about Ben and Jerry's*, STANFORD SOC. INNOVATION REV. 39, 40-41 (2012).

⁴ *Id.* at 39.

⁵ *Id.* at 39.

⁶ David Gelles, *How the Social Mission of Ben & Jerry's Survived Being Gobbled Up*, N.Y. TIMES (Aug. 21, 2015), <https://www.nytimes.com/2015/08/23/business/how-ben-jerrys-social-mission-survived-being-gobbled-up.html>.

⁷ Page & Katz, *supra* note 3, at 39.

Unilever is one of the world's largest consumer goods companies.⁸ In 2000, Unilever was the owner of commonly known brands such as Vaseline, Lipton Tea, and Ragu.⁹ Additionally, Unilever was the world's largest ice cream maker.¹⁰

With Ben & Jerry's sale to Unilever, some shareholders feared that the financial bottom-line would become the only concern in Ben & Jerry's future.¹¹ Investors had no guarantee Ben & Jerry's would continue to be the environmentally, socioeconomically, and animal-friendly corporation they had invested in initially.¹² This problem led to Vermont becoming the second state to create benefit corporation legislation in 2011.¹³

There is a long-standing legal debate about a business's duty to maximize shareholders' profits. Regardless of this debate, shareholder profit maximization is no longer the singular purpose of all for-profit businesses. Whether the commentary on profit maximization in *Dodge v. Ford* and *eBay v. Newmark* is dicta or law, the creation and adoption of benefit corporations, flexible purpose corporations, and low-profit limited liability corporations have provided a framework for corporations to pursue more than just profit.¹⁴ Still, how courts will enforce a corporation's purpose outside of profit maximization has yet to be tested. This note analyzes criticism of benefit corporation legislation and argues that The Benefit Corporation Act¹⁵ adds to the legal landscape in Arkansas because, although traditional corporations are free to practice corporate social responsibility and pursue some social purpose, benefit corporation legislation

⁸ *Id.*

⁹ Martha M. Hamilton, *Unilever to Buy Ben & Jerry's*, WASH. POST (Apr. 13, 2000, 11:00 AM), https://www.washingtonpost.com/business/unilever-to-buy-ben-and-jerrys/2018/09/24/90a52f84-c020-11e8-be77-516336a26305_story.html.

¹⁰ *Id.*

¹¹ Page & Katz, *supra* note 3, at 40.

¹² *Id.*

¹³ VT. STAT. ANN. tit. 11A, §§ 21.01–08 (West 2020).

¹⁴ Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 269–70 (2013).

¹⁵ ARK. CODE ANN. §§ 4-36-101 to -401 (West 2020).

builds the foundation for shareholders to hold companies accountable for how they pursue public purposes. This note also acknowledges the weakness of the Arkansas Benefit Corporation Act with respect to holding benefit corporations accountable for serving their stated public purposes. Nonetheless, this note argues that applying the doctrine of *parens patriae* and encouraging benefit corporations to adopt a quasi-poison pill provision could significantly correct that shortcoming.

Part II of this note addresses the origin and history of benefit corporations. It then reviews suggested enforcement strategies to ensure benefit corporations are fulfilling their public purposes. Part III examines the role benefit corporations play in Arkansas and how the benefit corporation legislation stands up against criticism and examines how the application of the doctrine of *parens patriae* could be applied to benefit corporations, flexible purpose corporations, and low-profit limited liability corporations. Further, this note recommends the adoption of a quasi-poison pill to strengthen the true value of benefit corporation legislation and to allow shareholders an avenue with which to hold entities they invest in accountable for the public purposes the entities claim to pursue.

II. BACKGROUND

The question of whether corporations exist to maximize shareholders' wealth is at the center of an ongoing argument in the United States. Some legal scholars point to the lack of cited authority in the landmark cases to dispel the shareholder's wealth maximization requirement as a myth.¹⁶ Other legal scholars claim that a proper reading of the case law clearly establishes the wealth maximization duty.¹⁷ Regardless of which side is correct, there has been a growing social movement to acknowledge alternative corporate purposes beyond that of profit maximization.¹⁸ A

¹⁶ Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166 (2008).

¹⁷ David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 187–94 (2014).

¹⁸ Fredrick H. Alexander, *The Capital Markets and Benefit Corporations*, ABA (July 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/05_

majority of states have adopted a benefit corporation, flexible purpose corporation, and low-profit limited liability corporation legislation based on model legislation written by B Lab.¹⁹ The model legislation, and the statutes adopted based on the model legislation, expressly provide for an entity to pursue public benefits in addition to shareholders' profits and creates a right of action that shareholders can utilize to ensure that the corporation's stated public benefit is pursued.²⁰ However, the right of action laid out in the model legislation falls short of being effective and scholarly efforts are underway to remedy the shortcoming.²¹

As this note discusses below, the private right of action created by benefit corporation legislation is limited by the business judgment rule.²² Under the business judgment rule, courts will accede to the business judgment of corporate executives,²³ making it likely that any explanation given by benefit corporation executives for not pursuing the general or specific public purposes will be protected under the rule.

The non-profit sector has done its part to develop a solution. B Lab has created a private certification for businesses that meet a certain level of social impact and gives the businesses they certify the designation of a B Corp.²⁴ To achieve the B Corp certification, businesses must complete B Lab's "B Impact Assessment" and integrate stakeholder consideration into the

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¹⁹ Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 381 (2017); B Lab is a nonprofit that serves the global movement of people using business as a force for good. *See About B Lab*, B LAB, <https://bcorporation.net/about-b-lab> (last visited Nov. 14, 2020).

²⁰ *Model Benefit Corporation Legislation*, BENEFIT CORP. (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf.

²¹ Jaime Lee, *Benefit Corporations: A Proposal for Assessing Liability in Benefit Enforcement Proceedings*, 103 CORNELL L. REV. 4, 1075, 1096 (2018).

²² *See infra* Section II D.

²³ *Id.*

²⁴ *See How to Become a B Corp*, B LAB, <https://www.bcorporation.net/become-a-b-corp/howto-become-a-b-corp> (last visited Feb. 27, 2020).

governance structure of their businesses.²⁵ The "B Impact Assessment" analyzes how a company interacts with its employees, customers, community, and environment.²⁶

A. Corporate Purpose Historically and Modern Alternatives

In the United States, the pervading notion is that a corporation exists to maximize shareholders' profits. The 1919 case *Dodge v. Ford* from the Michigan Supreme Court is a landmark shareholder wealth maximization case.²⁷ In *Dodge*, the court asserted in dictum that for-profit corporations exist exclusively for the benefit of their shareholders and that a director's primary interest should be maximizing shareholders' profit.²⁸ Absent *Dodge*, there is little authority on the matter.²⁹ It is essential to note *Dodge* is a state case, and no federal cases have addressed profit maximization since *Dodge* was decided. More recently, in *eBay v. Newmark*, a case primarily about minority shareholder rights, the Supreme Court of Delaware, arguably the court most proficient in handling business litigation, reaffirmed the duty of corporations to maximize shareholders' profits.³⁰ Strangely in both *eBay* and *Dodge*, the courts fail to provide authority for their positions on the existence of a duty to maximize shareholders' profits.³¹ Many scholars have discussed this lack of authority, urging their peers to stop teaching profit maximization as law and, instead, acknowledge it as dicta.³² Of course, there is an argument against profit maximization as dicta. The majority view is that profit maximization is settled law.³³

²⁵ *Id.*

²⁶ *Id.*

²⁷ M. Todd Henderson, *Everything Old Is New Again: Lessons from Dodge v. Ford Motor Company* 1–2 (John M. Olin Program in Law and Economics Working Paper No. 373, 2007).

²⁸ *Dodge v. Ford*, 170 N.W. 668, 684 (Mich. 1919).

²⁹ Stout, *supra* note 16, at 166.

³⁰ *eBay Domestic Holdings Inc v. Newark*, 16 A.3d 1, 6 (Del. Ch. 2010).

³¹ Yosifon, *supra* note 17, at 187–88; David B. Guenther, *The Strange Case of the Missing Doctrine and the "Odd Exercise" of eBay: Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. & BUS. REV. 3 427, 434–35 (2018).

³² Stout, *supra* note 16, at 166.

³³ Yosifon, *supra* note 17, at 181.

One scholarly argument is that, although no binding authority is cited in *Dodge v. Ford*, proper readings of *Unocal v. Mesa*³⁴ and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*³⁵ more clearly establish that the law requires directors to maximize shareholders' wealth.³⁶ The Honorable Leo Stine argues that corporate directors usually have much discretion in how to pursue the interests of stockholders, but, in the context of a company's sale, the sole focus must be on getting the highest price for the sale.³⁷ The argument regarding whether corporations have the singular duty to maximize shareholder profits continues. However, there has been a growing movement to acknowledge alternative corporate purposes beyond the concept of profit maximization.

Maryland led the charge of this social movement in 2010 and became the first state to adopt a statute creating a benefit corporation as a possible business entity.³⁸ As defined by most statutes, a benefit corporation is similar to a traditional corporation but legally has committed to a social purpose, accountability, and transparency.³⁹ Following in Maryland's footsteps, thirty-five states have adopted benefit corporation legislation, and ten states have adopted flexible purpose corporation or low-profit limited liability corporation legislation.⁴⁰ Flexible purpose corporations

³⁴ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

³⁵ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

³⁶ Yosifon, *supra* note 17, at 187–94.

³⁷ Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 773 (2015).

³⁸ Alexander, *supra* note 18.

³⁹ Loewenstein, *supra* note 19, at 382.

⁴⁰ ARK. CODE ANN. §§ 4-36-101 to -401 (West 2020); ARIZ. REV. STAT. ANN. §§ 10-2401 to -2442 (West 2020); CAL. CORP. CODE § 14600 *et seq.* (West 2020) (benefit corporation) and Cal. Corp. Code § 2500 *et seq.* (West 2020) (special purpose corporations); COLO. REV. STAT. ANN. §§ 7-101-501 to -509 (West 2020); D.C. CODE §§ 29-1301.01 to 29-1304.01 (West 2020); DEL. CODE ANN. tit. 8, §§ 361 to 368 (West 2020); FLA. STAT. ANN. §§ 607.601 to 607.613 (West 2020); HAW. REV. STAT. §§ 420D-1 to 420D-13.805 (West 2020); ID. CODE ANN. §§ 30-2001 to 2013 (West 2020); ILL. COMP. STAT. ANN. §§ 40/1 to 40/5.01 (West 2020); IN. CODE ANN. §§ 23-1.3-1-1 to 10-5 (West 2020); KY. REV. STAT. ANN. tit. XXIII, Ch. 271B *et seq.* (West 2020); LA. REV. STAT. ANN. §§ 1801 to 1832 (West 2020); MASS. GEN. LAWS ANN. ch. 156E, §§ 1 to 16 (West 2020); MD. CODE ANN., Corps. & Ass'ns. §§ 5-6C-01 to 08 (West 2020); ME. REV. STAT. tit. 13-C, § 1801 to 1832 (West 2020); MINN. STAT. ANN. §§ 304A.001 to 304A.301 (West 2020); MT. CODE ANN. §§ 35-1-1401 to -1412 (West 2020); NE. REV. STAT. ANN. §§ 21-401 to 21-414 (West 2020); NEV. REV. STAT. ANN. §§ 78B.010-190 (West 2020); N.H. REV. STAT. ANN. § 293-C:1 to C:13 (West 2020); N.J. STAT. ANN. §§ 14A:18-1 to :18-11 (West 2020); N.Y. BUS. CORP. LAW §§ 1701 to 1709 (West 2020); OKLA. STAT. ANN. tit. 18, §§ 1201 to 1210 (West 2020); OR. REV. STAT. ANN. §§ 60.750 to 770 (West 2020);

are similar to benefit corporations but have eased qualifying and reporting requirements.⁴¹ Low-profit limited liability corporations simplify compliance with Internal Revenue Service rules for program-related investments and act as a midpoint between non-profit and for-profit investing.⁴² Even though benefit corporations, flexible purpose corporations, and low-profit limited liability corporations remain for-profit entities, these corporate structures explicitly allow for the pursuit of public benefits in addition to shareholders' profits, promote increased transparency, and strengthen accountability. However, benefit corporations, flexible purpose corporations, nor low profit limited liability corporations get tax benefits from the IRS like the tax-exemption for 501c(3)s.

B. Model Legislation for Benefit Corporations

B Lab is a non-profit company that has worked towards uniformity across the states' varying benefit corporation legislation.⁴³ B Lab created model legislation (Model Legislation), and, while not all benefit corporation statutes directly incorporated the model legislation, most have been influenced by it.⁴⁴ B Lab's Model Legislation was created to maximize the advantages of expertise, by taking into account input from the states and business leaders; consistency, by uniformity between states; conformity, by adapting benefit corporation legislation to fit within the

15 PA. STAT. ANN. §§ 3301 to 3331 (West 2020); R.I. GEN. LAWS ANN. §§ 7-5.3-1 to -13 (West 2020); S.C. CODE ANN. §§ 33-38-110 *et seq.* (West 2020); TN. CODE ANN. §§ 48-28-101 to -109 (West 2020); TEX. BUS. ORGS. CODE ANN. §§ 21.951 to 21.959 (West 2020); UTAH CODE ANN. §§ 16-10B-101 to -402 (West 2020); VT. STAT. ANN. tit. 11A, §§ 21.01 to .08 (West 2020); VA. CODE ANN. §§ 13.1-782 to -791 (West 2020); WASH. REV. CODE §§ 23B.25.005 to .150 (West 2020); W. VA. CODE ANN. §§ 31F-1-101 to -501 (West 2020); WIS. STAT. ANN. §§ 204.101 to .401 (West 2020).

⁴¹ Derek A. Ridgway, *Flexible Purpose Corporation vs. Benefit Corporation*, HANSONBRIDGETT (Sept. 4, 2012), <https://www.hansonbridgett.com/Publications/articles/2012-09-flexible-purpose?pdf=1>.

⁴² Caryn Capriccioso, Rick Zwetsch, Erin Shaver, *Who is the L3C Entrepreneur?*, INTERSECTOR PARTNERS, 1, 12 (2012), https://www.americansforcommunitydevelopment.org/downloads/Who%20is%20the%20L3C%20Entrepreneur_Fal1%202012rfs.pdf.

⁴³ Loewenstein, *supra* note 19, at 381.

⁴⁴ *Id.* at 382.

structure of traditional corporate code; and economic development, by giving investors and social enterprise the tools they need to succeed.⁴⁵

The Model Legislation requires that a benefit corporation include a purpose clause in its articles of incorporation, creating a general public benefit that has a positive impact on society or the environment.⁴⁶ Additionally, the Model Legislation requires a benefit corporation to produce an annual report explaining how the benefit corporation pursued that general public benefit.⁴⁷ The report must be issued to shareholders, made available on the company's web site, and reported to the Secretary of State in the company's state of incorporation.⁴⁸ Many states have modified the reporting requirements of the Model Legislation by altering how often entities must create the report or by mandating that the report only be produced to shareholders and not the general public.⁴⁹

For publicly-traded benefit corporations, the Model Legislation requires that the annual report include an opinion from an independent Benefit Director.⁵⁰ The opinion must address whether the benefit corporation acted in pursuit of its general public purpose and whether the directors and officers contemplated the impact of their actions.⁵¹ If the Benefit Director determines that the entity did not act in accordance with its stated public purpose or the directors failed to contemplate the impact of their decisions, then the Benefit Director identifies the contributing circumstances in the report.⁵² Additionally, the Model Legislation provides for a benefit enforcement proceeding wherein shareholders may state a claim for failure of the benefit

⁴⁵ *The Model Legislation*, B LAB, <https://benefitcorp.net/attorneys/model-legislation> (last visited Nov. 14, 2020).

⁴⁶ *Model Benefit Corporation Legislation*, *supra* note 20, at § 201(a).

⁴⁷ *Id.* at § 401(a).

⁴⁸ *Id.* at § 402.

⁴⁹ Loewenstein, *supra* note 19, at 385.

⁵⁰ *Model Benefit Corporation Legislation*, *supra* note 20, at § 302(c).

⁵¹ *Id.* at § 401.

⁵² *Id.*

corporation to pursue its general public purpose or any specific public purpose as included in the corporation's articles.⁵³

In states that have adopted the entire Model Legislation, the benefit enforcement proceeding is the exclusive remedy against the benefit corporation, its directors, or officers for these claims.⁵⁴ However, for reasons explained below, benefit enforcement proceedings lack genuine force, and are therefore illusory.⁵⁵

There are three primary reasons why most states' enforcement provisions lack effectiveness. First, it is unlikely that a board of directors would authorize a non-monetary action against itself.⁵⁶ Second, when a shareholder brings a benefit enforcement proceeding the board of directors of the benefit corporation is entitled to appoint a special litigation committee to consider the action or determine how the matter should be resolved, and the business judgment rule makes it unlikely a shareholder would succeed in a derivative suit.⁵⁷ Third, no cause of action is created for the persons with the most incentive to sue the benefit corporation, the beneficiaries of its claimed public interest.⁵⁸

C. Shareholder Enforcement of a Benefit Corporation's Public Purposes

In light of these hurdles, it is unsurprising that there has been no litigation around benefit enforcement proceedings to date. Of the benefit enforcement legislation enacted thus far, Hawaii has arguably come closest to allowing a benefit corporation to be held accountable. Hawaii altered the Model Legislation to provide shareholders and directors the express power to enforce public

⁵³ *Id.* at § 305.

⁵⁴ Loewenstein, *supra* note 19, at 387.

⁵⁵ *Id.* at 388.

⁵⁶ *Id.* at 387.

⁵⁷ *Id.* at 388.

⁵⁸ *Id.*

benefit purposes, corporate purposes, and the director standard of conduct.⁵⁹ In Hawaii, directors must consider how each of their actions affects shareholders and the pursuit of the corporation's stated public benefits.⁶⁰ Even so, beneficiaries remain barred from bringing suit.

As discussed below, there have been several suggestions to strengthen benefit corporation law that would enable a benefit corporation's general public purpose and specific public purpose to be enforced.

Another potential option may be to empower a state's Attorney General, an office that historically has served as the state's implicit guardian of charity, to remedy breaches of fiduciary duties under a tradition grounded in English common law, *parens patriae*.⁶¹ While political and financial considerations may hinder enforcement through the state's Attorney General⁶², *parens patriae* could be adapted to enforce follow-through with the stated public purposes of benefit corporations.

Under B Lab's Model Legislation, it is challenging for shareholders to state a claim because the only cause of action is derived from the benefit enforcement proceeding. However, if benefit corporation law were strengthened or the Attorney General was permitted to bring action against a benefit corporation as the implicit guardian of charity, enforcement would be possible, and the business judgment rule would no longer prevent any enforcement of a benefit corporation's public purposes.

⁵⁹ Lyman Johnson, *Emerging Issues in Social Enterprise: Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 289 (2013).

⁶⁰ *Id.*

⁶¹ Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 U. PITT. L. REV. 281, 297 (2016).

⁶² *Id.*

D. Proposed Solutions for the Lack of Shareholder Recourse When a Benefit Corporation Fails to Pursue its Stated General or Specific Public Purposes

The proper balance between corporate profit maximization and the pursuit of public benefits has not been struck.⁶³ In keeping with the general tenets of corporation law, the Model Legislation states that a shareholder who wishes to pursue derivative litigation against the benefit corporation must first take his or her demand to the board of directors.⁶⁴ The business judgment rule protects a refusal by the board to comply with the demand.⁶⁵ The business judgment rule provides:

[A] director and her decision are protected from legal attack if: first, she and her colleagues made a judgment or decision; second, the decision makers were free from disabling conflicts of interest; third, they exercised some (not necessarily reasonable) care in informing themselves about the matter decided; and fourth, they had a rational (not necessarily reasonable) basis for the decision they made.⁶⁶

If a shareholder seeks to compel a benefit corporation to comply with its general or specific public purpose by way of the benefit enforcement proceeding, the benefit corporation's directors will likely offer a reasonable explanation as to why or how they are pursuing the stated public purpose. This explanation will be protected by the business judgment rule.⁶⁷ This leaves the shareholder in the same position as before the benefit enforcement proceeding, with no way to ensure his or her investment is being used in line with the stated public purpose. Legal scholars have offered multiple solutions to this problem.⁶⁸

⁶³ Stephen I. Glover et al., *A Corporate Paradigm Shift: Public Benefit Corporations*, GIBSON DUNN (Aug. 9, 2016), <http://www.gibsondunn.com/publications/documents/Corporate-Paradigm-Shift-Public-Benefit-Corporations.pdf> [<https://perma.cc/8MUQ-8H29>.]

⁶⁴ Loewenstein, *supra* note 20, at 388.

⁶⁵ *Id.*

⁶⁶ Douglas M. Branson, *The Rule That Isn't a Rule- The Business Judgment Rule*, 36 VALPARAISO U. L. REV. 631, 635 (2002).

⁶⁷ See Gerard V. Mantese & Emily S. Fields, *The Business Judgment Rule*, Mich. B.J., January 2020, at 31–32 (explaining the common application of the business judgment rule).

⁶⁸ Lee, *supra* note 21, at, 1096.

Some propose the abandonment of the benefit corporation structure altogether.⁶⁹ Kent Greenfield, professor at Boston College Law School, suggests scrapping the entire idea of benefit corporations in favor of electing government officials who are willing to make the duties owed by all corporations clear and enforceable.⁷⁰ Additionally, Phil Peters, co-chair of the Corporation Committee of the California Bar, suggests focusing on flexible purpose corporations, an alternative to traditional corporations and benefit corporations available in California that provides shareholders more control over a benefit corporation's pursuit of its public purpose.⁷¹

Other solutions focus on strengthening benefit corporation law to allow more remedies as a check on corporate action.⁷² For example, stakeholders who can show injury to a legitimate interest could be granted standing.⁷³ The burden would then shift to the board of the benefit corporation to show a legitimate corporate purpose.⁷⁴ If that burden is met, then the burden would shift back to the stakeholder to show that the directors have less injurious means of achieving the same ends.⁷⁵ Additionally, procedural requirements may be strengthened by imposing dividend caps, requiring the benefit corporation to identify the stakeholders it seeks to serve, and requiring transparency in the extent to which its social purpose is considered when making business decisions.⁷⁶ Accountability provisions in current benefit corporation law could also be improved by uniformly requiring an expansive approach to the position of Benefit Director and requiring that, as the entity grows, additional benefit directors will be added.⁷⁷

⁶⁹ Leslie Brokaw, *The "Benefit Corporation" Movement*, MIT SLOAN MGNT. REV. (Nov. 28, 2012), <https://sloanreview.mit.edu/article/the-benefit-corporation-movement/>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 190 (2012).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 190–191.

⁷⁶ Munch, *supra* note 72, at 191.

⁷⁷ *Id.* at 193.

Even if the law is strengthened, the government begins to hold all corporations responsible, or flexible purpose corporations are utilized, the question of determining liability in the face of the business judgment rule remains. Jamie Lee, from Cornell Law School, offers the following quasi-mathematical equation as a proposal for determining whether a court should impose liability in a benefit enforcement proceeding.

$$\frac{(\text{Kind of Benefit})(\text{Profit})(\text{Time})}{(\text{Time Lag of Benefit})}^{78}$$

"Kind of Benefit" refers to the size and kind of the social benefit pursued.⁷⁹ "Profit" refers to an average of the net positive income that a benefit corporation has collected since its origin.⁸⁰ "Time" refers to the life of the benefit corporation.⁸¹ "Time Lag of Benefit" refers to the length of time needed for the benefit to be realized.⁸² A court would weigh the factors realizing that some public benefits are more important than others, and profitability takes time.⁸³

All the solutions to increase the accountability of benefit corporations to the social purpose above are viable but require the adoption of new laws and new processes of enforcement. Even so, these solutions are still limited to shareholders bringing suit without the possibility of recovering damages. As discussed below, one established alternative avoids the deterring effect of the lack of damages and increases the likelihood of corporate accountability by placing the reigns of enforcement in governmental hands.

⁷⁸ Lee, *supra* note 21, at 1096.

⁷⁹ Lee, *supra* note 21, at 1096.

⁸⁰ *Id.* at 1097.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

IV. MAXIMIZING THE BENEFIT CORPORATION FOR SOCIALLY CONSCIOUS INVESTORS

In 2014, Arkansas adopted the benefit corporation legislation based mainly on B Lab's model legislation.⁸⁴ However, benefit corporation legislation in Arkansas has not significantly been utilized.⁸⁵ While there is a good argument that this underutilization is due to traditional corporations' ability to pursue purposes outside of profit maximization, the benefit corporation legislation still has a definite purpose. The real value of the benefit corporation legislation in Arkansas is to allow socially conscious investors an avenue to ensure that their investment is being put to the purpose a corporation claims it is pursuing. However, the problem remains that the benefit enforcement proceeding is the sole cause of action.⁸⁶ The benefit enforcement proceeding alone is not likely to comfort socially conscious individuals. Electing an attorney general who will enforce a benefit corporation's public purpose under the doctrine of *parens patriae* would begin to give investors adequate assurances their desired pursuit of public purposes would be enforced. More reliable assurances could come from encouraging the adoption of a quasi-poison pill that allows shareholders to purchase severely discounted shares of the corporation in the event that the benefit corporation's board decides to change its general or specific public purposes.

A. Benefit Corporations in Arkansas

Arkansas enacted benefit corporation legislation in 2014.⁸⁷ However, in the six years since the adoption of benefit corporation legislation in Arkansas, only a total of thirteen benefit organizations have incorporated under the act.⁸⁸ To understand why more entrepreneurs in Arkansas are not taking advantage of the legislation and why the slow start is expected and benign,

⁸⁴ ARK. CODE ANN. §§ 4-36-101 – 4-36-401 (West 2020).

⁸⁵ Ark. Sec. State, *Search Incorporations, Cooperatives, Banks and Insurance Companies*, Ark. Sec. State (2020), https://www.sos.arkansas.gov/corps/search_corps.php.

⁸⁶ ARK. CODE ANN. § 4-36-305 (West 2020).

⁸⁷ ARK. CODE ANN. §§ 4-36-101 – 4-36-401 (West 2020).

⁸⁸ Ark. Sec. State, *supra* note 85.

it is important to examine the arguments for and against benefit corporations. This examination requires attention to the necessity of benefit corporation legislation and what purpose such legislation plays in the broader legal landscape.

As discussed above, the benefit corporation legislation exists to allow an entity to pursue both social goals and shareholder profits. The Arkansas Benefit Corporation Act does precisely that by stating, "a benefit corporation shall have a purpose of creating a general public benefit."⁸⁹ A general public benefit is defined as "a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."⁹⁰ The Arkansas Benefit Corporation Act also allows a corporation to declare a specific public purpose; however, this declaration does not obviate the corporation's adherence to its general public purpose.⁹¹

Additionally, the Arkansas Benefit Corporation Act requires benefit corporation directors to consider the interests of stakeholders other than shareholders, including, but not limited to, employees, the workforce in the supply chain, customers, and the environment.⁹² The Act also makes clear that directors are not to be held personally liable for monetary damages arising from the failure of the benefit corporation to pursue general or specific public benefits.⁹³ Shareholders may only avail themselves of the benefit enforcement proceeding if a benefit corporation fails to create or pursue its stated general or specific public purposes.⁹⁴

Critics contend that benefit corporations are unnecessary and complicate the legal landscape. The debatable necessity of benefit corporation legislation is really an offshoot of the

⁸⁹ ARK. CODE ANN. § 4-36-201(a) (West 2020).

⁹⁰ ARK. CODE ANN. § 4-36-103(a)(5) (West 2020).

⁹¹ ARK. CODE ANN. § 4-36-201(2) (West 2020).

⁹² ARK. CODE ANN. § 4-36-303 (West 2020).

⁹³ *Id.*

⁹⁴ ARK. CODE ANN. § 4-36-305 (West 2020).

argument regarding whether shareholder profit maximization is dicta or settled law.⁹⁵ Critics of benefit corporation legislation point out that traditional corporations can—and do—pursue agendas outside profit maximization.⁹⁶ An example of a traditional corporation pursuing public benefits in Arkansas is Tacos 4 Life. Tacos 4 Life, a Central Arkansas based Limited Liability Corporation (LLC), was founded with the mission that for every taco, rice bowl, quesadilla, salad or nachos purchased, a hungry child receives a meal.⁹⁷ There are even independent standards for interested parties to measure a company's corporate social responsibility (CSR).⁹⁸ Corporations commonly release CSR reports of their own accord.

Some claim that benefit corporation legislation legitimizes the arguments that shareholder maximization is law and creates more uncertainty, not less. A strong argument has been made that corporation law that uses the language "all lawful purposes" is sufficiently broad enough to allow a business to pursue social ends.⁹⁹ This argument is augmented by highlighting the common misunderstanding of cases involving shareholder primacy. Proponents say that the business judgment rule allows directors ample leeway to justify CSR.¹⁰⁰ These criticisms lead some opponents to assert that benefit corporation law does more damage than good.¹⁰¹ The critics claim that, by creating an alternative form of incorporation that mandates a general public purpose, benefit corporation legislation has strengthened the argument that a traditional corporation acting on a social motivation is inappropriate.¹⁰²

⁹⁵ Amy K. Verbos & Stephanie Black, *Benefit Corporations as a Distraction: An Overview and Critique*, 36 BUS. AND PRO. ETHICS J. 229, 258 (2017).

⁹⁶ Verbos & Black, *supra* note 95, at 241.

⁹⁷ Tacos 4 Life, *Eat a Meal. Give a Meal*, Tacos 4 Life (2018), <https://tacos4life.com/mission/>.

⁹⁸ Michael Hopkins, *Measurement of Corporate Social Responsibility*, 6 INT. J. MGMT. AND DECISION MAKING 213,218 (2005).

⁹⁹ Verbos & Black, *supra* note 95, at 237–38.

¹⁰⁰ *Id.* at 243.

¹⁰¹ *Id.*

¹⁰² *Id.* at 247.

The business judgment rule in Arkansas is a presumption that the officers of a corporation acted on an informed basis, in good faith, and in an honest belief that their actions were in the best interest of the corporation.¹⁰³ The business judgment rule neither asserts that all decisions by corporate officers must be in the interest of maximizing profit, nor does it exclude social, environmental, or economic motivations as legitimate. The broad interpretation of the business judgment rule is supported by the social undertakings of businesses such as Tacos 4 Life discussed above.¹⁰⁴

These arguments fail to see the true value of benefit corporation legislation: the ability for socially conscious shareholders to ensure that their investments are being used not only for returns but also to pursue the public benefits claimed by a business entity.

The failure to see the actual value of benefit corporation legislation accentuates the argument that the sole cause of action, a benefit enforcement proceeding, is illusory. But, if the Attorney General will adopt his or her rightful role as the state's implicit guardian of charity, and if benefit corporations start to offer a quasi-poison pill that allows current shareholders to be offered shares at a severely discounted price in the event a board wishes to change its general or specific public purposes, socially conscious investing would find a home in Arkansas.

B. *Parens Patriae*

Benefit corporation legislation is necessary and helpful. In Arkansas, The Benefit Corporation Act is necessary because it provides a way for shareholders to enforce the creation and pursuit of a general public purpose and may provide the State Attorney General with an avenue of enforcement under *parens patriae*.

¹⁰³ Long v. Lampton, 324 Ark. 511, 522 (1996).

¹⁰⁴ Tacos 4 Life, *supra* note 97.

The concept of *parens patriae* is a remnant of the English constitutional system.¹⁰⁵ As the constitutional system developed, the King retained certain powers.¹⁰⁶ Initially, the doctrine of *parens patriae* acknowledged the King's capacity to act as a parent to the country, including the capacity to act as superintendent to all charitable uses.¹⁰⁷ The doctrine of *parens patriae* was brought as part of the English legal system to the American colonies and subsequently adopted into the common law of the United States.¹⁰⁸ *Parens patriae* in the United States generally recognizes that the State, usually through its Attorney General, is the ultimate beneficiary of charitable trusts.¹⁰⁹ As such, the Attorney General has the authority to enforce the public benefit of a non-profit organization or the terms of a charitable trust.¹¹⁰ However, in some states, the power to represent the public's interest is left to the district attorneys.¹¹¹ In either case, the state, through the Attorney General or district attorneys, is the primary guardian of charity.¹¹² Some states have codified the attorney general's role as the public's guardian of charity either by statute or in the enumeration of the powers of the attorney general.¹¹³ However, the majority of states still rely on the common law's recognition of the attorney general as the implicit guardian of charity.¹¹⁴

The doctrine of *parens patriae* could be applied by Arkansas' Attorney General, or any other individual state's Attorney General, to enforce the general and specific public purposes of benefit corporations. Just like the public is the end beneficiary of the public purpose of non-profit entities,

¹⁰⁵ Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 REAL PROP. PROB. & TR. J. 705, 718 (2006).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 722.

¹¹² *Id.* at 725.

¹¹³ *Id.*

¹¹⁴ Kaufman, *supra* note 109, at 726.

the public will be the beneficiary of the stated general and specific public purposes of benefit corporations, flexible purpose corporations, and low-profit limited liability corporations. The Attorneys General of each state are charged as the implicit guardians of charity through the doctrine of *parens patriae*,¹¹⁵ and it does not matter if that charity comes from non-profit or for-profit sources. If a benefit enforcement suit is unavailable or unsuccessful, shareholders could turn to the Attorney General of Arkansas, or any other state where the benefit corporation, flexible purpose corporation, or low-profit limited liability corporation is incorporated, to enforce the stated general or specific public purposes. For the Attorney General of a state to enforce a public purpose on a benefit corporation, flexible purpose corporation, or low-profit limited liability corporation, all that is needed is political will.

C. Quasi- Poison Pill

An additional risk for a social impact investor in a benefit corporation is that a benefit corporation can alter its general or specific public purposes.¹¹⁶ This amendment can take place with a minimum status vote.¹¹⁷ However, encouraging benefit corporations to adopt a quasi-poison pill would discourage this practice.

Poison pills are defensive measures historically used in an attempt to stop the hostile takeover of a corporation.¹¹⁸ Typically poison pills work by attaching latent rights to each share of a corporation's stock.¹¹⁹ When a triggering event occurs, usually the purchase 15% to 20% of a company's outstanding shares, the dormant rights are activated, and the holder is allowed to purchase new shares in the corporation at a highly discounted rate.¹²⁰ A vital stipulation to poison

¹¹⁵ *Id.* at 718.

¹¹⁶ ARK. CODE ANN. § 4-36-201(d)(1) (West 2020).

¹¹⁷ ARK. CODE ANN. § 4-36-201(d)(2) (West 2020).

¹¹⁸ Joseph M. Grieco, *The Ever-Evolving Poison Pill: The Pill in Asset Protection and Closely-Held Corporation Cases*, 36 DEL. J. CORP. L. 625, 627 (2011).

¹¹⁹ *Id.* at 628.

¹²⁰ Grieco, *supra* note 118, at 628.

pills is the person triggering the pill is not allowed to exercise his or her rights to purchase the discounted shares.¹²¹ This exception results in the dilution of the triggering party's ownership.¹²²

There is a two-part test developed in *Unocal*, applied in judicial review of a decision to activate a poison pill in the event of an attempted hostile takeover.¹²³ First, directors must show they reasonably believed a danger to corporate policy and effectiveness existed.¹²⁴ The court then determines if the pill was a reasonable measure in relation to the threat.¹²⁵

Not every poison pill case involves an attempted avoidance of a hostile takeover. In *Versata Enterprises, Inc. v. Selectica, Inc.*, a poison pill was successfully used in a non-takeover situation involving the protection of corporate assets.¹²⁶ However, in *eBay*,¹²⁷ a poison pill failed in an attempt to protect corporate assets.¹²⁸ Joseph Grieco makes a strong argument that had the court in *eBay* viewed the action as an attempt to protect corporate assets, the directors' decisions to implement the poison pill would have been upheld.¹²⁹ Grieco additionally argues that the *Unocal* standard was adopted to assess the use of a poison pill in the event of a hostile takeover, not in internal events, and it should not apply in such cases.¹³⁰

In order to avoid the possibility of a benefit corporation arbitrarily amending its general or specific public purposes, Arkansas businesses should adopt a quasi-poison pill. This simple measure recognizes that a stated public purpose is a corporate asset. The quasi-poison pill would be triggered in the event of a proposed amendment to a benefit corporation's general or specific

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1353 (Del. 1985).

¹²⁴ *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985).

¹²⁵ *Id.*

¹²⁶ 5 A.3d 586 (Del. 2010).

¹²⁷ *See supra* Part I.

¹²⁸ 16 A.3d 1 (Del. 2016).

¹²⁹ Grieco, *supra* note 118, at 637.

¹³⁰ *Id.* at 652.

public purposes. Triggering the quasi-poison pill would allow a dissenting shareholder to purchase more shares, at a steeply discounted rate, thereby increasing his or her voting power. Effectively thwarting any amendment that does not comport with the collective will of the shareholders.

The purpose of the benefit corporation legislation is to give shareholders the power of public benefit enforcement and to give corporations the explicit freedom to pursue purposes other than shareholders' profits. The Benefit Corporation Act also requires that benefit corporations report annually on how they have worked towards their general public purpose.¹³¹ Benefit corporations being required to pursue their public purposes does not mean that traditional corporations cannot participate in CSR. It means that benefit corporations must and that they must be transparent in doing so.

Not all agree that having an option to incorporate in a form that requires CSR is a good thing. Some fear that having two categories of companies is a problem.¹³² This fear highlights the importance of public perception. Whereas a benefit corporation may be favored on that designation alone, traditional companies might receive public condemnation in the absence of a benefit corporation designation despite those companies' legitimate CSR efforts.¹³³ Critics fear that benefit corporations will use their designation as a disingenuous marketing strategy, and the legislation does not have a built-in mechanism to evaluate whether companies are exploiting their existence as benefit corporations.¹³⁴

Again, this concern is without merit. The Arkansas Benefit Corporation Act does not make people more likely to view traditional business as bad per se. Instead, the act allows companies and their shareholders the opportunity to be committed to a public benefit in addition to profit. If

¹³¹ ARK. CODE ANN. § 4-36-401 (West 2020).

¹³² Verbos & Black, *supra* note 95, at 247.

¹³³ *Id.*

¹³⁴ *Id.*

investors and consumers are drawn to benefit corporations, then the legislation is doing exactly what it was created to accomplish—providing a framework for more socially conscious investing and consuming. Additionally, while the legislation may lack a built-in mechanism to evaluate whether companies are exploiting the benefit corporation legislation, the Attorney General can, and should, fill the gap as the guardian of charity under *parens patriae*.

V. CONCLUSION

Regardless of whether shareholder profit maximization is a requirement of the law or simple outdated dicta, it is no longer the singular purpose of all for-profit business. There is money in morality, and more and more people are investing in socially conscious businesses. While some traditional corporate structures are being utilized for social purposes, the creation and adoption of benefit corporations, flexible purpose corporations, and low-profit limited liability corporations have provided a framework for entities to explicitly pursue more than just profit.¹³⁵ However, the mechanisms in place currently do not offer stakeholder sufficient means with which to enforce a benefit corporation's stated general or specific public purposes.¹³⁶ There are many ideas about how to strengthen the law to better hold benefit corporations, flexible purpose corporations, and low-profit limited liability corporations accountable.

Nevertheless, a suitable way to strengthen the power of social investors already exists, but it must be utilized: Each state's Attorney General is the implicit guardian of charity as prescribed by the common law doctrine of *parens patriae*.¹³⁷ All that is necessary is the political will to apply that doctrine to the enforcement of stated general and specific public purposes.¹³⁸ Furthermore, if

¹³⁵ See *supra* Part II.

¹³⁶ See *supra* Part II.

¹³⁷ See *supra* Part III.

¹³⁸ See *supra* Part III.

benefit corporations adopted a quasi-poison pill, investors would receive protection from shifting public purposes. In Arkansas, The Benefit Corporation Act adds to the legal landscape because, although traditional corporations are free to pursue purposes outside of profit maximization, benefit corporation legislation builds the foundation for shareholders to hold companies accountable for how they pursue public purposes. What is left is to strengthen enforcement of a benefit corporation's accountability towards its stated public purpose through the doctrine of *parens patriae* and the encouragement of a new adoption of a poison pill.